Williams, Mary

SCOPE OF REVIEW

Combined effects pension

The scope of review in a combined effects pension does not include a determination that but for the preexisting conditions the industrial injury or occupational disease would not have rendered the worker totally and permanently disabled. *In re Janet Lord*, BIIA Dec., 93 6417 (1996). This does not prohibit a determination that a condition was symptomatic and disabling as of the date of injury or manifestation or that the combined effects caused the permanent total disability. ***….In re Mary Williams*, BIIA Dec., 06 10831 (2007)** [*Editor's Note:* The Board's decision was appealed to superior court under Snohomish County Cause No. 07-2-08038-2.]

SECOND INJURY FUND (RCW 51.16.120)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARY A. WILLIAMS	)	**DOCKET NO. 06 10831**
	)	
CLAIM NO. W-525067	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mary A. Williams, by
Law Office of William D. Hochberg, per
William D. Hochberg

Self-Insured Employer, The Boeing Company, by
Craig, Jessup & Stratton, PLLC, per
Gibby M. Stratton

The claimant, Mary A. Williams, filed an appeal with the Board of Industrial Insurance Appeals on January 23, 2006, from an order of the Department of Labor and Industries dated January 17, 2006. In this order, the Department closed the claim with time-loss compensation as paid through October 30, 2002, and directed the self-insured employer to pay the claimant a permanent partial disability award of 4 percent of the right arm at or above the deltoid insertion or by disarticulation at the shoulder. The Department order is **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on April 5, 2007, in which the industrial appeals judge reversed and remanded the Department order dated January 17, 2006. We agree with the industrial appeals judge's determinations in his Proposed Decision and Order that the claimant's right wrist condition subsequent to December 2002 is related to the December 6, 1999 industrial injury; that treatment of that condition provided by Edward North, M.D., from October 24, 2004 through September 7, 2005, should be authorized and paid for by the self-insured employer; and that the claimant is entitled to total disability benefits from October 31, 2002, forward. However, we disagree with the industrial appeals judge's determination in his Proposed Decision and Order that the effective date of the classification of the worker as permanently and totally disabled should be January 17, 2006, selecting instead September 7, 2005, as the effective date of the change in classification. In addition to the above, we have granted review in order to clarify the limitation to the scope of our review previously defined by *In re Janet Lord*, BIIA Dec., 93 6147 (1996) for appeals in which permanent total disability involving multiple disabilities is at issue.

Preliminary Evidentiary Matters

We have reviewed the evidentiary rulings in the record of proceedings. Those rulings are affirmed except as delineated below:

In the transcript of the testimony of Mary A. Williams, the objection at page 26, line 9 is sustained and the preceding answer is stricken.

In the deposition of Kathy Reid, the hearsay objections at page 19, line 14; page 20, lines 17 and 23; page 29, line 13; and page 31, line 10 are sustained. The testimony at page 19, lines 10-12; page 20, line 12 beginning with ". . . he indicated" through line 22; page 29, lines 11-12; and page 31, line 4 beginning with " . . . that he reported" through line 9, is stricken.

In the deposition of Edward North, M.D., the objection at page 26, line 5 is sustained. The objection at page 31, line 18 is sustained and the testimony at page 31, line 22 beginning with ". . . and" through page 32, line 2 is stricken. The objection at page 32, line 10 is sustained and the testimony at page 32, lines 8-14 is stricken. The objection at page 51, line 16 is sustained.

In the deposition of Andrew Camarda, the hearsay objection at page 35 is sustained and the testimony from page 34, line 23 through page 35, line 17 is stricken.

History and Causation

Prior to the December 6, 1999 industrial injury, Ms. Williams had significant cardiac, knee, and other disabilities that limited her to sedentary or light work with significant restrictions to lifting, bending, walking, and complete restrictions to kneeling, crawling, squatting, and climbing. These pre-existing disabilities and the restrictions therefrom did not completely foreclose Ms. Williams from obtaining and performing some form of reasonably continuous gainful employment. She was able to work for the self-insured employer at its Harbour Point facility where it employs workers who need significant accommodations in order to maintain employment. Ms. Williams required a parking permit so that she had only a short distance to walk to the building that housed her work station. The job at the Harbour Point facility required the claimant to use both hands while operating small tools such as drills, presses, sanders, and riveters.

