

Simmons, Cynthia

TREATMENT

Accepted conditions

"Administratively accepted" conditions are not a separately recognized class of conditions related to a claim. Conditions stipulated as "administratively accepted" are accepted conditions under the claim.*In re Cynthia Simmons*, BIIA Dec., 18 18875 (2020)

Scroll down for order.

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

IN RE: CYNTHIA Y. SIMMONS) **DOCKET NO. 18 18875**
)
CLAIM NO. Y-963854) **DECISION AND ORDER**

Cynthia Simmons was injured when she tripped and fell while in the course of employment for Sell Thru Services, Inc. She injured her low back, right ankle, feet, and neck. The Department closed the claim with an award for permanent partial disability consistent with Category 2 of the categories of permanent cervical and cervical dorsal impairment. Our industrial appeals judge reversed the order closing the claim and directed the Department to allow conditions of peroneus brevis tendon tear of the right foot, lesion of the talor dome of the right foot, tarsal tunnel syndrome of right foot, and directed treatment for the lumbar joint facet arthritis. The Department contends that we should not allow conditions that were not at issue; we should consider the testimony of Gavin Smith, DPM; and should not allow peroneus brevis tendon tear of the right foot, lesion of the talor dome of the right foot, and tarsal tunnel syndrome of right foot. We have considered the testimony of Dr. Gavin, as well as the complete record. The record does not establish that tarsal tunnel syndrome of the right foot can be diagnosed or related to the industrial injury but the conditions referred to as tear of the peroneus brevis tendon or lesion of the talor dome should be allowed, but are not in need of further treatment. The claim should remain closed, but the evidence establishes Ms. Simmons is entitled to an award for permanent disability for her lumbar impairment in addition to the previously awarded cervical impairment. The Department order closing the claim is **REVERSED** and the matter is **REMANDED** with direction to close the claim with awards for permanent partial disability equal to Category 2 of the categories of permanent lumbosacral impairment and Category 2 of the categories of permanent cervical impairment.

DISCUSSION

Ms. Simmons was injured on July 18, 2006, when she tripped and fell while in the course of employment for Sell Thru Services, Inc. Ms. Simmons testified that she injured her low back, right ankle, feet, and knees. Ms. Simmons was treated with chiropractic and physical therapy and underwent injections into her feet, neck, and low back. Facet neurotomy provided relief to her low back symptoms that occasionally flared. The conditions allowed by final and binding orders of the Department included right ankle sprain and lumbar facet joint arthritis. The conditions that the parties stipulated to as "administratively allowed" included: thoracic sprain and strain, neck sprain and strain, closed dislocation thoracic vertebra, lumbar sprain and strain, closed dislocation lumbar vertebra,

1 and closed dislocation of an unspecified cervical vertebra. The conditions denied by final and binding
2 orders included bilateral carpal tunnel syndrome and right shoulder sprain.
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4 Terrence Hess, DPM, first treated Ms. Simmons for her right foot and right ankle conditions in
5 April 14, 2009. He has continued to treat her through at least September 2018. Based on MRI
6 findings he diagnosed talor dome lesion caused by the industrial injury. He believes a tear of the
7 peroneus brevis tendon occurred as a result of compensation caused by the lesion to the talor dome.
8 He suspected tarsal tunnel syndrome also related to compensation after the industrial injury. He
9 based a possible tarsal tunnel diagnosis on his finding a positive Tinel's sign. Although at certain
10 points in his testimony he appears to diagnose tarsal tunnel, his final assessment of the tarsal tunnel
11 was:
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13 I don't know that it's tarsal tunnel, but it's hard to tell with the nerve loop. I'm drawing a
14 circle. Wherever the nerve is getting interfered with, that's where the problem lies, and
15 I think it may be tarsal tunnel, but I actually think it's more proximal. Even though there's
16 been some evidence on the diagnostic nerve conduction tests suggesting it's tarsal
17 tunnel, I think it's more proximal. I think it's a radiculopathy.¹
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19 We do not find that this testimony establishes a diagnosis of tarsal tunnel, particularly in light
20 of the lack of support for the diagnosis by other experts. Although the Proposed Decision and Order
21 stated that Arfan Ansari, M.D., who specializes in physical medicine and rehabilitation, diagnosed
22 tarsal tunnel, we could find no such testimony. It can be said that Dr. Ansari infers the diagnosis as
23 he states Ms. Simmons' foot symptoms were caused by neuropathic pain due to compressions of
24 two of the three nerves that pass through the tarsal tunnel of **both** feet. He did not relate any foot
25 conditions to the industrial injury, however. The occurrence of tarsal tunnel symptoms on both feet
26 would not be explained by the industrial injury, which damaged the right foot.
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28 Gavin Smith, DPM, whose testimony was not discussed in the Proposed Decision and Order,
29 also testified that the abnormality of the nerves going through the tarsal tunnel appeared bilaterally
30 and he believed could be explained only by neuropathy or diseased nerves. He diagnosed, however,
31 bi-lateral lateral plantar and inferior calcaneal neuropathy, not tarsal tunnel. Jeffrey Patterson, M. D.,
32 an orthopedic surgeon, did not reproduce a positive Tinel's sign and believed there was no basis to
33 diagnose tarsal tunnel. Sidney Spector, M. D., a neurologist, reviewed the EKG data and concluded
34 that the values were fairly equal and symmetrical for both feet. The clinical findings were for both
35 feet and the EKG data likely reflects normal values for Ms. Simmons because she was not presenting
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47 ¹ Hess Dep. at 41.

