Meeks, Steve

TREATMENT

Fixity of condition

The Department can not deny payment of medical benefits on the basis that the worker has reached maximum medical improvement without also making a determination of permanent disability. **....*Steve Meeks*, 06 20754 (2008)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: STEVE A. MEEKS	)	**DOCKET NOS. 06 20754 & 06 20852**
	)	
CLAIM NO. Y-705566	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Steve A. Meeks, by
Law Office of James A. Nelson, per
James A. Nelson

Employer, Shipp Construction, Inc., by
Washington Contract Loggers Association, Inc., per
Rebecca Aikens

Department of Labor and Industries, by
The Office of the Attorney General, per
Debra M.H. Tollefson, Assistant

Docket No. 06 20754: On October 26, 2006, the claimant, Steve A. Meeks, filed an appeal with the Board of Industrial Insurance Appeals, from an order of the Department of Labor and Industries dated September 8, 2006 order. In this order, the Department affirmed a June 26, 2006 letter to Kevin T. Caserta, M.D. In this letter, the Department determined that Mr. Meeks had reached maximum medical improvement and that the Department would stop paying for opioid therapy 30 days from the date of the letter, to allow Dr. Caserta sufficient time to find an alternative payment source or to assist the worker in a gradual detoxification or weaning process. The Department order is **REVERSED AND REMANDED**.

Docket No. 06 20852: On October 30, 2006, the claimant filed an appeal with the Board from an October 4, 2006 Department order. In this order, the Department affirmed an April 27, 2006 order, in which the Department denied responsibility for the claimant's diarrhea condition, as unrelated to the industrial injury. The Department order is **REVERSED AND REMANDED**.

ISSUES

Docket No. 06 20754: May the Department, as a matter of law, terminate its payment for opioid medications in an open claim under RCW 51.36.010 and WAC 296-20-03022, based on a determination that the worker has reached maximum medical improvement (MMI), without also determining the extent of permanent disability?

Docket No. 06 20852: Was the industrial injury a proximate cause of Mr. Meeks' diarrhea condition?

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 Department to a Proposed Decision and Order issued on October 26, 2007.

In Docket No. 06 20754, the industrial appeals judge affirmed the September 8, 2006 order. He also determined that, as of September 8, 2006, Mr. Meeks' low back and right leg conditions, proximately caused by the industrial injury, had reached MMI and he did not require further medical treatment. Finding of Fact No. 7; Conclusion of Law No. 2.

In Docket No. 06 20852, the industrial appeals judge reversed the October 4, 2006 order and remanded the matter to the Department with direction to accept responsibility for the claimant's diarrhea condition. He also determined that, as of October 4, 2006, that condition had reached MMI and did not require medical treatment. Finding of Fact No. 10; Conclusion of Law No. 5.

In its Petition for Review, the Department contends that the industrial appeals judge should have sustained its objections during the deposition of Kevin T. Caserta, M.D., at pages 14 through 15. As discussed below, we agree. We have reviewed all other evidentiary rulings in the record of proceedings and find that no other prejudicial error was committed. All other rulings are affirmed.

In addition to this evidentiary issue, the Department contends that there is no basis in the record for the determination that Mr. Meeks' diarrhea was proximately caused by the industrial injury. As discussed below, we disagree.

Other than these two issues, the Department stresses that it is "generally in agreement" with the Proposed Decision and Order, in particular the determination that Mr. Meeks has reached MMI and does not require further treatment. The Department requests that, in the event we find the diarrhea condition related to the industrial injury, Finding of Fact No. 10 and Conclusion of Law No. 5 not be disturbed. However, once any party has sought review, we are free to address all contested issues of law and fact. *In re Richard Sims*, BIIA Dec. 85 1748 (1986). In addition to the issues raised by the Department, we address several other questions pertaining to the scope of review in these appeals.