Following the December 6, 1999 industrial injury to her right wrist, Ms. Williams never returned to work. Dr. North, her attending hand surgeon, performed surgery on the right wrist in January 2002, during which he removed a 1 cm. bone fragment that had adhered to soft tissue in the wrist. Dr. North continued to see the claimant for wrist pain and popping through December 2002. The wrist condition resulted in additional restrictions to Ms. Williams such as further limiting her ability to lift and carry, preventing her from using impact or vibratory tools, and

limiting her ability to grasp or grip objects or use her right hand for repetitive activity. These new restrictions prevented her from returning to her job at the Harbour Point facility. Thereafter, the claimant continued to have right wrist pain on the ulnar side, decreased wrist motion in radial deviation, and wrist popping.

In October 2004, Ms. Williams returned to Dr. North complaining of increased right wrist pain. She attributed these symptoms to bearing weight on her right wrist when she used a cane or walker to ambulate because of a painful low back. Dr. North performed a right wrist arthroscopic surgical procedure that revealed a tear of the right wrist triangular fibro cartilage complex, which he then repaired. That tear had not been present in July 2000 when an arthrogram of the wrist was performed. Dr. North did not observe it during the first surgery in 2002.

After the second surgery, Ms. Williams had additional permanent restrictions to the use of her dominant arm and hand. Dr. North last saw the claimant for her right wrist condition on September 7, 2005. He concluded that the right wrist permanent impairment had increased since the second surgery, but that the condition was now medically stable. He testified that but for the industrial injury and the first surgery, the claimant's right wrist would not have flared by her use of the cane and the second surgery would not have been necessary.

The self-insured employer argues that the right wrist triangular fibro cartilage complex tear was not proximately caused by the December 6, 1999 industrial injury, but instead was due to a supervening cause, the use of a cane and walker by Ms. Williams due to unrelated back pain. The employer contends that it should not be responsible for the right wrist treatment and total disability benefits subsequent to the claimant's rating examination by Dr. North on October 30, 2002. Our industrial appeals judge found that Ms. Williams' right wrist condition, for which the 2004-2005 treatment was provided, was proximately caused by the industrial injury and earlier treatment therefor, and that she had been totally disabled since October 31, 2002, and directed the self-insured employer to provide those benefits.

We agree with the self-insured employer that the weight of the evidence proves that the flare-up of the right wrist symptoms, along with the triangular fibro cartilage complex tear that occurred subsequent to December 2002, were likely due to her use of a cane and/or walker to ambulate because of back pain. Nonetheless, these wrist conditions must be accepted under this claim because they did not occur due to any supervening traumatic event, but instead arose incident to activities of daily living.

In *McDougle v. Department of Labor & Indus.*, 64 Wn.2d 640 (1964), our Supreme Court set forth a principle of legal causation that is applicable in just such a situation as is presented in this appeal. The court stated:

> Aggravation of the claimant's condition caused by the ordinary incidents of living—by work which he could be expected to do; by sports or activities in which he could be expected to participate—is compensable because it is attributable to the condition caused by the original injury.
>
> . . . .
>
> The test to be applied, in cases such as the present, is whether the activity which caused the aggravation is something that the claimant might reasonably be expected to be doing, or whether it is something that one with his disability would not reasonably be expected to be doing. See 1 Larson, Workmen's Compensation Law § 13.11, p. 183.

McDougle, at 644-645.

