Kish, Ernest

AGGRAVATION (RCW 51.32.160)

First terminal date: Order on Agreement of Parties

Because the parties agreed in an Order on Agreement of Parties that the Department should adjudicate the claim through December 3, 2009, December 3, 2009, became the first terminal date. **….*In re Ernest Kish*, BIIA Dec., 12 20993 (2014)** [*Editor's Note:* The Board's decision was appealed to superior court under Pierce County Cause No. 14-2-10478-8.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ERNEST KISH	)	**DOCKET NO. 12 20993**
	)	
CLAIM NO. W-435140	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ernest Kish, by
Tacoma Injury Law Group, Inc., P.S., per
Tamara S. Clower and Cameron T. Riecan

Self-Insured Employer, King County, by
King County Prosecuting Attorney, per
Tylar A. E. Edwards

The claimant, Ernest Kish, filed an appeal with the Board of Industrial Insurance Appeals on September 13, 2012, from a July 18, 2012 order of the Department of Labor and Industries. In that order, the Department denied the claimant's application to reopen his claim. The Department order is **REVERSED AND REMANDED.**

PROCEDURAL MATTERS AND OVERVIEW

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a November 1, 2013 Proposed Decision and Order in which the industrial appeals judge affirmed the July 18, 2012 Department order. King County, the self-insured employer, filed a Reply to the Petition for Review on January 17, 2014.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The issue on appeal is whether Mr. Kish's neck condition proximately caused by the April 6, 2000 industrial injury objectively worsened between December 3, 2009, and July 18, 2012. We have granted review for several reasons.

As a threshold matter the industrial appeals judge used the wrong first terminal date. The correct date is December 3, 2009, not May 21, 2010. On the merits, the choice is between the evidence provided by H. Richard Johnson, M.D., who examined Mr. Kish on October 5, 2009, and February 29, 2012; and Aleksandar Curcin, M.D., and John S. Wendt, M.D., who examined him on May 12, 2012. There are also comparative EMGs (January 27, 2006, and May 29, 2012) and comparative MRIs (January 16, 2008, and June 4, 2012).

As a result of the industrial injury, Mr. Kish has undergone three surgeries—a fusion of C5-6 and C6-7 on October 30, 2000; a second fusion of C7-T1 on July 17, 2001; and a third fusion of C4-5 on October 30, 2005. The claim was closed effective December 3, 2009, with a permanent partial disability award equal to Category 4 of WAC 296-20-240.

Based on a comparison of the January 27, 2006, and May 29, 2012 EMGs, Mr. Kish's neurological findings were worse as of the second terminal date. The 2012 EMG substantiated an ulnar nerve problem across the left elbow and pinched nerves at C5-6. Neither finding was present in 2006. In addition, on October 5, 2009, the left elbow Tinel's sign was negative for ulnar nerve entrapment while in 2012 both Drs. Johnson and Wendt found a positive Tinel's sign in his left elbow. Dr. Johnson also observed increased left triceps atrophy in 2012 as compared with his 2009 exam. In addition, the June 4, 2012 MRI showed the progression of degenerative changes at C3-4, when compared with the 2008 MRI. We therefore conclude that Mr. Kish's neck condition proximately caused by the April 6, 2000 industrial injury objectively worsened between December 3, 2009, and July 18, 2012. The July 18, 2012 Department order denying Mr. Kish's application to reopen his claim is reversed.

DECISION

First terminal date: The Department closed the claim on February 17, 2009, with time-loss compensation benefits as paid through December 1, 2008, and a permanent partial disability award equal to Category 3 of WAC 296-20-240. The claimant protested on April 10, 2009, and the Department affirmed the February 17, 2009 order on June 26, 2009. Mr. Kish appealed on August 24, 2009, and the Board issued an Order on Agreement of Parties (OAP) on May 13, 2010. The parties agreed to close the claim effective December 3, 2009 (rather than June 26, 2009), with a permanent partial disability award equal to Category 4 of WAC 296-20-240 for the neck. In addition, they agreed that Mr. Kish was entitled to an additional year of time-loss compensation benefits for the period of December 2, 2008, through December 2, 2009. On May 21, 2010, the Department issued an order effectuating the OAP.

In the current appeal, the industrial appeals judge held a scheduling conference on February 12, 2013. In the resulting Interlocutory Order Establishing Litigation Schedule, she stated that the first terminal date was May 21, 2010, but gave the parties permission to argue their positions regarding that date on the first day of hearings, June 19, 2013. At the beginning of proceedings on that date, there was an off-the-record discussion by the parties. When the

industrial appeals judge came back on the record, she stated that the first terminal date was May 21, 2010.

