Proszek, Nancy

EVIDENCE

Learned treatise

Although an expert witness could testify about his conclusions based on a NIOSH report, he could not read the text of the report into the record as that would subvert the purposes of the hearsay rule, as well as the learned treatise exception. *Citing* ER 703. ***….In re Nancy Proszek*, BIIA Dec., 92 6049 (1995)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 95-2-0188-8.]

EXPERT TESTIMONY

Conclusions

An expert witness could testify about his conclusions based on a NIOSH report and be questioned regarding his reliance on the report. *Citing* ER 703. ***….In re Nancy Proszek*, BIIA Dec., 92 6049 (1995)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 95-2-0188-8.]

INJURY (RCW 51.08.100)

Toxic Encephalopathy

OCCUPATIONAL DISEASE (RCW 51.08.140)

Toxic Encephalopathy

A worker presented no objective evidence of exposure to carbon monoxide or insufficient oxygen during a specific flight when she felt hungry and disoriented and after which the worker felt mentally slow, easily frustrated, and afflicted with memory problems. As a result, although the medical witness diagnosed hypoxic encephalopathy due to oxygen deprivation or toxic encephalopathy due to carbon monoxide exposure during specific flights, the Department appropriately rejected the claim for industrial injury. ***….In re Nancy Proszek*, BIIA Dec., 92 6049 (1995)** [*Editor's Note: Intalco Aluminum v. Department of Labor & Indus*., 66 Wn. App. 644 (1992) distinguished because there the facts demonstrated multiple possible causes of neurological damage actually present in the workplace. The worker offered no objective evidence of a damaging incident or damaging exposure. The Board's decision was appealed to superior court under King County Cause No. 95-2-0188-8.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: NANCY LYNN PROSZEK	**)**	**DOCKET NOS. 92 6049 & 92 6133**
	)	
CLAIM NO. T-446208	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Nancy Lynn Proszek, by
Delay, Curran, Thompson & Pontarolo, P.S., by
Robert H. Thompson and Michael J. Walker

Self-Insured Employer, Alaska Airlines, Inc., by
Williams, Kastner & Gibbs, per
Richard M. Slagle and Joan L. G. Morgan

Employer's Lay Representative,
Epic Insurance Services, by
Cheryl Klahn, Claims Examiner

These appeals were filed by claimant, Nancy Lynn Proszek, and consolidated for all purposes before this Board. The appeal in Docket 92 6049 was filed on December 14, 1992, from an order of the Department of Labor and Industries dated October 15, 1992, which affirmed an order dated July 7, 1992. That order directed the self-insured employer to reduce any future time-loss compensation benefits on this claim by the $3,750.00 cost of medical examinations or evaluations which the worker refused or failed to attend on March 15, 1991 and August 23, 1991, without good cause. **REVERSED AND REMANDED.**

Docket 92 6133 is an appeal filed by the claimant on December 14, 1992, from an order of the Department of Labor and Industries dated October 16, 1992, which affirmed an order dated July 8, 1992. That order rejected the claim because the claimant's condition is neither the result of the exposure alleged nor an occupational disease as contemplated by RCW 51.08.140. **AFFIRMED.**

EVIDENTIARY AND PROCEDURAL MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the self-insured employer to a Proposed Decision and Order issued on July 24, 1994, in which the October 15, 1992 order of the Department was reversed and the October 16, 1992 order of the Department was affirmed.

On September 24, 1993, an order on summary judgment was issued concerning Docket 92 6049. The order on summary judgment disposed of the issue of whether the Department had the jurisdiction to issue an order concerning the claimant's failure to attend a medical examination dated

March 15, 1991. The Order Granting Summary Judgment Solely with Respect to March 15, 1991 Medical Examination is correct and is incorporated in this decision by this reference. The Summary Judgment order did not resolve the issue of the claimant's failure to attend the medical examination scheduled for August 23, 1991. That issue is addressed in the body of this order.

