Connor, Betty

SCOPE OF REVIEW

Time-loss compensation

The Board is without authority to consider the issues of fixity of a medical condition or extent of permanent disability in an employer's appeal of an order directing payment of time-loss compensation. **….*In re Betty Connor*, BIIA Dec., 91 0634 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 92-2-25991-5. But see *In re Douglas Palmer*, BIIA Dec., 14 13660 (2015).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BETTY A. CONNOR	)	**DOCKET NO. 91 0634**
	)	
CLAIM NO. T-198974	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Betty A. Connor, by
Walthew, Warner, Costello, Thompson & Eagan, P.S., per
Timothy S. McGarry and Robert H. Thompson, and Marilyn MacAdoo, Legal Assistant

Employer, Snoqualmie School District No. 410, by
Hall & Keehn, per
Gary D. Keehn and Janet L. Smith, and
Linda Bauer, Legal Assistant

Department of Labor and Industries, by the
Office of the Attorney General, per
Mary V. Wilson, Mitchell T. Harada, Andrew Carrington,
Jody A. Gross and Linda L. Williams, Assistants, and Gary W. McGuire, Paralegal

This is an appeal filed by the self-insured employer, Snoqualmie School District No. 410, on February 11, 1991 from an order of the Department of Labor and Industries dated January 8, 1991. The order affirmed a November 28, 1990 order directing the employer to pay time-loss compensation pending a determination of the claimant's ability to work. **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 29, 1992. The proposed order reversed the Department order dated January 8, 1991, and found that the condition related to the September 29, 1989 industrial injury was fixed, and that the claimant was employable, and directed that the claim be closed without further time loss compensation and without a permanent partial disability award.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed. Exhibit Nos. 4 and 5 were identified during the January 24, 1992 deposition of William R. Loscher, M.D. Since no party moved for their admission, they have not been considered in making this decision.

The claimant's petition challenges the determination in the Proposed Decision and Order that the claimant was employable, and challenges the jurisdiction of the Board to decide issues of the fixed

status of the medical condition and the extent of permanent disability. We affirm the Proposed Decision and Order, except for the determinations of the fixed status of the medical condition and extent of permanent disability. The Department must be given the opportunity to adjudicate these questions. The Proposed Decision and Order includes a detailed summary of the evidence so that only a brief description will be presented here.

Ms. Connor was 27 years old when the January 8, 1991 order was issued. Prior to 1985, she worked as a cashier and a food service aide. She then began work as a custodian for the Snoqualmie School District. She is right-handed, and has limited use of her left arm due to the effects of a 1978 motorcycle accident and resulting left shoulder fusion. The accident also left her with cognitive and memory difficulties. After experiencing right arm pain and numbness for some months, she injured her right arm at work on September 29, 1989. The injury occurred when she hit her right wrist on a washing machine while throwing clothes into it. Dr. William R. Loscher diagnosed de Quervain's disease, and on December 5, 1989 he performed a decompression surgery on her right wrist to restore function. Ms. Connor returned to custodial work in February 1990. She stopped work in May 1990 due to right arm pain. Dr. Loscher last saw the claimant on December 9, 1991 at which time Ms. Connor complained of decreased sensation over the right median nerve and tenderness over the lateral epicondyle. Dr. Loscher described her condition as overuse syndrome and felt that it would improve with less stress. The doctor did not believe that she could perform custodial work. Thomas C. Wilder, Jr., M.D. and Mark D. Holmes, M.D. performed a joint examination on June 4, 1990 and diagnosed overuse syndrome, mild carpal tunnel syndrome, and a history of a bruised wrist. They concluded that the claimant no longer needed treatment, had minimal if any disability, and could return to work as a custodian. In a subsequent examination on September 10, 1991, Dr. Holmes found no change, but noted that the claimant should not lift over 50 lbs. The employer presented vocational counselor, Maureen Larson, who met with Ms. Connor on September 27, 1991. She concluded that the claimant could perform custodial work with a 50 lbs. lifting restriction. Ms. Larson also said that Ms. Connor could do lighter jobs such as food service work which she had previously done, and which would not require lifting over 20 lbs.

The exact language of the November 28, 1990 order, which was affirmed by the order here on appeal, is as follows:

> WHEREAS, the attending physician, Dr. W.R. Loscher, cited physical restrictions due to the pre-existing left upper extremity condition in combination with the effects of the right wrist industrial injury, and

> WHEREAS, the combined physical restrictions preclude Betty Annette Connor from returning to her job on a full duty basis.
>
> IT IS HEREBY ORDERED School District #410 King County reinstate time loss and continue to pay until a determination is made regarding Betty Annette Connor's ability to work on a gainful basis, pursuant to RCW 51.32.090 and RCW 51.32.095.

The order specifically orders payment of time-loss compensation which is a benefit that may be received during periods of temporary total disability. The employer's appeal asked that the claim be closed with time-loss as paid. Thus, the appeal clearly made Ms. Connor's eligibility for time-loss compensation an issue to be litigated before the Board.

