# Chavez, Maria

## AGGRAVATION (RCW 51.32.160)

### Temporary worsening

When Department has reopened a claim for medical treatment it has admitted at least a temporary increase in disability (*In re John Qualls*, BIIA Dec., 28,430 (1969)). A worker need not prove aggravation in an appeal from an order reclosing the claim with no additional permanent disability award if the worker is seeking further treatment, time-loss compensation or loss of earning power benefits. However, if the worker's condition is fixed and stable, it is incumbent upon the worker to establish a permanent worsening of condition by comparative evidence in order to prove entitlement to a permanent disability award. (*Dinnis v. Department of Labor & Indus*., 67 Wn.2d 654 (1965)). **….*In re Maria Chavez*, BIIA Dec., 87 0640 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

## BOARD

### County in which hearings held

If a party timely objects to the scheduling of a continued hearing in a county other than the county where the injury occurred or the worker resides, it is incumbent upon the Industrial Appeals Judge to make a determination as to whether "a continuance elsewhere is required in justice to interested parties." RCW 51.52.102 and WAC 263-12-115(7). **….*In re Maria Chavez*, BIIA Dec., 87 0640 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

## EVIDENCE

### Rebuttal testimony

WAC 263-12-115(2)(c) does not entitle a party to present rebuttal testimony as a matter of right. The rule only concerns the order in which rebuttal testimony is presented, if allowed. Rebuttal evidence is not simply a reiteration of a party's evidence in chief, but must consist of evidence offered in reply to new matters. A party may not withhold substantial evidence merely to present the evidence cumulatively at the end of the other party's case. The determination of whether to allow or restrict rebuttal is within the discretion of the Industrial Appeals Judge and can only be made following a disclosure of the evidence sought to be presented. **….*In re Maria Chavez*, BIIA Dec., 87 0640 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

### Statements by interpreter

Statements interpreting statements of the worker made during medical examinations were relied upon by the doctors for the purpose of diagnosis or treatment and are admissible under ER 803(a)(4). If the worker questions the accuracy of the interpretation, the

burden is on the worker to present evidence to that effect. Such evidence, however, would only bear on the weight to be given the doctors' opinions, and not on their admissibility. ***….In re Maria Chavez*, BIIA Dec., 87 0640 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

## TIME-LOSS COMPENSATION (RCW 51.32.090)

### Entitlement beyond date condition becomes fixed

A worker's condition is not legally fixed until the Department first issues an order which classifies the worker's condition as fixed and permanent. No time-loss compensation or loss of earning power payments are payable beyond that date unless the medical evidence establishes that the worker's condition was not fixed at that time (following *In re Douglas Weston*, BIIA Dec., 86 1645 (1987)). ***….In re Maria Chavez*, BIIA Dec., 87 0640 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

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

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| **IN RE: MARIA CHAVEZ** | **)** | **DOCKET NO. 87 0640** |
| | **)** | |
| **CLAIM NO. J-292769** | **)** | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Maria Chavez, by
Carlos Barr

Employer, R. E. Redman & Sons, Inc., by
Carol Redman

Department of Labor and Industries, by
The Attorney General, per
A. Craig McDonald and Lani-Kai Swanhart, Assistants

This is an appeal filed by the claimant, Maria Chavez, on February 19, 1987 from an order of the Department of Labor and Industries dated December 8, 1986. This order adhered to the provisions of a prior order dated October 25, 1985 which closed the claim with no award for permanent partial disability. **REVERSED AND REMANDED**.

## DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on May 9, 1988 in which the order of the Department dated December 8, 1986 was reversed and the claim remanded to the Department with direction to pay time-loss compensation to the claimant for the period June 15, 1985 through February 24, 1986, make no award for permanent partial disability, pay none of the medical costs incurred by the claimant subsequent to October 25, 1985 which are alleged to be the result of her industrial injury, and thereupon close the claim.

In the Petition for Review, counsel for the claimant raises a host of procedural and evidentiary objections. We find no merit in any of these objections. Nevertheless, while we would prefer to move directly to a discussion of the substantive merits of this appeal, we will address a few of the evidentiary and procedural objections specifically.