As noted in the Proposed Decision and Order, Ms. Proszek's appeals were consolidated for hearing with those of several other Alaska Airlines, Inc. (Alaska Airlines) flight attendants whose claims involved similar events and identical witnesses.[1] In each of those cases, the self-insured employer offered into evidence a complete and an edited copy of a report compiled by the National Institute for Occupational Safety and Health (NIOSH) and completed in January 1993. Exhibits 10 and 34. In her Petition for Review, the claimant asks that the Board strike from the record "all evidence using NIOSH as a foundation."

The NIOSH report consists of a summary of the results of various tests performed by NIOSH on flights of Alaska Airlines MD-80 aircraft in the spring of 1990 at the request of the Association of Flight Attendants. The report also includes conclusions drawn by NIOSH employees from the results of the testing. The self-insured employer did not present testimony from any of the individuals who performed the testing or compiled the report. Instead, the self-insured employer attempted to offer the report in its entirety as a public record through the testimony of Dr. Philip Edelman, a specialist in occupational medicine, pharmacology and toxicology.

For a document to be admissible into evidence under RCW 5.55.040, the public records exception to the hearsay rule, the document must be factual in nature, as opposed to conclusory, and must have a statutory basis for compilation. See, e.g., State v. Monson, 113 Wn.2d 833(1989); Steel v. Johnson, 9 Wn.2d 347 (1941). Our industrial appeals judge properly determined that the NIOSH report did not satisfy the requirements of the public records exception to the hearsay rule.

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[1] The matters originally scheduled to be tried together were In re Janice Sidwell, Claim T-367264, Dckts. 92 6042 and 92 6043; and Claim T-367280, Dckts. 92 6044 and 93 0043; In re Matthew Reppert, Claim T-446210, Dckts. 92 4440, 92 4441, and 92 4442; In re Carmen Allum, Claim T-521795, Dckts. 92 6134 and 92 6135; Claim T-592743, Dckt. No. 93 2845; and Claim T-713404, Dckt. 93 2846; In re Susan Ishimitsu (Wise), Claim T-445066, Dckts. 92 6045 and 92 6046; and Claim T-592732, Dckts. 93 0148, 93 0149, and 93 0233; In re Christine Lavandero, Claim T-446062, Dckts. 92 6047 and 92 6048; and In re Nancy Proszek, Claim T-446208, Dckts. 92 6049 and 92 6133.

Of these claims, Sidwell and Reppert were resolved in their entirety prior to hearing. The remaining cases, Proszek, Allum, Ishimitsu (Wise), and Lavandero were tried together, although certain docket numbers were resolved either partially or wholly by way of summary judgment.

On her own initiative, the industrial appeals judge considered the NIOSH report as a learned treatise under ER 803(a)(18) and permitted portions of the report to be included in the record as selected by the self-insured employer (11/15/93 Tr. at 48-50) and the claimants (1/21/94 Tr. at 35-53).

Evidence Rule 803(a)(18) enumerates specific exceptions to the hearsay rule, including:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

The NIOSH report is not a learned treatise as contemplated in ER 803. It is published only in the sense that it was prepared by a public agency and is, thus, a public document. It is not a generally recognized statement of historical, scientific, or artistic fact or subject matter, but a record of specific testing performed directly in response to the complaints of Alaska Airlines flight attendants.

The Washington Supreme Court discussed the learned treatise exception to the hearsay rule in Nordstrom v. White Metal, 75 Wn.2d 629 (1969). Citing 5 J. Wigmore, Evidence (3rd ed., 1940), the court noted at page 632 that the purpose of the hearsay rule is to "exclude untrustworthy evidence which may prejudice a litigant's cause or defense. It is the inability to cross-examine the author of a publication when its contents are offered as proof of a fact in issue, which renders the publication objectionable." The learned treatise exception to the hearsay rule applies only where there is no possibility that reasonable minds could disagree about the trustworthiness of the document and no purpose is to be served by cross-examination of the authors. The NIOSH report directly addresses facts in issue in these appeals. The aggrieved workers take issue with the results of the study. They had no opportunity to cross-examine the authors of the study on their qualifications, methodology or potential bias. Under these circumstances, including the NIOSH report in the record of proceedings, subverts the purposes of the rule and the exception alike. Those portions of the NIOSH report read directly into the record by the parties are stricken as follows: November 15, 1993 Tr. at 48, line 8, through page 50, line 25; January 21, 1994 Tr. at 35, line 3, through page 53, line 25.

