

Lord, Janet

SCOPE OF REVIEW

Closing order

SECOND INJURY FUND (RCW 51.16.120)

Jurisdiction

If the Department had not had the opportunity to address the issue of Second Injury Fund relief it is inappropriate to make a finding of fact that but for pre-existing conditions the industrial injury-related condition would not have rendered the worker permanently totally disabled. ...*In re Janet Lord, BIIA Dec., 93 6147 (1996)*

Scroll down for order.

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

1 IN RE: JANET D. LORD)	DOCKET NO. 93 6147
2)	
3 CLAIM NO. T-103622)	DECISION AND ORDER
4		

APPEARANCES:

7 Claimant, Janet D. Lord, by
8 Walthew, Warner, Costello, Thompson & Eagan, P.S., per
9 Thomas A. Thompson and Timothy McGarry

11 Self-Insured Employer, The Boeing Company, by,
12 Eisenhower & Carlson, per
13 Rebecca D. Craig

15 This is an appeal filed by the claimant, Janet D. Lord, on November 18, 1993, from an order
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17 of the Department of Labor and Industries dated September 21, 1993, which closed the claim with
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19 time-loss compensation ended as paid to November 30, 1988, and without award for further time-
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21 loss compensation or permanent partial disability. **REVERSED AND REMANDED.**

DECISION

25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
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27 and decision on a timely Petition for Review filed by the self-insured employer, the Boeing
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29 Company, to a Proposed Decision and Order issued on November 9, 1995, in which the order of
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31 the Department dated September 21, 1993, was reversed and the claim remanded to the
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33 Department with direction to classify the claimant as a totally and permanently disabled worker and
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35 to take such further action as indicated by law.

37 The self-insured employer does not contest the determination made in the Proposed
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39 Decision and Order that the claimant is totally and permanently disabled. It is the employer's
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41 contention that the Board should include a finding regarding the claimant's preexisting, non-
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43 industrially related conditions and a finding that, but for the preexisting physical conditions, the
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45 industrial injury alone would not have rendered the claimant totally and permanently disabled. The
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1 employer further contends that the Board should direct the Department of Labor and Industries to
2 consider the provision of Second Injury Fund Relief in light of the findings of the case.
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5 The claimant and Dr. Gary Schuster were the only witnesses who testified in this appeal.
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7 Their testimony established that the claimant had a number of symptomatic preexisting conditions
8 which limited her activities. These preexisting conditions include: 1) bilateral carpal tunnel
9 syndrome, 2) right shoulder rotator cuff tendinitis, chronic with impingement syndrome, 3) low
10 back pain, secondary to lumbar strain, and lumbar disc disease, degenerative type. Probable disc
11 injury at L4 with some motor loss in the right leg, evidence for sensory loss left leg as well as right
12 lateral foot, 4) osteoarthritis of the thumbs, left greater than right, 5) chronic obstructive
13 pulmonary disease, 6) reactive asthma/bronchial hyperactivity secondary to industrial exposure,
14 7) status post bilateral hip replacement with a vascular necrosis of the femoral heads, and residual
15 loss of range of motion of movement of the hips bilaterally.
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25 The Proposed Decision and Order found that, as a proximate result of the industrial injury,
26 the claimant has a condition diagnosed as bilateral elbow problems/chronic epicondylitis, bilateral
27 forearm tendinitis, and bilateral wrist sprains. Further, the Proposed Decision and Order found that
28 the claimant was incapable of gainful employment on a reasonably consistent basis as the
29 proximate result of the industrial injury, considered with her age, education, work experience, and
30 training superimposed on her preexisting non-industrially related physical conditions. We agree
31 with the self-insured employer that a finding should be made identifying these conditions.
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39 We disagree, however, that an additional finding should be made that, but for the
40 preexisting conditions, the industrial injury alone would not have rendered the claimant totally and
41 permanently disabled. Although the record would support such a finding, that issue is not before
42 the Board. The proposed finding relates to the issue of Second Injury Fund Relief, which has not
43 yet been passed upon by the Department. To make such a finding would invade the province of
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1 the Department, which was not represented in this appeal. By the same reasoning, the employer's
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3 assignment of error to Conclusion of Law No. 3 for its failure to direct the Department to consider
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5 the provision of Second Injury Fund Relief is also incorrect. As noted above, this issue is not
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7 before the Board, and, in any event, RCW 51.16.120 directs the Department to pass upon the
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9 application of Second Injury Fund Relief in all cases where benefits are paid for permanent total
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11 disability and to issue an order appealable by the employer.