The claimant contends that it was error for the Industrial Appeals Judge to conclude that this was a claim for aggravation of condition rather than an appeal from an original claim closure. Her argument in this regard is predicated on the allegation that the Department's original closing order of October 17, 1983 was not meaningfully communicated to her. This allegation was first raised in the

Petition for Review. Furthermore, her attorney stipulated to the jurisdictional facts as contained in Exhibit 1. Any contention that the order of October 17, 1983 was not communicated to the claimant should have been raised before that stipulation was entered into. We see no reason to set aside the stipulation at this time and we find that, at least with respect to any permanent conditions, this case presents an issue of aggravation of the type described by the decision of the Supreme Court in Dinnis v. Department of Labor and Industries, 67 Wn.2d 654 (1965).

The claimant also takes exception in her Petition for Review to the granting of the Department's motion for the exclusion of witnesses at the October 19, 1987 hearing. The claimant's attorney maintains that such a procedure reduces the proceedings to those of the "star chamber." We would first note that counsel for the claimant failed to articulate an objection to the exclusion of the witnesses at the time the motion was made. Furthermore, the exclusion of witnesses is a practice which is expressly permitted under Evidence Rule 615.

The claimant also takes exception to the presentation of the testimony of Harold O. Smith, M.D. in Seattle, Washington on November 2, 1987. She contends that the Industrial Appeals Judge lacked authority to hold a hearing in King County. It is her position that all hearings were required to be held in Yakima County, where the injury occurred and where she resides.

We would first note that the claimant did not raise her objection to the scheduling of Dr. Smith's testimony in Seattle until October 13, 1987. This was a full six months after the claimant's attorney was notified that the Department wished to present the testimony of a physician in Seattle. If a party objects to the scheduling of a continued hearing in a county other than the county where the injury occurred or where the claimant resides, we do believe that it is incumbent upon our Industrial Appeals Judges to make a determination as to whether "a continuance elsewhere is required in justice to interested parties". RCW 51.52.102. By the same token, we expect a party aggrieved by the scheduling of a hearing in another county to make a timely objection. We will not allow a party to frustrate the scheduling process by withholding such an objection until after another party has scheduled the testimony of its expert witness. Under the circumstances, we believe that the scheduling of Dr. Smith's testimony in King County was permissible under RCW 51.52.102 and WAC 263-12-115(7), for the reason that Dr. Smith resided in the Seattle-Tacoma area.

The claimant also objects to the testimony of Dr. Smith and Dr. Thomas C. Grow, on the grounds that their testimony is based on hearsay because they relied on an interpreter to relate to them what the claimant was saying at the time of their respective examinations. This objection is

unfounded. Whether statements of the claimant or statements interpreting statements of the claimant, the statements were relied upon by the doctors for the purpose of diagnosis or treatment. See ER 803(a)(4). We believe that if the claimant questioned the accuracy of the interpretation, the burden was on her to present evidence to that effect. Any such evidence, however, would only have a bearing on the weight to be given the doctor's opinions, and not on the admissibility of such opinions.

The final evidentiary objection of the claimant which we will specifically consider concerns the issue of rebuttal testimony. It is the claimant's contention that our Industrial Appeals Judge improperly burdened her right to rebuttal by requiring prior disclosure of and discovery of the points of rebuttal. The claimant suggests that WAC 263-12-115(2)(c) stands for the proposition that she is entitled to rebuttal as a matter of right. This is not the case. The aforementioned rule only concerns the order in which rebuttal testimony is presented, if allowed. Rebuttal evidence is not simply a reiteration of a party's evidence in chief, but must consist of evidence offered in reply to new matters. The claimant is not allowed to withhold substantial evidence supporting her claim merely to present the evidence cumulatively at the end of the Department's case. See W.E. Roche Fruit Company v. Northern Pacific Railway, 184 Wash. 695 (1935). Allowing or restricting rebuttal is a matter within the discretion of the Industrial Appeals Judge. A determination of the need or right to present rebuttal testimony can only be made following a disclosure of the evidence sought to be presented. We believe our Industrial Appeals Judge properly restricted and limited the presentation of rebuttal evidence.

Following our review of the other procedural and evidentiary rulings in the record of proceedings, we find that no prejudicial error was committed and said rulings are hereby affirmed.

The issues, as we perceive them, are whether the claimant was in need of medical treatment beyond October 25, 1985; whether she was entitled to time-loss compensation or loss of earning power benefits for any period between November 3, 1984 and December 8, 1986; whether her conditions causally related to the industrial injury of July 22, 1983 were fixed and stable as of December 8, 1986; and whether there had been any permanent aggravation of such conditions between October 17, 1983 and December 8, 1986, such that the claimant was entitled to an award for permanent partial disability as of the latter date.

