Al-Maliki, Waheed

SANCTIONS

Discovery

When considering sanctions for discovery violations, the Board is guided by the principle that it should impose the least severe sanction that does not undermine the purpose of discovery. *Citing Physicians Ins. Exch. v. Fisons Corp.,* 122 Wn.2d 299 (1993). ***….In re Waheed Al-Maliki,* BIIA Dec., 01 14923 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 03-2-11311-5 KNT.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WAHEED S. AL-MALIKI	**DOCKET NOS. 01 14923 & 01 14923-A**
CLAIM NO. W-264633	**DECISION AND ORDER**

APPEARANCES:

Claimant, Waheed S. Al-Maliki, by
Foster Law Office, P.C., per
Christine A. Foster

Self-Insured Employer, Container Corp. of America/ Jefferson Smurfit Corporation, by
Reinisch Mackenzie Healey Wilson & Clark, P.C., per
Steven R. Reinisch

Department of Labor and Industries, by
The Office of the Attorney General, per
Anastasia R. Sandstrom, Assistant

The claimant, Waheed S. Al-Maliki, filed an appeal with the Board of Industrial Insurance Appeals on May 8, 2001, from an order of the Department of Labor and Industries dated April 17, 2001. The self-insured employer received the claimant's Notice of Appeal on June 11, 2001, and mailed a cross-appeal to the Board on July 2, 2001. In its order, the Department directed the self-insured employer to accept a lumbar strain as related to the October 19, 1998 industrial injury; found that the condition of degenerative lumbar spine disease was not related to nor aggravated by the October 19, 1998 industrial injury and found that no time loss compensation was payable from March 7, 2000, to the present and ongoing because of a light-duty release and the employer was able to accommodate the light-duty restrictions. The Department order is **AFFIRMED**.

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 20, 2003, in which the industrial appeals judge affirmed the order of the Department dated April 17, 2001.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed, including the decision not to strike, in its entirety, the deposition of employer witness Douglas P. Robinson, M.D. The industrial appeals judge determined that the employer failed to provide accurate discovery responses regarding the

nature of Dr. Robinson's testimony. Specifically, Dr. Robinson's testimony went beyond the information contained in his report, contrary to the employer's representation.

Choice of discovery sanction is within the discretion of the judge. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494 (1997). In choosing the appropriate sanction, the judge is given wide latitude but must abide by certain principles:

> First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions. (Footnotes omitted.)

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 355 (1993). *Accord*, *In re Catalina Oseteo*, Dckt. No. 01 19620 (May 16, 2003). We find that our industrial appeals judge properly exercised his discretion in striking only that portion of Dr. Robinson's testimony that went beyond the information contained in the doctor's report. This sanction ensures that the employer does not profit from failing to provide full discovery to the claimant. Further, no evidence shows that the employer intended to violate the discovery rules.

We have granted review to address issues raised in Mr. Al-Maliki's Petition for Review. He contends that the industrial appeals judge erred by: (1) deciding entitlement to temporary total disability based on some, but not all, of claimant's physical and mental conditions; and (2) determining the proximate cause of the right foot plantar fasciitis, herniated disk, major depression and complex regional pain syndrome.

Mr. Al-Maliki seeks payment of time loss compensation for the period March 7, 2000 through April 17, 2001. The claimant correctly notes that total disability determinations must be made with reference to the whole person. *See*, *Leeper v. Department of Labor & Indus*., 123 Wn.2d 803 (1994). But even if we consider the impact of every diagnosis raised in this appeal, we conclude that a preponderance of credible evidence shows that Mr. Al-Maliki was capable of performing the light duty job provided by his employer. During the period at issue, the doctor had released the claimant to full-time sedentary work. A job fitting this description was made available to Mr. Al-Maliki. Rather than accept the job, the claimant chose to drive a taxi part-time. Mr. Al-Maliki did not present evidence regarding a loss of earning power. The Department correctly denied time loss compensation.

The April 17, 2001 order denied time loss compensation on grounds that the claimant was released to light duty work and the employer was able to accommodate the restrictions. The grounds for denying time loss compensation—the availability of light duty work claimant could perform—does not require acceptance or segregation of alleged conditions. *See*, *In re Julie Hunlock*, Dckt. No. 01 13777 (August 5, 2002)(where claimant is not temporarily totally disabled considering all conditions, findings regarding segregation are inappropriate).

