Edwards, W. Tom

BOARD

Additional evidence secured on Board's own motion (RCW 51.52.102; WAC 263-12-120)

The parties' agreement to submit the appeal on the Department file does not prevent the Board from securing additional live testimony on its own motion. ***….In re W. Tom Edwards*, BIIA Dec.,26,382 (1967)**

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Cosmetic defect

Because the worker's burn injury caused a loss of bodily function and not just a cosmetic defect, he was entitled to a permanent partial disability award to compensate him for that loss of function. ***….In re W. Tom Edwards*, BIIA Dec., 26,382 (1967)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: W. TOM EDWARDS	)	**DOCKET NO. 26,382**
	)	
CLAIM NO. F-102224	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, W. Tom Edwards, by
Robert Atkinson

Employer, Kaiser Aluminum & Chemical Corporation, by
Keith, Winston & Repsold, per
Michael J. Cronin

Department of Labor and Industries, by
The Attorney General, per
James M. Beecher, Assistant

This is an appeal filed by the employer on April 13, 1966, from an order of the Supervisor of Industrial Insurance dated March 11, 1966, which closed this claim with a permanent partial disability award of 5 per cent of the amputation value of the left, minor, arm at or above the elbow. **SUSTAINED**.

DECISION

This matter is before the Board for review and decision on a timely Statement of Exceptions filed by the employer to a Proposed Decision and Order issued by a hearing examiner for this Board on September 29, 1966, in which the order of the Supervisor of Industrial Insurance dated March 11, 1966, was sustained.

The issue presented by this appeal is the extent of claimant's permanent partial disability, if any, on or about March 11, 1966, resulting from a burn injury to his left forearm sustained in his employment on July 3, 1963. More particularly, the question raised, both by the employer's notice of appeal and by the exceptions, is whether this injury caused any loss of bodily function which would justify a permanent partial disability award, or whether it only caused a "cosmetic defect" in which event it is contended that no award is payable as a matter of law.

However, before determining the basic issue above stated, we must first dispose of certain objections to the procedure the Board followed in obtaining additional evidence in the case. These objections were raised by the employer's "MOTION TO STRIKE TESTIMONY AND TO COMPEL BOARD TO DECIDE APPEAL IN ACCORDANCE WITH THE LAW," filed on April 3, 1967. In order to rule on these objections, it is necessary that we set forth the procedural history of this appeal.

After the filing of the employer's appeal on April 13, 1966, and our granting thereof, a pre-hearing conference was held on July 13, 1966, before one of the Board's hearing examiners, at which all parties agreed that, in lieu of presentation of "live" testimony at a hearing, the issues raised by the appeal could be submitted for a decision and order based on all the material in the Department file. Thereafter, on September 29, 1966, the hearing examiner entered his Proposed Decision and Order sustaining the Supervisor's order of March 11, 1966, paying the disability award in question. The employer thereupon filed a timely Statement of Exceptions with the Board.

This Board, upon review of the record, determined that in order to decide the appeal fairly and equitably, we needed further evidence, in the form of testimony of Dr. David E. Sullivan, to clarify and explain in further detail the exact medical basis for his permanent partial disability evaluation based on his examination of claimant on February 15, 1966. Accordingly, we entered an order on January 31, 1967, pursuant to the authority contained in the second proviso of RCW 51.52.102, and in Rule 8.4(c) of our Rules of Practice and Procedure, assigning the case to a hearing examiner to obtain this additional evidence which we deemed necessary to decide the appeal fairly and equitably. A hearing was accordingly held on March 22, 1967, and Dr. Sullivan was called and testified as a Board witness; and the record, with this additional evidence, is again before us for review and issuance of a final decision.