RCW 51.32.090(3) concerns temporary total disability and states, "As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease." A worker may also receive temporary total disability benefits during vocational rehabilitation, if rehabilitation is found "necessary and likely to enable the injured worker to become employable at gainful employment . . . ." RCW 51.32.095(1). Here, Dr. Wilder and Dr. Holmes believed that the claimant had minimal disability, and was employable as a custodian. Dr. Holmes imposed only a 50 lbs lifting limitation. While Dr. Loscher stated that Ms. Connor should not go back to her custodial duties, he was not asked whether she was able to engage in any other gainful employment. The only vocational expert to testify described lighter jobs that Ms. Connor could do besides the medium janitorial or custodial work. The record shows that Ms. Connor has continued to complain of symptoms with repeated heavy use of her right arm. This is understandable since she has limited use of her left arm. Nonetheless, she is a young worker with several years' experience in the food industry which includes lighter jobs. Under Bonko v. Dep't of Labor & Indus., 2 Wn. App. 22, 25 (1970), a period of potential temporary total disability must be analyzed under the same standard as permanent total disability, since the two types of disability only differ in duration and not in character.

The clear weight of the evidence in the record is that Ms. Connor was able to perform at least lighter, gainful employment on a regular basis from May 1990 through the date of the order on appeal.

Since she was able to engage in gainful employment, she was not temporarily totally disabled from May 1990 through January 8, 1991, nor was she entitled to benefits on the basis of vocational training as vocational rehabilitation has not been necessary under the criteria of RCW 51.32.095. Proposed Finding of Fact No. 2 addressed the claimant's employability from January 18, 1990 through the order on appeal. However, the record shows that the claimant worked at her custodial job until May 1990 (exact date not determined). She remained able to engage in gainful employment thereafter, until the date of the order here on appeal. Thus, Finding of Fact No. 2 will be revised accordingly.

When industrially related conditions are fixed, generally they are also ready for permanent disability determinations. The Department has not yet issued an order which addressed the fixity of the claimant's injury-related condition. It has only addressed the question of her employability. We must agree with the claimant that in this case the issues of fixity of the medical condition or extent of permanent disability are not before the Board. Clearly, no determinations of these questions have been made by the Department. The courts have long restricted the Board's jurisdiction to an appellate review of matters first determined by the Department. In Brakus v. Dep't of Labor & Indus., 48 Wn.2d 218, 223 (1956), the Supreme Court stated that the Board could not enlarge the scope of the proceedings on its own motion. The Court of Appeals has also stated that appealing parties cannot enlarge the Board's jurisdiction by statements within notices of appeal. Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977, 985 (1970). In an order declining an interlocutory review of our hearing judge's declaration of the issues in this appeal, an assistant chief industrial appeals judge referred to our recent decision of In re Patsy B. Williams-Anderson, Dckt. No. 90 1156 (August 11, 1991). In that appeal, the Board determined that it did have jurisdiction to determine permanent disability when an employer appealed from a Department order that set aside an order closing the claim without a permanent disability award and reopened it for further treatment. That situation differs markedly from this case, since the Department has not yet issued an order determining fixity of condition, closing the claim, or determining the extent of permanent disability, if any. As recognized in Lenk and Brakus, the Department must be allowed to initially adjudicate a claim. Therefore, Ms. Connor's claim must be

remanded to the Department to consider whether the industrially related right arm condition is fixed and, if so, whether she has a permanent disability.

In conclusion, we agree with the disposition made by the Proposed Decision and Order, except that no determinations can here be made regarding the fixed status of the claimant's right arm condition or the extent of her permanent disability, if any. Proposed Finding of Fact No. 1 and Proposed Conclusion of Law No. 1 are hereby adopted as this Board's final finding and conclusion. In addition, the Board enters the following finding and conclusions:

FINDINGS OF FACT

2. During the period after leaving her custodial work in May 1990 through January 8, 1991, Ms. Connor was able to engage in gainful employment regardless of the effects of her September 29, 1989 industrial injury.

CONCLUSIONS OF LAW

2. During the period from May 1990 through January 8, 1991, claimant, Betty A. Connor, was not a temporarily totally disabled worker within the meaning of RCW 51.32.090, nor was she in need of vocational rehabilitation services within the contemplation of RCW 51.32.095.

3. The order of the Department of Labor and Industries dated January 8, 1991, which affirmed a November 28, 1990 order that directed the self-insured employer to reinstate and continue to pay time-loss compensation pending a determination of the claimant's ability to work on a gainful basis pursuant to RCW 51.32.090 and RCW 51.32.095, is incorrect, and is hereby reversed. The claim is remanded to the Department to issue an order denying time-loss compensation for the period from cessation of claimant's work as a custodian in May 1990 through January 8, 1991, and to determine the claimant's eligibility for benefits under the Industrial Insurance Act after January 8, 1991, including whether or not further medical treatment is needed for the effects of the September 29, 1989 industrial injury, and the extent of permanent disability, if any, if the condition related to the industrial injury is found to be fixed, and to take such further action as indicated.

It is so **ORDERED**.

Dated this 2nd day of October, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____

S. FREDERICK FELLER Chairperson

/s/_____

PHILLIP T. BORK Member