As a general rule, the date of the Department's ministerial order effectuating the Board's order is not the first terminal date in an aggravation case. Instead, the appropriate date is the date through which the Department has adjudicated the claim *In re Donald Workman*, BIIA Dec., 00 24102 (2001); and *In re Jimmy Storer*, BIIA Dec., 86 4436 (1988). Typically, that date would be the date of the order under appeal, which in this case was June 26, 2009. But the parties agreed that on remand the Department should adjudicate the claim through December 3, 2009. December 3, 2009 is therefore the first terminal date.

Because the case was tried using the wrong first terminal date, we have considered whether the appeal should be remanded to the hearing process for further proceedings using the correct date. We conclude that remand is unnecessary because the relevant evidence would be the same either way. The first terminal date findings would still be based on the same clinical exams, Dr. Johnson's of October 5, 2009, and Dr. Harris's of November 17, 2008, and the same diagnostic testing, the January 27, 2006 EMG and the January 16, 2008 MRI.

Weighing the Evidence: Mr. Kish is left-handed. He suffered an industrial injury to his neck on April 6, 2000, and his symptoms and findings have consistently been left-sided. For example, he experiences numbness in the left hand; tends to drop things when he uses that hand; and has visible, longstanding atrophy of the left pectoralis muscle as a result of the injury. Mr. Kish underwent a fusion of C5-6 and C6-7 on October 30, 2000; a second fusion of C7-T1 on July 17, 2001; and a third fusion of C4-5 on October 30, 2005. He participated in a year-long vocational retraining program that apparently concluded in December 2008 and was found employable as a biomechanical technician.

On November 17, 2008, Mr. Kish was evaluated by James Harris, M.D., who determined that he had a permanent impairment equal to Category 3 of WAC 296-20-240. On February 17, 2009, the claim was closed with a permanent partial disability award based on that rating and with time-loss compensation benefits as paid through December 1, 2008. That order was affirmed on June 26, 2009, and Mr. Kish appealed. During the pendency of the appeal, Dr. Johnson examined him on October 5, 2009. The parties ultimately agreed that the claim should be closed effective December 3, 2009, with time-loss compensation benefits as paid through December 2, 2009, and a permanent partial disability award equal to Category 4 of WAC 296-20-240.

Mr. Kish returned to work in December 2011, working about one day a week as a photo booth technician. He also helped his friend out at a restaurant and did some other odd-jobs. His symptoms increased and he was seen again by Dr. Johnson on February 29, 2012. Dr. Johnson assisted Mr. Kish in filing an application to reopen his claim on March 2, 2012. The Department extended the time for making a decision to July 30, 2012. King County requested an independent medical examination (IME) and Mr. Kish was examined by Drs. Wendt and Curcin on May 12, 2012. They recommended further diagnostic testing. An EMG was obtained on May 29, 2012, and a cervical MRI on June 4, 2012. The Department denied reopening on July 18, 2012.

Dr. Johnson: Of particular note for comparison purposes, Dr. Johnson's February 29, 2012 findings included the following: Mr. Kish had atrophy at all three heads of the left triceps, with weakness; the triceps strength on the left was minus 4 over 5; and the Tinel's sign at the left elbow was mildly positive. When asked if there was a difference between his 2009 and 2012 clinical exams, Dr. Johnson responded:

> Well, there certainly was difference in that the patient now was showing evidence of the atrophy had progressed in the left triceps to where it was significant in all three heads of the triceps versus the fact that it was significant in my initial examination on October 5, 2009 just in the lateral head with mild—correction, with less atrophy in the other two heads.
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> The Tinel's sign at the elbow on the left was negative on my initial examination and it was positive on the follow-up examination, consistent with progression of the ulnar nerve involvement to now being shown evidence of ulnar entrapment. This ulnar entrapment was also in evidence when the patient underwent more recent electrodiagnostic studies on May 29, 2012, showing evidence of moderate left ulnar neuropathy across the elbow, consistent with the physical findings. And those findings were negative in the electrodiagnostic studies [prior] to closure of his claim.[1]

Dr. Johnson also said that the 2006 EMG had shown a problem at C7 and C8, whereas the 2012 EMG showed an additional area of involvement at C5 and C6.