The industrial appeals judge characterized the issues on appeal as:

> **Docket No. 06 20754**: Whether the claimant's industrial injury condition to his low back and right leg required further medical treatment.
>
> **Docket No. 06 20852**: Whether the claimant's condition, described as diarrhea, was proximately caused by the industrial injury, and if so,

whether that condition required further proper and necessary medical treatment.

Proposed Decision and Order, at 1; 8/28/07 Tr. at 3.

This statement of the issues is too broad. In Docket No. 06 20754, the Department sent a June 26, 2006 letter to Dr. Caserta advising him that it would stop paying for opioid treatment 30 days from the date of the letter, because Mr. Meeks had reached MMI. After the worker protested, the Department affirmed that determination on September 8, 2006, and Mr. Meeks appealed. The issue in this appeal is whether the Department may, as a matter of law, terminate its payment for opioid treatment in an open claim under RCW 51.36.010 and WAC 296-20-03022, based on a determination that the worker has reached MMI, without also determining the extent of permanent disability.

There is no question that the Department cannot continue to pay for opioid medications once the injured worker has reached MMI and permanent disability has been addressed. RCW 51.36.010 is explicit on this point. However, what the Department has attempted to do here is to determine that Mr. Meeks has reached MMI, terminate payment for his opioid medications, and keep the claim open. That it cannot do. Thus, as a matter of law, the September 8, 2006 order, in which the Department affirmed the June 26, 2006 letter, must be reversed.

In Docket No. 06 20852, the Department issued an order on April 26, 2006, in which it accepted responsibility for the condition diagnosed as anal dysfunction, incontinence, due to neuropathy in the inferior rectal nerves. Jurisdictional History; 8/28/07 Tr. at 21-22. The next day, the Department denied responsibility for Mr. Meeks' diarrhea. After Mr. Meeks protested, the Department affirmed that order on October 4, 2006, and Mr. Meeks appealed. The issue in this appeal is whether Mr. Meeks' diarrhea was proximately caused by the industrial injury. Since the Department segregated this condition, it has not addressed the question of what, if any, treatment Mr. Meeks would be entitled to, or whether the condition has reached MMI. The industrial appeals judge exceeded the scope of the Board's review in Docket No. 06 20852 by determining that Mr. Meeks had reached MMI in this open claim. Finding of Fact No. 10; Conclusion of Law No. 5. The only issue before the Board in this appeal is whether the diarrhea condition should have been segregated.

DECISION

The Proposed Decision and Order contains an excellent overview of the facts, which we will not repeat here. Briefly, Mr. Meeks began experiencing serious right leg and low back problems

while driving a dump truck for Shipp Construction, Inc., on September 3, 2003. As a result, he underwent a November 12, 2003 lumbar laminectomy at L4-5, to relieve nerve root compression, with poor results. The surgeon was Carl Birchard, M.D. The Department required Mr. Meeks receive treatment from Dr. Birchard, despite the fact that he had previously operated on Mr. Meeks, with a poor outcome. Exhibit No. 1; WAC 296-20-065.

As a result of the November 12, 2003 surgery, Mr. Meeks developed a spinal fluid leak with associated headaches. However, Dr. Birchard was on vacation, so Mr. Meeks had to wait until January 1, 2004, to undergo further surgery, a blood patch to stop the leak. While that repair was successful, Mr. Meeks developed diarrhea immediately following the surgery. 8/28/07 Tr. at 15-16. He has also developed chronic regional pain syndrome or reflex sympathetic dystrophy (RSD) in the right lower extremity.

Shortly after the January 1, 2004 surgery, Dr. Birchard referred Mr. Meeks to Kevin T. Caserta, M.D., a specialist in physical medicine and rehabilitation. Dr. Caserta has been the treating physician since January 26, 2004. He has tried many different treatment modalities and medications to control Mr. Meeks' pain related to the RSD. Only opioids work, and Mr. Meeks has exhibited no substance abuse issues. When he does not have access to opioids, he suffers flare ups of "exquisite" pain and goes to the emergency room. Caserta Dep. at 13. With respect to the diarrhea condition, all of the treatment options tried by Dr. Caserta were unsuccessful, and he referred Mr. Meeks to gastroenterologist James B. Wagonfeld, M.D., for evaluation.