For the purpose of determining the claimant's need for further treatment and eligibility for time-loss compensation or loss of earning power benefits during the aforementioned periods, we believe it was proper for the Industrial Appeals Judge to characterize this case as a "direct appeal" because the Department had reopened the claim for treatment. We believe that by reopening the

claim the Department has admitted that there was at least a temporary increase in disability. See In re John Qualls, BIIA Dec., 28,430 (1969). In such a case we do not believe the claimant is required to present comparative evidence of worsening to establish the need for further treatment, time-loss compensation, or loss of earning power benefits. On the other hand, if it is determined that the claimant's condition is fixed and stable, it is incumbent upon the claimant to establish a permanent worsening of condition by comparative evidence in order to prove entitlement to a permanent disability award. Dinnis v. Department of Labor and Industries, 67 Wn.2d 654 (1965).

No testimony was presented that there was a permanent worsening of the claimant's condition between October 17, 1983 and December 8, 1986. In fact, no testimony was presented that the claimant had any permanent impairment as of December 8, 1986. Furthermore, although Dr. Lincoln Ries originally offered the opinion that the claimant's condition was not fixed and stable as of December 1986 and required further treatment, his opinion was predicated on the assumption that the claimant had not been able to return to work. He agreed on cross examination that had the claimant returned to work full time as of December 1986 that would "probably" change his opinion concerning the fixity of the claimant's condition. Since the evidence is uncontroverted that the claimant returned to continuous employment in October 1986, we must conclude that the claimant has failed to establish a need for further treatment beyond December 8, 1986.

By separating the claimant's proof from her allegations, we believe that the issues can be further narrowed to (1) whether she was entitled to time-loss compensation for the period June 15, 1985 through July 1, 1986 and (2) whether a course of treatment directed by Dr. Livingston during the period November 1985 through May 20, 1986 was medically necessary. Our Industrial Appeals Judge concluded that the claimant's condition was medically fixed as of June 1, 1985, but determined that the claimant was entitled to time-loss compensation for the period June 15, 1985 through February 24, 1986. We granted review because these two findings are legally inconsistent.

Recently, in the case of In re Douglas Weston, BIIA Dec. (Supp.), 86 1645 (1987), we held that a worker's condition is not "legally fixed" until the Department first issues an order which classifies the worker's condition as fixed and permanent. We held that loss of earning power payments could be made through that date, provided the worker was otherwise entitled to such benefits, even though his condition was "medically fixed." However, we noted that if the Department had taken action to close the claim, no loss of earning power benefits could be paid beyond the date of the closing order unless medical evidence established that the workers' condition was not fixed on the date of such order. In

the instant case the Department entered an order closing the claim on October 25, 1985. Hence, no time-loss compensation or loss of earning power benefits would be payable beyond that date unless the medical evidence established that the claimant's condition was not fixed at that time.

We disagree with our Industrial Appeals Judge's determination that the claimant's condition was fixed as of June 1, 1985. Although neither Dr. Thomas C. Grow nor Dr. Harold O. Smith support a claim for treatment beyond October 25, 1985, and although Dr. Ries himself never found anything objectively wrong with the claimant other than some spasm and tenderness associated with a healing contusion of the dorsal spine, we are convinced that the physical therapy program and anti-inflammatory medications administered by Dr. Livingston from November 1985 through May 1986 were beneficial to the claimant and necessary to restore her to gainful employment. It is true that the claimant had already received physical therapy in September 1985 on the recommendation of Dr. Grow and that perhaps Dr. Livingston's physical therapy program was redundant. On the other hand, the need for such additional physical therapy has been demonstrated by its result. The claimant did return to work shortly after completing the physical therapy program at St. Elizbeth's Hospital. Therefore, we believe the treatment identified in Exhibit 2 was medically necessary and proper to restore the claimant to her pre-injury status. We note that Exhibit 2 also lists medical services and prescriptions obtained prior to October 25, 1985. We see no reason why these should not be paid by the Department as well.

We do, nevertheless, agree with our Industrial Appeals Judge's determination that the claimant was only entitled to time-loss compensation for the period June 15, 1985 through February 24, 1986. In this regard we note that it is only through the testimony of Dr. Ries that the claimant presents even a prima facie case for time-loss compensation. It was his opinion that the claimant was unable to work between June 15, 1985 and July 1, 1986. For a number of reasons, we are unable to accept Dr. Ries's opinion that the claimant was unable to work for that entire period.