Dr. Philip Edelman testified that he relied upon the findings and conclusions in the NIOSH report in forming his own opinions about any causal relationship between the conditions on Alaska Airlines MD-80 aircraft and the physical complaints which form the basis of the consolidated appeals. The claimants repeatedly objected to his testimony on the basis that it was founded upon the

inadmissible NIOSH report. The industrial appeals judge properly overruled the objections. In forming an opinion on a matter in controversy an expert witness may rely upon facts and data reasonably relied upon by experts in his field even though those facts and data may not be otherwise admissible into evidence. ER 703. Inquiry into the basis for an expert witness's testimony is permissible under ER 705. The claimant laid a foundation for Dr. Edelman's reliance on the NIOSH report in the record of proceedings of November 15, 1993 at pages 38 through 41. While the NIOSH report may not be included in the record as substantive evidence, references to the report in Dr. Edelman's testimony are admissible for the limited purpose of establishing the basis for his expert opinion.

The Board has reviewed the remaining evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

DECISION

The facts necessary to the resolution of these appeals are thoroughly summarized in the Proposed Decision and Order. We will set forth in the course of our decision only those facts necessary to illustrate our reasoning.

Alaska Airlines petitions for review of the hearing judge's determination that Ms. Proszek had good cause for her failure to appear at a scheduled medical examination on August 23, 1991. We conclude that Ms. Proszek did not have good cause for her failure to appear for the examination.

By way of background, we note that on June 28, 1991, the claimant participated in an Order on Agreement of Parties before this Board in Dockets 91 1247 and 91 1947, in which she agreed to submit to a medical examination at the expense of the self-insured employer and to provide a written release of all medical records. Exhibit 4. On August 1, 1991, Ms. Proszek received written notice that examinations had been scheduled for August 21 and August 23, 1991. She called Alaska Airlines claim services company and requested that the dates be rescheduled because she planned to travel with her family during that week. The claim service company agreed to reschedule the examination to September on the condition that Ms. Proszek immediately sign the release of medical records which she had not executed after the entry of the June Order on Agreement of Parties. Ms. Proszek verbally agreed to the conditions for rescheduling the examination. Shortly thereafter, she changed her mind because she objected to providing medical records to the self-insured employer. She did not notify the claim service company that she had changed her mind. 11/2/93 Tr. at 41, lines 1-13, and at 73, lines 11 through 74, line 2. When the claim service company did not receive the executed releases, it sent Ms. Proszek another letter, dated August 14, 1991, informing her that the scheduled examinations

would take place at the original date and time. Exhibit 4. Ms. Proszek never contacted the employer's representative again and did not appear for the examination. As a consequence, Alaska Airlines incurred a no-show fee associated with the missed appointment.

The hearing judge read the record to show that Ms. Proszek unconditionally thought she had obtained Alaska Airlines', agreement to reschedule. In fact, the record clearly reflects that the agreement was conditioned on Ms. Proszek's compliance with the Order on Agreement of Parties and release of medical records. Ms. Proszek intentionally did not send the release. She understood there was no rescheduling absent the release. Ms. Proszek failed to establish good cause for not attending the examination.

The record does not reveal the exact cost to the employer of the examination cancelled on August 21, 1991. The order on appeal recites the figure $3,750.00 as the cost cancelling the examinations of March 15, 1991 and August 21, 1991. In light of the summary judgment order entered earlier and our present ruling, this matter should be remanded to the Department with direction to establish the cost of the cancelled August 21, 1991 examination and enter a further order consistent with the facts and our ruling in this appeal.

Ms. Proszek seeks review of the determination that she did not suffer an industrial injury or an occupational disease in the course of her employment with Alaska Airlines. As the appealing party, Ms. Proszek has the burden of establishing the existence of an industrial injury or the development of an occupational disease which would account for her alleged physical condition.

RCW 51.08.100 defines an industrial injury as:

> A sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

By definition, an industrial injury is three things: 1) a sudden tangible happening of a traumatic nature, producing a prompt result; 2) occurring from without; and 3) such physical conditions as result therefrom. Thus, the definition includes any physical condition proximately caused by the happening.