The Board's scope of review is limited to those issues that the Department previously decided. We cannot expand upon those issues. *Lenk v. Department of Labor & Indus.,* 3 Wn. App. 977, 982 (1970). The order on appeal addressed only two conditions, lumbar strain and degenerative disk disease. It is not a closing order; the Board does not have the latitude to address other issues outstanding in the claim. *See*, *In re Jay Brooks*, Dckt. No. 01 19907 (March 19, 2003).

We note that the claimant, in his Notice of Appeal, requested acceptance of all conditions proximately caused by the industrial injury and that parties litigated the allowance of conditions diagnosed as a herniated lumbar disc, plantar fasciitis of the right foot, complex regional pain syndrome, and depression. But neither the Notice of Appeal, nor the parties' litigation of particular issues, can expand the Board's jurisdiction. We, therefore, amend the findings and conclusions, limiting the proximate cause determinations to left plantar fasciitis (the condition initially allowed by the Department and not contested); and the lumbar strain and degenerative lumbar spine disease (conditions subsequently addressed by the April 17, 2001 order).

FINDINGS OF FACT

1. The claimant filed an application for benefits with the self-insured employer on October 31, 1998, alleging that he sustained an industrial injury during the course of his employment with Jefferson Smurfit Corporation on October 19, 1998. The claim was allowed and benefits paid.

   On April 17, 2001, the Department issued an order that directed the self-insured employer to accept a condition diagnosed as a lumbar strain as related to the October 19, 1998 injury, and found that the condition of degenerative lumbar spine disease was neither related to, nor aggravated by, the October 19, 1998 industrial injury. No time loss compensation was payable from March 7, 2000 to the date of the order and ongoing because of a light duty release and because the employer was able to accommodate the light duty restrictions.

The claimant filed an appeal from this order with the Board of Industrial Insurance Appeals on May 8, 2001. The Board issued an order granting the appeal on June 7, 2001, assigned it Docket No. 01 14923 and ordered that further proceedings be held.

The employer received the order granting the appeal on June 11, 2001 and the Board received the employer's cross appeal to the Department order dated April 17, 2001 on July 2, 2001. On July 17, 2001, the Board issued an order granting the employer's cross appeal, assigning it Docket No. 01 14923-A and ordering that further proceedings be held.

2. The claimant sustained an industrial injury on October 19, 1998 during the course of his employment with Jefferson Smurfit Corp. when he jumped from a bailer to a concrete floor. He sustained left plantar fasciitis and a lumbar strain, proximately caused by his industrial injury. The condition diagnosed as degenerative disease of the lumbar spine was not proximately caused by the industrial injury.

3. The claimant was born on February 1, 1965, in Iraq. He received a degree in physics in Iraq and worked as a high school teacher for two years in his native country. He came to the United States in March 1993 and is a United States citizen. He has worked in the hotel industry, as a machinist operating heavy machinery in the recycling industry, and as a taxi cab driver.

4. The self-insured employer made available to the claimant a light duty job. The treating physician, Dr. Bernstein, signed off in agreement that Mr. Al-Maliki was physically capable of performing the job. The job was available to Mr. Al-Maliki, but he quit the job in March 2000.

5. Mr. Al-Maliki drove a taxicab part-time during the period from March 8, 2000 through April 17, 2001.

6. From March 1, 2000 through April 17, 2001, Mr. Al-Maliki was capable of obtaining and performing gainful employment on a reasonably continuous basis when considering his age, education, training, work experience, the availability of light duty work within his physical restrictions at the employer of injury, and his physical and mental restrictions.

7. From March 1, 2000 through April 17, 2001, the claimant's earning capacity was not reduced more than 5 percent.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. During the period March 1, 2000 through April 17, 2000, Mr. Al-Maliki was not a temporarily totally disabled worker within the meaning of RCW 51.32.090.

3. During the period from March 1, 2000 through April 17, 2001, inclusive, the claimant was not entitled to loss of earning power pursuant to RCW 51.32.090(3).

4. The Department order dated April 17, 2001, is correct and is affirmed.

It is so **ORDERED.**

Dated this 3rd day of December, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
CALHOUN DICKINSON Member