Dr. Wagonfeld was not called as a witness by either party. Instead, the worker presented the testimony of Dr. Caserta and the Department presented the testimony of Charles Bedard, M.D., a gastroenterologist who conducted an independent medical examination (IME) on November 15, 2005. Dr. Wagonfeld saw Mr. Meeks on three occasions and both testifying doctors were asked about apparently conflicting portions of his reports. The worker's attorney raised no objections to Dr. Bedard's testimony regarding Dr. Wagonfeld's opinions (Bedard Dep. at 9-10), but the Department objected to the worker's attorney's questions regarding those opinions (Caserta Dep. at 14-15). The industrial appeals judge overruled the Department's objections.

Dr. Caserta's testimony unfolded in the following manner. The claimant's attorney showed him a copy of the report Dr. Wagonfeld had addressed to him. The attorney then quoted two opinions from that report, and asked if Dr. Caserta agreed with them. Caserta Dep. at 15.[1] The

[1] "That the patient's diarrhea is related to a neurologic injury seems unavoidable." "His diarrhea occurred chronologically following his last back surgery." Caserta Dep. at 15.

Department objected to the worker's attorney essentially testifying to Dr. Wagonfeld's opinions. Caserta Dep. at 14-15.

ER 703 and 705 permit an expert to give an opinion based on facts and data that may not themselves be admissible. However, neither rule permits someone else to act as a conduit for a non-testifying expert's opinions. See, for example, *In re Welfare of J.M.*, 130 Wn.App. 912 (2005). We therefore sustain the Department's objections and strike page 14, line 14, through page 15, line 11 in Dr. Caserta's deposition. For the same reasons, we also strike Dr. Bedard's testimony at page 9, line 11 (beginning with "and was not able to come up with a reason"), through line 12; page 9, lines 20 through 24; and page 17, lines 13 through 25.

We note that, on the one hand, the worker's attorney quoted Dr. Wagonfeld as saying: "That the patient's diarrhea is related to a neurologic injury seems unavoidable." Caserta Dep. at 15. On the other hand, Dr. Bedard testified that his "chart review indicated a report from Dr. Wagonfeld which indicated that he did not have any clue as to what was causing his diarrhea problem." Bedard Dep. at 9. Only Dr. Wagonfeld himself could have reconciled the apparent discrepancy in his reports. That is precisely why none of his uncross-examined opinions should be considered to prove the truth of the matter asserted. Indeed, it is clear from the way the industrial appeals judge analyzed the evidence that he did not consider Dr. Wagonfeld's opinions. Thus, even after excluding those opinions, we analyze the medical testimony the same way as the industrial appeals judge.

Was the industrial injury a proximate cause of Mr. Meeks' diarrhea condition? At the outset, we accept Dr. Bedard's description of the difference between fecal incontinence and diarrhea, which Dr. Caserta did not dispute. The first involves control of the rectal muscles; the second involves the character of the stool. Bedard Dep. at 13; Caserta Dep. at 15-17. The Department has accepted responsibility for fecal incontinence, apparently based on Dr. Bedard's opinion (Bedard Dep. at 13), and is paying for Mr. Meeks' Depends. 8/28/07 Tr. at 22. The Department has denied responsibility for the diarrhea. The question before us is whether the industrial injury was a cause of that condition.

We turn first to Dr. Caserta's testimony. After striking page 14, line 14, through page 15, line 11, in his deposition, we are left with the following exchange:

> Q. I'll show you a copy of this report which is addressed to you from Dr. Wagonfeld. Do you recognize this?
>
> A. Yes.

. . ..

