

## **Walster, Sandra (II)**

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### **BOARD**

#### **Appearance of fairness doctrine**

A Board member may participate in the decision on an appeal from a Department order entered when he was the Supervisor of Industrial Insurance where the appeal raised only a legal issue and, despite the fact that his name appeared on the Department order, he was not personally involved in the Department action on the claim. ...*In re Sandra Walster (II)*, BIIA Dec., 43,049 (11/73) [special concurrence] [*Editor's note*: Consider also RCW 42.36.090.]

#### **Petition for review**

An order denying an appeal cannot be petitioned to the Board but must be appealed to superior court. [RCW 51.52.080] ...*In re Sandra Walster (II)*, BIIA Dec., 43,049, (11/73)

### **PETITIONS FOR REVIEW (RCW 51.52.104; RCW 51.52.106)**

#### **Order denying appeal**

An order denying an appeal cannot be petitioned to the Board but must be appealed to superior court. [RCW 51.52.080.] ...*In re Sandra Walster (II)*, BIIA Dec., 43,049, (11/73)

Scroll down for order.

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

1 **IN RE: SANDRA LUCILLE WALSTER ) DOCKET NO. 43,049**  
2 **Scott Paper Company, Petitioner )**  
3 **) ORDER DENYING REQUEST**  
4 **CLAIM NO. S-117733 ) FOR RECONSIDERATION**  
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6 The above-entitled matter concerns an appeal filed with this Board by the Scott Paper  
7 Company, a self-insured employer, on August 27, 1973, from an order of the Department of Labor  
8 and Industries dated July 31, 1973, adhering to a prior Department order of June 28, 1973, which  
9 directed the said employer to pay temporary disability compensation to which the claimant may be  
10 entitled in accordance with RCW 51.32.190.  
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12 On October 26, 1973, this Board entered its Order Denying Appeal (with one Board member  
13 dissenting), and mailed it to all parties on October 31, 1973, confirming the Department's order of  
14 July 31, 1973, and denying the employer's appeal therefrom. It was clear to us that there were no  
15 issues of fact in this appeal, and it raised solely a question of law.  
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17 We conclude that the Department's order of July 31, 1973 was proper and lawful under what  
18 we viewed as the clear intent of two new pertinent statutory sections, now codified as RCW Secs.  
19 51.32.190 and 51.32.210, and that the self-insured employer was thus required to pay time-loss  
20 compensation to the claimant for whatever period between May 21 and August 28, 1973, that she  
21 was in fact temporarily totally disable due to the back condition for which she had filed this claim. In  
22 view of this legal conclusion, we made final disposition of the appeal by our above-mentioned Order  
23 Denying Appeal, pursuant to the authority of RCW 51.52.080 providing that if an appeal "raises no  
24 issue or issues of fact and the board finds that the department properly and lawfully decided all  
25 matters raised by such appeal it may, without further hearing, deny the same and confirm the  
26 department's decision" based on the department record.  
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28 Thereafter on November 8, 1973, this Board received from the employer a document entitled  
29 Petition for Review, asking this Board to review our Order Denying Appeal of October 26, 1973, and  
30 after such review, to reach a contrary conclusion and reverse the Department's orders in question.  
31 It appears from the format of this document that it may have been intended to invoke the review  
32 procedures provided in RCW 51.52.104 and 51.52.106. Those statutes apply only to cases where  
33 proposed decisions and orders are issued by hearing examiners, and Board review is then  
34 requested and made, and final Board decisions issued based on such review. However, as pointed  
35 out above, our Order Denying Appeal in this case was entered pursuant to RCW 51.52.080, and it  
36 was the Board's final decision on this particular matter. This fact has now apparently been  
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1 recognized, inasmuch as the employer filed an appeal from said order to the Snohomish County  
2 Superior Court on November 15, 1973, under Cause No. 120320.  
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4 We have, nevertheless, considered the Petition for Review as a request for reconsideration  
5 of our order, and we have carefully noted the various arguments therein. In light thereof, it appears  
6 there may have been a partial misconception by the employer as to the import of our order, and we  
7 feel further comments should be made on certain points.  
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10 First, as to the statutory and case law citations made in support of the employer's argument  
11 that there is never any obligation to pay temporary total disability compensation prior to  
12 determination that an industrial injury occurred which caused the disability, we of course are familiar  
13 with those citations and recognize the continued applicability of the several judicial opinions in  
14 appropriate cases (such as the claimant's pending appeal under docket no. 43,109). However, as  
15 we attempted to make clear in our order of October 26, 1973, we are concerned here with the 1971  
16 and 1972 amendments to the Act which created the new sections, RCW 51.32.190 and 51.32.210.  
17 These new sections indicate, in our opinion, a new legislative intent to guarantee a prompt initial  
18 determinative order as to allowance or rejection of the claim.  
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24 It should again be pointed out that the only period for which compensation is to be paid prior  
25 to a determination is the period which may be consumed until the entry of the Department's  
26 determinative order as to allowance or rejection of the claim. Once such an order is entered,  
27 whether it is to allow or to reject which then is challenged by way of an appeal by the employer or  
28 the claimant, as the case may be, there is no requirement to continue any payments while the issue  
29 of allowance is being litigated to a final conclusion before this Board and the courts.  
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32 Furthermore, this whole question of possible erroneous "pre-payment" of compensation can  
33 easily be rendered completely moot in any case -- namely, by adhering to the expressed legislative  
34 intent that the Department's determinative order as to claim allowance or rejection be issued  
35 promptly, by assuring that the same is issued within 14 days after receipt of the claim. In view of  
36 the considerable investigative staffs and information-gathering facilities possessed both by self-  
37 insurers and the Department, it clearly cannot be said that this is an unreasonable period of time  
38 within which to expect such a determination in the vast majority of cases.  
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1           These observations negate, in our opinion, the "horrible example" arguments made by the  
2 employer that compensation might have to be paid in some cases for a disability which is  
3 immediately obvious as being unrelated to a person's employment, or might have to be paid for  
4 "months or even years" for a disability which is finally adjudicated to be non-industrial. These  
5 situations simply will not happen. Of course, it is recognized that occasional claims will raise more  
6 complex problems such as a difficult causal relationship question, so that the initial investigative  
7 period in some claims will exceed 14 days. As to such cases, we reiterate the observation made in  
8 our order of October 26, 1973, namely, that the new sections of the law intend that the economic  
9 burden of any delayed initial determination be placed on the workmen's compensation system  
10 rather than on the temporarily disabled claimant or other social welfare program.

