

## Klein, Brent

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### RES JUDICATA

#### **\*Prior stipulation in Order on Agreement of Parties**

The Board won't be bound by the stipulated medical opinion underlying an order on agreement of parties in a previous appeal, particularly where, as here, a party requests that the Board should infer facts from the parties' prior stipulation. ....*In re Brett Klein*, BIIA Dec., 19 16443 (2021) [Editor's Note: The Board's decision was appealed to superior court under Pierce County Cause No. 21-2-05652-2]

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

**IN RE: BRETT J. KLEIN**

**) DOCKET NO. 19 16443**

**CLAIM NO. SZ-31508**

**) DECISION AND ORDER**

Brett J. Klein sustained an industrial injury on December 5, 2013. He filed a claim for benefits, which was accepted and benefits were provided. The Department closed the claim on March 20, 2019, with time-loss benefits ended as paid through July 21, 2018, and no award for permanent partial disability. Mr. Klein appealed, contending that the industrial injury proximately caused or aggravated his condition diagnosed as spondylosis, degenerative disc disease, and anterolisthesis. He seeks payment of time-loss compensation benefits from July 22, 2018, through March 19, 2019, and a pension as of March 20, 2019. Alternatively, he seeks an award for permanent partial disability.

After hearing the evidence, our industrial appeals judge determined that Mr. Klein failed to show by a preponderance of the evidence that his conditions diagnosed as spondylosis, degenerative disc disease, and anterolisthesis were proximately caused or aggravated by the industrial injury, and that the self-insured employer did not accept these conditions by authorizing spinal injection treatment. Further, she determined that based solely on conditions proximately caused by the industrial injury, Mr. Klein was able to perform and obtain gainful employment on a reasonably continuous basis as of July 22, 2018, that he required no further treatment, and that he had no permanent partial disability. As such, she affirmed the Department's order closing the claim.

Mr. Klein asks us to reweigh the evidence and reverse and remand the Department's order. We have reviewed the record and conclude that our industrial appeals judge's ultimate conclusions are correct. We grant review solely to rule on Mr. Klein's attorney's request that the industrial appeals judge take judicial notice of an Order and Agreement of Parties in a previous appeal, filed under Docket No. 15 14066. The Department order is **AFFIRMED**.

**DISCUSSION**

Brett J. Klein sustained an industrial injury on December 5, 2013, while working as a forklift driver/maintenance technician at Costco. On that day, he hopped off a forklift, slipped in a puddle of water, and fell on his buttocks. Mr. Klein continued to work full time, but on June 2, 2014, sought treatment with his regular chiropractor, Dr. Bains. He filed a claim for benefits in June 2014 and his claim was allowed. Treatment primarily involved chiropractic care, and trigger point and epidural injections. Mr. Klein testified that he felt little relief from the treatment he received, and his daily activities have become so restricted that he is no longer able to work.

1 The Department affirmed an order closing the claim on March 20, 2019, with time-loss benefits  
2 ended as paid through July 21, 2018, and no award for permanent partial disability. Mr. Klein  
3 appealed, contending that the industrial injury proximately caused or aggravated his condition  
4 diagnosed as spondylosis, degenerative disc disease, and anterolisthesis. In support of his appeal,  
5 Mr. Klein called Guy H. Earle, M.D., a physician focusing on occupational medicine, who examined  
6 Mr. Klein in May 2015, at his attorney's request. Dr. Earle diagnosed buttocks contusion, resolved;  
7 lumbar sprain; aggravation of preexisting lumbar degenerative disc and joint disease; and unstable  
8 L4-5 spondylolisthesis, all proximately caused or aggravated by the industrial injury. Mr. Klein also  
9 called H. Richard Johnson, M.D., an orthopedic surgeon, who examined Mr. Klein in November 2019,  
10 also at his attorney's request. Dr. Johnson diagnosed contusion of the right back; lumbar  
11 sprain/strain; aggravation or permanent worsening of preexisting lumbar spondylosis; and, right L5-  
12 S1 lumbar sciatica, with constant numbness, plantar aspect of the right foot, all related to the industrial  
13 injury. In Dr. Johnson's opinion Mr. Klein was temporarily totally disabled from July 22, 2018, through  
14 March 20, 2019, and permanently and totally disabled thereafter. Mr. Klein also called Christina  
15 Casady, OTR/L, occupational therapist, who conducted two functional capacity evaluations of  
16 Mr. Klein in 2015 and 2019. Based on the two evaluations, which Ms. Casady considered valid,  
17 Ms. Casady testified that Mr. Klein was unable to sustain full-time work activity due to multiple  
18 physical restrictions. In Ms. Casady's opinion, Mr. Klein's restrictions included being unable to sustain  
19 sitting, standing, or walking alternatively for more than 7 hours in an 8 hour day, and being unable to  
20 stand or walk for more than 20 minutes at a time, and no more than one-and-one-half hours in an  
21 eight-hour day. Mr. Klein also called Carl Gann, VRC, a vocational rehabilitation counselor, who  
22 testified that based on the opinions of Dr. Earle, Ms. Casady, and his own vocational evaluation,  
23 Mr. Klein was unable perform or obtain gainful employment on a reasonably continuous basis as of  
24 July 22, 2018.