1 clinically with the expected symptoms for tarsal tunnel syndrome. The evidence does not establish
2 that tarsal tunnel, even if diagnosed, was related to the industrial injury.
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4 We conclude that the industrial injury, which involved an ankle sprain allowed under the claim,
5 also caused a lesion of the talor dome. Dr. Hess, Dr. Ansari, and Dr. Patterson noted the lesion
6 based on MRIs. Only Dr. Smith believed it could not be seen on the MRI. Dr. Specter did not
7 comment on this condition. Similarly, they all noted a tear of the peroneus brevis tendon of the right
8 foot as seen on various MRIs. Dr. Hess's explanation of the tear having been caused by the extra
9 wear on the tendon due to the lesion on the talor dome is persuasive, the lesion and tear must be
10 accepted under the claim.
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12 The other problematic issue concerns whether the foot conditions or any of the other numerous
13 conditions finally or "administratively" allowed under the claim require treatment. The two treatment
14 modalities discussed were for bracing the foot conditions or injections, and the medial branch blocks
15 for back pain.
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17 Regarding the foot, only Dr. Hess recommended treatment. He believed he should continue
18 to try different bracing, which is in fact treatment he provided after the claim closure. He did not
19 believe the bracing would be curative, but rehabilitative. He did not elaborate on how it would be
20 rehabilitative. He has been using different bracing since 2011 with mixed results and indicated that
21 he had been trying to get Ms. Simmons' support to make her comfortable. While he says this would
22 be rehabilitative, it's not clear further attempts at bracing would increase her functioning or lead to
23 long term improvement.² Merely to make her comfortable is neither rehabilitative nor curative. None
24 of the other experts provide testimony to support ongoing treatment for the foot or that continued
25 bracing would be rehabilitative.
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27 Dr. Ansari devised a treatment plan for her pain. She had been receiving injections plus
28 various medications. He also endorsed lumbar and cervical blocks for facet mediated pain. He did
29 not find that she was experiencing any significant radicular symptoms. In November 2017 she was
30 seen, and, after having had another block, the pain was improved. In July 2018 her pain was
31 returning and Dr. Ansari noted the effects of the blocks are not permanent. Like Dr. Hess for the foot,
32 he testified that ongoing blocks would be rehabilitative without providing any explanation why they
33 should be considered so, rather than palliative. None of the experts testifying for the Department
34 believed treatment was necessary and believed that her conditions were at maximum medical
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47 ² See WAC 296-20-01002 definition of proper and necessary treatment.

1 improvement. We conclude that lumbar and cervical blocks for facet mediated pain is not curative or
2 rehabilitative and therefore is not proper and necessary treatment.

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4 Because we affirm claim closure, we need to address appropriate permanent partial disability.
5 The Department had attempted to close the claim in 2016 with an award for a Category 2 **lumbar**
6 disability. After an appeal, the parties agreed to reverse that order with direction to provide additional
7 treatment. When the Department issued the order closing the claim this time, it did so with a Category
8 2 for **cervical** disability. The lumbar disability should be included when the claim is closed. It was
9 supported by Dr. Ansari and not disputed by Dr. Patterson, who agreed the Category 2 of lumbar
10 impairments was appropriate in 2016, but did not clearly affirm it was appropriate in 2018 when the
11 order under appeal was issued. Dr. Specter did not address permanent partial disability nor did the
12 podiatrists, either for the foot or the cervical and lumbar spines. Dr. Hess testified that he thought
13 Ms. Simmons had a permanent impairment of her foot, but did not provide a rating. No other
14 testimony from any expert was elicited regarding impairment due to the foot conditions.

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16 Finally, we are not persuaded by the Department's arguments about the findings for conditions
17 it stipulated were accepted by the Department. Although it's true the stipulation referred to many
18 conditions as "administratively accepted" the Department does not argue that "administratively
19 accepted" means something other than accepted under the claim, we are not aware of a class of
20 conditions that can be "administratively accepted" but not otherwise accepted under the claim. We
21 direct the Department accept the conditions of peroneus brevis tendon tear of the right foot, lesion of
22 the talor dome of the right foot, to deny responsibility for bilateral tarsal tunnel, issue findings of fact
23 to direct the Department to accept conditions that were stipulated as administratively accepted and
24 to close the claim with awards for lumbar and cervical impairment.

