

## **Ellinghausen, Darla**

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### **AGGRAVATION (RCW 51.32.160)**

#### **Permanent total disability**

Where a worker's claim is closed without an industrial insurance pension and later reopened, then reclosed, and the worker seeks increased permanent disability, the evidence of worsening does not need to be substantial; a slight worsening of a condition where the percentage rating of impairment does not increase can still result in the award of a pension provided that a preponderance of the evidence shows the worker can no longer maintain gainful employment. ....*In re Darla Ellinghausen*, BIIA Dec., 19 24229 (2021)

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: DARLA J. ELLINGHAUSEN ) DOCKET NOS. 19 24229 & 19 24320  
2 )  
3 CLAIM NO. P-589145 ) DECISION AND ORDER  
4

5 The claimant, Darla J. Ellinghausen, injured her left knee after slipping on ice while in the  
6 course of her employment. Despite relatively good results from her arthroscopic surgery, she was  
7 unable to return to her job of injury and participated in a six-week "secretarial" vocational retraining  
8 program. Her claim was closed in 2002 with a permanent impairment rating of 36 percent for her left  
9 knee. Despite her vocational retraining, Ms. Ellinghausen did not obtain a job doing clerical or office  
10 work. In 2004, Ms. Ellinghausen reopened her claim so she could get a total knee replacement  
11 surgery. Her claim was closed again in 2008 with an increased permanent impairment rating of  
12 50 percent of her left leg. No additional vocational services were provided. Ms. Ellinghausen's claim  
13 was reopened again in 2009. The Department issued an order that denied time-loss compensation  
14 benefits and closed the claim without any increased impairment. The claimant argued that she has  
15 been unable to work as a result of her left knee injury and that she is permanently and totally disabled.  
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17 Our industrial appeals judge agreed with Ms. Ellinghausen and awarded time-loss  
18 compensation benefits and found her permanently and totally disabled. The Department argues that  
19 the industrial appeals judge erred because Ms. Ellinghausen did not make a prima facie case for  
20 benefits. We have granted review because, although we agree with our industrial appeals judge's  
21 findings, we wanted to provide further explanation as to why a preponderance of the evidence  
22 supports that Ms. Ellinghausen was unable to work and is entitled to a pension. The Department  
23 orders are **REVERSED AND REMANDED** to find Ms. Ellinghausen totally and temporarily disabled  
24 from August 1, 2012, through July 15, 2019, and to find Ms. Ellinghausen totally and permanently  
25 disabled as of July 16, 2019.  
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27 **DISCUSSION**

