Roening, Jana

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Rating

When the AMA guides on disability do not specify a rating for a particular condition or loss of function, a medical expert may rate by analogy to the "best fit" under the guideline that reflects the worker's particular condition. **….*In re Jana Roening*, BIIA Dec., 04 22220 (2006)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JANA J. ROENING	)	**DOCKET NO. 04 22220**
	)	
CLAIM NO. W-045386	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Jana J. Roening, by
Casey & Casey, P.S., per
Gerald L. Casey

Self-Insured Employer, Safeway, Inc., by
Thomas G. Hall & Associates, per
Thomas G. Hall and Joseph A. Albo

This is an appeal filed by the claimant, Jana J. Roening, on December 13, 2004, from an order of the Department of Labor and Industries dated October 21, 2004. In this order, the Department directed the self-insured employer to recalculate and repay previously paid time-loss compensation, based on the wage calculation set forth in the order; directed the self-insured employer to pay loss of earning power benefits to legal fixity; ended time-loss compensation as paid to September 14, 2002; and closed the claim without an award for permanent partial disability. The Department order is **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, Jana J. Roening, to a Proposed Decision and Order issued on February 17, 2006. The industrial appeals judge reversed the October 21, 2004 Department order and remanded the appeal to the Department to direct the self-insured employer to pay loss of earning power benefits for the period of September 15, 2002 through September 22, 2003, and to thereupon close the claim otherwise in accordance with the October 21, 2004 Department order. The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

In her Petition for Review, the claimant contends that she is entitled to loss of earning power benefits for the period of September 22, 2003 to September 22, 2004, and that she has a permanent impairment as a result of her right shoulder girdle strain. We agree with the industrial appeals judge's determination that Ms. Roening was not entitled to loss of earning power benefits

after September 22, 2003, because that was the date of legal fixity. *In re Carl Coolidge,* BIIA Dec., 89 4308 (1991). However, we have granted review because the claimant is entitled to a permanent partial disability award, based on a "best fit" analysis. *In re Miguel Barraza*, Dckt. No. 02 20933 (January 30, 2004).

The evidence presented by the parties is adequately set forth in the Proposed Decision and Order and will be reviewed here only to the extent necessary to an understanding of our decision. Ms. Roening has been employed by Safeway for over 18 years. She is right-handed and strained her right shoulder girdle working as a checker. The claim was allowed based on an October 15, 1998 injury date.

After the injury, Ms. Roening was released to return to work at light duty and worked in that capacity until sometime in 2000, at which point she was taken off work again for 16 months. She was paid time-loss compensation for that period. On March 15, 2002, Theodore Becker, Ph.D., performed a physical capacities evaluation at Safeway's request. He found weakness in the muscles of Ms. Roening's right upper extremity. He concluded that she should not reach out in a fully horizontal position at or above the right shoulder, on a constant or continuous basis. She could only perform those movements on a frequent basis, *i.e*., 66 percent of the time. He felt she could return to work as a checker/cashier, so long as she was accommodated in this fashion, and he conveyed his opinions to Safeway.

Dr. Becker's recommendation was consistent with a long history of various medical providers recommending that Ms. Roening's work station be modified. For example, a May 5, 2000 independent medical examination (IME) recommended ergonomic modifications. On May 14, 2001, an occupational therapist performed a work site analysis and recommended that a left-sided check-out stand be provided to Ms. Roening. An October 3, 2001 IME recommended work station modifications. Similar recommendations were made on October 3, 2001; January 17, 2002; and April 14, 2004.

Eventually, Safeway offered Ms. Roening a lower paying job as a video clerk and bookkeeper. She returned to work in that capacity on August 19, 2002, but kept "pestering" her employer to provide a left-handed check stand, so that she could return to the higher paying job-at-injury. 7/21/05 Tr. at 17. Safeway paid loss of earning power benefits only until September 14, 2002, even though Ms. Roening continued working in the lower paying position for two years. Then, in the late summer of 2004, the employer offered Ms. Roening a job as a checker,

using a left-handed check stand. On September 22, 2004, she returned to the job-at-injury, with that accommodation.

In the meantime, on October 11, 2002, the self-insured employer attempted to close the claim with time-loss compensation as paid to September 14, 2002, and with no permanent partial disability award. However, the claimant protested that order and, on May 16, 2003, the Department declared the self-insured employer's order null and void, because it was issued without authority. A self-insured employer is permitted to close a claim only when the worker has "returned to work with the self-insured employer of record, whether at the worker's previous job or at a job that has comparable wages and benefits." RCW 51.32.055(9). Neither of those prerequisites was satisfied here.