When Dr. Johnson compared the January 16, 2008 MRI findings with the June 4, 2012 MRI findings, he noted that the latter showed the degenerative changes at C3-4 had progressed. In his opinion, Mr. Kish's condition related to the April 6, 2000 industrial injury had objectively worsened between May 21, 2010, and July 18, 2012, based on cervical range of motion; the positive Tinel's

[1] 6/19/13 Tr. at 49-50.

sign at the left elbow; the ongoing evidence of nerve irritation substantiated by physical findings and electrodiagnostic studies; and the progression of degenerative changes on MRI.

Dr. Wendt and Dr. Curcin: Drs. Wendt's and Curcin's testimony was not quite as detailed as Dr. Johnson's testimony with respect to their examination findings, but the findings they described on May 12, 2012, were consistent with what Dr. Johnson had found a few months earlier. In addition, Mr. Kish's presentation during both examinations was straightforward with no evidence of pain behavior. All five Waddell's signs were negative during Dr. Johnson's examination. Axial loading was positive during Dr. Curcin's examination but he said this was not a concern and the rest of the Waddell's signs were negative.

Dr. Wendt, a neurologist, said he "saw no convincing evidence" [2] that Mr. Kish's cervical condition had worsened between May 21, 2010, and July 18, 2012. Likewise, Dr. Curcin, an orthopedic surgeon, said there was no evidence of objective worsening between those dates.

Neurological aspect of Mr. Kish's condition: Like Dr. Johnson, Dr. Wendt found triceps weakness; an absent left triceps reflex; and sensory loss, particularly in the fourth and fifth digits, which is over the ulnar nerve distribution. Like Dr. Johnson, he found a positive Tinel's sign at the elbow, which was also substantiated by the May 29, 2012 EMG. Dr. Wendt did not know if Mr. Kish had a positive Tinel's sign before claim closure but he said that the finding was not related to the neck injury because it had "to do with pinching of a peripheral nerve after it has come out of the spine" and was in a "totally separate anatomic area."[3]

In contrast, Dr. Johnson said the ulnar nerve problem at the elbow was related to the neck condition because:

> Ulnar entrapment occurs as a result of an increased sensitization of the C7 and C8 nerves, and that the entrapment occurs at the elbow in the area where it's commonly referred to as the funny bone, the nerve is quite close to the surface in the ulnar nerve at the elbow as it passes around the posterior medial aspect of the elbow. The nerve with the sensitization and the normal pressure there then begins to show[s] dysfunction. . . .[T]he physical examination in terms of Tinel's sign, shows that there's definitely now evidence of increased irritation and therefore entrapment of the ulnar nerve.[4]

[2] Wendt Dep. at 22.
[3] Wendt Dep. at 28-29.
[4] 6/19/13 Tr. at 52.

For comparison purposes, Dr. Johnson used the November 17, 2008 independent medical examination (IME) performed by Dr. James Harris, an orthopedist. Dr. Wendt did not describe Dr. Harris's findings. According to Dr. Johnson:

> Dr. Harris performed an IME on 11-17-08 and his physical examination did reveal evidence of limited neck motion, the decreased sensation in the left upper extremity over the area of the left ulnar nerve involvement. There was also weakness in the left triceps and decreased left grip strength. The findings there were similar to the findings that I recorded in my evaluation of October 5, 2009, with regards to the limitation of motion and strength testing, as well as sensory deficits.[5]

Dr. Wendt said his May 12, 2012 examination was "comparable"[6] to Dr. Harris's 2008 examination but that he had found "increased weakness of left upper extremity since last claim closure."[7] He was not sure whether this was due to variability between examiners, which was why he recommended additional testing.

According to Dr. Wendt, the May 29, 2012 EMG substantiated a longstanding problem with the ulnar nerve across the elbow and showed "evidence of chronic, that means long-standing, multi-level, that means multiple levels, of pinched nerves in the neck, mild at C5-6, more significant C7. And mild at C8."[8] He stressed that the changes were longstanding, not acute or active. Unlike Dr. Johnson, he did not compare the May 29, 2012 EMG with the January 27, 2006 EMG. His focus instead was on whether Mr. Kish "had active injury to the nerve roots or whether he just had some chronic long-standing changes that would be considered less significant."[9]

King County's other medical expert, Dr. Curcin, testified that according to what Dr. Wendt wrote in the IME report, the first EMG showed a problem at C7-8, whereas the second one showed a problem at that level and at C5-6. He said that because Dr. Wendt was a neurologist, he would defer to him with respect to whether the electrodiagnostic testing showed any objective worsening.