The term "occupational disease" is defined by RCW 51.08.140 as:

> . . . such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

Under either theory, Ms. Proszek must establish some tangible and provable relationship between the injury or the disease suffered and her employment at Alaska Airlines. Favor v. Department of Labor &

Indus., 53 Wn.2d 698, 703 (1959). In reviewing the record of this appeal, we find that Ms. Proszek has not met this burden. The preponderance of the evidence does not establish that she even has an objectively verifiable medical condition, much less that any such condition was related to her employment under any theory of compensability.

On September 23, 1990, at about 7:45 p.m., as she worked as a flight attendant on a flight from Seattle, Washington to Anchorage, Alaska on a Boeing 737 aircraft, Ms. Proszek suddenly felt hungry and disoriented. She used oxygen in an attempt to restore herself, but was only partially successful. She performed her duties on the flight, but felt slow and confused. She testified the other flight attendant also appeared unwell. No passengers seemed to be affected. Her condition persisted the next morning, but she had an uneventful flight home. The next day she consulted Dr. Richard Jobe.

Ms. Proszek claims that since September 23, 1990, she has been mentally slow, easily frustrated, and afflicted with memory problems. She has successfully continued working at her job and lost only a few days due to this incident. She flies without difficulty as a passenger. Ms. Proszek's medical history before September 1993 includes migraine headaches.

Ms. Proszek attributed her difficulties to a lack of oxygen in the cabin caused by the plane flying at 37,000 feet above sea level with a resulting cabin air pressure level equivalent to 8,000 feet, roughly the same altitude as Mexico City. In fact, the pilot of the flight in question, Willard Johnson, testified that the plane was flying at only 33,000 feet. At that elevation, the cabin is pressurized to 6,000 feet. Boeing 737 aircraft do not use recirculated air.

Dr. Jobe is an internist at the Polyclinic in Seattle. Fewer than 5 percent of his cases involve industrial medicine or toxic exposures. He has had major concerns about airline air quality since reading a New York Times article about innovations in jet engine design which result in less air being recirculated into the cabins of aircraft. He has been consulted by 35 or 40 flight attendants with complaints similar to those of Ms. Proszek. In each case, he has concluded that the flight attendant suffers from toxic encephalopathy due to carbon monoxide exposure or hypoxic encephalopathy due to deprivation of oxygen during specific flights. In other words, he testifies to an industrial injury setting rather than an occupational disease setting.

Dr. Jobe was unaware of any potential source of carbon monoxide in a Boeing 737 aircraft. He was unaware that 737s do not use recirculated air. He cited elevation as the possible culprit if hypoxia were the cause of Ms. Proszek's physical complaints. However, Dr. Jobe assumed cabin

pressures were 8,000 feet or higher. He was unaware of any literature which associates elevations of 8,000 feet with danger of hypoxia. He was aware of a single, anecdotal incident on a skiing trip. He offered no opinion on the dangers of hypoxia at 6,000 feet.

In Ms. Proszek's case, Dr. Jobe made his diagnosis based on her subjective complaints of loss of mental acuity. His only specific finding was that she had difficulty counting by sevens backwards from 100 (serial sevens). On two occasions, he asked her to read and summarize paragraphs from magazines and she had difficulty doing so. Over all, he believed her condition had improved since September 1990.

Dr. Jobe ordered an EEG, which was normal, and an MRI of Ms. Proszek's brain. Dr. Jobe characterized the MRI as showing "nothing specific." The MRI was performed by Dr. Gary Stimac, a neuro-radiologist. Dr. Stimac testified the MRI findings were extremely subtle, but compatible with diffuse brain injury. On the other hand, he could not say the findings did not exist before September 23, 1990.

Dr. Stimac specifically noted:

> (1) Two definite focal white matter lesions in her left frontal lobe and the left lateral callosal fibers. Such lesions can be caused by a variety of disease processes, such as multiple sclerosis, collagen and vascular disease, migraine headache syndrome, head trauma, and toxic brain injury.
>
> (2) Focal areas of increased intensity in the posterior aspect of the globus pallidus bilaterally. This finding is within the range of normal.
>
> (3) Subtle increased intensity which may be present in the deep white matter near the posterior horns of the lateral ventricles, which could be due to increased water content. The white matter is affected by carbon monoxide, as well as other inflammatory diseases, including toxic brain injury.