Q. I would ask whether or not you agree with that conclusion.

A. I would say in terms of time frame itself, obviously the diarrhea started at the same time as his neurologic condition. The diarrhea is atypical of what you would have expected to see with somebody with a lower lumbar injury such as Steve itself. So, I would say the time frame I would a hundred percent concur. In terms of the symptoms which are more atypical, I'm not sure a hundred percent why he has the diarrhea.

Caserta Dep. at 14-15.

As the Department points out in its Petition for Review, Dr. Caserta did not specifically testify that the industrial injury was a cause of the diarrhea on a more-probable-than-not basis. However, "[i]t is sufficient if the medical testimony *shows* the causal connection. If, from the medical testimony given and the facts and circumstances proven by other evidence, a reasonable person can infer that the causal connection exists, we know of no principle which would forbid the drawing of that inference." *Sacred Heart Medical Ctr. v. Department of Labor & Indus.*, 92 Wn.2d 631, 636-637 (1979). "The evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists." *Intalco Aluminum Corp. v. Department of Labor & Indus.*, 66 Wn. App. 644, 655 (1992), *review denied*, 120 Wn.2d 1031 (1993). Indeed, while he did not cite *Intalco* and *Sacred Heart*, the industrial appeals judge's analysis is entirely consistent with those court opinions. We cannot improve upon the discussion at page 9, line 28, through page 10, line 29, of the Proposed Decision and Order:

> In Docket No. 06, 20852, the Department order of October 4, 2006 determined, through its affirmation of a prior order, that Mr. Meeks' diarrhea condition was unrelated to the industrial injury. The issue presented is acceptance or rejection of that condition. While the claimant had some sort of diarrhea condition in high school for a week or so, he was otherwise normal until the day of his second surgery on January 1, 2004. That operation was necessary to repair problems resulting from the initial operation for this industrial injury. On that very day, January 1, 2004, the claimant contracted or developed his unresolved diarrhea condition. Although the frequency of his diarrhea bowel movements has diminished, the condition has not abated and he has continued to have episodes several times daily. Diagnostic testing identified some nerve damage affecting the claimant's rectal area, from which the Department accepted fecal incontinence as part of the industrial injury condition.

> Dr. Bedard, the Department's medical expert, opined the fecal incontinence differs from diarrhea and concluded the industrial injury did not cause Mr. Meeks' diarrhea condition. He was at a loss to explain what brought about that condition for the claimant. Dr. Caserta, the attending physician, believed the diarrhea was somehow caused by the second operation, but he acknowledged the claimant's case was not typical and he was not able to identify any mechanism that would have caused the condition from the surgery. The timing of the onset was important to Dr. Caserta's opinion about causality.
>
> Mr. Meeks did not have diarrhea before the industrial injury, nor is there any known susceptibility to that condition in the record. He had his gall bladder removed in 2001, a surgery that sometimes produces chronic diarrhea. That surgery was two years prior to the industrial injury, and because the diarrhea began on January 1, 2004, the gall bladder removal is an unlikely factor. He also took Prednisone which can also result in the condition. The Prednisone Mr. Meeks took was prescribed as one of the many treatments he was given for this industrial injury. That drug was prescribed by Dr. Caserta, who began seeing Mr. Meeks after the diarrhea condition began. It, too, is not a likely factor. The only remaining variable is the hospital experience the claimant had during the second surgery. The operation itself may have produced the condition in some way not yet understood by medical science, or perhaps some other factor from the hospital setting itself may have manifested the condition.
>
> Probable cause is a matter of likelihood of there being a cause and effect. An understanding of the precise mechanism is unnecessary. He did not have a diarrhea problem before he went to the hospital for his January 1, 2004 surgery, but he has had the condition since. Because Mr. Meeks was in the hospital and undergoing the surgery done because of the industrial injury, that injury proximately caused him to have the diarrhea condition he now has. It should be an accepted industrial event.

Proposed Decision and Order, page 9, line 28, through page 10, line 29.