We conclude that Mr. Kish has shown an objective worsening of his neurological findings related to the April 6, 2000 industrial injury. In his testimony, Dr. Wendt failed to do the necessary comparison of the January 27, 2006, and May 29, 2012 EMGs. But his description of the two EMGs in his IME report is consistent with and supports Dr. Johnson's conclusion that as of the second terminal date there was a worsening at C5-6. In terms of clinical findings, Dr. Wendt

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[5] 6/19/13 Tr. at 54.
[6] Wendt Dep. at 12.
[7] Wendt Dep. at 16.
[8] Wendt Dep. at 18.
[9] Wendt Dep. at 12.

conceded that his examination showed increased left arm weakness compared with Dr. Harris's, and Dr. Johnson found increased atrophy of the triceps in 2012.

In addition, Dr. Johnson testified that the ulnar nerve problem at the elbow was not evident during his October 5, 2009 examination or revealed by the January 27, 2006 EMG. By comparison, the May 29, 2012 EMG substantiated ulnar nerve entrapment at the left elbow, which was clinically confirmed by both Drs. Johnson and Wendt in 2012. That is another objective change supporting reopening of the claim, with the remaining question being causation.

Dr. Wendt summarily asserted that the ulnar nerve entrapment was unrelated to the neck problem because it was at the elbow. Dr. Johnson gave a more detailed explanation for relating the entrapment at the elbow to the cervical condition. His theory was that the irritation of the C7 and C8 nerve roots at the neck sensitized the nerves so that with normal pressure at the elbow they were entrapped. Dr. Wendt was not asked his views regarding Dr. Johnson's theory.

Dr. Wendt is a neurologist and Dr. Johnson is an orthopedic surgeon. At the same time, Dr. Wendt's opinions are undermined by his failure to satisfy the most basic requirement in an aggravation case—he failed to compare the EMG findings. He was unable to say whether the positive Tinel's sign in 2012 coupled with the supporting EMG evidence constituted a new or an old finding. We find Dr. Johnson's testimony more persuasive and accept his rationale for relating the 2012 ulnar nerve findings to the neck injury.

Comparison of the MRIs: Without giving specifics, Dr. Wendt said the June 4, 2012 MRI scan was "similar to what was found in MRI scans performed previously."[10] He said there was no evidence of an acute disc herniation or new or accelerated spinal cord compression or damage. Like Dr. Johnson, Dr. Curcin is an orthopedic surgeon. He testified

> The findings documented the previous surgical changes from C4-5 to T1. There was mild cord compression at C3-4, but that was unchanged. Basically compared to the 2008 study, there wasn't any significant objective change other than the postsurgical changes and multiple levels of arthritic disease.[11]

When he was asked to further explain and was provided with copies of the two reports, he said:

> So first of all, these are C spine MRI reports, January 16, '08, and June 4, 2012. Both of those were read by the same radiologist. And the 2008 study, there are degenerative changes at C3-4. There's some question

[10] Wendt Dep. at 19.
[11] Curcin Dep. at 16.

> of a signal abnormality in the cord at that level. Dr. Kell talks about discogenic end-plate edema present at that level.
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> And the two (sic) 2012 study, there's no signs of cord edema or myelomalacia, no mention of the (sic) any end-plate edema at this point. Dr. Kell's impression is some progression of disc-space loss at C3-4, but he compared, at the time of his reading, the 2012 study to the 2008 study and felt that there was no change, and if anything, improvement in those signal abnormalities in the cord.[12]

In sum, Dr. Curcin acknowledged there was increased narrowing at the C3-4 level but stressed the radiologist's conclusion of no change or maybe improvement with respect to cord compression.

Dr. Johnson also noted the changes at the C3-4 level in 2012 as compared with 2008. He testified that the June 4, 2012 MRI:

> [S]howed that clearly there what's referred to as a transfer lesions at C3-C4. There had been previous degenerative changes noted in the MRI prior to patient's claim closure; namely, that of January 16, 2008 that did reveal evidence of degenerative changes; however, the degenerative changes noted on the more recent study of June 4, 2012, clearly reveal progression of the degenerative changes in that transfer lesions at C3-C4.[13]

According to Dr. Johnson: "The patient's previous MRI studies had demonstrated prior to closure of his claim that he had a transfer lesion in terms of progression of degenerative changes C2-3 and C3-4"[14] but the 2012 MRI showed that "the degenerative changes in that transfer lesion had progressed."[15]

Dr. Curcin agreed that the June 4, 2012 MRI showed "some progression of disc-space loss at C3-4."[16] We conclude that Mr. Kish has shown that the degenerative changes have progressed at the C3-4 level, which is one level above his fusion site. Dr. Johnson related the progression of the changes at C3-4 to the industrial injury. This is another objective finding in support of reopening the claim.