28 Darla Ellinghausen injured her left knee while working as a home care provider on  
29 December 6, 1996. Her claim has been closed and reopened on two occasions. We take judicial  
30 notice of the orders issued in 2007 and 2008 that closed Ms. Ellinghausen's claim with a 50 percent  
31 impairment rating for her left knee.  
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33 Ms. Ellinghausen's claim was opened again in 2009. She contends that she was unable to  
34 work since August 1, 2012, and, as of July 16, 2019, should be found permanently and totally disabled  
35 as a result of her industrial injury. A worker is permanently and totally disabled within the meaning of  
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1 the Industrial Insurance Act when as a result of an industrial injury she is unable to perform any  
2 substantial gainful employment existing in the labor market within the worker's qualifications.<sup>1</sup>  
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4 Temporary total disability, which would warrant payment of time-loss compensation, differs from  
5 permanent total disability only in duration.<sup>2</sup>  
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7 With regard to the award of time-loss compensation benefits, the Department asserts that the  
8 testimony of S. Daniel Seltzer, M.D., about work restrictions for Ms. Ellinghausen's left knee, only  
9 applied as of July 1, 2019. Therefore, the Department maintains there is no medical testimony in the  
10 record to support that Ms. Ellinghausen was unable to work from August 1, 2012, through June 30,  
11 2019. The Department concludes that without any medical restrictions to support her inability to work,  
12 Ms. Ellinghausen has failed to make a prima facie case for time-loss compensation benefits. We  
13 disagree. Testimony of a qualified vocational expert can support a finding of entitlement to time-loss  
14 compensation benefits.<sup>3</sup> The uncontested vocational testimony of Trevor Duncan, Psy.D., is not only  
15 sufficient to make a prima facie case for entitlement to time-loss compensation benefits, it is sufficient  
16 to find Ms. Ellinghausen was entitled to such benefits on a more probable than not basis.  
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22 Dr. Duncan testified that Ms. Ellinghausen did not have the skills to obtain work as an office  
23 clerk, receptionist, or similar position. His opinion was based on his review of the entire file, including  
24 prior medical and vocational records, including the Department's determination in 1996 that  
25 Ms. Ellinghausen was unemployable without retraining as a result of her left knee injury.  
26 Ms. Ellinghausen further testified that she was never able to obtain a clerical position even after  
27 undergoing the six-week retraining course. While it is res judicata that Ms. Ellinghausen was  
28 employable when her claim first closed in 2002 as a result of the skills obtained during her vocational  
29 retraining, and employable in 2008 when her claim closed a second time, Dr. Duncan's testimony  
30 that whatever clerical skills Ms. Ellinghausen obtained during her six week training course in 1998  
31 are outdated and woefully inadequate to make her competitive in 2012 or in 2019 is persuasive. That  
32 is, even if we assume Ms. Ellinghausen was physically able to perform the job of office clerk or  
33 general clerk between 2012 and 2019, the vocational evidence is unrefuted that she did not have the  
34 vocational skills to obtain such a job during that same period of time. Accordingly, a preponderance  
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45 <sup>1</sup> *Allen v. Dep't of Labor & Indus.*, 30 Wn. App. 693, 697-98 (1981).

46 <sup>2</sup> *Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22 (1970).

47 <sup>3</sup> *In re David Potts*, BIIA Dec., 88 3822 (1989).

1 of the evidence supports that Ms. Ellinghausen was unable to obtain or maintain full-time reasonably  
2 continuous employment between August 1, 2012, and July 1, 2019.  
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4 Similarly, the Department asserts that Ms. Ellinghausen failed to make a prima facie case that  
5 she is totally and permanently disabled because she has not shown objective evidence of worsening.  
6 The Department argues that because her claim was closed in 2008 with a 50 percent impairment  
7 rating for her left knee and both Dr. Seltzer and Micheal W. Gillespie, M.D. continue to rate  
8 Ms. Ellinghausen with a 50 percent impairment of her left knee, her condition has not worsened. We  
9 disagree.  
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11 Ms. Ellinghausen's application to reopen her claim in 2009 was deemed granted under  
12 RCW 51.32.060. Accordingly, Ms. Ellinghausen's left knee condition is considered to have  
13 objectively worsened on at least a temporary basis.<sup>4</sup> In order to be found permanently and totally  
14 disabled, Ms. Ellinghausen must now show that the worsening she sustained is permanent.<sup>5</sup> The  
15 evidence of worsening does not need to be substantial; a slight worsening of a condition where the  
16 percentage rating of impairment does not increase can still result in the award of a pension where  
17 the evidence supports that the worker can no longer maintain gainful employment.<sup>6</sup>  
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19 Although both of the medical experts had reviewed extensive records regarding  
20 Ms. Ellinghausen's left knee condition, neither testified about specific range of motion findings on  
21 exam when her claim closed in 2008. However, Dr. Gillespie testified about multiple x-rays he  
22 reviewed of Ms. Ellinghausen's left knee between 2009 and 2018. X-rays from August 2009 showed  
23 a satisfactory total knee arthroplasty with no documented complications. X-rays from 2015 also  
24 appeared normal, meaning there was nothing to suggest a loosening of hardware in the left knee.  
25 But an x-ray taken on April 11, 2018, suggested loosening of the femoral component in the left knee.  
26 The 2018 x-ray would be consistent with Dr. Seltzer's testimony that Ms. Ellinghausen's hardware  
27 from her total knee replacement surgery in 2005 has deteriorated to some degree over the prior 14  
28 years and that deterioration would account for her loss of function and increased pain.  
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30 In addition to the x-ray evidence, the record reveals additional worsening between  
31 Dr. Gillespie's examination in February 2019 and Dr. Seltzer's examination of Ms. Ellinghausen in  
32 July 2019. In February 2019, Dr. Gillespie documented that Ms. Ellinghausen had definite valgus  
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45 <sup>4</sup> *In re Patricia A. Gaulien-Hill*, Dckt. No. 14 16897 (August 4, 2015); *In re Maria Chavez*, BIIA Dec., 87 0640 (1988).  
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47 <sup>5</sup> *In re Duane Marquardt*, Dckt. No. 00 16936 (July 12, 2001).