In addition, we note that Dr. Bedard did not entirely rule out the industrial injury as a cause of the diarrhea, testifying instead that: "I don't believe it's possible to say more probably than not." Bedard Dep. at 14. Dr. Bedard pointed out that Mr. Meeks "takes large doses of Ibuprofen, which also is a cause of diarrhea, which potentially could be a cause of diarrhea." Bedard Dep. at 10, 14. In addition, he suggested that the fact Mr. Meeks had his gallbladder removed in 2001 might have played a role in the development of the diarrhea on January 1, 2004. When asked how soon after the gall bladder removal one would normally expect diarrhea to occur, he responded: "It can come at variable times. It may up [*sic*] show up right away. If you have the additive effect of taking high

doses of Ibuprofen, as a result of the injury, and plus you have the gall bladder problem, it could be an additive problem. I mean, that's hypothetical. Those are potential causes of diarrhea." Bedard Dep. at 15.

Like the industrial appeals judge, we doubt that the 2001 gallbladder surgery alone could be the sole cause of Mr. Meeks' diarrhea, given the fact that he began experiencing diarrhea in the hospital immediately following the January 1, 2004 surgery to repair the spinal fluid leak. In light of that temporal connection, it is reasonable to infer that the diarrhea is related in some way to that surgery and that hospital stay, as Dr. Caserta suggests, even though the exact mechanism has not been established. Alternatively, perhaps, as Dr. Bedard suggests, the high dosages of Ibuprofen used to treat the industrial injury, coupled with the absence of a gall bladder, contributed to the development of the diarrhea condition. Either way, the record is sufficient to permit a reasonable person to infer that a causal connection exists. Like the industrial appeals judge, we conclude that the industrial injury was a proximate cause of Mr. Meeks' diarrhea condition.

May the Department, as a matter of law, terminate its payment for opioid medications in an open claim under RCW 51.36.010 and WAC 296-20-03022, based on a determination that the worker has reached MMI, without also determining the extent of permanent disability? WAC 296-20-03022 provides that "[o]nce the worker's condition has reached maximum medical improvement, further treatment with opioids is not payable." Presumably that language is based on RCW 51.36.010, which explicitly precludes the Department from paying for opioids beyond the date when compensation has been awarded for permanent disability. Thus, the Department was free to issue an order in which it determined that Mr. Meeks had reached MMI; addressed the question of whether he had any permanent disability; and notified him that no opioid therapy would be paid for after the date of the order. Prior to the issuance of that order, it would also have been appropriate to notify Dr. Caserta that the claim was ready for a determination of permanent disability and that opioids would no longer be paid for after the Department had issued the relevant order.

However, instead of following that procedure, the Department notified Dr. Caserta and Mr. Meeks that it would stop paying for opioid therapy 30 days from June 26, 2006, without reference to any determination of permanent disability. That is, the Department bifurcated the process by declaring that the worker had reached MMI, and denying payment for opioids for that reason, but keeping the claim open, contrary to the longstanding rule that the Industrial Insurance Act contemplates two separate, distinct, and mutually exclusive classifications--temporary disability

status and permanent disability status. *Hunter v. Department of Labor & Indus.*, 43 Wn.2d 696 (1953).

Under *Hunter*, Mr. Meeks' status is either temporary or it is permanent; it cannot be some combination of the two. MMI does not occur in a vacuum; it must be linked with a determination of whether there is any permanent disability. The Department therefore acted prematurely in announcing that it would terminate payment for opioids within 30 days of June 26, 2006, without also addressing the question of permanent disability. Under RCW 51.36.010, until the Department has issued an order in which it addresses permanent disability, Mr. Meeks' status remains temporary, and the Department may not deny payment for opioids based on its determination that Mr. Meeks has reached MMI. It is for that reason that we reverse the September 8, 2006 order.