Counsel for the employer at that hearing orally objected to this Board's obtaining further evidence,a nd formally renewed such objection by the "MOTION TO STRIKE TESTIMONY AND TO COMPEL BOARD TO DECIDE APPEAL IN ACCORDANCE WITH THE LAW" filed on April 3, 1967. The legal arguments advanced by the employer can be fairly summarized as follows:

(1) The parties had agreed to present this matter for decision based solely on the Department file, which they had a right to do under RCW 51.52.095. Therefore, the provisions of RCW 51.52.102 cannot be applied because "the parties have agreed how the evidence shall be presented to the Board and have further agreed to waive their rights to present live testimony in the case." Where such an agreement has been made, the only function left to the Board is, under the last sentence of RCW 51.52.095, to determine whether such agreement is in conformity with the law and the facts of the case.

(2) The Board's course of procedure has prevented the parties from presenting "live" testimony, while at the same time permitting the Board to present such testimony. The provisions of RCW 51.52.102 do not contemplate such action because such provisions apply "only in a situation where the Board wishes to present evidence of its own during

the course of formal hearings on an appeal after all other parties have been given an opportunity to present testimony."

(3) The provisions of RCW 51.52.102 do not apply after a contested case has been submitted for a decision and particularly after the Hearing Examiner has entered his Proposed Decision and Order; after exceptions are taken to a Proposed Decision and Order, "the Board's jurisdiction in the case is limited to a review of the Proposed Decision and Order as provided for in RCW 51.52.106."

We do not accept the correctness of any of the foregoing arguments.

As to (1), we agree that the parties could agree to submit the matter for decision, based on a record consisting of the Department file in lieu of testimony of witnesses at a hearing; this is one of many purposes for which a conference is held pursuant to RCW 51.52.095, and is specifically encompassed by the portion of that statute regarding "the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof." However, we disagree with the argument that our only remaining function is to determine whether that agreement is in accord with the law and the facts; this is a basic error in interpretation of the statute. The last sentence of RCW 51.52.095, relied on by counsel, clearly has no application to this case. That sentence concerns only the entry of a final order of the Board in accordance with an agreement of the parties for final disposition of the appeal -- in other words, a settlement of the appeal. It has nothing to do with a contested case (which the instant case certainly is) where disputed issues of fact or law are presented for decision.

Since this is a contested case, we heartily disagree with the contention that the last proviso of RCW 51.52.102 cannot be applied to the case. Regardless of how the parties choose to present their evidence -- whether it be all by sworn testimony, or partially by testimony and partially documentary, or by factual stipulations, or (as in this case) entirely documentary -- we are given the statutory authority to exercise our discretion to secure any evidence, "in addition to that presented by the parties," which we feel is necessary for us to meet our basic obligation in any appeal before us, namely, to decide it is "fairly and equitably" as we can. Any other interpretation of this statutory proviso would be a partial abdication of the reason for this Board's creation and existence. Our right to secure evidence, in addition to that presented by the parties in a contested case, can never be taken away by the manner in which the parties choose to present their evidence.

As to contention (2) previously summarized, it is largely answered by our discussion in the immediate preceding paragraph. Suffice it to say again that the last proviso of RCW 51.52.102

always is applicable in contested cases before us, and we have the sole discretion as to whether or not we will exercise such authority. The parties, of course, were not prevented from presenting "live" testimony; they simply chose to present their evidence by documents in lieu of such testimony.

As to contention (3), we are also in hearty disagreement therewith. This Board, as a body, does not preside over proceedings in any contested case, during the time when the parties are presenting their evidence; this is always done by hearing examiners as presiding officers. It is only after entry of a hearing examiner's Proposed Decision and Order and filing of exceptions thereto, that this Board considers and reviews the record in a contested case. To accept the contention that in no such case can the last proviso of RCW 51.52.102 be utilized by the Board would mean that such proviso is a complete "dead letter." We categorically reject such a result.