There are few activities that are more obviously "activities of daily living" than being able to get around the house, walk out to a mailbox, and enter and exit an automobile to shop or see a doctor. The use of a cane and a walker enabled Ms. Williams to perform these and other activities of daily living that she otherwise might not have been able to accomplish. It is true that the use of these assistive devices required the claimant to bear weight on her right wrist. However, there is no proof in the record that she had been warned by Dr. North or any other physician against the use of her wrist in this fashion. The fact that in 2002 Dr. North had rated her permanent right wrist disability at 4 percent of the right upper extremity does not by itself indicate that it was unreasonable for Ms. Williams to bear weight on her right wrist through the use of a cane or walker. An injured worker should not be expected to remain bedridden in order to prevent any possible chance that a disability could become aggravated. See *Scott Paper Co. v. Department of Labor & Indus.*, 73 Wn.2d 840 (1968).

Total Disability

Ms. Williams contends that she has been totally disabled since her date of injury, December 6, 1999. Indeed, she has not returned to work since that time. She has not received time-loss compensation since October 30, 2002. She contends that she is entitled to receive total disability benefits since that time, and that somewhere in the period between October 31, 2002 and the date of the closing order (January 17, 2006), her disability status should change from that of **temporary** total disability to **permanent** total disability.

In *Spring v. Department of Labor & Indus.*, 96 Wn.2d 914 (1982), our Supreme Court stated:

> A prima facie case of total disability can be made when it is established that a workman was able to work prior to injury and is unable to do so after injury because of pain and the nature of the injury; when medical experts have testified to the loss of function and limitations on his ability to work; and when vocational experts have concluded that the workman is not employable in the competitive labor market.

Spring, at 918.

The scope and complexity of the factors that may need to be considered by the finder of fact in appeals where total disability is at issue is best described by the Court of Appeals in *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972):

> Total disability is inability, as the result of a work-connected injury, to perform or obtain work suitable to the workman's qualifications and training. Total disability is not a purely medical question. It is a hybrid quasi-medical concept in which there are intermingled in various combinations, the medical *fact* of loss of function and disability, together with the inability to perform and the inability to obtain work as a result of his industrial injury. A workman may be found to be totally disabled, in spite of sporadic earnings, if his physical disability, caused by the injury, is such as to disqualify him from regular employment in the labor market. Indeed, if the injury has left the workman so disabled that he is incapable of becoming a workman of acceptable capacity in any well-known branch of the labor market—if his capacity to work is no longer a merchantable article in the labor market—it is incumbent upon the department to show that such special employment can, in fact, be obtained by him. *Kuhnle v. Department of Labor & Indus.,* [12 Wn.2d 191 (1942)]*;* 2 A. Larson, The Law of Workmen's Compensation §§ 57 and 57.71 (1971).
>
> Proof of permanent total disability is more individualized than proof of permanent partial disability. The testimony necessarily requires a study of the whole man as an individual—his weakness and strengths, his age, education, training and experience, his reaction to his injury, his loss of function and other relevant factors that build toward the ultimate conclusion of whether he is, as a result of his injury, disqualified from employment generally available in the labor market.

Fochtman, at 294-295.

Having reviewed the medical, vocational, and lay evidence in the record, we conclude that Ms. Williams has been totally disabled since October 31, 2002, for the reasons stated in the Proposed Decision and Order. The record supports a finding that Ms. Williams has been totally disabled since October 31, 2002, and that disabilities and restrictions resulting from her December 6, 1999 industrial injury are a proximate cause of her ongoing total disability.

Effective Date of Classification of Permanent Total Disability

As stated before, we agree with our industrial appeals judge that Ms. Williams has been totally disabled since October 31, 2002. However, based on the medical and vocational evidence in the record, the self-insured employer is clearly correct that under the criteria we established in *In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001), the effective date of the claimant's entitlement to permanent total disability benefits should **not** be the date of the closing order. We believe that the appropriate effective date for the classification of Ms. Williams as a permanently and totally disabled worker is September 7, 2005, the date she was last examined by Dr. North and during which examination Dr. North concluded that no further treatment would improve her condition. We believe that the medical services she received for her right wrist up to and including that date were "proper and necessary medical and surgical services" within the meaning of RCW 51.36.010. No vocational activity designed to return Ms. Williams to gainful employment occurred after that date.

