

## **Baker, James**

---

### **DEPOSITIONS**

#### **Prior Appeals**

CR 32(a) contemplates use of depositions from prior actions if they involve the same parties, subject matter, and issues. Where the issues in prior appeals differed from the issues in the present appeals, the prior depositions don't meet the narrow strictures of CR 32 and may be excluded. ....*In re James Baker, BIA Dec., 16 17782 (2017)* [Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 17-2-01629-4.]

Scroll down for order.

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

**IN RE: JAMES G. BAKER** ) **DOCKET NOS. 16 17782, 16 17983 & 16 18688**  
 )  
**CLAIM NO. SC-29373** ) **DECISION AND ORDER**

James G. Baker herniated a disc in his low back in 2008 while operating a street sweeper for Kitsap County, Washington. The Department allowed the claim in 2008, closed it with a Category 2 low back permanent partial disability award in 2009, and reopened it in 2010. Mr. Baker appealed three Department orders. In the first order, the Department declined to impose a penalty against Kitsap County after it failed to cover chiropractic treatment visits at Kingston Crossing Wellness. In the second order, the Department altogether denied chiropractic treatment for Mr. Baker from Kingston Crossing Wellness. In the third order, the Department closed Mr. Baker's claim without an award for further permanent partial disability. Mr. Baker argues that chiropractic treatment restored his ability to function and his claim should remain open. In the alternative, he requests an increased permanent partial disability award. Our industrial appeals judge affirmed the three Department orders. We grant review solely to reject the depositions of Carter Maurer, M.D., and Joseph R. Lynch, M.D., taken in different appeals before the Board in 2011 and 2014. These depositions do not meet the admissibility requirements of CR 32. Because the preponderance of the evidence ultimately failed to establish that chiropractic treatment improved Mr. Baker's function or that Mr. Baker was entitled to further permanent partial disability, the Department orders are **AFFIRMED**.

**DISCUSSION**

Sixty-six-year-old James "Gary" Baker was injured on February 11, 2008, while driving a street sweeper for Kitsap County after a winter storm. He was ultimately diagnosed with a herniated disc at L1-2, which was accepted under this claim. Mr. Baker seeks ongoing chiropractic treatment and a penalty against the self-insured employer after it declined to cover similar services from November 2015. In the alternative, Mr. Baker seeks increased permanent partial disability. Although we agree that the preponderance of the evidence did not establish Mr. Baker's entitlement to further relief, we grant review to address our industrial appeals judge's ruling admitting the depositions of two medical witnesses from two prior Board appeals.

At the scheduling phase of this litigation and in witness confirmations, Kitsap County indicated its intent to call two medical experts by "prior deposition." On March 31, 2017, the self-insured employer filed the depositions. The first deposition, taken of Carter Maurer, M.D., on April 7, 2014, in Docket No. 13 11290, pertained to the Department's July 1, 2013 closing order (which we ultimately

1 reversed). The second deposition, taken of Joseph R. Lynch, M.D., on July 14, 2011, in Docket  
2 No. 11 10390, pertained to Mr. Baker's August 18, 2010 aggravation application (which we ultimately  
3 denied).  
4

5 CR 32 governs the use of depositions in court proceedings. The rule provides:

6 (a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory  
7 proceeding, any part or all of a deposition, so far as admissible under the Rules of  
8 Evidence applied as though the witness were then present and testifying, may be used  
9 against any party who was present or represented at the taking of the deposition or who  
10 had reasonable notice thereof . . .  
11

12 . . .

13 (B)...[w]hen an action has been brought in any court of the United States or of any state  
14 and another action involving the same issues and subject matter is afterward brought  
15 between the same parties or their representatives or successors in interest, all  
16 depositions lawfully taken and duly filed in the former action may be used in the latter  
17 as if originally taken therefor.  
18

19 CR 32(a)(5)(B) contemplates use of the prior deposition in another action if it involves same  
20 parties, subject matter and issues. Here, Dr. Maurer and Dr. Lynch's depositions address a  
21 four-year-old closing order and a seven-year-old application to reopen. Their testimony related to  
22 these distinct issues is likely to cause confusion or to instill prejudice. Otherwise admissible evidence  
23 may be excluded if its probative value is substantially outweighed by the danger of confusion or unfair  
24 prejudice.<sup>1</sup> Our industrial appeals judge should have excluded these depositions from the record.  
25

26 Even without these depositions, however, a preponderance of the evidence supports the  
27 Department orders. Although necessary and proper medical treatment is a "benefit"<sup>2</sup> that, if  
28 unreasonably delayed, would support a penalty under the Act,<sup>3</sup> treatment measures must be curative  
29 or rehabilitative to be covered. Curative treatment leads to a permanent elimination or decrease of the  
30 effects of the condition caused by the industrial injury. Rehabilitative treatment leads to a return or  
31 increase of functional activity.<sup>4</sup>  
32

33 Conceding that his chiropractic treatment was not "curative," as defined by WAC 296-20-  
34 01002, Mr. Baker admitted the treatments would not cure him. Instead, Mr. Baker argues that  
35 chiropractic treatments at Kingston Crossing Wellness improved his function.<sup>5</sup>  
36  
37

38  
39  
40  
41  
42  
43 

---

<sup>1</sup> ER 403.