Dr. Stimac emphasized that the significance of the MRI findings hinged on support from and evaluation of clinical findings. He did not describe what he felt would be significant clinical findings, but he generally agreed that Dr. Jobe's theories of carbon monoxide exposure or hypoxia were consistent with the MRI results.

Ms. Proszek presented no objective evidence that on September 23, 1990, in the course of her employment, she actually was exposed to carbon monoxide or deprived of adequate oxygen, either on an accidental basis (industrial injury) or as a result of conditions peculiar to her specific employment (occupational disease). She argues that the holding in Intalco Aluminum v. Department of Labor &

Indus., 66 Wn. App. 644 (1992), relieves her of the requirement of establishing the exact mechanism of her injury or disease. She proposes that, because she felt ill suddenly, the trier of fact may infer that an incident occurred as a matter of law, even though the nature of the incident is unknown. She also argues that she need not prove the specific agent that caused her condition. According to her, Intalco permits the trier of fact to infer not only that an incident occurred, but that some unknown agent caused her condition. We disagree.

There are significant differences between Ms. Proszek's circumstances and the plight of the workers in Intalco. The workers in Intalco established through objective evidence that they suffered prolonged exposure to a chemical soup of known neurotoxins while working the potline of an aluminum plant. In Ms. Proszek's case, she has not established the presence of carbon monoxide or the absence of oxygen on the flight in question.

The Intalco workers each demonstrated documented, objective neurological damage. Ms. Proszek only presented evidence of neurological findings within the range of normal for the general population, accompanied by subjective complaints such as confusion and anxiety.

The Intalco workers presented medical evidence that any number of the various neurotoxins actually present on the aluminum potline could more probably than not have resulted in the extensive damage to their nervous systems. This evidence was supported by exhaustive research and physical and chemical studies performed by or at the request of the physicians treating the claimants. Ms. Proszek presented the testimony of an internist whose primary source of reference was a New York Times article. Again, unlike the well established conditions of the potline in Intalco, Dr. Jobe had no actual knowledge of conditions on the aircraft in question and no theory whatsoever of how carbon monoxide might have been introduced into the atmosphere of a Boeing 737 which does not use recirculated air.

The appellate court in the Intalco case found that the claimants had presented evidence on multiple possible causes of neurological damage, all actually present in the work environment. The totality of the evidence supported the conclusion that distinctive conditions of the claimants' employment on the potline more probably than not gave rise to their neurological damage. Having established those distinctive conditions of employment, the workers did not have to further break down the chemical cause of each item of neurological damage. By contrast, Ms. Proszek offered no objective evidence whatsoever that there was either a damaging incident or an inherently damaging condition present in the work environment she was exposed to on September 23, 1990. To exempt

her from establishing one or the other would completely relieve her of the burden of establishing a causal relationship between her course of employment and her alleged injury or disease.

Absent any objective evidence of injury or distinctive conditions of employment which could have given rise to the condition complained of, Ms. Proszek has not established even a prima facie case for compensation. Although Alaska Airlines chose to proceed with a case in opposition to the claim for benefits, it is not necessary for us to recite the elements of that case at this point as it is thoroughly summarized in the Proposed Decision and Order. The Department order of December 14, 1992, rejecting Ms. Proszek's application for benefits, is correct and is affirmed.

FINDINGS OF FACT

1. On October 11, 1990, Nancy Lynn Proszek filed an application for benefits with the self-insured employer, in which she alleged that she had sustained an industrial injury during the course of her employment with Alaska Airlines, Inc., (Alaska Airlines), on September 23, 1990. On March 7, 1991, the self-insured employer forwarded the application for benefits to the Department of Labor and industries.

   On February 22, 1991, the self-insured employer, through its workers' compensation administrator, Epic Insurance Services, sent a letter advising the claimant that a examination had been scheduled for March 15, 1991.

   On February 22, 1991, the claimant's counsel advised the attorney for the self-insured employer that his client would not attend the medical examination.