<sup>6</sup> *In re Otis R. Lovett*, Dckt. No. 69642 (April 24, 1986).

1 alignment in her right knee but good alignment in her left. By July 2019, Dr. Seltzer documented  
2 varus deformities on both the right and left knees. Dr. Gillespie noted Ms. Ellinghausen had full  
3 extension with a clicking sound of unknown origin and flexion of 110 degrees in her left knee.  
4 Dr. Seltzer found an overall decreased range of motion, including only 90 degrees of flexion in the  
5 left knee. Finally, Dr. Gillespie testified that Ms. Ellinghausen's patella on the left knee was  
6 well-centered and aligned. Dr. Selzter testified that her patella was slightly offset and to the lateral  
7 side in her left knee.  
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11 In addition to the x-rays and documented deterioration in left knee function between January  
12 and July 2019, Dr. Seltzer also provides new permanent work restrictions consistent with  
13 "sub-sedentary" levels of employment. These new restrictions prevent Ms. Ellinghausen from  
14 working in even a sedentary office clerk position without modifications. These restrictions were not  
15 in place when Ms. Ellinghausen's claim was closed in 2008. The increase in permanent physical  
16 restrictions also supports that her disability, as a result of the industrial injury, has worsened since  
17 2008 and that Ms. Ellinghausen is permanently restricted from returning to work on a reasonably  
18 continuous basis.  
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24 When considering the documented worsening of Ms. Ellinghausen's left knee between  
25 Dr. Gillespie's examination in February 2019 and Dr. Selzter's examination in July 2019, deterioration  
26 of hardware in her left knee between 2008 and 2019, and the permanent increase in  
27 Ms. Ellinghausen's physical restrictions as a result of her injury, we find a preponderance of the  
28 evidence supports that Ms. Ellinghausen's disability as a result of the industrial injury has permanently  
29 increased since her claim was closed in 2008 even though her percentage of impairment rating has  
30 not. Further, a preponderance of the evidence supports that Ms. Ellinghausen was permanently and  
31 totally disabled as of July 16, 2019.  
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### 35 **DECISION**

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37 1. In Docket No. 19 24229, the claimant, Darla J. Ellinghausen, filed a protest with the Department  
38 of Labor and Industries on September 3, 2019. The Department forwarded it to the Board of  
39 Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated  
40 July 16, 2019. In this order, the Department affirmed a prior order closing the claim as of May 13,  
41 2019. This order is incorrect and is reversed and remanded.  
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- 44 2. In Docket No. 19 24320, the claimant, Darla J. Ellinghausen, filed a protest with the Department  
45 of Labor and Industries on September 3, 2019. The Department forwarded it to the Board of  
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1 Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated  
2 July 15, 2019. In this order, the Department affirmed a prior order that denied time-loss  
3 compensation benefits from August 1, 2012, through May 9, 2019. This order is incorrect and is  
4 reversed and remanded.  
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### 7 **FINDINGS OF FACT**