First, Dr. Smith was of the opinion that the claimant was capable of employment as of the date of his February 24, 1986 examination. Although Dr. Ries saw the claimant in October 1985, November 1985, and February 1986, he did not see her at any time between March 1986 and July 1986. Furthermore, from his testimony it is clear that Dr. Ries was obviously unaware that the claimant had worked in June 1986 or even that she had returned to full time employment in October 1986. Because of his lack of knowledge of the claimant's condition beyond February 24, 1986 and his ignorance of the claimant's work activity, his testimony concerning her employability is simply not

persuasive. Further, we note that save for a few office visits to Dr. Livingston, the physical therapy program was essentially completed by the end of February 1986. In sum, an award of time-loss compensation through February 24, 1986 seems reasonable and we believe that following that date the claimant was capable of returning to her previous occupation.

In her Petition for Review the claimant asks that, in addition to continued treatment, she should be given a new closing and rating examination. However, if she was aggrieved by the Department order closing her claim without a disability award, the burden was on her to present medical evidence that she had a permanent disability. See Olympia Brewing Co. v. Department of Labor and Industries, 34 Wn.2d 498 (1949). She failed in her proof and we see no reason to remand the claim for further disability rating as she suggests. The claimant also asks for interest, at the rate of 12%, on the unpaid medical bills. We know of no authority which would allow us to award interest to the claimant, in her appeal of a Department order, for any benefits other than time-loss compensation resulting from our decision on the appeal. Such interest will be awarded by the Board through a supplemental Order Fixing Interest. See WAC 263-12-160 and RCW 51.52.135.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto and a careful review of the entire record, we are persuaded that the Department order of December 8, 1986 is incorrect and should be reversed and this claim remanded to the Department with direction to pay time-loss compensation for the period June 15, 1985 through February 24, 1986, inclusive. The Department is also directed to pay for medical treatment incurred during the period June 7, 1985 through May 20, 1986 (as evidenced by Exhibit 2 of the record on appeal) and to pay for medical travel expenses claimed for the period June 1985 through August 1985 (if the same are otherwise reimbursable pursuant to WAC 296-20-1103), and to thereupon close the claim as paid without award for any permanent partial disability.

Findings of Fact Nos. 1 through 4 and 7 through 9, as contained in the Proposed Decision and Order, are hereby adopted as the final Findings of Fact of the Board. Conclusions of Law Nos. 1 through 3, as contained in the Proposed Decision and Order, are also adopted as the final Conclusions of Law of the Board. In addition, the Board makes the following additional Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

5. As of May 21, 1986 and continuing through December 8, 1986, the claimant's condition, causally related to her injury of July 22, 1983, was fixed and stable and she was in need of no further medical treatment.

6. Between October 17, 1983 and December 8, 1986, the claimant's condition, causally related to her industrial injury of July 22, 1983, temporarily worsened, requiring further treatment. As of December 8, 1986 there had been no permanent worsening of the claimant's condition or increase in disability over that which existed on October 17, 1983, and the claimant's condition was best described by Category 1 of WAC 296-20-260, the Categories of Permanent Dorsal Impairment.

## CONCLUSIONS OF LAW

4. Between February 25, 1986 and December 8, 1986 the claimant was not a temporarily and totally disabled worker within the meaning of RCW 51.32.090.

5. Between February 25, 1986 and December 8, 1986 the claimant did not sustain a compensable loss of earning capacity and was not entitled to loss of earning power benefits as provided by RCW 51.32.090.

6. Between October 17, 1983 and December 8, 1986 the claimant's condition, causally related to her industrial injury, did not become aggravated, on more than a temporary basis, within the meaning of RCW 51.32.160.

7. The Department order of December 8, 1986, which adhered to the provisions of an order dated October 25, 1985, which closed the claim with no award for permanent partial disability, is incorrect and is reversed. The claim is remanded to the Department with direction to pay time-loss compensation to the claimant for the period June 15, 1985 through February 24, 1986, inclusive, to pay medical costs for treatment provided for the period June 7, 1985 through May 20, 1986 (as reflected by Exhibit 2 as contained in the record of proceedings), to pay for medical travel expenses for the period June 1985 through August 1985 to the extent the same are otherwise reimbursable under WAC 296-20-1103, and to thereupon close the claim as paid without award for permanent partial disability.

It is so ORDERED.

Dated this 1st day of November, 1988.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/_____
SARA T. HARMON Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
PHILLIP T. BORK Member