

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

IN RE: GEORGE H. HIGGINS SR. CLAIM NO. M-185329)))	DOCKET NOS. 17 16301 & 17 18102 DECISION AND ORDER
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George Higgins suffered an industrial injury in 1989. Benefits were allowed and his claim was closed in 1992. Thirteen years later, the claim was reopened for medical treatment only. Mr. Higgins appeals orders closing his claim and providing that the Director of the Department of Labor and Industries decided not to exercise discretionary authority to find Mr. Higgins eligible for time-loss compensation, but did exercise discretionary authority to find him eligible for permanent partial disability benefits. Applying a preponderance of the evidence standard, our industrial appeals judge determined that Mr. Higgins was a totally temporarily disabled worker from March 20, 2007, through June 1, 2017, and permanently totally disabled thereafter. The Department argues that the appeal should have been decided under an abuse of discretion standard, and if that standard had been applied, it would have prevailed. Thus, the crux of the parties' dispute arises over what standard of proof applies to the Director's determination that a worker is eligible for one disability benefit (an increased permanent partial disability award) but not another (time-loss or pension). For reasons explained below, we conclude that our industrial appeals judge applied the proper standard. The Department orders are **REVERSED AND REMANDED.**

DISCUSSION

The claimant, George Higgins (age 60), injured his back on July 21, 1989, while working as an electrician for Saint Martin's College. His claim was closed in 1992 with a permanent partial disability award equal to a Category 2 of dorso-lumbar and/or lumbosacral impairments. Mr. Higgins was subsequently laid off from Saint Martin's College. He tried to reopen his claim multiple times but was denied. In late 1999, Mr. Higgins opened BNJ Automotive, a repair shop, with his partner, Bill. Mr. Higgins tried to do only light-duty work, with his partner or his sons doing the heavier work. The shop failed in 2003. Mr. Higgins attributes part of the business failure to not being able to work hard or fast enough. Other than odd jobs, Mr. Higgins has not worked since 2007. He contends he has been unable to work due to back pain. His wife left him and he ended up homeless for about 18 months, but was finally able to get some help through DSHS.

Mr. Higgins' claim was eventually reopened in 2005 for medical treatment only. Mr. Higgins established treatment with Robert G. R. Lang, M.D., a neurosurgeon, in April 2005. Dr. Lang treated

1 Mr. Higgins regularly for about 12 years. Dr. Lang had Mr. Higgins' medical records but there were
2 gaps. He did not believe he had any records from about 1995 through 2005.

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4 Dr. Lang concluded that Mr. Higgins sustained a left disc herniation as a result of the industrial
5 injury. Dr. Lang understood that Mr. Higgins also injured his back in 2002 during a brief period of
6 employment selling Christmas trees, but he considered the L4-5 disc herniation to have originated
7 from the industrial injury. Dr. Lang performed a laminotomy, discectomy in October 2005. The
8 surgery did not improve Mr. Higgins' symptoms. Dr. Lang performed a lumbar fusion at L4-L5 in
9 May 2007. Mr. Higgins' symptoms actually worsened with the lumber fusion and in January 2011,
10 Dr. Lang performed a third surgery to remove instrumentation and reinforce the fusion.

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12 Dr. Lang did not believe that Mr. Higgins worked during the entire time he treated him (2005-
13 2017), and he did not believe Mr. Higgins was capable of working during that time. Based on his
14 understanding that Mr. Higgins had a tenth grade education, he believed Mr. Higgins would require
15 vocational services in order to return to work in a light-duty capacity. Because Mr. Higgins' claim had
16 reopened for medical treatment only, Mr. Higgins was unable to get vocational services approved.
17 Dr. Lang did not believe Mr. Higgins could return to work due to an extensive period of inactivity and
18 the possibility of re-injury.

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20 Dr. Lang performed an impairment rating of Mr. Higgins in February 2017. He concluded that
21 Mr. Higgins was at maximum medical improvement and that Mr. Higgins had a permanent impairment
22 equal to a Category 4 permanent dorso-lumbar and/or lumbosacral impairments.