11           In the instant case, of course, a period of three months transpired between notice of claim  
12 and the Department's determinative rejection order. However, it would seem that most of the  
13 information which was obtained by concentrated investigative efforts in July and August, upon  
14 which it was determined, in August, that there was no proof of an injury at a definite time and place  
15 in the course of employment in April, was available to be investigated and obtained in the 14 days  
16 following claimant's filing of her claim on May 22, 1973. Indeed, the Legislature has declared that a  
17 self-insurer must give written notice of its denial of a claim, with reasons therefor, within seven days  
18 after notice of it (RCW 51.32.190(1)), thus indicating that seven days is deemed to be sufficient  
19 time for a self-insurer to gather all its information on whether or not an injury did occur. The whole  
20 controversy raised by this particular appeal would not have arisen if there had been an expeditious  
21 gathering of the available information immediately after May 22, 1973, so that the Department's  
22 determinative order could have been entered by June 5 rather than by August 28.

23           Secondly, as to the contention that the conclusion reached in our Order Denying Appeal is in  
24 violation of Constitutional provisions regarding due process of law, we reiterate that the issue is  
25 moot where the statutes' intent is followed and a determinative order as to allowance or rejection is  
26 entered within 14 days after receipt of the claim. In any event, this constitutional issue will  
27 presumably be argued in the employer's pending Court appeal, and the final decision on such an  
28 issue should properly come from the courts rather than from an administrative tribunal.