44 <sup>2</sup> *In re James Coston*, BIIA Dec., 11 12310 (2012).

45 <sup>3</sup> RCW 51.48.017.

46 <sup>4</sup> WAC 296-20-01002 and *Roller v. Department of Labor and Indus.*, 128 Wn. App 922 (2005).

47 <sup>5</sup> *In re Susan Pleas*, BIIA Dec., 96 7931 (1998); *In re Sheri L. Hopkins*, Dckt. Nos. 02 18502 & 02 20307 (December 17, 2003).

1 While an increase in the ability to work is among those factors that demonstrate a treatment  
2 is rehabilitative,<sup>6</sup> proof of pain relief is not enough. Here, Mr. Baker's testimony provided only vague  
3 assertions that Dr. Gill's chiropractic treatments allowed him to continue his job. But bare assertions  
4 that a treatment is able to keep a claimant going is insufficient.  
5

6  
7 Further, treatment must lead to permanent changes.<sup>7</sup> Recently, we determined that injection  
8 treatments which provided up to two weeks of relief from headaches were neither curative nor  
9 rehabilitative.<sup>8</sup> Here, Mr. Baker's own testimony shows that his pain had continue to resurface despite  
10 the treatment. Further, Mr. Baker said the pain was resurfacing more quickly as time went on.  
11 Because Mr. Baker offered no other evidence that treatment was necessary and proper as of July 15,  
12 2016, the record supports claim closure.  
13

14  
15 The only remaining issue is whether Mr. Baker is entitled to an increased permanent partial  
16 disability award. Mr. Baker's claim was previously closed on March 9, 2009, with a permanent partial  
17 disability award consistent with Category 2 of WAC 296.20.280. Because Mr. Baker's application to  
18 reopen his claim was deemed granted, it is presumed that there was at least a temporary worsening  
19 in his condition. But to receive a further permanent disability award, Mr. Baker must prove a  
20 permanent worsening of his claim-related conditions between the date of the earlier claim closure,  
21 March 9, 2009, and the date of the closing order on appeal, July 15, 2016.<sup>9</sup> Because the record fails  
22 to show permanent worsening, we hold that Mr. Baker's level of permanent lumbar impairment  
23 remained at Category 2.  
24

25  
26 Two non-treating physicians offered opinions on the question of permanent impairment and  
27 worsening. Guy Earle, M.D., a family medicine physician examined Mr. Baker on February 25, 2014,  
28 and again on January 4, 2017. He felt Mr. Baker's impairment had increased from Category 2 to  
29 Category 3. Dr. Earle's Category 3 rating focused on Mr. Baker's left leg external rotator motor  
30 weakness. James F. Harris, M.D., an orthopedic surgeon who conducted an independent medical  
31 examination of Mr. Baker on January 14, 2016, found no objective motor loss on examination to  
32 support a higher permanent partial disability award.  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43

---

44  
45 <sup>6</sup> *In re In re Susan Pleas*, BIIA Dec., 96 7931 (1998)

46 <sup>7</sup> WAC 296-20-01002 and *Roller*, at 931.

47 <sup>8</sup> *In re Silvia L. Chavez*, Dckt. Nos. 15 10277 & 15 10780 (January 22, 2016).

<sup>9</sup> *Dinnis v. Department of Labor and Indus.*, 67 Wn.2d 654 (1965); *In re Margaret Casey*, BIIA Dec., 90 5286 (1992).

1 Having considered this conflicting testimony of two non-treating physicians, we are most  
2 persuaded by Dr. Harris. Dr. Earle's hip rotator weakness testing was subjective to the extent it relied  
3 on Dr. Earle's judgment regarding Mr. Baker's use of force. And, Dr. Earle assumed Mr. Baker used  
4 his full strength during the test. The preponderance of the evidence shows our hearing judge properly  
5 denied Mr. Baker's request for increased permanent partial disability.  
6  
7

### 8 **DECISION**

9  
10 In Docket No. 16 17782, the claimant, James G. Baker, filed an appeal with the Board of  
11 Industrial Insurance Appeals on July 27, 2016, from an order of the Department of Labor and  
12 Industries dated May 31, 2016. In this order, the Department affirmed its order dated March 22,  
13 2016. In that order, the Department declined to issue a penalty against the self-insured employer for  
14 failing to pay for ten chiropractic treatments supplied by Kingston Crossing Wellness over the course  
15 of ten appointments from November 30, 2015, through January 22, 2016. This order is correct and  
16 is affirmed.  
17

18  
19 In Docket No. 16 17983, the claimant, James G. Baker, filed an appeal with the Board of  
20 Industrial Insurance Appeals on August 1, 2016, from an order of the Department of Labor and  
21 Industries dated July 14, 2016. In this order, the Department affirmed its order dated March 25, 2016.  
22 In that order, the Department denied treatment at Kingston Crossing Wellness for dates of service  
23 from November 30, 2015, to March 25, 2016. This order is correct and is affirmed.  
24