23 24 25 26 27 **Relevant Procedural History**

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29 Because Mr. Higgins' application to reopen his claim was granted more than seven years after
30 the date of last closing, his claim is referred to as an "over-seven" claim. Workers with over-seven
31 claims are typically not eligible for benefits other than medical treatment. However, RCW 51.32.160
32 authorizes the Director of the Department of Labor and Industries to find workers with over-seven
33 claims eligible for other benefits on a discretionary basis.¹

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¹ RCW 51.32.160; *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502 (2009).

1 When Mr. Higgins sought to reopen his claim, he sought other benefits in addition to medical
2 treatment. By Department order dated February 1, 2017, the Director issued an order stating, in
3 relevant part:
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5 This claim was reopened effective 3/22/2005.
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7 Only the Director of Labor and Industries has the authority to grant additional disability
8 benefits such as time-loss compensation or disability awards for those claims that
9 have been closed over 7 years from the first claim closure (10 years for eye injuries
10 from the first claim closure).
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12 The Director has decided not to exercise his discretionary authority to find you eligible
13 for time-loss compensation because you stopped working in 2003 and there is no
14 contemporaneous medical to support that you stopped working due to your industrial
15 injury.

16 However, the Director is exercising his discretionary authority to find you eligible for
17 permanent partial disability benefits in the interest of equity and good conscience,
18 because you had a significant increase in your permanent impairment of your lumbar
19 condition.
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21 Thus, the Director determined that Mr. Higgins was entitled to an increased permanent partial
22 disability award, but not time-loss compensation benefits. Thereafter the Department issued an order
23 closing the claim with an award for dorso-lumbar and/or lumbosacral impairment equal to Category 4,
24 minus the earlier award for Category 2 dorso-lumbar and/or lumbosacral impairment.
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26 Mr. Higgins timely appealed both Department orders, seeking time-loss benefits and, in
27 alternative to an increased permanent partial disability award, a pension. At a hearing on the appeal,
28 Mr. Higgins offered his own testimony and the testimonies of his son and Dr. Lang. The Department
29 rested and presented no evidence. Based on the record before him, our industrial appeals judge
30 determined that Mr. Higgins established by a preponderance of the evidence that he was a
31 temporarily totally disabled worker from March 20, 2007, through June 1, 2017, and a permanently
32 totally disabled worker thereafter.
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35 The Department filed a Petition for Review asserting that our judge erred by not applying an
36 abuse of discretion standard, and if an abuse of discretion standard had been applied, the
37 Department would have prevailed. Thus, the crux of the parties' dispute arises over what standard
38 of proof applies to the Director's determination that a worker is eligible for one disability benefit (an
39 increased permanent partial disability award) but not another (time-loss or pension). Mr. Higgins
40 argues that once the Director exercises discretion to award a disability benefit, such as increased
41 permanent partial disability, the question of whether he is entitled to other disability benefits, such as
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1 time-loss, is decided under a preponderance of evidence standard. The Department argues that the
2 Director is vested with broad discretionary authority to find a worker eligible for permanent partial
3 disability benefits but not time-loss or pension. As such, the Director's discretionary authority can
4 only be reviewed under an abuse of discretion standard.² We conclude that our industrial appeals
5 judge applied the proper standard and agree with our judge's ultimate determination in favor of
6 Mr. Higgins on the issues of temporary total disability and permanent total disability.
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10 **Applicable Law**