1 Finally, we must comment on the employer's challenge to the participation of the Board  
2 Chairman, Phillip T. Bork, in the decision on this appeal, because he was the Supervisor of  
3 Industrial Insurance in the Department at the time of issuance of the appealed orders and his name  
4 appears thereon, and this fact allegedly constitutes a violation of the "appearance of fairness"  
5 doctrine as set forth by the Supreme Court in Chrobuck v. Snohomish County, 78 Wn. 2d 858  
6 (1971).  
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10 We have carefully considered the Chrobuck case, as well as the prior decision of Smith v.  
11 Skagit County, 75 Wn. 2d 715 (1969), upon which the Chrobuck case relied and which first set forth  
12 the "appearance of fairness" principle. Both of these cases were concerned with public hearings  
13 before the Planning Commissions and Boards of County Commissioners of the respective counties,  
14 on applications by corporations for amendments to the counties' comprehensive plans and for  
15 rezoning under their zoning ordinances of certain land areas from rural and residential  
16 classifications to industrial classifications. Under the state's zoning laws, hearings are required on  
17 such matters, to afford the public and any interested parties the opportunity to present their views  
18 and factual evidence to the Planning Commissions in their fact-finding role, on the basis of which  
19 findings of fact and recommendations are made as to whether the planning and zoning changes  
20 should be granted. The majority of the Court in each of these cases stated that such public  
21 hearings must be fair and impartial, and that there must be fairness not only in substance, but the  
22 appearance of fairness as well. In both cases, the Court held that there was a lack of the essential  
23 appearance of fairness in the hearing processes -- because of the manner in which a closed  
24 session was held in the Smith case, and, in the Chrobuck case, because of participation in the  
25 Planning Commission's hearings and deliberations by three members thereof who had some prior  
26 business and social relationships which appeared to indicate a partiality toward the rezoning being  
27 requested. Because of the lack of apparent fairness, the Court held that due process was not  
28 accorded, and the rezoning in both cases was declared void.  
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39 The instant case before this Board is different in many ways from the zoning and planning  
40 proceedings involved in Chrobuck and Smith, and there is serious doubt that those cases are  
41 applicable here. For one thing, there was no fact-finding hearing necessary in this appeal since  
42 there are no disputed issues of fact, and our Order Denying Appeal was rendered solely on a  
43 question of law and statutory interpretation, based on review of the Department's file and without a  
44 hearing, which is a procedure specifically authorized by RCW 51.52.080.  
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1 Also, the Court in those decisions placed considerable emphasis on the wide public impact  
2 of, and the necessity for the highest public confidence in, planning and zoning decisions which  
3 govern the uses to which land may be put and thus are often controversial and affect the lives of  
4 many segments of our complex society; and because of these factors, the appearance of fairness  
5 in such matters, in the words of Justice Finley in the Chrobuck case, becomes of paramount  
6 importance." Query, whether the same sort of public impact is present in this case, involving a  
7 rather narrow legal issue of statutory interpretation, with no factual dispute?  
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11 It must be noted that the Court in the Chrobuck case, in commenting on the participation in  
12 the hearings by those Planning Commission members who apparently had some prior individual  
13 relationships and views, found no dishonorable or self-serving motives on the part of those  
14 individuals. But the Court concluded that the "unfortunate combination of these circumstances ...  
15 and the cumulative impact thereof ... cast an aura of improper influence, partiality, and prejudice  
16 over the proceedings thereby creating and erecting the appearance of unfairness condemned in  
17 Smith v. Skagit County, supra."  
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22 In the instant case, the employer specifically disclaims the inference of any self-serving or  
23 improper motives on Mr. Bork's part in participating in our decision on this appeal. Therefore, even  
24 if it is assumed that the above-quoted holding in Chrobuck applies to this case, the question comes  
25 down to whether or not the simple fact that Mr. Bork was Supervisor of Industrial Insurance for the  
26 Department at the time of issuance of the appealed orders, and his name appears thereon in  
27 printed-signature fashion, casts such an "aura of partiality or prejudice" that has participation in  
28 this appeal creates an appearance of unfairness. We are convinced that this is not the case.  
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33 Mr. Bork was not personally involved in issuance of any of the Department's decisions or  
34 orders in this particular claim, and the claim record bears out this fact.  
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36 In accordance with RCW 43.22.020 and 43.22.030, the Supervisor of the Industrial Insurance  
37 Division of the Department is charged with administering the entire workmen's compensation  
38 system, and he has the authority to employ and retain all necessary additional people to carry out  
39 this assignment. It is a matter of common knowledge that the Industrial Insurance Division is, as its  
40 name implies, a large insurance organization; and it has several hundred employees, including  
41 experts in premium rates, classifications, and actuarial matters, fiscal analysts, underwriters,  
42 employer account auditors and premium collection personnel, medical consultants and medical  
43 treatment authorizers, field auditors, claims investigators, physical and vocational rehabilitation  
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1 experts, self-insurance regulators, several dozen claims examiners and adjudicators, and the  
2 necessary supervisory staff over these varied functional operations. The claims examiners and  
3 adjudicators are making literally hundreds of decisions on active claims on an every-day basis, on a  
4 total volume of claims which approaches 150,000 annually. It would be folly to expect that the  
5 manager of such an organization, whether Mr. Bork or anyone else, would or could get involved in  
6 the myriad of every-day individual claims decisions. To do so would be to virtually abdicate the  
7 managerial and broad decision-making functions necessary to see that the Division and its  
8 component parts are properly administering the entire workmen's compensation system.  
9 Recognizing these realities, we believe that the imprint of Mr. Bork's name on these appealed  
10 orders, because he held the position of Supervisor of Industrial Insurance prior to becoming  
11 Chairman of this Board on August 1, 1973, does not by itself give rise to an appearance of  
12 unfairness within the principles of Chrobuck and Smith.