25 26 27 28 29 30 31 32 33 34 **DECISION**

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36 In Docket No. 18 18875, the claimant, Cynthia Y. Simmons, filed an appeal with the Board of
37 Industrial Insurance Appeals on June 20, 2018, from an order of the Department of Labor and
38 Industries dated April 23, 2018. In this order, the Department closed the claim with an award for
39 permanent partial disability consistent with Category 2 of the categories of permanent cervical and
40 cervical dorsal impairment. This order is incorrect and is reversed and remanded to the Department
41 with direction to accept the tear of the peroneus brevis tendon of the right foot, lesion of the talor
42 dome of the right foot, deny responsibility for bilateral tarsal tunnel, and close the claim with awards
43 for permanent partial disability equal to Category 2 of the categories of permanent cervical and
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1 cervical dorsal impairment and Category 2 of the categories of dorso-lumbar and lumbosacral
2 impairment.
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4 **FINDINGS OF FACT**

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- 6 1. On September 4, 2018, an industrial appeals judge certified that the
7 parties agreed to include the Jurisdictional History in the Board record
8 solely for jurisdictional purposes.
 - 9 2. Cynthia Simmons sustained an industrial injury on July 18, 2006, when
10 she tripped and fell in the course of her employment with Sell Thru
11 Services, Inc. Conditions described as lumbar facet arthritis, strain and
12 strain of the thoracic spine, strain and sprain of the cervical spine, closed
13 dislocations of the thoracic, lumbar and cervical vertebrae, sprain of the
14 right ankle, lumbar facet stenosis, lumbar facet arthropathy, and chronic
15 lumbar and cervical strains with facet mediated pain were proximately
16 caused by the industrial injury.
 - 17 3. Ms. Simmons' conditions described as a tear of the peroneus brevis
18 tendon of the right foot and lesion of the talor dome of the right foot were
19 proximately caused by the industrial injury.
 - 20 4. Ms. Simmons' condition described as tarsal tunnel syndrome was not
21 proximately caused or aggravated by the industrial injury.
 - 22 5. As of April 23, 2018, Ms. Simmons' conditions caused by the industrial
23 injury were fixed and stable and did not need further proper and
24 necessary treatment.
 - 25 6. On April 23, 2018, Ms. Simmons had a permanent partial disability caused
26 by the industrial injury equal to Category 2 of the categories of permanent
27 dorso-lumbar and lumbosacral impairments as described by
28 WAC 296-20-280.
 - 29 7. On April 23, 2018, Ms. Simmons had a permanent partial disability caused
30 by the industrial injury equal to Category 2 of the categories of permanent
31 cervical and cervico-dorsal impairments as described by
32 WAC 296-20-240.
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37 **CONCLUSIONS OF LAW**

- 38 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
39 and subject matter in this appeal.
- 40 2. Ms. Simmons' conditions caused by the industrial injury were fixed and
41 stable as of April 23, 2018, and she is not entitled to further treatment.
42 RCW 51.36.010.
- 43 3. On April 23, 2018, Ms. Simmons had permanent partial disabilities within
44 the meaning of RCW 51.32.080 proximately caused by the industrial
45 injury.
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4. The Department order of April 23, 2018, is reversed. This matter is remanded to the Department with direction to accept responsibility for a tear of the peroneus brevis tendon of the right foot and lesion of the talor dome of the right foot, deny responsibility for bilateral tarsal tunnel syndrome; pay a permanent partial disability award equal to Category 2 of the categories of permanent dorso-lumbar and lumbosacral impairments, less prior awards, if any; pay a permanent partial disability award equal Category 2 of the categories of permanent cervical and cervico-dorsal impairments, less prior awards, if any; and to close the claim.

Dated: January 10, 2020.

BOARD OF INDUSTRIAL INSURANCE APPEALS



LINDA L. WILLIAMS, Chairperson



JACK S. ENG, Member

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**Addendum to Decision and Order
In re Cynthia Y. Simmons
Docket No. 18 18875
Claim No. Y-963854**

Appearances

Claimant, Cynthia Y. Simmons, by Putnam Lieb Potvin, per Kathryn N. Potvin

Employer, Sell Thru Services, Inc. (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Dilek F. Aral-Still

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 Department filed a timely Petition for Review of a Proposed Decision and Order issued on September 10, 2019, in which the industrial appeals judge reversed and remanded the Department order dated April 23, 2018. On November 15, 2019, the claimant 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.