11 Under RCW 51.32.160, the Director is granted authority to "readjust" the worker's rate of
12 compensation at any time upon his or her own motion:
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14 (1)(a) If aggravation, diminution or termination of disability takes place, the director
15 may, upon the application of the beneficiary, made within seven years from the date
16 the first closing order becomes final, or at any time upon his or her own motion,
17 readjust the rate of compensation in accordance with the rules of this section provided
18 for the same, or in a proper case terminate the payment; PROVIDED, That the director
19 may, upon application of the worker made at any time, provide proper and necessary
20 medical and surgical services as authorized under RCW 51.36.010.
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22 Our Washington Court of Appeals has held that "the Director must comply with the rules provided
23 under Title 51 in determining the eligibility of a claimant."³ In *In re Bernard James*,⁴ we held that the
24 limitation contained in RCW 51.32.160, which was five years under the former statute, was a statute
25 of limitations, and that once the claim is reopened, the worker is entitled to benefits as if there had
26 been no time-limitation bar.
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29 RCW 51.32.160 does not directly address whether the Director's decision to reopen the claim
30 is purely discretionary. In *Cascade Valley Hospital v. Stach*,⁵ the Washington Court of Appeals,
31 Division 2, specifically addressed the issue of what standard of review applies in an over-seven claim.
32 In that case, the Department reopened the claimant's over-seven claim for medical benefits only.
33 The Department subsequently issued an order authorizing two surgeries. The claimant then filed a
34 request for time-loss benefits. On February 3, 2006, the Director wrote a letter to the claimant
35 informing her that she was "eligible" to receive time-loss benefits and that she "may" also be eligible
36 to receive a permanent partial disability award. On February 9, 2006, the Department issued an
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45 ² Department's Response to Worker's Briefing Regarding Standard of Review on Appeal.

46 ³ *Walmer v. Dep't of Labor and Indus.*, 78 Wn. App. 162 (1995).

47 ⁴ BIIA Dec., 04,394 (1955).

⁵ 152 Wn. App. 502 (2009).

1 order reopening the claimant's back injury claim for such additional disability benefits as are
2 authorized by law. The employer, Cascade, appealed.

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4 On appeal to the Washington Court of Appeals, Cascade argued that a previous order
5 reopening the over-seven claim for medical benefits only was res judicata; that RCW 51.32.160 limits
6 the Director's authority in over-seven claims to medical benefits only; that the proper standard of
7 review was by a preponderance of the evidence, and that it was improper for the Director to reopen
8 the claim first by determining eligibility and then in a second order determining entitlement to time-loss
9 benefits. The court rejected all of these arguments. The court stated:

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13 In sum, the director's decision to review an over-seven claim is discretionary. Whether
14 to reopen a claim for additional benefits is also discretionary, provided there is
15 aggravation. Once the director reopens a claim on grounds of aggravation, he or she
16 may grant additional benefits only "in accordance with the rules in this section provided
17 for the same."

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19 The parties agree, and we concur, that the director's grant or denial of specific benefits
20 is to be reviewed under the preponderance standard.⁶

21 Looking to the order on appeal, the *Cascade* court concluded that the Director reopened the
22 over-seven claim but did not grant any specific benefits. Therefore, the *Cascade* court held that the
23 proper standard was abuse of discretion.

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25 In the present appeal, the Director specifically granted disability benefits in the form of an
26 increased permanent partial disability award. We conclude that the Director's grant or denial of other
27 specific benefits, such as temporary or permanent total disability, must be reviewed under the
28 preponderance standard. This determination is consistent with RCW 51.32.160, relevant Washington
29 authority, and the supreme court's determination that "the guiding principle in construing provisions
30 of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in
31 order to achieve its purpose of providing compensation to all covered employees injured in their
32 employment, with doubts resolved in favor of the worker."⁷

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34 We conclude that our industrial appeals judge applied the proper standard after the Director
35 determined that Mr. Higgins condition had worsened and he was entitled to an increased permanent
36 partial disability award.
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47 ⁶ *Cascade* at 512.

⁷ *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470 (1987).

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DECISION

1. In Docket No. 17 16301, the claimant, George H. Higgins Sr., filed an appeal with the Board of Industrial Insurance Appeals on July 28, 2017, from an order of the Department of Labor and Industries dated June 1, 2017. This order provided that the Director of the Department of Labor and Industries decided not to exercise discretionary authority to find Mr. Higgins eligible for time-loss compensation, but did exercise discretionary authority to find him eligible for permanent partial disability benefits. This order is incorrect and is reversed and remanded.
2. In Docket No. 17 18102, the claimant, George H. Higgins Sr., filed an appeal with the Board of Industrial Insurance Appeals on July 28, 2017, from an order of the Department of Labor and Industries dated June 20, 2017. In this order, the Department closed the claim with a permanent partial disability award for Category 4 permanent dorso-lumbar and/or lumbosacral impairments. This order is incorrect and is reversed and remanded.