We firmly believe that our review duties under RCW 51.52.106 are more extensive than simply "a review of the Proposed Decision and Order" as contended by the employer. More completely stated, our duty and authority under that statute is to consider and review the record and the Proposed Decision and Order in light of the exceptions filed to such proposed order. If, in such review, we feel it necessary to secure additional evidence to decide the issues raised in the case "fairly and equitably," we may obtain such evidence under the authority of the last proviso of RCW 51.52.102. These two statutes should be construed together to give harmonious effect to both, rather than to construe one in a manner which emasculates the purpose and effect of the other. It is significant that RCW 51.52.106 does not of itself indicate an intention to limit this Board's authority solely to issuance of a final order based on the record made by the parties. The statute requires consideration of the record and entry of any decision by at least two Board members, and then defines what must be contained in "Every final decision and order rendered by the board." (Emphasis added) This clearly infers that we may make other decisions or orders which are not "final," and we believe one of such decisions can be to secure additional evidence pursuant to the last proviso of RCW 51.52.102.

It is acknowledged that, in view of the statutory system governing appeals under our Act, many cases before us are inevitably very "adversary" in nature. However, we do not believe this adversary system was meant to be carried so far as to destroy our right, as an impartial fact-finding agency, to exercise our discretion in securing evidence in addition to that which the adversaries

present to us, to try to decide a case fairly and equitably. The employer's motion here, if granted, would come close to such destruction.

We are convinced that our action in obtaining the clarifying testimony of Dr. Sullivan was proper and completely within our discretionary authority under RCW 51.52.102 and RCW 51.52.106, and that our Rule 8.4(c) is in accord with, and a proper implementation of, those statutory sections. We therefore deny the motion to strike the doctor's testimony, and will consider said testimony, in addition to the Department file, in resolving this case.

We turn, then, to the basic issue, i.e., has the claimant's burn injury caused any loss of bodily function which would justify the disability award made by the Department's order of March 11, 1966? In the opinion of this Board, the answer is in the affirmative.

Dr. Sullivan testified that to the best of his recollection there was sensory loss over the immediate area occupied by the scars themselves. He further testified in part as follows:

> "Q Doctor, isn't it true that where scar tissue had replaced normal skin that there is a loss of - that the scar tissue doesn't withstand the normal wear and tear of life as well as normal skin would?"
>
> * * *
>
> A The answer is, yes, it is true, and that is the main reason I rated this as 5 per cent permanent partial disability because of the fact of that which I consider a functional loss."

In response to a request that the doctor enlarge upon his opinion as to functional loss, he further stated:

> "A I feel that the functional loss here depends very little on the sensory loss and very largely on the fact that this scar will not function in the future like normal skin and will not stand up to ordinary pressure and vicissitudes of life. It is more like the (sic) normal skin to break down and ulcerate on mild trauma or more apt to ulcerate on temperature changes that might affect normal skin relatively slightly, but it might do much, far more damage to this scarring. That is the major factor in rating this functional disability."
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> \- - -

He further testified:

> "Q Did this man complain that itching was something that bothered him?
>
> A Yes.
>
> Q Is this consistent with medical knowledge regarding hypertrophic scarring?
>
> A It is very common in hypertrophic scarring."

The following excerpt further indicates that Dr. Sullivan based his rating upon loss of physical function:

> "Q Doctor, going back to your examination of February 15, 1966, wasn't it true at that time that really this disability award that you recommended was based primarily on the cosmetic effects and appearances of these scars?
>
> A No."

In Henson v. Department of Labor and Industries, 15 Wn. 2d384 (1942), the term "disability" was defined in part as follows:

> "Disability means the impairment of the workman's mental or physical efficiency. It embraces any loss of physical or mental functions which detracts from the former efficiency of the individual in the ordinary pursuits of life."

We are in full agreement with the hearing examiner's statement in the Proposed Decision and Order to the effect that "the Departmental award of 5% of the amputation value of the left, minor, arm at the elbow is amply supported by other than cosmetic considerations."

The Board adopts the findings and conclusions set forth in the Proposed Decision and Order and by this reference thereto they are incorporated herein.

It is so ORDERED.

Dated this 31st day of July, 1967.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/________________________________
R. H. POWELL Member

/s/________________________________
R. M. GILMORE Member