Gleason, Traci

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Cervical conditions

The system of permanent impairment ratings contemplates a best fit analysis, thus a finding of neck rigidity is necessary to support a rating equal to category 2, cervical impairments, in the absence of the other physical findings listed in WAC 296-20-240(2). **….*In re Traci Gleason*, BIIA Dec., 92 5936 (1994)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: TRACI L. GLEASON	**)**	**DOCKET NO. 92 5936**
	)	
CLAIM NO. N-406697	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Traci L. Gleason, by
Aaby, Putnam, Albo & Causey, per
Joseph A. Albo, Attorney

Employer, Financial Maintenance Corporation, by
None

The Department of Labor and Industries, by
The Office of the Attorney General, per
James S. Kallmer, Assistant

This is an appeal filed by the claimant, Traci L. Gleason, on December 7, 1992 from an order of the Department of Labor and Industries dated November 13, 1992 which closed the claim with time-loss compensation as paid to April 14, 1992 without further award for time-loss compensation or permanent partial disability. **AFFIRMED**.

PROCEDURAL AND EVIDENTIARY MATTERS

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 August 9, 1993 in which the order of the Department dated November 13, 1992 was affirmed.

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.

DECISION

Ms. Gleason did not challenge our industrial appeals judge's determination that the claimant was not temporarily and totally disabled during the period from April 15, 1992 through November 13, 1992. Even so, we reviewed the evidence in the record on this issue and are convinced that our industrial appeals judge made the right decision.

The only issue Ms. Gleason raised in her Petition For Review is whether Category 2 of WAC 296-20-240 for permanent cervical and cervico-dorsal impairments "absolutely" requires proof of neck rigidity substantiated by x-ray findings of loss of anterior curve. She argues that it does not, and contends that there is compensable disability if there is any impairment evidenced by objective

findings. Specifically, the claimant charges that "rote" adherence to specific wording in the Washington Administrative Code (WAC) defeats the purpose of the Industrial Insurance Act, and violates the mandated liberal construction provision. Ms. Gleason requests that the Board give a "definitive ruling" regarding its interpretation/construction of the WAC 296-20-240(2) requirements for cervical impairment.

We are not persuaded that a preponderance of the evidence in this appeal demonstrates that the claimant sustained a compensable permanent partial disability for cervical impairment as a result of the September 10, 1991 industrial injury. We granted review, however, to provide a detailed discussion of our reasoning and our interpretation of the pertinent WAC provisions.

The facts of this case are simple and will only be reiterated here as necessary to understand our decision. Ms. Gleason sustained a muscle and ligamentous strain injury to her cervical-dorsal spine on September 10, 1991, while in the course of her employment with Financial Maintenance Corporation. The injury occurred when she was swinging a 50-60 pound bag of trash into a dumpster. As a result of the injury, she experienced immediate pulling and burning sensations in her neck and across her shoulders, and heard a "crunching" type of noise.

On September 10, 1991, Ms. Gleason sought medical treatment at CHEC Medical Center for her industrially related condition. Over the next several months, she received conservative medical treatment which included: anti-inflammatories, muscle relaxants, pain and anti-depressant medications, and physical therapy.

On December 27, 1991, Ms. Gleason was referred to "Back in Action" for an intensive eight-week back rehabilitation program. The claimant testified that she did not feel that the treatment she received helped to relieve her symptoms very much, but that her condition had plateaued by the end of the "Back in Action" program.

Ms. Gleason did not work during the period from April 14, 1992 through the end of October 1992. She testified that she did not feel that she was capable of working and understood that her treating physician had not released her for work during that period. In November 1992, Ms. Gleason returned to work as a cook at a cafe in Renton. She continued to work in this capacity until January 1993 when she left the job because she felt it was too physically demanding. Subsequently, the claimant started working as a cook at the International House of Pancakes, in what she described as a less physically demanding job.

Only two medical witnesses testified in this matter, neither of whom treated the claimant for her cervical condition. Dr. Roy D. Broman, a certified family practitioner and emergency room physician, testified on behalf of the claimant. Dr. Paul F. Williams, a certified orthopedic surgeon, testified on behalf of the Department.