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FINDINGS OF FACT

1. On October 12, 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On July 21, 1989, George Higgins Sr. sustained an industrial injury when he lifted two 5-gallon paint cans, proximately causing or aggravating a left disc herniation at L4-5.
3. By order dated February 1, 2017, the Director of the Department of Labor and Industries exercised his discretion and reopened the claim for payment of disability benefits in the form of an increased award for permanent partial disability.
4. Mr. Higgins is 60 years old, completed tenth grade, and worked as an electrician, handyman, and mechanic. The physical limitations, proximately caused by the industrial injury of July 21, 1989, included restricted abilities to walk, crawl, reach, lift, and bend. Lifting was limited to no more than 10 to 15 pounds. Mr. Higgins had functional limits due to his industrial injury that restricted his gait and postural functions, including sitting and bending.
5. Mr. Higgins was unable to perform or obtain gainful employment on a reasonably continuous basis from March 20, 2007, through June 20, 2017, due to the residuals of the industrial injury and taking into account his age, education, work history, and preexisting conditions.
6. As of June 20, 2017, Mr. Higgins' conditions proximately caused by the industrial injury were fixed and stable.

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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.
2. The Director's grant of disability benefits after seven years from the first closure of the claim allows the grant or denial of additional disability benefits to be reviewed under a preponderance of the evidence standard.⁸
3. Mr. Higgins was a temporarily totally disabled worker within the meaning of RCW 51.32.090 from March 20, 2007, to June 19, 2017.
4. Mr. Higgins was a permanently totally disabled worker within the meaning of RCW 51.08.160 as of June 20, 2017.
5. In Docket No. 17 16301, the Department order dated June 1, 2017, is incorrect and is reversed. This matter is remanded to the Department to determine that the industrial injury of July 21, 1989, was a proximate cause of Mr. Higgins' inability to perform continuous gainful employment on a reasonable basis from March 20, 2007, to June 1, 2017; to pay time-loss compensation benefits from March 20, 2007, to June 1, 2017; and to take such further action as is required by the law and the facts.
6. In Docket No. 17 18102, the Department order dated June 20, 2017, is incorrect and is reversed. This matter is remanded to the Department to pay time-loss compensation benefits from June 2, 2017, to June 19, 2017; award benefits consistent with Mr. Higgins' status as a permanently totally disabled worker as of June 20, 2017; and to take such further action as is required by the law and the facts.

Dated: May 29, 2019.

BOARD OF INDUSTRIAL INSURANCE APPEALS


LINDA L. WILLIAMS, Chairperson


FRANK E. FENNERTY, JR., Member

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DISSENT

I dissent. I disagree with the majority that the appropriate standard of review is a preponderance of the evidence. I would apply abuse of discretion as the proper standard of review or remand to the Director with direction to make a new determination that conforms to the majority's decision.

⁸ RCW 51.32.160; *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 512 (2009).

1 Washington courts and our Significant Decisions have consistently held that RCW 51.32.160
2 authorizes the director to find workers with an over-seven claim eligible for disability benefits on a
3 discretionary basis.⁹ Contrary to the majority's conclusion, *Cascade Valley Hospital v. Stach*
4 specifically provides that the decision to "reopen a claim for *additional* benefits is also discretionary,
5 provided there is aggravation."¹⁰ Applying the court's holding in *Cascade*, the Director must first find
6 the worker eligible for a disability benefit, such as time-loss, on a discretionary basis. The Director's
7 determination is reviewed for an abuse of discretion. If the Director finds the worker eligible for a
8 disability benefit, the worker must still be demonstrably entitled to that benefit. Accordingly, a
9 preponderance of the evidence standard would apply.

10 We addressed this issue specifically in *In re Ira Davenport*.¹¹ In that case, the claimant
11 appealed a letter and order from the Director reopening his over-seven claim for medical benefits but
12 denying additional disability benefits. The Director's letter specifically stated that the claimant was
13 "not eligible" for time-loss compensation. The order stated "[o]nly payment of medical benefits is
14 appropriate."