   On March 5, 1991, the Department wrote a letter to the claimant's attorney, which directed the claimant to appear for the examination for which she was notified by the February 22, 1991 letter, and further confirmed that failure to attend the scheduled examination without good cause could result in the suspension of her entitlement to further benefits, and that the no show fee could be deducted from any future benefits.

   On March 11, 1991, the claimant, through her attorney, filed a Notice of Appeal of the March 5, 1991 Department letter, including a supporting affidavit. That Notice of Appeal raised issues of whether the examination was an abuse of discretion under the Medical Aid Rules, a violation of the Rules of Civil Procedure, and whether Epic Insurance Services had engaged in abusive conduct. The appeal also requested injunctive relief.

   On March 25, 1991, the Department filed a motion for denial of appeal, and on March 29, 1991, the Board issued an order denying the motion for denial of appeal, as well as the request for injunctive relief.

   On April 5, 1991, the Department issued an order stating that the Department of Labor and Industries was suspending further action and

compensation on this claim effective April 5, 1991, because the worker refused or failed to attend or cooperate with a medical examination, that the action is taken under the authority of RCW 51.32.119, and that such suspension shall continue so long as the worker's refusal to attend the medical examinations continues.

On April 10, 1991, the Board issued an order granting the claimant's appeal of the letter of March 5, 1991, assigning it Docket 91 1247 and directing that proceedings be held on the issues raised in the Notice of Appeal.

On April 18, 1991, the claimant filed a Notice of Appeal of the Department order of April 5, 1991. On April 26, 1991, the Board issued an order granting the claimant's appeal of the Department order of April 5, 1991, assigning it Docket 91 1947 and directing that proceedings be held on the issues raised in the Notice of Appeal.

On June 25, 1991, the parties entered into an Order on Agreement of Parties relative to Dockets 91 1247 and 91 1947. That order provided that:

> The determination of March 5, 1991 and the order of April 5, 1991 are reversed and the claim is remanded to the Department of Labor and Industries to issue an order reiterating the requirement that the claimant attend a medical examination, and also requiring the claimant to execute a general medical release to the employer for medical records and diagnostic tests, but requiring the employer to provide prior knowledge to the claimant with respect to the manner in which that release is to be used or exercised, and also to issue an order requiring the employer to pay provisional time-loss compensation, as applicable as of the date of prior suspension. This order should also indicate that if the medical release is rescinded, or the claimant fails to appear for the required medical examination, then benefits will be further suspended.

On July 7, 1992, the Department issued an order directing the self-insured to reduce any future time-loss compensation by $3,750.00, the examination charge, because the worker refused or failed to attend the scheduled medical examination or evaluation on March 15, 1991 without good cause, and further directing that the reduction shall be divided into payments not to exceed 25 percent of the total time-loss compensation payment.

On July 13, 1992, the Department order of July 7, 1992, was received by the claimant. On July 17, 1992, the claimant filed a protest and request for reconsideration of the Department order of July 7, 1992. On September 8, 1992, the claimant placed a supplemental protest and request for reconsideration in the mail, which was received by the Department on

September 11, 1992. On October 15, 1992, the Department issued an order affirming the Department order of July 7, 1992.

On December 14, 1992, the claimant filed a Notice of Appeal of the Department order of October 15, 1992, with the Board of Industrial Insurance Appeals. On January 8, 1993, the Board issued an order granting the appeal, assigning it Docket 92 6049, and directing that proceedings be held on the issues raised therein.

On July 8, 1992, the Department issued an order rejecting the claim as the claimant's condition was not the result of the exposure alleged, nor is it an occupational disease. On July 13, 1992, the claimant received the Department order of July 8, 1992. On July 17, 1992, the claimant filed a protest and request for reconsideration of the Department order of July 8, 1992. On October 16, 1992, the Department issued an order affirming the Department order of July 8, 1992. On December 14, 1992, the claimant filed a Notice of Appeal of the Department order of October 16, 1992 with the Board of Industrial Insurance Appeals. On January 8, 1993, the Board issued an order granting the appeal, assigning it Docket 92 6133, and directing that proceedings be held on the issues raised therein.