The claim remained open until September 22, 2003, when the Department closed it with time-loss compensation as paid to September 14, 2002, and no permanent partial disability award. The claimant filed a timely protest and the order was held in abeyance. The Department once again closed the claim on October 21, 2004, with time-loss compensation as paid to September 14, 2002, and with no award for permanent partial disability. In the October 21, 2004 order, the Department also set forth the calculation of the wage rate, directed the self-insured employer to recalculate and repay time-loss compensation based on that rate, and directed the employer to pay loss of earning power benefits "to legal fixity."

Ms. Roening appealed, seeking additional loss of earning power benefits and a permanent partial disability award. The self-insured employer cross-appealed in Docket No. 04 22220-A, challenging the wage rate. That appeal was dismissed on December 6, 2005.

Loss of earning power benefits: The industrial appeals judge determined that Ms. Roening was entitled to loss of earning power benefits for the period of September 15, 2002 through September 22, 2003, the date on which the Department issued its first claim closure order. In so finding, he essentially directed the self-insured employer to do what the Department had already required in its October 21, 2004 order, to "pay loss of earning power benefits to legal fixity." He concluded that September 22, 2003, was the date of legal fixity, under the analysis of such cases as *In re Douglas Weston*, BIIA Dec., 86 1645 (1987) and *In re Carl Coolidge,* BIIA Dec., 89 4308 (1991). Under *Coolidge,*

> a worker cannot automatically extend the period of entitlement to loss of earning power compensation by protesting an initial closing order which determined the extent of permanent partial disability. The period of entitlement

> is not extended absent proof that the worker's condition was not fixed on the date of the closing order.

Coolidge, at 4.

In her Petition for Review, the claimant seeks loss of earning power benefits "until her full return to work in the left-hand check stand on September 22, 2004." Petition for Review, at 9. In order to qualify for such benefits, Ms. Roening was required to show both that her loss of earning power continued after September 22, 2003, and that her condition was not fixed as of that date. She has satisfied the first requirement, but not the second.

Ms. Roening testified that after the self-insured employer initially closed the claim on October 11, 2002, she received no treatment until after she was involved in an unrelated motor vehicle accident on February 20, 2003. She agreed that the treatment after October 11, 2002, resulted primarily from that accident. In addition, neither Guy Earle, M.D., nor Linda M. Wray, M.D., suggested that Ms. Roening needed any further rehabilitative treatment after September 22, 2003. Ms. Roening's condition was therefore fixed and stable as of that date. As a result, she was not entitled to loss of earning power benefits after September 22, 2003, the date of legal fixity.

Permanent partial disability: With respect to the question of whether Ms. Roening has a permanent impairment, WAC 296-20-2015 "provides guidance regarding the rating systems generally used." For specified disabilities, physicians are directed to use the *AMA Guides to the Evaluation of Permanent Impairment* and to determine the percentage of loss of function, as compared to the amputation value listed in RCW 51.32.080.

Only two doctors testified, Dr. Earle on the claimant's behalf and Dr. Wray on behalf of the employer. Neither was a treating doctor; each examined Ms. Roening on only one occasion. The industrial appeals judge found Dr. Wray more persuasive, in part because she saw the claimant six months prior to claim closure, while Dr. Earle "did not see Ms. Roening until almost ten months after claim closure." Proposed Decision and Order, at 9. Since Ms. Roening's condition has been fixed and stable for years, this is not a meaningful distinction. Furthermore, the basis for the purported ten-month gap is an error in the transcript of Dr. Earle's June 20, 2005 deposition. At page 8 of the transcript, he reportedly testified that he had examined Ms. Roening on "August 2, 2005." That is not possible and was either a misstatement or a transcription error. On cross-examination, the

self-insured employer's attorney clarified that Dr. Earle had examined Ms. Roening on March 2, 2005. Thus, Dr. Earle actually saw the claimant closer to the closing date than Dr. Wray.

Dr. Earle and Dr. Wray agreed that Ms. Roening's right shoulder range of motion was entirely normal. They agreed that the *AMA Guides* do not provide an impairment rating under those circumstances. In fact, that is what Dr. Earle wrote in his initial report. However, when the claimant's attorney asked him to reconsider, he gave an impairment rating of 6 percent of the amputation value at the shoulder, by using a "best fit" analysis.

