

Klein, Brent

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]

Scroll down for order.

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.

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37 For its part, Costco called three physicians who performed examinations at its request: Dennis
38 Chong, M.D., a physiatrist, examined Mr. Klein in May 2018; Scott Grabill, D.O., an orthopedic
39 surgeon, examined Mr. Klein in March 2019; and, Linda A. Wray, M.D., a neurologist, examined
40 Mr. Klein in March 2019 with Dr. Grabill, and also in March 2018 with a different physician. Dr. Chong
41 diagnosed preexisting 1991 lumbosacral injury with chronic chiropractic adjustments continuing to
42 less than six weeks prior to the declaration of the industrial event; preexisting lumbar spine multilevel
43 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."¹
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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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27 After reviewing this very large record, our industrial appeals judge credited the well-reasoned
28 opinions of Drs. Grabill and Wray, and affirmed the Department order on appeal. Mr. Klein filed a
29 Petition for Review asking us to reweigh the evidence and accept the conditions diagnosed as
30 spondylosis, degenerative disc disease and anterolisthesis, pay time-loss, and find him permanently
31 partially disabled, or in the alternative, determine that he is totally and permanently disabled. We
32 decline to do so because we agree with our industrial appeals judge's ultimate conclusions. We grant
33 review solely to rule on Mr. Klein's attorney's request that the industrial appeals judge take judicial
34 notice of a 2016 Order and Agreement of Parties filed under Dckt. No. 15 14066 related to the same
35 claim.
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¹ Chong Dep. at 26.

1 **Order on Agreement of Parties**

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3 At a hearing on August 20, 2020, Mr. Klein's counsel asked our industrial appeals judge to
4 take judicial notice of an Order on Agreement of Parties that was issued following the parties'
5 negotiated settlement of an appeal related to this claim in 2016. Our industrial appeals judge
6 indicated she would rule on the matter in her Proposed Decision and Order, but the ruling was
7 inadvertently omitted. Solely for the purpose of addressing Mr. Klein's request, we note that the 2016
8 Order on Agreement of Parties incorporates a Report of Proceeding Agreement of Parties that
9 memorialized the parties' stipulation of facts for the purpose of remanding the claim back to the
10 Department for additional treatment. In the Report of Proceeding, the parties stipulate that, "If called
11 to testify, Guy Earle, M.D., would state on a more-probable-than-not basis: The claimant's
12 condition(s) proximately caused by the industrial injury did not reach maximum medical improvement
13 and did require further proper and necessary medical treatment as of February 9, 2015." In its Petition
14 for Review, Mr. Klein argues that Dr. Earle would have offered such testimony because in his opinion
15 the industrial injury proximately caused or aggravated Mr. Klein's lumbar degenerative disc and joint
16 disease and unstable L4-5 spondylolisthesis. Therefore, according Mr. Klein, the Report of
17 Proceeding establishes "that the industrial injury caused or aggravated an unstable spondylolisthesis
18 at L4-5, which was the source of the worker's current symptoms and need for further treatment."²
19 Mr. Klein further argues that based on the Report of Proceeding, the parties are precluded from
20 litigating whether the industrial injury proximately caused or aggravated Mr. Klein's lumbar
21 degenerative disc and joint disease and unstable L4-5 spondylolisthesis under the doctrines of res
22 judicata or equitable estoppel.
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25 Mr. Klein's request that we take judicial notice is denied. ER 201 permits a court to take judicial
26 notice of an adjudicative fact, which is defined under the rule as a fact that is "not subject to
27 reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial
28 court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot
29 reasonably be questioned."³ We have previously held that it is appropriate to take judicial notice of
30 final Board orders.⁴ Final Board orders identify specific facts that have been established through the
31 adjudicative process. By contrast, the Report of Proceeding merely memorializes the parties'
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46 ² Petition for Review, at 11.

47 ³ ER 201.

⁴ 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.
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10 **DECISION**

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

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

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

Dated: April 6, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS


LINDA L. WILLIAMS, Chairperson

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.