Scope of Review

Entitlement to total disability benefits, and in particular permanent total disability benefits, is at issue in Ms. Williams' appeal. The above quotation from *Fochtman* amply illustrates the breadth and complexity of relevant considerations or factors in total disability cases. Just as each injured worker is an individual, so proof of total disability is individualized and findings may need to be made regarding the effect of numerous conditions that are related to, pre-existing, or subsequent to the industrial insurance claim that is the subject matter of the appeal. Often in permanent total disability appeals, the injured worker contends that disabilities resulting from an industrial injury or occupational disease, when combined with the effects of other disabilities that antedate the claim or the reopening of the claim, render her permanently and totally disabled.

However, the scope of our review in a "combined effects" type case is not unlimited. RCW 51.16.120(1), regarding the second injury fund, provides in relevant part: ". . . The department shall pass upon the application of this section in all cases where benefits are paid for total permanent disability or death and issue an order thereon appealable by the employer." We construed that statute to deprive us of jurisdiction to enter a finding that "but for the preexisting condition, the industrial injury alone would not have rendered the claimant totally and permanently disabled." *In re Janet Lord*, BIIA Dec., 93 6147 (1996), at 2. Such a finding is a necessary finding

regarding an employer's entitlement to second injury relief [*Jussila v. Department of Labor & Indus.*, 59 Wn.2d 772 (1962)] and it is not a necessary finding in a permanent total disability appeal. We affirm our holding in *Lord* because the aforementioned "but for" type of finding usurps the Department's jurisdiction as set forth by the Legislature in RCW 51.16.120(1).

There has been some confusion in past orders regarding exactly what findings are prohibited by RCW 51.16.120(1) and *Lord*. The only finding that is prohibited is the "but for" finding referred to above. In particular, we note that *Lord* does not prohibit the use of the word "disability" or "disabilities" when describing the effects of a condition in existence as of the date of injury. Nor does *Lord* prohibit a finding that a condition was symptomatic and disabling as of the date of injury for which the claim was filed. There are many instances when these other types of findings may be necessary findings in a permanent total disability appeal involving multiple conditions. See, for example, *Erickson v. Department of Labor & Indus.*, 48 Wn.2d 458 (1956) and *Allen v. Department of Labor & Indus.*, 30 Wn. App. 693 (1981). We may also use the phrase "combined effects" (or similar phrases such as "in combination with," "considered along side of," or "considered in conjunction with," etc.) in a finding of fact in a permanent total disability appeal, as required to adequately describe our determination regarding a contested issue of fact.

In this appeal, as in *Lord*, the Department did not appear, present evidence, or otherwise participate in the proceedings. We have noted in *In re Shelby McCallum*, BIIA Dec., 00 17408 (2001), that the Department, as the trustee for the second injury fund, has a financial interest in this litigation. This is true not only in regard to the potential for second injury fund relief for the self-insured employer, but also insofar as shifting the effective date of pension backward in time tends to increase the claim costs for which the Department is responsible, while lowering those costs for the self-insured employer. We mention this only to observe that the Department received notice of the filing of an appeal from the parties and from the Board. The opportunity for the Department to participate and be heard in this matter has been afforded to it. Non-participation in this matter is an action that the Department itself has chosen. The fact that the Department has made this choice does not in any way restrict the findings and conclusions we may reach, nor does it prevent the Department from being bound by those findings and conclusions.

FINDINGS OF FACT

1. The claimant, Mary A. Williams, filed an Application for Benefits with the Department of Labor and Industries on May 15, 2000, in which she alleged an industrial injury to her right wrist occurring on December 6, 1999, while acting in the course of her employment for The Boeing Company. On September 8, 2000, the Department issued an order in

which it allowed the claim and directed the self-insured employer to pay benefits as may be indicated.

On January 17, 2006, the Department issued an order in which it closed the claim with time-loss compensation as paid through October 30, 2002, and directed the self-insured employer to pay the claimant a permanent partial disability award of 4 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder.