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19 Mr. Bork is quite conscious of the necessity to disqualify himself from participating in the  
20 decision on any appeal where it is apparent from the record that he had prior direct involvement  
21 with the case in his former position. He did in fact disqualify himself from a recent Board decision,  
22 because he was a principal witness called to testify on the Department's behalf at a hearing in the  
23 case held prior to the date he became Board Chairman. In re Herbert E. Thomas, Claim No. G-  
24 354780, Board Docket No. 42,061, Board Decision of 8-31-73. The final disposition of that case  
25 was that the Board issued its decision reciting that the two other Board members were split one-to-  
26 one on the legal issue raised by the appeal; and, since there was no Board majority for either  
27 sustaining or reversing the Department's order appealed from, said order must stand. The cases of  
28 Department of Ecology v. City of Kirkland, 8 Wn. App. 576 (1973), and State v. Beck, 56 Wn. 2d  
29 474 (1960), were cited in support of that result. We fail to see how such a result would benefit the  
30 employer her, inasmuch as there would be a one-to-one split between the two other Board  
31 members on the legal issue herein; the Department order of July 31, 1973, accordingly would  
32 stand; and the employer would still have to seek reversal on appeal and review in the courts.

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40 The employer's court appeal is now pending, in any event, under Snohomish County Cause  
41 No. 120320, and the "appearance of fairness" argument, which is grounded basically on  
42 constitutional due process provisions, will no doubt be argued and determined in that forum.  
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1 In light of all the foregoing, we adhere to the result reached in our Order Denying Appeal  
2 dated October 26, 1973; and the employer's Petition For Review filed on November 8, 1973, which  
3 we have treated as a request for reconsideration of that order, should be denied.  
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6 It is so ORDERED.

7 Dated this 30th day of November, 1973.  
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10 BOARD OF INDUSTRIAL INSURANCE APPEALS

11  
12 /s/ \_\_\_\_\_  
13 PHILLIP T. BORK Chairman  
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15 /s/ \_\_\_\_\_  
16 R. H. POWELL Member  
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18 **SPECIAL POSITION STATEMENT**

19 Inasmuch as I dissented from the Board's majority opinion in the Order denying Appeal dated  
20 October 26, 1973, on the merits of the legal issue raised by this appeal, I am now dissenting from  
21 the majority's adherence to that opinion.  
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24 However, as to the employer's "appearance of fairness" argument, I heartily concur with the  
25 entire discussion on that subject as expressed by the other two Board members, and I likewise do  
26 not believe that the Chairman, Mr. Bork, must disqualify himself from participation in this appeal  
27 simply because he was Supervisor of the Industrial Insurance Division of the Department at the  
28 time of issuance of the appealed orders and his printed-signature name appears thereon.  
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30 Dated this 30th day of November, 1973.  
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32 /s/ \_\_\_\_\_  
33 R. M. GILMORE Member  
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