- 8 1. On February 24, 2020, an industrial appeals judge certified that the  
9 parties agreed to include the Jurisdictional History in the Board record  
10 solely for jurisdictional purposes.  
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- 12 2. Darla Ellinghausen sustained an industrial injury to her left knee on  
13 December 6, 1996, when she slipped and fell on ice while working as a  
14 home caregiver.  
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- 16 3. Ms. Ellinghausen was 60 years old at the time of her testimony. She has  
17 a high school education and limited work experience in a juice processing  
18 plant, as a home caregiver, and as a dialysis technician.  
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- 20 4. Ms. Ellinghausen underwent a six-week vocational retraining program in  
21 1998 for "secretarial" work. After successfully completing the retraining  
22 program, Ms. Ellinghausen did not obtain work in an office environment.  
23 Her claim was closed in 2002 with a 38 percent impairment of the  
24 amputation value of the left leg above knee joint with short thigh stump.  
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- 26 5. Ms. Ellinghausen's claim was reopened so she could undergo a total knee  
27 replacement surgery. On May 21, 2008, Ms. Ellinghausen's claim was  
28 closed a second time with a permanent impairment rating of 50 percent  
29 of the amputation value of the left leg above knee joint with short thigh  
30 stump. She did not receive additional vocational retraining prior to her  
31 claim being closed in 2008.  
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- 33 6. Between August 1, 2012, and July 15, 2019, any office skills that  
34 Ms. Ellinghausen obtained during her six-week vocational retraining  
35 course in 1998 were outdated and no longer sufficient to render her  
36 employable.  
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- 38 7. Ms. Ellinghausen was unable to perform or obtain gainful employment on  
39 a reasonably continuous basis from August 1, 2012, through July 15,  
40 2019, due to the residuals of the industrial injury and taking into account  
41 the claimant's age, education, work history, and preexisting conditions.  
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- 43 8. Between May 21, 2008, and July 16, 2019, Ms. Ellinghausen's left knee  
44 condition proximately caused by the industrial injury permanently  
45 worsened. The worsening is supported by objective findings that include  
46 x-ray evidence suggestive of a loosening of hardware in the left knee; loss  
47 of range of motion, including loss of flexion in the left knee; the  
development a varus deformity in the left knee; and movement of  
Ms. Ellinghausen's patella to the lateral side of her left knee.


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9. As of July 1, 2019, Ms. Ellinghausen was permanently restricted to sitting for two hours at a time, up to eight hours a day; standing for 30 minutes at a time, up to one hour a day; walking 30 minutes at a time, up to one hour per day; lifting and carrying up to five pounds on an occasional basis; and no bending, squatting, kneeling, crawling, or climbing. These restrictions place Ms. Ellinghausen in a sub-sedentary category of work.
  10. As of July 16, 2019, Ms. Ellinghausen's conditions proximately caused by the industrial injury were fixed and stable.
  11. Ms. Ellinghausen was unable to perform or obtain gainful employment on a reasonably continuous basis as of July 16, 2019, due to the residuals of the industrial injury and taking into account the claimant's age, education, work history, and preexisting conditions.

### CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.
2. Darla Ellinghausen's left knee conditions proximately caused by the industrial injury were fixed and stable as of July 16, 2019, and she is not entitled to further treatment. RCW 51.36.010.
3. Ms. Ellinghausen was a temporarily totally disabled worker within the meaning of RCW 51.32.090 from August 1, 2012, through July 15, 2019.
4. Ms. Ellinghausen was a permanently totally disabled worker within the meaning of RCW 51.08.160, as of July 16, 2019.
5. The Department orders dated July 15, 2019, and July 16, 2019, are incorrect and are reversed. This matter is remanded to the Department to pay time-loss compensation benefits from August 1, 2012, through July 15, 2019, and to find Darla Ellinghausen permanently totally disabled as of July 16, 2019.

33 Dated: March 18, 2021.

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35 BOARD OF INDUSTRIAL INSURANCE APPEALS

36   
37 LINDA L. WILLIAMS, Chairperson

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39 ISABEL A. M. COLE, Member  
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**Addendum to Decision and Order  
In re Darla J. Ellinghausen  
Docket Nos. 19 24229 & 19 24320  
Claim No. P-589145**

**Appearances**

Claimant, Darla J. Ellinghausen, by Prediletto, Halpin, Scharnikow & Nelson, P.S., per Brett N. Goodman

Employer, SL Start & Associates Human Service, by Sedgwick CMS (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per James A. Yockey

**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 November 19, 2020, in which the industrial appeals judge reversed and remanded the orders of the Department dated July 16, 2019, and July 15, 2019. The claimant filed a response to the Department's 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.