Dr. Broman examined Ms. Gleason on November 2, 1992. He noted that the attitude of the claimant's head and neck appeared normal. In fact, Dr. Broman's examination of the claimant's cervical spine and upper extremities was normal except for the following findings: tenderness and spasm of the right mid-dorsal and neck muscles and left dorsal-trapezius muscles; some spasm of the interscapular muscles and tightness of the posterior axillary wall muscles; point tenderness at the insertion of the levator scapulae muscles bilaterally; and limitations in the claimant's cervical range of motion for flexion, extension, rotation, and side bending. Based on Ms. Gleason's objective findings and subjective complaints, and the clinical consistency of all these findings, Dr. Broman rated the impairment caused by the industrial injury at Category 2, WAC 296-20-240, for permanent cervical impairment. In his opinion, the claimant was capable of reasonably continuous gainful employment at that time in a light or sedentary capacity.

Dr. Williams examined Ms. Gleason on April 23, 1992. His examination did not reveal any muscle spasm or significant limitations in the claimant's cervical range of motion. In fact, he did not detect any findings on examination to objectify the claimant's continuing pain complaints. Dr. Williams reviewed the claimant's medical history and noted that Dr. Monlux, who treated the claimant for 5-6 months beginning in December 1991, did not record any findings of muscle spasm either. Dr. Williams rated the claimant's industrially related cervical condition at Category 1, WAC 296-20-240.

Neither Dr. Broman nor Dr. Williams obtained x-rays at the time of their respective examinations; however, they reviewed x-rays and an MRI of Ms. Gleason's cervical spine taken shortly after the industrial injury. The cervical x-rays and MRI were normal, except that the x-rays evidenced a congenital fusion between C2 and C3, and the MRI revealed an abnormal rightward signal intensity by the tracheae at T1-2. Neither of these abnormalities were industrially related, however.

The category system of rating impairment for unspecified disabilities was adopted pursuant to a legislative grant of authority, a 1971 amendment to RCW 51.32.080(2). That amendment directed the Department to classify unspecified permanent partial disabilities and determine the proportion they

bear to total bodily impairment. The express purpose of the amendment was to reduce litigation and establish more certainty and uniformity in fixing awards for unspecified disabilities.

In Vliet v. Dep't of Labor & Indus., 30 Wn. App. 709, 713 (1981), the Washington Court of Appeals upheld the validity of the category system of rating unspecified impairments as being reasonably consistent with the enabling legislation. The Court of Appeals specifically noted that:

> It is implicit in the language of the amended statute that the legislature contemplated the loss of a certain degree of precision in rating workers' impairments in order to attain these administrative goals. We are convinced that the regulations enacted by the Department, which base disability awards on the presence of specific physical findings and eliminate reliance on physicians' subjective opinions, are entirely consistent with these goals and must be upheld.

Under the category system of rating impairment for unspecified permanent partial disabilities, physicians are directed to "select the one category which most accurately indicates the overall degree of permanent impairment." If it appears that more than one category may be applicable, the physician must select "the category which most accurately reflects the overall impairment." WAC 296-20-220(1)(g). Impairment is defined as the "loss of physical . . . function," and must be evidenced by objective clinical findings. WAC 296-20-220(1)(c). Under WAC 296-20-230(1)(a), such objective clinical findings, including muscle spasm or involuntary guarding, are to be considered "only insofar as productive of cervical or cervico-dorsal impairment."

In this appeal, we are faced with choosing between the disability ratings of two forensic examiners. Based on a careful review of the record, we are convinced that the opinion of Dr. Williams preponderates. We believe that his rating of Category 1, WAC 296-20-240, most accurately reflects the overall degree of the claimant's permanent cervical impairment.

Under WAC 296-20-240(1), subjective complaints are generally present, but there are "no objective clinical findings" of impairment. On examination, Dr. Williams was not able to detect any muscle spasm or other significant objective findings as a causal result of the industrial injury. We also note that Dr. Williams' findings, or lack thereof, were consistent with the claimant's medical history since the injury.

Conversely, Dr. Broman rated the claimant's permanent partial disability at Category 2 for cervico-dorsal impairment. WAC 296-20-240(2) defines cervico-dorsal impairment as follows:

> Mild cervico-dorsal impairment, with objective clinical findings of such impairment with neck rigidity substantiated by x-ray findings of loss of anterior curve, without significant objective neurological findings.
>
> This and subsequent categories include the presence or absence of pain locally and/or radiating into an extremity or extremities. This and subsequent categories also include the presence or absence of reflex and/or sensory losses. This and subsequent categories also include objectively demonstrable herniation of a cervical intervertebral disc with or without discectomy and/or fusion, if present.