25 For its part, Costco called three physicians who performed examinations at its request: Dennis  
26 Chong, M.D., a physiatrist, examined Mr. Klein in May 2018; Scott Grabill, D.O., an orthopedic  
27 surgeon, examined Mr. Klein in March 2019; and, Linda A. Wray, M.D., a neurologist, examined  
28 Mr. Klein in March 2019 with Dr. Grabill, and also in March 2018 with a different physician. Dr. Chong  
29 diagnosed preexisting 1991 lumbosacral injury with chronic chiropractic adjustments continuing to  
30 less than six weeks prior to the declaration of the industrial event; preexisting lumbar spine multilevel  
31 degenerative disease and spondylosis that progressed in the natural course of a chronic  
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1 degenerative process and was not caused by nor aggravated by the industrial injury; temporary  
2 exacerbation of chronic low back pain, resolved; chronic obesity; chronic narcotic dependency; and,  
3 "excellent muscle tone and bulk and lower and upper limbs, which is completely inconsistent with a  
4 supposedly sedentary lifestyle over the past half a decade."<sup>1</sup>  
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7 Dr. Grabill and Dr. Wray diagnosed contusion of the buttocks related to the industrial injury,  
8 and lumbar strain, administratively accepted. They also diagnosed multilevel degenerative changes  
9 in the lumbar spine that were preexisting and neither permanently nor temporarily aggravated by the  
10 industrial injury; narcotic habituation; and symptom magnification. Both Dr. Wray and Dr. Grabill  
11 testified that Mr. Klein could perform the job of injury without any restrictions as of July 22, 2018.  
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14 Costco also called Julie Busch, VRC, a vocational rehabilitation counselor, who performed a  
15 vocational assessment for Costco in June 2016. In Ms. Busch's opinion, Mr. Klein had transferable  
16 skills for positions as a warehouse worker, which are at least a medium level of exertion and delivery  
17 driver, which is light to medium. Finally, Costco called Theodore J. Becker, Ph.D., a physical therapist  
18 with a Ph.D. in human performance, who testified that the physical capacity evaluations performed  
19 by Ms. Casady were invalid and that surveillance video of Mr. Klein taken in the fall of 2017  
20 demonstrated that Mr. Klein's biomechanics for the trunk, spine, pelvis, and upper and lower  
21 extremities were all intact or normal.  
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24 After reviewing this very large record, our industrial appeals judge credited the well-reasoned  
25 opinions of Drs. Grabill and Wray, and affirmed the Department order on appeal. Mr. Klein filed a  
26 Petition for Review asking us to reweigh the evidence and accept the conditions diagnosed as  
27 spondylosis, degenerative disc disease and anterolisthesis, pay time-loss, and find him permanently  
28 partially disabled, or in the alternative, determine that he is totally and permanently disabled. We  
29 decline to do so because we agree with our industrial appeals judge's ultimate conclusions. We grant  
30 review solely to rule on Mr. Klein's attorney's request that the industrial appeals judge take judicial  
31 notice of a 2016 Order and Agreement of Parties filed under Dckt. No. 15 14066 related to the same  
32 claim.  
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<sup>1</sup> Chong Dep. at 26.

## Order on Agreement of Parties

At a hearing on August 20, 2020, Mr. Klein's counsel asked our industrial appeals judge to take judicial notice of an Order on Agreement of Parties that was issued following the parties' negotiated settlement of an appeal related to this claim in 2016. Our industrial appeals judge indicated she would rule on the matter in her Proposed Decision and Order, but the ruling was inadvertently omitted. Solely for the purpose of addressing Mr. Klein's request, we note that the 2016 Order on Agreement of Parties incorporates a Report of Proceeding Agreement of Parties that memorialized the parties' stipulation of facts for the purpose of remanding the claim back to the Department for additional treatment. In the Report of Proceeding, the parties stipulate that, "If called to testify, Guy Earle, M.D., would state on a more-probable-than-not basis: The claimant's condition(s) proximately caused by the industrial injury did not reach maximum medical improvement and did require further proper and necessary medical treatment as of February 9, 2015." In its Petition for Review, Mr. Klein argues that Dr. Earle would have offered such testimony because in his opinion the industrial injury proximately caused or aggravated Mr. Klein's lumbar degenerative disc and joint disease and unstable L4-5 spondylolisthesis. Therefore, according Mr. Klein, the Report of Proceeding establishes "that the industrial injury caused or aggravated an unstable spondylolisthesis at L4-5, which was the source of the worker's current symptoms and need for further treatment."<sup>2</sup> Mr. Klein further argues that based on the Report of Proceeding, the parties are precluded from litigating whether the industrial injury proximately caused or aggravated Mr. Klein's lumbar degenerative disc and joint disease and unstable L4-5 spondylolisthesis under the doctrines of res judicata or equitable estoppel.