2. The claimant received a letter from the company administering her workers' compensation claim, informing her that an independent medical examination had been scheduled for her on August 23, 1991. Ms. Proszek called the administrator and told them that the appointment was scheduled during a time she had planned to be on a family vacation. She discussed rescheduling the appointment, and at the close of the telephone conversation it was her understanding that the examination would be rescheduled only if she completed a release of medical information. She did not complete the medical release and did not inform the claim service company that she would not complete the release. On August 14, 1991, the claim service company sent Ms. Proszek a letter informing her that as a result of failure to complete the release the examination would not be rescheduled. Ms. Proszek did not attend the examination even though she was aware it had not been rescheduled.

3. Nancy Lynn Proszek has been employed by Alaska Airlines since approximately 1976. She has been a flight attendant for the majority of the time. Her duties include addressing the needs of passengers while the aircraft is on the ground or in flight.

4. On September 23, 1990, Ms. Proszek was working on a flight from Seattle to Fairbanks on a Boeing 737-200 aircraft flying at 33,000 feet above sea-level, when she suddenly felt sharp hunger pains. She also felt disoriented and had to think about every move she made. She took oxygen, but this did not help appreciably. When she arrived in Fairbanks, she went to her hotel room. The next morning, she again felt dizzy and disoriented, and had difficulty taking a shower. As of October 16, 1992, she continues to feel less focused and mentally acute, and feels she has

memory loss, disorientation and confusion, numbness on the top of her head, and sensitivity to odors. She feels that she is more emotional, and that her organizational skills are not as good.

5. There is no evidence to suggest that the claimant was exposed to toxic fumes or carbon monoxide gas on September 23, 1990.

6. A Boeing 737-200 aircraft does not use recirculated air. It does, however, provide ventilation and cabin pressurization for passengers. When an aircraft is at 37,000 feet, the cabin pressure is approximately 8,000 feet.

7. There is no evidence that the claimant was deprived of oxygen on September 23, 1990.

8. The claimant does not have a condition proximately caused by any incident occurring on September 23, 1990.

9. The claimant's alleged condition does not arise naturally and proximately out of her employment.

CONCLUSIONS OF LAW

1. Relative to Dockets 92 6049 and 92 6133, the Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of both appeals.

2. Relative to Docket 92 6049, the Department lacked jurisdiction to require the claimant to attend the medical examination of March 15, 1991, while the issue of attendance of the medical examination was on appeal to the Board of Industrial Insurance Appeals.

3. Relative to Docket 92 6049, the Department lacked the jurisdiction to issue the portion of its order of July 7, 1992, which related to the examination of March 15, 1991, or to affirm that portion of the order in its order of October 15, 1992.

4. Relative to Docket 92 6049, the claimant did not have good cause for her failure to attend the scheduled examination of August 23, 1991.

5. Relative to Docket 92 6049, the order of October 15, 1992, which affirmed an order dated July 7, 1992, relating to the imposition of no show fees for failure to attend the March 15, 1991 medical examination and the August 23, 1991 medical examination, and directed the self-insured employer to reduce any future time-loss compensation on this claim by the amount of the examination charge, because the worker refused or failed to attend the scheduled medical examination or evaluation on March 15, 1991, without good cause, and further provided that the reduction shall be divided into payments not to exceed 25 percent of the total time-loss compensation payment, is incorrect and is reversed and remanded to the Department with direction to establish the cost of the cancellation for Ms. Proszek's failure to appear at the examination scheduled on August 21, 1991, and to issue a further order consistent with this Decision and Order.

6. Relative to Docket 92 6133, the claimant's condition is not an occupational disease as defined by RCW 51.08.140.

7. Relative to Docket 92 6133, the claimant's condition is not an industrial injury as defined by RCW 51.08.100.

8. The Department order of October 16, 1992, which affirmed a prior order dated July 8, 1992, wherein the Department rejected the claim, stating that the claim for benefits was rejected as the claimant's condition is not the result of the exposure alleged, nor is the claimant's condition an occupational disease as contemplated by RCW 51.08.140, is correct, and is affirmed.

It is so ORDERED.

Dated this 13th day of January, 1995.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
ROBERT L. McCALLISTER Member