As Dr. Earle testified, impairment equates to loss of function. There is no question that Ms. Roening has an objective loss of function in the right scapular area, which Dr. Earle described as follows:

> there was visible swelling in the right trapezius muscle and she carried her right shoulder in a down and forward position. What this did was to pull the right shoulder blade, or scapula, around the side of the chest wall and cause it to stick out away from the chest wall in back.

Earle Dep. at 17.

Dr. Earle performed "a focused examination on the scapula or shoulder blades and found movement abnormalities of the scapula. In examining her from the back, I noticed that when she crossed her arms in front, there was diminished movement of the right scapula. And then when she crossed her arms behind herself, again the right scapula did not move as well as the left." Earle Dep. at 19. He described how he stood behind Ms. Roening and asked her to:

> slowly raise her arms from her side away from her body and directly over her head. And during this time period, I was watching the movement of the right scapula compared to the left scapula.
> What happened on the left side, which is normal, is beyond a certain point, for most people around 90 degrees, in order to get the arms straight away from the body, in order to get the arms higher, the scapula actually has to rotate on the chest wall. And you can actually watch the scapula slowly rotate upwards to get the arms over the head. On the right side, this process did not go smoothly. She was able to get her arm up over her head but the motion of the scapula was very jerky, and through part of that motion, it was sticking out away from the chest wall, which is again a sign that there's a lot of imbalance of the muscles of the scapula.

Earle Dep. at 20.

Indeed, in order to get normal mobility in the right shoulder, Ms. Roening had to "actually sacrifice a

lot as far as the scapular function goes. That abnormal positioning and movement of the scapula is what really allows her to get to the 180 degrees of flexion [and] adduction [in her right shoulder]." Earle Dep. at 28.

Because there is no specific rating in the *AMA Guides* for a shoulder girdle or scapular loss of function, Dr. Earle rated the impairment by analogy, under the closest fit he could find. The best equivalent in the *Guides* was occult shoulder instability. Looking at the criteria for that condition, he gave a rating of "6 percent upper extremity impairment with respect to amputation at the shoulder level, using the equivalency approach." Earle Dep. at 24. Thus, the question before us is whether a worker who has an objectively demonstrable loss of function is entitled to a permanent partial disability award under a "best fit" analysis, if that impairment is not specifically described in the *AMA Guides*.

There is no question that a "best fit" analysis applies to unspecified disabilities. *In re Traci Gleason*, BIIA Dec., 92 5936 (1994). More recently, we have extended the "best fit" approach to specified disabilities. *In re Miguel Barraza*, Dckt. No. 02 20933 (January 30, 2004). Our starting point, then, is that Ms. Roening is not precluded from receiving a permanent partial disability award simply because the *AMA Guides* do not specifically address her condition.

Turning to the medical evidence, we find Dr. Earle's "best fit" approach and his well-documented clinical findings persuasive. Unlike Dr. Earle, who specializes in occupational medicine, Dr. Wray is a neurologist. Her specialty is not particularly relevant here, since there is no contention that Ms. Roening has any neurological deficits. To the contrary, Dr. Earle agreed that the claimant's neurological examinations have been consistently normal.

In addition, there is no indication that Dr. Wray performed the relevant focused examination of the scapula which Dr. Earle described so vividly, objectively demonstrating loss of function. Furthermore, Dr. Wray's opinion that Ms. Roening had no restrictions and could return to work as a checker, without any accommodation, is not credible, and undermines her opinion on impairment. The self-insured employer's own experts have been saying for years that Ms. Roening has restrictions and needs to be accommodated with a left-handed check stand. The claimant was highly motivated to return to work in the higher paying checker position. There is no question about her sincerity; Dr. Wray herself agreed that Ms. Roening was straightforward and did not exaggerate her symptoms. If Ms. Roening could have returned to the checker position without an accommodation, she likely would have done so. It is apparent that she was unable to do so precisely because of the loss of function described by Dr. Earle.

We therefore accept Dr. Earle's impairment rating. As a result, the October 21, 2004 Department order must be reversed, and the claim remanded to the Department to calculate the monthly wage rate as set forth in the October 21, 2004 order; direct the self-insured employer to recalculate and pay time-loss compensation based on that wage rate; direct the self-insured employer to pay loss of earning power benefits for the period of September 14, 2002 to September 22, 2003; and close the claim with a permanent partial disability award equal to 6 percent of the amputation value of the arm at or above the deltoid insertion or by disarticulation at the shoulder.