Mr. Klein's request that we take judicial notice is denied. ER 201 permits a court to take judicial notice of an adjudicative fact, which is defined under the rule as a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."<sup>3</sup> We have previously held that it is appropriate to take judicial notice of final Board orders.<sup>4</sup> Final Board orders identify specific facts that have been established through the adjudicative process. By contrast, the Report of Proceeding merely memorializes the parties'

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<sup>2</sup> Petition for Review, at 11.

<sup>3</sup> ER 201.

<sup>4</sup> See, for example, *In re Filipe R. Morales*, Dckt. No. 17 11852 (April 5, 2018).

1 agreement as to what Dr. Earle's opinion would have been if he had been called to testify. A finder  
2 of fact is not required to accept a medical expert's opinion merely because the parties agree what the  
3 medical expert's opinion is. Just as importantly, the stipulated language in the Report of Proceeding  
4 does not identify any specific conditions as related to the industrial injury. It would be wholly  
5 inconsistent with the language and purpose of ER 201 to infer from the parties' stipulation that the  
6 industrial injury proximately caused or aggravated Mr. Klein's spondylosis, degenerative disc disease,  
7 and anterolisthesis. For this same reason, we also find no basis for the application of the doctrines  
8 of collateral estoppel or res judicata.

### 13 **DECISION**

14 In Docket No. 19 16443, the claimant, Brett J. Klein, filed an appeal with the Board of Industrial  
15 Insurance Appeals on May 16, 2019, from an order of the Department of Labor and Industries dated  
16 March 20, 2019. In this order, the Department affirmed an order closing the claim with time-loss  
17 ended as paid through July 21, 2018, and no award for permanent partial disability. This order is  
18 correct and is affirmed.

### 22 **FINDINGS OF FACT**

- 23 1. On July 17, 2019, an industrial appeals judge certified that the parties  
24 agreed to include the Jurisdictional History in the Board record solely for  
25 jurisdictional purposes.
- 26 2. Brett J. Klein sustained an industrial injury on December 5, 2013, when  
27 he hopped off a forklift, slipped in a puddle of water, and fell on his  
28 buttocks, resulting in buttocks contusion and lumbar sprain.
- 29 3. Mr. Klein's conditions diagnosed as spondylosis, degenerative disc  
30 disease, and anterolisthesis were not proximately caused or aggravated  
31 by his industrial injury.
- 32 4. The employer, Costco Wholesale, did not accept Mr. Klein's degenerative  
33 lumbar spine conditions and radiculopathy by authorizing treatment of  
34 those conditions.
- 35 5. Mr. Klein is a 58-year-old single man with a ninth grade education and  
36 work experience as a truck driver. He has preexisting multilevel  
37 degenerative disc disease and spondylosis of the lumbar spine.
- 38 6. Mr. Klein has no physical or mental limitations or restrictions proximately  
39 caused by the industrial injury as of July 22, 2018.
- 40 7. Based solely on the conditions proximately caused by the industrial  
41 injury, Mr. Klein is able to perform the job of injury as of July 22, 2018.

- 1 8. Mr. Klein was able to perform and obtain gainful employment on a
- 2 reasonably continuous basis as of July 22, 2018.
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- 4 9. Mr. Klein's conditions proximately caused by the industrial injury were
- 5 fixed and stable as of March 20, 2019.
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- 7 10. On March 20, 2019, Mr. Klein did not have a permanent partial disability
- 8 proximately caused by the industrial injury.
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#### 10 **CONCLUSIONS OF LAW**

- 11 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
- 12 and subject matter in this appeal.
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- 14 2. Brett J. Klein was not a temporarily totally disabled worker within the
- 15 meaning of RCW 51.32.090 as of July 22, 2018.
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- 17 3. Mr. Klein was not a permanently totally disabled worker within the
- 18 meaning of RCW 51.08.160, as of March 20, 2019.
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- 20 4. On March 20, 2019, Mr. Klein did not have a permanent partial disability,
- 21 within the meaning of RCW 51.32.080, proximately caused by the
- 22 industrial injury.
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- 24 5. The Department order dated March 20, 2019, is correct and is affirmed.

25 Dated: April 6, 2021.

26 BOARD OF INDUSTRIAL INSURANCE APPEALS

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28 LINDA L. WILLIAMS, Chairperson

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30 JACK S. ENG, Member

**Addendum to Decision and Order  
In re Brett J. Klein  
Docket No. 19 16443  
Claim No. SZ-31508**

**Appearances**

Claimant, Brett J. Klein, by David B. Vail, Jennifer Cross-Euteneier & Assoc, per Jennifer M. Cross-Euteneier

Self-Insured Employer, Costco Wholesale #1193, by Hall & Miller, P.S., per Ryan S. Miller

**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 January 29, 2021, in which the industrial appeals judge affirmed the Department order dated March 20, 2019.

**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.

**Other**

The Proposed Decision and order erroneously identifies Dr. H. Richard Johnson as testifying by perpetuation deposition. Dr. Johnson testified at hearing on September 3, 2020.