25  
26 In Docket No. 16 18688, the claimant, James G. Baker, filed an appeal with the Board of  
27 Industrial Insurance Appeals on August 22, 2016, from an order of the Department of Labor and  
28 Industries dated July 15, 2016. In that order, the Department affirmed its order dated April 1, 2016,  
29 closing Mr. Baker's claim with time-loss compensation benefits paid through February 11, 2015, and  
30 with no award for increased permanent partial disability. This order is correct and is affirmed.  
31

### 32 **FINDINGS OF FACT**

- 33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47
1. On September 28, 2016, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
  2. James G. Baker sustained an industrial injury on February 11, 2008, when he was driving a street sweeper for an extended period of time and sustained a herniated disc at L1-2.
  3. As of November 30, 2015, James G. Baker's conditions proximately caused by the industrial injury did not require further necessary and proper chiropractic treatment.

- 1 4. In Docket No. 1617782, Kitsap County was not required to pay for  
2 James G. Baker's November 30, 2015; December 11, 2015;  
3 December 18, 2015; December 23, 2015; December 28, 2015;  
4 December 31, 2015; January 4, 2016; January 8, 2016; January 19,  
5 2016; and January 22, 2016 chiropractic treatments at Kingston Crossing  
6 Wellness.
- 7 5. As of July 14, 2016, (Docket No. 1617983) and as of July 15, 2016,  
8 (Docket No. 16 18688) James G. Baker's condition proximately caused  
9 by the industrial injury was fixed and stable and did not need further  
10 proper and necessary treatment, including chiropractic treatment at  
11 Kingston Crossing Wellness.
- 12 6. As of July 15, 2016, James G. Baker had a herniated disc at L1-2  
13 proximately caused by the industrial injury with no significant objective  
14 motor loss.
- 15 7. On March 9, 2009, and on July 15, 2016, James G. Baker had a  
16 permanent partial disability proximately caused by the industrial injury  
17 equal to Category 2 permanent dorso-lumbar and lumbosacral  
18 impairment (WAC 296-20-280).
- 19 8. James G. Baker's condition proximately caused by the industrial injury did  
20 not permanently objectively worsen between March 9, 2009, and July 15,  
21 2016.

#### 22 **CONCLUSIONS OF LAW**

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
24 and subject matter in these appeals.
- 25 2. As of November 30, 2015, James G. Baker was not entitled to further  
26 proper and necessary treatment, including the chiropractic treatment at  
27 Kingston Crossing Wellness, as contemplated by RCW 51.36.010.
- 28 3. As of July 14, 2016, (Docket No. 1617983) and as of July 15, 2016, (Docket  
29 No. 1618688), James G. Baker's condition proximately caused by the  
30 industrial injury was fixed and stable and he was not entitled to further proper  
31 and necessary treatment, specifically, chiropractic treatment at Kingston  
32 Crossing Wellness, as authorized by RCW 51.36.010.
- 33 4. The self-insured employer did not unreasonably delay or refuse to pay for  
34 chiropractic treatment for James G. Baker after those benefits became due  
35 as contemplated by RCW 51.48.017.
- 36 5. Between March 9, 2009, and July 15, 2016, James G. Baker's condition  
37 proximately caused by the industrial injury did not permanently worsen as  
38 shown by objective findings within the meaning of RCW 51.32.160.
- 39 6. On July 15, 2016, James G. Baker's permanent partial disability, within the  
40 meaning of RCW 51.32.080, proximately caused by the industrial injury,  
41 remained equal to a Category 2 permanent dorso-lumbar and lumbosacral  
42 impairment (WAC 296-20-280).
- 43  
44  
45  
46  
47

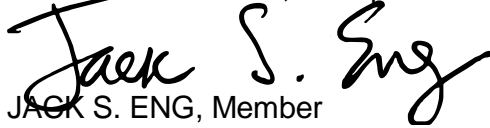
1 7. The Department orders dated May 31, 2016, July 14, 2016, and July 15,  
2 2016, are correct and are affirmed.  
3

4 Dated: August 29, 2017.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS

6   
7

8 LINDA L. WILLIAMS, Chairperson

9   
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

JACK S. ENG, Member

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

**Addendum to Decision and Order**  
**In re James G. Baker**  
**Docket Nos. 16 17782, 16 17983 & 16 18688**  
**Claim No. SC-29373**

**Appearances**

Claimant, James G. Baker, by Casey & Casey, P.S., per Gerald L. Casey  
Self-Insured Employer, Kitsap County, by Deputy Prosecuting Attorney, per Deborah A. Boe  
Department of Labor and Industries, by Office of the Attorney General, per Sharon James

**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 claimant filed a timely Petition for Review of a Proposed Decision and Order issued on May 11, 2017, in which the industrial appeals judge affirmed the orders of the Department dated May 31, 2016, July 14, 2016, and July 15, 2016. Kitsap County filed a response to the Petition for Review.

**Evidentiary Rulings**

Except as discussed above, all other evidentiary rulings in the record of proceedings are affirmed.