15 The industrial appeals judge affirmed the letter and order, but applied a preponderance of
16 evidence standard. We agreed with the judge's conclusion but granted review to clarify that the
17 proper standard is abuse of discretion. We stated:

18 The law recognizes a clear distinction between a Director's determination of eligibility
19 to receive time-loss compensation benefits in an over-seven reopening (a
20 discretionary determination by the Director); and the next step for an eligible claimant,
21 a decision on actual entitlement to time-loss compensation benefits in an over-seven
22 reopening (based on a preponderance of the evidence). This distinction is noted in
23 *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 512 (2009), which affirmed the
24 Board's analysis in *In re Lori D. Stach*, Dckt. No. 06 12646 (September 24, 2007).
25 Both the Board and appellate decisions explicitly address these two distinct steps in
26 resolving over-seven reopening applications, as well as the standards of proof
27 applicable to each stage.

28 The Director's discretionary decision to waive the 7-year time limit and decide whether
29 the claimant is **eligible** (pursuant to the Department's policy) for time-loss
30 compensation and other disability benefits is the first step. An abuse of discretion
31 standard is applicable to the eligibility stage. The second step, which occurs only when
32 eligibility is decided in the affirmative, is a determination as to whether claimant is
33 **entitled** to time-loss compensation or other disability benefits. In an appeal where
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45 ⁹ *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502 (2009); *Botica v. Dep't of Labor & Indus.*, 184 Wash. 573 (1937); *In*
46 *re Michael Bell*, BIIA Dec., 11 15598 (2012).

47 ¹⁰ *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502 (2009) (Emphasis added).

¹¹ Dckt. No. 08 21373 (2010).

1 entitlement is at issue, the burden is on the claimant to prove by a preponderance of
2 the evidence that he is entitled to benefits . . .¹²

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4 Thus, *Davenport* explained that the second step can only occur when eligibility is decided in the
5 affirmative. Here, the order on appeal states, "The Director has decided not to exercise his
6 discretionary authority to find you eligible for time-loss compensation . . ." Because the Director
7 exercised his discretion to find Mr. Higgins not eligible for time-loss benefits or a pension, the proper
8 standard of review is abuse of discretion.
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11 Additionally, I agree with the Department's argument that if the Board concludes that the
12 director lacks authority to find a worker eligible for some benefits but not eligible for others, a proper
13 remedy would be to remand to the Department with direction to the Director to make a new decision
14 that conforms to its reading of the statute.¹³ To do otherwise is tantamount to making a discretionary
15 decision for the Director.
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19 Accordingly, I disagree with the majority's conclusion that if the Director exercises discretion
20 to find a worker eligible for one type of disability benefits, this opens the door for the worker to seek
21 other disability benefits under a preponderance of evidence standard.
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23 Dated: May 29, 2019.

24 BOARD OF INDUSTRIAL INSURANCE APPEALS

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28 JACK S. ENG, Member
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46 ¹² *In re Ira Davenport*, Dckt. No. 08 21373 (2010) (Emphasis in original).

47 ¹³ Department's Response to Worker's Briefing Regarding Standard of Review Appeal.

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**Addendum to Decision and Order
In re George H. Higgins, Sr.
Docket Nos. 17 16301 & 17 18102
Claim No. M-185329**

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Appearances

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Claimant, George H. Higgins, Sr., by Atlas Law, P.S., per Elijah M. Forde
Employer, Saint Martin's University, Human Resources (did not appear)
Department of Labor and Industries, by the Office of the Attorney General, per John Barnes and
Steve Vinyard,

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Petition for Review

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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 December 26, 2018, in which the industrial appeals judge reversed and remanded the orders of the Department dated June 1, 2017, and June 20, 2017. On March 8, 2019, Mr. Higgins filed a response to the Petition for Review.

Evidentiary Matters

During proceedings the Department offered a copy of the claim file as an exhibit. It was not marked or retained by the industrial appeals judge. We have obtained a copy of the exhibit and designated it as Exhibit 1, and is rejected.