## Drachenberg, Donica

## **BOARD**

#### **Summary judgment**

Because a determination of genuine doubt goes to the state of mind, summary judgment is not appropriate when considering whether an employer had a genuine doubt as to its need to pay benefits. ....In re Donica Drachenberg, BIIA Dec., 16 12263 (2016)

## **PENALTIES (RCW 51.48.017)**

#### **Genuine doubt**

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# BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: DONICA J. DRACHENBERG	)	DOCKET NOS. 16 12263 & 16 12366
	)	ORDER VACATING PROPOSED DECISION
<b>CLAIM NO. SJ-18100</b>	)	AND ORDER AND REMANDING THE APPEALS FOR FURTHER PROCEEDINGS

Donica Drachenberg requested penalties against the self-insured employer, Catholic Health Initiatives, Franciscan Health System St. Francis (CHI Franciscan), for alleged delays in payment of time-loss compensation benefits and authorizing surgery. The Department of Labor and Industries denied both requests. Ms. Drachenberg contends that CHI Franciscan failed to pay intermittent benefits and improperly relied on a practitioner not authorized to treat injured workers in Washington State to unreasonably delay Ms. Drachenberg's surgery. CHI Franciscan maintains that it did not fail to pay benefits when due and did not unreasonably delay the requested surgery. Our industrial appeals judge determined that no material issue of fact exists and granted CHI Franciscan's Motion for Summary Judgment, finding that it did not unreasonably delay payment of time-loss compensation benefits or authorization for surgery, and affirmed the Department decisions. In her Petition for Review, Ms. Drachenberg argues that the industrial appeals judge should have granted her request to continue the hearing on summary judgment; that summary judgment is inappropriate; and that the CHI Franciscan unreasonably delayed benefits and authorization for surgery. We find that summary judgment is not appropriate because the absence or presence of a genuine doubt concerns the state of mind of the employer's claims manager. The self-insured employer's motion for summary judgment is denied, and this appeal is remanded to the hearings process for further proceedings. The Proposed Decision and Order of August 2, 2016, is vacated and this appeal is **REMANDED FOR** FURTHER PROCEEDINGS.

#### DISCUSSION

CHI Franciscan hired Donica Drachenberg as a per-diem employee in February 2011, without health care benefits. Ms. Drachenberg injured her right wrist and shoulder on September 5, 2014, while working at CHI Franciscan. The Department allowed the claim. Ms. Drachenberg filed a protest to the Department's wage rate order, but it was untimely.

On June 15, 2015, Kenneth R. Koskella, M.D., Ms. Drachenberg's attending physician, requested that CHI Franciscan authorize surgery for the Ms. Drachenberg's right wrist condition. CHI Franciscan relied on the opinion of David H. Trotter, M.D., an orthopedic surgeon, regarding the

appropriateness of the requested surgery. Although he is licensed elsewhere, Dr. Trotter is not licensed to practice in Washington State.

Dr. Trotter determined that Ms. Drachenberg's surgery was not medically necessary because she had not yet attempted physical therapy to treat her injuries and he recommended that CHI Franciscan deny the surgery. On June 29, 2015, CHI Franciscan's third-party benefits administrator informed Dr. Koskella that it was denying his surgery request. On July 8, 2015, Dr. Koskella referred Ms. Drachenberg for physical therapy as a prerequisite for surgery.

The third-party benefits administrator spoke to Ms. Drachenberg several times in July, August, September, and October 2015, regarding the denial of surgery. On October 6, Ms. Drachenberg declined CHI Franciscan's offer to arrange an independent medical examination.

On November 13, 2015, and December 3, 2015, Ms. Drachenberg's counsel wrote to the Department regarding her wage rate. On December 2, 2015, the third-party benefits administrator received an incomplete authorization request from Stephen Kennedy, M.D., seeking approval to perform surgery to treat Ms. Drachenberg's right wrist condition. That day, CHI Franciscan notified Dr. Kennedy of the need for a medical causation statement before the surgery could be approved. On December 9, 2015, CHI Franciscan again contacted Dr. Kennedy to request the medical causation statement to link the surgery to Ms. Drachenberg's industrial injury. Dr. Kennedy provided the signed statement on December 10, 2015, and the CHI Franciscan authorized the requested surgery that day.

On January 3, 2016, Ms. Drachenberg's counsel wrote to the Department seeking a penalty for the CHI Franciscan's delay of surgery authorization and for mistakenly claiming that the surgery had not yet been approved. Ms. Drachenberg's counsel also reiterated his disagreement with the rate of benefits being paid for time-loss compensation benefits. On February 8, 2016, Ms. Drachenberg's counsel wrote another letter about the benefits rate and again mistakenly stated that surgery had not been approved.