On January 23, 2006, the claimant filed an appeal from the January 17, 2006 Department order with the Board of Industrial Insurance Appeals. On February 14, 2006, the Board issued an order in which it granted the appeal and assigned it Docket No. 06 10831.

2. Prior to December 6, 1999, the claimant, Mary A. Williams, suffered from several physical conditions that restricted her daily activities. The claimant had a heart condition that limited her ability to exert herself. The claimant had a bilateral knee condition and a back condition that limited her ability to walk, stand, sit, and lift.

The claimant also had undergone bilateral carpal tunnel releases and suffered from regular migraine headaches. Despite these conditions, she was working full-time as an assembler for The Boeing Company as of December 6, 1999, at their Harbour Point facility, which accommodated workers with restrictions.

3. On December 6, 1999, the claimant, Mary A. Williams, injured her right wrist on the ulnar side when she was repetitively using a hammer to assemble parts during the course of her employment for The Boeing Company. Findings of the condition on examination included subjective pain, grinding, and clicking on the ulnar side of the wrist with movement, reduced grip strength on the right, and x-ray findings of a bone fragment.

4. As of January 16, 2006, Mary A. Williams was 56 years old and a high school graduate. She has taken numerous classes from a variety of sources since then, but has no additional certificates or degrees other than having received a real estate license at some point in the past.

5. Since 1985 Mary A. Williams was employed by The Boeing Company as an assembler. She worked a total of 23 years for Boeing. She worked in jewelry sales prior to 1985.

6. Mary A. Williams received medical and surgical treatment for right wrist conditions, proximately caused by the December 6, 1999 industrial injury, from Dr. Edward North. This treatment included right wrist surgery performed on October 28, 2004, in which a tear of the triangular

fibro cartilage complex and a tear and attenuation of the ulnar carpal ligament were observed and repaired. The claimant's right wrist conditions had not reached maximum medical improvement until September 7, 2005, when Dr. North concluded that no further treatment would improve the wrist.

7. From October 31, 2002 through January 16, 2006, inclusive, the claimant's right wrist condition, proximately caused or aggravated by the industrial injury of December 6, 1999, left her with restrictions, which included no use of vibratory tools or hammers for job tasks, no deviating the right wrist, and no lifting over 25 pounds on an occasional basis.

8. Mary A. Williams was temporarily unable to obtain or perform reasonably continuous gainful employment from October 31, 2002 through September 6, 2005, inclusive, as a proximate result of conditions, proximately caused or aggravated by the industrial injury of December 6, 1999, when considered in conjunction with her age, education, work history, and pre-existing disabilities.

9. As of September 7, 2005, Mary A. Williams was permanently unable to obtain or perform reasonably continuous gainful employment as a proximate result of conditions proximately caused or aggravated by the industrial injury of December 6, 1999, when considered in conjunction with her age, education, work history, and pre-existing disabilities.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The medical and surgical services Mary A. Williams received from Dr. Edward North through September 6, 2005, were proper and necessary treatment under this claim, as contemplated by RCW 51.36.010.

3. During the period from October 31, 2002 through September 6, 2005, inclusive, Mary A. Williams was a temporarily totally disabled worker within the meaning of RCW 51.32.090, and therefore entitled to time-loss compensation for this period.

4. As of September 7, 2005, Mary A. Williams was a permanently totally disabled worker within the meaning of RCW 51.08.160.

5. The order of the Department of Labor and Industries dated January 17, 2006, is incorrect and is reversed. This matter is remanded to the Department with instructions to authorize and direct the self-insured employer to pay for the treatment by Dr. Edward North through September 6, 2005, including the right wrist surgery performed on October 28, 2004; pay the claimant time-loss compensation from

October 31, 2002 through September 6, 2005, inclusive; and to classify the claimant totally and permanently disabled effective September 7, 2005, and entitled to benefits concomitant to that status.

It is **ORDERED**.

Dated: September 25, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
CALHOUN DICKINSON Member