

Foster, Nancy (II)

SCOPE OF REVIEW

Time-loss compensation

When the order under appeal denies time-loss compensation benefits for a specified period and is not an order also closing the claim, the Board's scope of review is limited to consideration of time-loss compensation benefits for that period and does not extend to other periods in which the worker may seek compensation. **...*In re Nancy Foster (II)*, BIIA Dec., 15 13351 (2016)** [*Editor's Note:* The Board's decision was appealed to superior court under Kitsap County Cause No. 16-2-01568-1.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: NANCY A. FOSTER**)
2)
3 **CLAIM NO. N-318911**)
4)
5 **DOCKET NO. 15 13351**
6)
7 **DECISION AND ORDER**

5 In 1992, Nancy A. Foster injured her back while lifting a stack of reports at work. The claim
6 closed in 1994, when Ms. Foster returned to work, and reopened in 1997. Ms. Foster remained
7 employed from 1994 until 2006. She suffers from continuing back pain. On October 30, 2014, the
8 Department denied time-loss compensation benefits from March 7, 2014, through June 11, 2014. On
9 February 19, 2015, the Department affirmed the October 30, 2014 order **terminating** time-loss
10 compensation benefits. On March 12, 2015, the Department corrected and superseded the
11 February 19, 2015, order and specified that it was affirming the October 30, 2014 order **denying**
12 time-loss compensation benefits.
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14 Ms. Foster contends that she is entitled to time-loss compensation for the period from March 7,
15 2014, through March 12, 2015, the date of the order under appeal. The Proposed Decision and
16 Order denied time-loss compensation benefits for the entire period for which benefits were sought by
17 Ms. Foster. We agree Ms. Foster is not eligible for time-loss compensation benefits, but issue this
18 order to clarify that the Board's scope of review is confined to the specific time period for which the
19 Department denied time-loss compensation benefits in the October 30, 2014 order, and to correct
20 the Findings of Fact and Conclusions of Law to reflect this period. The Department order dated
21 March 12, 2015, is **AFFIRMED**.
22

DISCUSSION

23 Ms. Foster is a 50-year-old high school graduate. On June 23, 1992, she was lifting paper off
24 a printer while performing clerical computer work and felt a twinge in her back and suffered herniated
25 discs. She was off work following the industrial injury. In 1994, Ms. Foster returned to work and
26 remained employed until 2006. She indicated that her back pain made it too difficult to continue to
27 work.
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29 On October 30, 2014, the Department denied time-loss compensation benefits for the period
30 March 7, 2014, through June 11, 2014. On February 19, 2015, the Department issued an order
31 affirming the October 30, 2014 order **terminating** time-loss compensation benefits. On
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1 March 12, 2015, the Department corrected and superseded the February 19, 2015 order and clarified
2 that it was affirming the October 30, 2014 order **denying** time-loss compensation benefits.
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4 The industrial appeals judge concluded that Ms. Foster is not entitled to time-loss
5 compensation benefits for the period from March 7, 2014, through March 12, 2015, because she is
6 capable of performing light-duty sedentary work. For the reasons contained in the Proposed Decision
7 and Order, we agree that Ms. Foster is not entitled to time-loss compensation benefits. However, we
8 disagree that our scope of review may be extended beyond the March 7, 2014, through the June 11,
9 2014 period listed in the October 30, 2014 order denying time-loss compensation benefits.
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11 The Board's scope of review in an appeal is fixed by the Department order from which the
12 appeal was taken and limited by the issues in the Notice of Appeal.¹ Each time-loss compensation
13 order is an independent adjudication of entitlement to time-loss compensation benefits.² In the case
14 at hand, the Department denied time-loss compensation benefits for the discrete period from
15 March 7, 2014, through June 11, 2014. We will not expand our scope of review to deny benefits for
16 a period of time that was not covered by the order appealed. We distinguish the circumstances that
17 fashion our scope of appeal in this appeal from the circumstance where the Department affirms an
18 order terminating time-loss compensation benefits. In the latter circumstance, our scope of review
19 will extend to the date of the affirming order. The Department order should be affirmed and the
20 Findings of Fact and Conclusions of Law should be corrected to reflect this discrete period.
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22 **DECISION**

23 In Docket No. 15 13351, the claimant, Nancy A. Foster, filed an appeal with the Board of
24 Industrial Insurance Appeals on March 23, 2015, from an order of the Department of Labor and
25 Industries dated March 12, 2015. In this order, the Department affirmed its order dated October 30,
26 2014, denying time-loss compensation benefits from March 7, 2014, through June 11, 2014. This
27 order is correct and is affirmed.
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29 **FINDINGS OF FACT**