FINDINGS OF FACT

1. On November 15, 1999, an Application for Benefits was received by the Department of Labor and Industries, in which the claimant, Jana J. Roening, alleged that she sustained an industrial injury on October 15, 1998, while in the course of employment with Safeway, Inc. The application for benefits was received by the self-insured employer on October 27, 1998. On November 19, 1999, the Department allowed the claim for an injury or occupational disease.

   On September 22, 2003, the Department closed the claim with time-loss compensation as paid to September 14, 2002, and without an award for permanent partial disability.

   On November 4, 2003, the claimant protested the September 22, 2003 Department order. On October 21, 2004, the Department corrected its September 22, 2003 order; calculated the claimant's monthly wage as $3,697.78; determined that the claimant was married with two children; directed the self-insured employer to recalculate and repay time-loss compensation based upon the monthly wages set forth in the order; ended time-loss compensation as paid to September 14, 2002; directed the self-insured employer to pay loss of earning power benefits to legal fixity; and closed the claim without an award for permanent partial disability.

   On December 13, 2004, the claimant filed a Notice of Appeal from the October 21, 2004 Department order with the Board of Industrial Insurance Appeals. On January 5, 2005, the Board granted the appeal and assigned it Docket No. 04 22220.

2. On October 15, 1998, the claimant, Jana J. Roening, sustained an industrial injury while in the course of her employment with Safeway, Inc. As a proximate result of that injury, Ms. Roening suffered a right shoulder girdle strain.

3. At the time of the industrial injury, Ms. Roening was working as a checker, approximately thirty hours per week, earning $14.85 per hour (adjusted for inflation $17.85). After the injury, she was released to return to work at light duty and worked in that capacity until sometime in 2000, at which point she was taken off work again for 16 months. She was paid time-loss compensation for that period. On August 19, 2002, she returned to work with Safeway, with restrictions, as a video clerk/office worker, for approximately twenty hours per week. While working in that position, Ms. Roening earned approximately $12.15 per hour and worked approximately twenty hours per week. Safeway paid loss of earning power benefits until September 14, 2002. Ms. Roening continued working in the lower paid video clerk/office worker position for two years, until September 22, 2004. On that date, she returned to the job-at-injury as a checker, with the aid of a left-handed check stand.

4. The Department issued its first closing order on September 22, 2003. On November 4, 2003, the claimant protested that order and on October 21, 2004, the Department issued the closure order which is the subject of this appeal.

5. As of September 22, 2003 and through October 21, 2004, Ms. Roening's condition, proximately caused by the October 15, 1998 industrial injury, was fixed and stable. No further proper and necessary treatment was warranted between September 22, 2003 and October 21, 2004.

6. During the period of September 14, 2002 to September 22, 2003, Ms. Roening sustained a loss of earning power greater than 5 percent, as a proximate result of the October 15, 1998 industrial injury.

7. As of September 22, 2003 and through October 21, 2004, Ms. Roening's permanent impairment, proximately caused by the October 15, 1998 industrial injury, was equal to 6 percent of the amputation value of the arm at or above the deltoid insertion or by disarticulation at the shoulder.

CONCLUSIONS OF LAW

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

2. During the period of September 14, 2002 to September 22, 2003, the claimant was entitled to loss of earning power benefits pursuant to RCW 51.32.090(3).

3. September 22, 2003, was the date of legal fixity. Ms. Roening was no longer entitled to loss of earning power benefits as of that date, because her condition, proximately caused by the October 15, 1998 industrial injury, was fixed and stable at that point. *In re Carl Coolidge,* BIIA Dec., 89 4308 (1991).

4. As of September 22, 2003 and through October 21, 2004, Ms. Roening was a permanently partially disabled worker within the meaning of RCW 51.32.080.

5. The October 21, 2004 Department order is incorrect and is reversed. The claim is remanded to the Department to calculate the monthly wage rate as set forth in the October 21, 2004 order; direct the self-insured employer to recalculate and pay time-loss compensation based on that wage rate; direct the self-insured employer to pay loss of earning power benefits for the period of September 14, 2002 to September 22, 2003; and close the claim with a permanent partial disability award equal to 6 percent of the amputation value of the arm at or above the deltoid insertion or by disarticulation at the shoulder.

It is so **ORDERED.**

Dated this 25th day of May, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
CALHOUN DICKINSON Member