12 **FINDINGS OF FACT**

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15 1. On October 6, 1986, an application for benefits from the claimant was
16 received by the Department of Labor and Industries alleging an
17 industrial injury on April 24, 1986, while in the course of employment
18 with The Boeing Company.
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20 The claim was allowed and time-loss compensation was paid. On May
21 21, 1990, the Department issued an order closing the claim without an
22 award for permanent partial disability and further ordered the self-
23 insured employer to deny responsibility for right shoulder tendinitis as
24 unrelated to the industrial injury. A timely protest and request for
25 reconsideration was filed by the claimant, and on August 14, 1990, the
26 Department issued an order setting aside the order of May 21, 1990,
27 and directed the self-insured employer to accept responsibility for the
28 condition of right shoulder tendinitis with mild impingement syndrome.
29 The employer filed a Notice of Appeal and on May 5, 1992, the Board
30 issued an Order Adopting Proposed Decision and Order which reversed
31 the Department order of August 14, 1990, and remanded the claim to
32 the Department with direction to issue an order requiring the self-
33 insured employer to deny responsibility for right shoulder condition
34 diagnosed as tendinitis with mild impingement syndrome. On May 15,
35 1992, the Department issued an order pursuant to the Board order
36 dated May 5, 1992.
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38 On September 21, 1993, the Department issued an order closing the
39 claim without award for permanent partial disability and with time-loss
40 compensation ended as paid to November 30, 1988. On November 18,
41 1993, the claimant filed a Notice of Appeal with the Board of Industrial
42 Insurance Appeals. On December 20, 1993, the Board issued an order
43 granting the appeal.
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- 45 2. The claimant is a 61-year-old woman with a high school education and
46 work experience as a waitress, bartender, practical nurse, wire
47 assembler, and clerk.

- 1 3. On April 24, 1986, while working for The Boeing Company, the claimant
2 sustained an industrial injury to her right and left elbow and right and left
3 wrist.
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- 5 4. As a proximate result of the industrial injury, the claimant has conditions
6 diagnosed as bilateral elbow problems/chronic epicondylitis, bilateral
7 forearm tendinitis, and bilateral wrist sprains.
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- 9 5. As of September 23, 1993, the claimant's conditions proximately caused
10 by the industrial injury of April 24, 1986, were fixed and stable, and no
11 further treatment was indicated.
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- 13 6. Prior to her industrial injury of April 24, 1986, the claimant suffered from
14 several preexisting, non industrially-related conditions including: (a)
15 bilateral carpal tunnel syndrome; (b) right shoulder rotator cuff
16 tendinitis, chronic with impingement syndrome; (c) low back pain
17 secondary to lumbar strain and lumbar degenerative disc disease; (d)
18 probable disc injury at L4 with some motor loss in the right leg and
19 evidence of sensory loss to the left leg as well as the right lateral foot;
20 (e) osteoarthritis of the thumbs; (f) chronic obstructive pulmonary
21 disease; (g) bilateral hip replacement with avascular necrosis of the
22 femoral heads with residual loss of range of movement of the hips
23 bilaterally; (h) chronic bronchitis/asthmatic bronchitis..
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- 25 7. As of September 21, 1993, the claimant was incapable of gainful
26 employment on a reasonably continuous basis as a proximate result of
27 the industrial injury of April 24, 1986, considered with her age,
28 education, work experience, and training, superimposed on her
29 preexisting physical conditions.
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CONCLUSIONS OF LAW

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- 33 1. The Board of Industrial Insurance Appeals has jurisdiction over the
34 parties and the subject matter of this appeal.
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- 36 2. As of September 21, 1993, the claimant was a totally and permanently
37 disabled worker within the meaning of RCW 51.32.060.
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- 39 3. The Department order of September 21, 1993, is incorrect and is
40 reversed and the claim is remanded to the Department of Labor and
41 Industries with direction to classify the claimant as a totally and
42 permanently disabled worker and to take such further action as is
43 indicated by law.
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45 It is so ORDERED.

46 Dated this 1st day of February, 1996.
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BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
S. FREDERICK FELLER Chairperson

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

/s/ _____
ROBERT L. McCALLISTER Member

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