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- 31 1. On May 26, 2015, and July 15, 2015, an industrial appeals judge certified
32 that the parties agreed to include the amended Jurisdictional History in
33 the Board record solely for jurisdictional purposes.
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39 ¹ *Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956); *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977
40 (1970).
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42 ² *In re Tom Camp*, BIIA Dec., 38,035 (1973), *In re Kellie M. Stuczynski*, Dckt. No. 1312262 (2014).
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- 1 2. The Department denied Ms. Foster's time-loss compensation benefits for
2 the period of March 7, 2014, through June 11, 2014, and affirmed that
3 denial in the order under appeal on March 12, 2015.
- 4 3. Nancy Foster sustained an industrial injury on June 23, 1992, when she
5 lifted a stack of reports from a computer printer, felt a twinge in her right
6 leg, and severe pain in her back. Ms. Foster sustained three herniated
7 discs in her low back, including an annular tear at the L4-L5 level, some
8 disc desiccation at L5-S1, and degenerative disc and joint disease of the
9 low back that produces chronic axial back pain. Following physical and
10 massage therapy, Ms. Foster returned to the workforce in 1994.
- 11 4. Nancy Foster is a 50-year-old high school graduate who has worked as a
12 computer operator and as a receptionist. In addition to the industrial injury
13 to her low back and related depression, she also suffers from a thyroid
14 condition, obesity, diabetes, hypertension, hypercholesterol, asthma, and
15 anxiety.
- 16 5. Due to her industrial injury, from March 7, 2014, through June 11, 2014,
17 Ms. Foster's limitations included sitting for more than 40 minutes and
18 standing for more than 20 minutes. Additionally, Ms. Foster's industrial
19 injury causes her difficulty in bending or twisting at the waist and difficulty
20 kneeling or bending at the knees.
- 21 6. Nancy Foster was able to perform sedentary work, including work as a
22 receptionist, from March 7, 2014, through June 11, 2014.
- 23 7. Nancy Foster was able to perform and obtain gainful employment on a
24 reasonably continuous basis from March 7, 2014, through June 11, 2014.

25 **CONCLUSIONS OF LAW**

- 26 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
27 and subject matter in this appeal.
- 28 2. Our scope of review in this appeal is limited to Ms. Foster's eligibility for
29 time-loss compensation benefits from March 7, 2014, through June 11,
30 2014, under *In re Tom Camp*, BIIA Dec., 38,035 (1973), and *In re Kellie*
31 *M. Stuczynski*, Dckt. No. 13 12262 (2014).
- 32 3. Nancy Foster was not a temporarily totally disabled worker within the
33 meaning of RCW 51.32.090 from March 7, 2014, through June 11, 2014.

1 She has been out of the labor market for eight years. She has difficulty focusing. Activity causes
2 serious pain and discomfort. Dr. Guy Earle testified on a more-probable-than-not basis, "[I]f I look at
3 the combined effects of the severe oxygen dependent asthma, the mental health condition and the
4 chronic back condition, it's really hard for me to see this lady being gainfully employed on a full-time
5 basis. I don't see how there would be a job available for her do with that combination of conditions."⁵
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9 The record establishes Ms. Foster's mental health condition (depression) and her back condition
10 were proximately caused by the industrial injury. Dr. Earle's testimony is compelling and persuasive.
11 Moreover, Dr. Earle testified that this inability to work would likely be permanent. It is not practical or
12 reasonable to expect Ms. Foster to obtain employment under these circumstances, much less
13 maintain that employment on a reasonably continuous basis. The preponderance of the evidence
14 shows that Ms. Foster was temporarily and totally disabled during the period for which the Department
15 denied benefits.
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19 Dated: August 11, 2016.
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21 BOARD OF INDUSTRIAL INSURANCE APPEALS
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24
25 /s/ _____
26 FRANK E. FENNERTY, JR. Member
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⁵ Earle Dep. at 26.

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Addendum to Decision and Order
In re Nancy A. Foster
Docket No. 15 13351
Claim No. N-318911

Appearances

Claimant, Nancy A. Foster, by Casey & Casey, P.S., per Gerald L. Casey and Carol L. Casey
Employer, Scott Wetzel Services, Inc., None
Department of Labor and Industries, by The Office of the Attorney General, per John Barnes

Petition for Review

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 Proposed Decision and Order issued on April 15, 2016, in which the industrial appeals judge affirmed the Department order dated March 12, 2015. On July 5, 2016, the Department filed a response.