Under WAC 296-20-680(1), a Category 2 rating for cervical impairment is equal to 10% of total bodily impairment.

In this appeal, we are simply not convinced that Dr. Broman's one-time findings of some muscle spasm and associated range of motion deficits are indicative of permanent impairment. This is especially true given the lack of any such findings by prior examining and treating physicians. Further, Dr. Broman's findings, by themselves, do not establish the existence of a condition that is equivalent to 10% of total bodily impairment, a significant disability.

The claimant challenges our industrial appeals judge's narrow reading of WAC 296-20-240. She argues that the rule should not be construed to absolutely require a finding of "neck rigidity substantiated by x-ray findings of loss of anterior curve." We concede that the category rating system contemplates a "best fit analysis." In our view, we are not compelled to place an injured worker in a lower category simply because of the absence of one of the elements contained in the higher category.

The lack of a finding of "neck rigidity . . ." is, however, a critical or determinative factor in this appeal. We are convinced that such a finding is necessary to support a Category 2 rating <u>in the absence of the other physical findings listed in WAC 296-20-240(2) which are productive of mild cervical impairment</u>. As noted above, one-time findings of some muscle spasm and some range of motion limitations do not necessarily evidence permanent impairment and are not sufficient for a Category 2 rating for cervical impairment.

We recognize that the category system does not provide for compensation for some injured workers with objectively measurable, but slight, loss of cervical function or cervical impairment. Under WAC 296-20-240 and WAC 296-20-680(1) an injured worker is not entitled to monetary compensation for permanent partial disability unless his or her cervical impairment is evidenced by the requisite physical findings and equals or exceeds 10% of total bodily impairment. While such a result is

arguably unfair to some individuals, our Legislature and the courts have determined that the category system is preferable to the uncertainty, lack of uniformity, and subjectivity that preceded its adoption.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Department order dated November 13, 1992, which closed the claim with time-loss compensation as paid to April 14, 1992 without further award for time-loss compensation or permanent partial disability, is correct and should be affirmed.

FINDINGS OF FACT

1. On September 13, 1991, Traci L. Gleason, claimant, filed an application for benefits with the Department of Labor and Industries alleging that she sustained an injury on September 10, 1991, during the course of her employment with Financial Management Corp. The claim was subsequently allowed and benefits were paid to the claimant. On November 13, 1992, the Department entered an order closing the claim with time-loss compensation as paid to April 14, 1992 and without further award for time-loss compensation or permanent partial disability.

   On December 7, 1992, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On December 30, 1992, the Board entered an order granting the appeal, assigning Docket No. 92 5936 and directing that hearings be held on the issues raised by the appeal.

2. On September 10, 1991, the claimant, Traci L. Gleason, was working as a janitor for Financial Maintenance Corp. On that day, she was attempting to throw a 50 to 60 pound trash bag over her head into a trash dumpster when she felt an immediate pull and pain in her shoulder, upper back and neck.

3. As a direct and proximate result of the September 10, 1991 industrial injury, the claimant sustained a cervical and thoracic strain.

4. The claimant has a congenital fusion at C2-C3, which pre-existed and was not causally related to the September 10, 1991 industrial injury.

5. As of November 13, 1992, the claimant's condition, causally related to the industrial injury of September 10, 1991, was fixed and stable and not in need of further medical treatment.

6. As of November 13, 1992, the claimant's permanent disability causally related to the September 10, 1991 industrial injury was best described by Category 1 of WAC 296-20-240.

7. The claimant is a 29-year-old high school graduate who has worked in commercial foods as a cook, on an assembly line producing car stereos, as a file clerk and as a janitor.

8. Between April 15, 1992 and October 25, 1992, the claimant was not precluded by the residuals of the industrial injury, given her age, education, and work experience, from engaging in gainful employment on a reasonably continuous basis.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. Between April 15, 1992 and October 25, 1992, the claimant was not temporarily and totally disabled within the meaning of RCW 51.32.090.

3. As of November 13, 1992, the claimant did not sustain a compensable permanent partial disability within the meaning of RCW 51.32.080 as a result of the September 10, 1991 industrial injury.

4. The order of the Department of Labor and Industries dated November 13, 1992, which closed this claim with time-loss compensation as paid to April 14, 1992 and without further award for time-loss compensation or permanent partial disability is correct and is affirmed.

It is so ORDERED.

Dated this 7th day of January, 1994.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
ROBERT L. McCALLISTER Member