To summarize, Mr. Kish has proved that his neck condition proximately caused by the April 6, 2000 industrial injury worsened between December 3, 2009, and July 18, 2012, based on objective findings, including: The May 29, 2012 EMG showed involvement at the C5 and C6 levels, which were not affected in the past, and substantiated an ulnar nerve problem across the left elbow

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[12] Curcin Dep. at 17.
[13] 6/19/13 Tr. at 58.
[14] 6/19/13 Tr. at 68.
[15] 6/19/13 Tr. at 69.
[16] Curcin Dep. at 17.

that was not evident on the prior EMG. Drs. Johnson and Wendt both documented a positive Tinel's sign at the left elbow in 2012 compared with Dr. Johnson's negative finding in 2009. Dr. Johnson observed increased left triceps atrophy in 2012 as compared with his 2009 exam. And the June 4, 2012 MRI showed the progression of degenerative changes at C3-4 when compared to the 2008 MRI.

There is one final matter we wish to address. There appears to be an undercurrent in this case about the fact that Mr. Kish has gone back to work and the effect that may have had on his symptoms. Mr. Kish was straightforward regarding the work he began performing in December 2011. His symptoms worsened thereafter and he filed the application to reopen his claim in March 2012. "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." *McDougle v. Department of Labor & Indus.*, 64 Wn.2d 640 (1964). There is no suggestion in this record that Mr. Kish exceeded his restrictions or acted unreasonably. The fact that his symptoms increased as a result of the ordinary incidents of living, including work, is not a barrier to the reopening of his claim. It is the essence of an aggravation case.

FINDINGS OF FACT

1. On June 19, 2013, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Ernest Kish sustained an industrial injury on April 6, 2000, when he was pulling on a large pipe wrench while trying to take apart a pipe joint. Mr. Kish suddenly fell backwards; twisted; tried to catch himself with his left hand; and injured his left upper extremity and neck. As a proximate result of the industrial injury, Mr. Kish underwent three surgeries—a fusion of C5-6 and C6-7 on October 30, 2000; a second fusion of C7-T1 on July 17, 2001; and a third fusion of C4-5 on October 30, 2005.

3. On December 3, 2009, Mr. Kish experienced numbness in his left hand, and dropped items held in his left hand as a proximate result of the April 6, 2000 industrial injury. His objective findings proximately caused by the industrial injury included the following: A January 27, 2006 EMG showed evidence of cervical radiculopathy involving C7-8, but no evidence of ulnar nerve entrapment at the left elbow. The left elbow Tinel's sign was negative. Mr. Kish had some triceps atrophy in the lateral triceps head with less atrophy in the other two heads. A January 16, 2008 cervical MRI revealed degenerative changes at C3-4 and end plate edema. Mr. Kish had a permanent cervical and

cervico-dorsal impairment equal to Category 4 of WAC 296-20-240 which includes: moderate cervico-dorsal impairment with objective clinical findings of such impairment with neck rigidity substantiated by x-ray findings of loss of anterior curve; narrowed intervertebral disc spaces and/or osteoarthritic lipping of vertebral margins with objective findings of moderate nerve root involvement with weakness and numbness in one or both upper extremities.

4. On July 18, 2012, Mr. Kish experienced numbness in his left hand and dropped items held in his left hand as a proximate result of the April 6, 2000 industrial injury. His objective findings proximately caused by the industrial injury included: a May 29, 2012 EMG showed ulnar nerve entrapment and involvement at the additional levels of C5 and C6 when compared with the January 27, 2006 EMG. The left elbow Tinel's sign was mildly positive. Mr. Kish had atrophy at all three heads of the left triceps, with weakness. His triceps strength on the left was minus 4 over 5. His left triceps atrophy had progressed to where it was significant in all three heads of the triceps as compared with the atrophy that was present in 2009. A June 4, 2012 cervical MRI revealed degenerative changes at C3-4 and no end plate edema, but it also showed increased narrowing and progression of the degenerative changes at C3-4 as compared with the January 16, 2008 MRI.

5. Mr. Kish's condition proximately caused by the April 6, 2000 industrial injury objectively worsened between December 3, 2009, and July 18, 2012.

CONCLUSIONS OF LAW

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

2. Between December 3, 2009, and July 18, 2012, Mr. Kish's condition proximately caused by the April 6, 2000 industrial injury objectively worsened within the meaning of RCW 51.32.160.

3. The July 18, 2012 Department order is incorrect and is reversed. This matter is remanded to the Department to reopen the claim and take further action as indicated.

DATED: February 26, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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