The employer filed a motion for summary judgment and has the burden of demonstrating there is no genuine issue of material fact. Where benefits have been delayed, the dispositive question is whether the employer had a genuine doubt from a medical or legal standpoint as to the liability for benefits.<sup>1</sup> CHI Franciscan presented evidence at summary judgment to suggest a basis on which its third party administrator might have had genuine doubt. Dr. Koskella, Ms. Drachenberg's attending

<sup>&</sup>lt;sup>1</sup> Taylor v. Nalley's Fine Foods, 119 Wn. App. 919, 926 (2004) citing In re Frank Madrid, BIIA Dec., 86 0224-A (1987).

physician, requested that CHI Franciscan authorize surgery for Ms. Drachenberg's right wrist condition. Dr. Trotter believed that Ms. Drachenberg's surgery was not medically necessary because she had not yet attempted physical therapy. He recommended that CHI Franciscan deny the surgery. On June 29, 2015, the third-party benefits administrator informed Dr. Koskella that it was denying the surgery request. This evidence conflicted with Dr. Koskella's opinion that the requested surgery was necessary and proper treatment.

We granted review because summary judgment is not appropriate when a material fact concerns state of mind, as such matters are normally resolved only after cross-examination.<sup>2</sup> The absence or presence of CHI Franciscan's genuine doubt goes to the state of mind of the employer's claims manager and requires a weighing of the evidence. The existence of conflicting medical opinions alone is not sufficient to establish genuine doubt as a matter of law. Under the circumstances, Ms. Drachenburg, the non-moving party, should be given the opportunity to cross examine the employer's witnesses who assert they had a genuine doubt as to the obligation to pay benefits. Consequently, the self-insured employer's motion for summary judgment should be denied and this appeal remanded so that a record can be developed on the question of genuine doubt.

#### **ORDER**

CHI Franciscan's Motion for Summary Judgment is **DENIED**. The August 2, 2016 Proposed Decision and Order is **VACATED**. This appeal is remanded to the hearings process, as provided by WAC 263-12-145(4), for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided

<sup>&</sup>lt;sup>2</sup> 14A Washington Practice § 25.17 (*Citing Haubry v. Snow*, 106 Wn. App. 666 (2001) and *Pearson v. Gray*, 90 Wn. App. 911 (1998), *et al.*).

by RCW 51.52.104.	This order vacating i	is not a final Decision and Or	der of the Board within the
meaning of RCW 51.	52.110.		
Dated: Novembe	er 7, 2016.		
		BOARD OF INDUSTRIAL IN	ISURANCE APPEALS
		/s/	
		DAVID E. THREEDY	Chairperson

/s/\_\_\_\_ FRANK E. FENNERTY, JR. Member

## Addendum to Decision and Order In re Donica J. Drachenberg Docket Nos. 16 12263 & 16 12366 Claim No. SJ-18100

### **Appearances**

Claimant, Donica J. Drachenberg, by Casey & Casey, P.S., per Gerald L. Casey

Self-Insured Employer, Catholic Health Initiatives Franciscan Health System ST Francis, by Sather, Byerly & Holloway, LLP, per Aaron J. Bass

Department of Labor and Industries, by The Office of the Attorney General, per James S. Johnson

## **Department Order(s) Under Appeal**

- 1. In Docket No. 16 12263, the claimant, Donica J. Drachenberg, filed an appeal with the Board of Industrial Insurance Appeals on March 2, 2016, from an order of the Department of Labor and Industries dated January 13, 2016. In this order, the Department affirmed an earlier order denying Ms. Drachenberg's request for an unreasonable delay penalty against the CHI Franciscan due to an alleged unreasonable delay in paying time-loss compensation benefits.
- 2. In Docket No. 16 12366, the claimant, Donica J. Drachenberg, filed an appeal with the Board of Industrial Insurance Appeals on March 4, 2016, from an order of the Department of Labor and Industries dated February 25, 2016. In this order, the Department affirmed an earlier order denying Ms. Drachnberg's request for an unreasonable delay penalty against CHI Franciscan due to an alleged unreasonable delay in authorizing a surgical procedure.

#### **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. Donica Drachenberg filed a timely Petition for Review of a Proposed Decision and Order issued on August 2, 2016, in which the industrial appeals judge affirmed the orders of the Department dated January 13, 2016, and February 25, 2016. CHI Franciscan filed a response to the Petition for Review.

#### **Evidentiary Rulings**

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