FINDINGS OF FACT

1. On September 25, 2003, the Department received an Application for Benefits alleging a September 3, 2003 industrial injury to Steve A. Meeks, while in the course of his employment with Shipp Construction, Inc. On October 27, 2003, the Department allowed the claim.

   On April 27, 2006, the Department determined that Mr. Meeks' diarrhea condition was not caused by the industrial injury. The claimant protested that order on May 8, 2006, and on October 4, 2006, the Department affirmed the April 27, 2006 order. On October 30, 2006, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals, from the October 4, 2006 order. The Board granted the appeal on December 1, 2006, assigned it Docket No. 06 20852, and directed that further proceedings be held.

   In a June 26, 2006 letter, the Department determined that Mr. Meeks had reached maximum medical improvement, and informed him and his doctor that the Department would cease paying for opioid therapy 30 days from June 26, 2006. On July 11, 2006, Mr. Meeks protested the letter, and on September 8, 2006, the Department affirmed the June 26, 2006 letter. On October 26, 2006, the claimant filed a Notice of Appeal with the Board from the September 8, 2006 order. The Board granted the appeal on December 1, 2006, assigned it Docket No. 06 20754, and directed that further proceedings be held.

2. On September 3, 2003, Steve A. Meeks sustained an industrial injury to his low back and right leg, while in the course of his employment with Shipp Construction, Inc., when he was driving a dump truck and helping his employer construct a logging road.

3. As a proximate result of the September 3, 2003 industrial injury, Mr. Meeks underwent two surgeries. On November 12, 2003, a lumbar

laminectomy at L4-5 was performed, to relieve nerve root compression. As a result of that surgery, Mr. Meeks developed a spinal fluid leak with associated headaches. On January 1, 2004, he underwent a further surgery, to repair the leak.

4. **Docket No. 06 20754**: As a proximate result of the industrial injury and the two operations it required, Mr. Meeks developed chronic regional pain syndrome or reflex sympathetic dystrophy in his right lower extremity, to the degree that he has constant pain in his right leg and right foot.

5. Mr. Meeks was prescribed opioid medications for his residual pain, proximately caused by the industrial injury.

6. In a June 26, 2006 letter, the Department determined that Mr. Meeks had reached maximum medical improvement, and informed him and his doctor that the Department would cease paying for opioid therapy 30 days from June 26, 2006. After Mr. Meeks protested that letter on July 11, 2006, the Department affirmed the June 26, 2006 letter in a September 8, 2006 order.

7. The Department made no determination regarding whether Mr. Meeks had any permanent disability in the June 26, 2006 letter or the September 8, 2006 order, and the claim remained open.

8. **Docket No. 06 20852**: Immediately following the January 1, 2004 surgery for his industrial injury, Mr. Meeks developed a diarrhea condition which has continued and has not resolved.

9. Mr. Meeks' diarrhea condition was proximately caused by the industrial injury.

CONCLUSIONS OF LAW

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

2. **Docket No. 06 20754**: Until the Department has issued an order in which it addresses permanent disability, Mr. Meeks' status remains temporary, and the Department may not deny payment for opioids based on its determination that Mr. Meeks has reached maximum medical improvement. RCW 51.36.010.

3. The September 8, 2006 Department order is incorrect and is reversed. The claim is remanded to the Department, with direction to issue an order in which it states that payment for opioid medications will not be denied for the reason that Mr. Meeks has reached maximum medical improvement unless and until the Department also makes a

determination, at the same time, regarding the extent of Mr. Meeks' permanent disability, if any.

4. **Docket No. 06 20852**: Mr. Meeks' diarrhea condition was proximately caused by the industrial injury, and it is a covered condition within the meaning of RCW 51.08.100.

5. The October 4, 2006 Department order is incorrect and is reversed. The claim is remanded to the Department with direction to issue an order in which it accepts responsibility for Mr. Meeks' diarrhea condition, and to take further action, consistent with the law and the facts.

It is so **ORDERED**.

DATED: March 10, 2008.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
CALHOUN DICKINSON Member