Woods, Evelyn

CAUSAL RELATIONSHIP

Physician's Assistant

EXPERT TESTIMONY

Physician's Assistant

Because the Department's medical aid rules permit a physician's assistant to render opinions on causation, a physician's assistant's opinion is a sufficient expert opinion to prove causation of a diagnosed condition. **….*In re Evelyn Woods*, BIIA Dec., 07 23506 (2009)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EVELYN C. WOODS	)	**DOCKET NO. 07 23506**
	)	
CLAIM NO. AB-77884	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Evelyn C. Woods, by
Calbom & Schwab, P.S.C., per
David L. Lybbert

Employer, Tri City Herald, per
Kelly Nite, Human Resources Manager

Department of Labor and Industries, by
The Office of the Attorney General, per
Mark Bunch, Assistant

The claimant, Evelyn C. Woods, filed an appeal with the Board of Industrial Insurance Appeals on October 12, 2007, from an order of the Department of Labor and Industries dated September 19, 2007. In this order, the Department affirmed its order dated April 3, 2007, in which it rejected the claimant's Application for Benefits; stating that at the time of injury the claimant was not in the course of employment; that the claimant's condition is not the result of an industrial injury; and that the claimant's condition is not the result of the injury alleged. 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 to a Proposed Decision and Order issued on October 9, 2008, in which the industrial appeals judge affirmed the Department order dated September 19, 2007. All contested issues are addressed in this 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. We have granted review because we believe that a preponderance of the evidence shows that Ms. Woods sustained cervical and lumbar strains due to an industrial injury that occurred on or about December 20, 2006.

An industrial injury is an "injury" that occurs to a worker during the course of his or her employment covered under the Washington State Industrial Insurance Act. An "injury" is defined by

RCW 51.08.100 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.

Initially we note that in the Proposed Decision and Order our industrial appeals judge misinterpreted this definition of "injury" when he concluded that Ms. Woods must not have sustained an injury simply because she could not have been injured on the date she put down on her Application for Benefits (Exhibit No. 1)[1] and did not testify to a different specific date of injury. In discussing the claimant's burden of proof, the industrial appeals judge, in the Proposed Decision and Order, states:

> It is her burden to establish by the preponderance of the evidence that such a sudden and tangible happening occurred at a specific date and time during the course of her employment with Tri-City Herald.

Proposed Decision and Order, at 5.

RCW 51.08.100 makes no reference to a requirement of a "specific date and time." It is sufficient for purposes of claim allowance as an "injury" if the worker's description of the events is specific enough to identify that it involved a "sudden and tangible" event as opposed to a process or exposure that occurred over a long period of time. See, for example, *In re Laura Cooper*, BIIA Dec., 54,585 (1981); *In re David Erickson, Dec'd*, 65,990 (1985); *In re Renford Gallier*, BIIA Dec., 89 3109 (1990); and *In re James Jacobs*, BIIA Dec., 48, 634 (1977). It is not unusual for a worker to wait a period of time after a rather modest injury in the hope that the resulting condition goes away, or in the belief it is not a serious injury, only to discover days, weeks, or months later when medical help is sought that he or she can no longer remember the specific date of injury. Pinpointing the exact date and time of an injurious event can be helpful to a worker when attempting to prove he or she sustained an industrial injury, but the lack of that specific information is not determinative as to whether such an injury in fact occurred and the claim is valid.

Ms. Woods worked as an "inserter" for the employer, a regional newspaper. Her primary job duties were to pick up advertisements or packs of them from pallets, place them onto a machine that aligns them properly (called a "jogger"), and once that is done take them off that machine and place them into the hopper of another machine that inserts them into the newspapers. The bodily movements required to perform these tasks included bending, reaching, and twisting. Ms. Woods testified that while she was loading the machines one day she experienced sharp spinal pain that

[1] This is a true statement because Ms. Woods did not work on that date.

she initially ignored, but which became sharper and sharper over the next several days when she worked. Taking the claimant's testimony at face value, she has described a sudden and tangible happening that resulted in a physical condition that required medical treatment.

Our industrial appeals judge did not take Ms. Woods' testimony at face value due to its lack of specificity, confusion about the date of injury, and the apparent two-week delay in reporting the injury. To say that Ms. Woods' testimony is hard to understand is merely stating the obvious. One need only read her testimony to understand why. As Ms. Kelly Nite, the employer's human resources manager testified:

> Nothing with Ms. Woods is clear, ever. It -- it was very confusing to have that conversation with her; and, no, it wasn't clear that she'd been hurt on the job. I wasn't sure what had even happened.

8/26/08 Tr. at 21-22.

It is also evident from the testimony of Ms. Cleo Nimietz, the physician's assistant who initially was the attending provider for Ms. Woods, that she had difficulties communicating with her as well. This is also evident in the claimant's description of the injury as she wrote it on the Application for Benefits (Box 18 in Exhibit No. 1). Especially problematic is the reference to a "15 inch high step." It is clear that there were low steps that she might encounter on the job, but the existence and whereabouts of this particular step (or for that matter its significance, if any) were never explained, even though she was given an opportunity to try.

Clearly there are sufficient grounds to support a determination that Ms. Woods was not credible, and therefore no on-the-job injury occurred. However, unlike our industrial appeals judge, we conclude that the difficulties with Ms. Woods' testimony are merely due to her lack of sophistication and ability to handle this type of complex legal situation. We interpret Ms. Nite's statement, quoted above, to be one of frustration with the difficulties in communicating with Ms. Woods rather than being an opinion that she is falsifying something.

In reviewing the testimony of Ms. Nimietz, we find evidence (consistent with Ms. Woods' testimony) that supports the occurrence of the spinal strains approximately two weeks prior to the filing of the Application for Benefits. Ms. Nimietz first saw Ms. Woods on December 22, 2006, for a "women's health exam." Such a regular preventative examination likely would have been scheduled weeks earlier. **While at the December 22, 2006 examination the claimant for the first time asked for a disability examination due to neck and back pain**. Ms. Nimietz apparently refused to provide a disability examination that day, informing the claimant she needed to have disability forms filled out first. This encounter reveals two things: (1) The claimant's neck

and back pain had originated before December 22, 2006. (2) Ms. Nimietz did not obtain a history of onset of the pain, either because she was focused on the original purpose of the examination, or Ms. Woods' inability to communicate effectively meant she did not understand that this was a workers' compensation matter. Based on the totality of this testimony, we conclude that a December 20, 2006 date of injury is likely.[2] This date is consistent with the claimant's statement to Ms. Nimietz on January 5, 2007, that her problems started approximately two weeks before. It also bolsters her credibility because there is written proof that she attempted to report the work-related conditions to Ms. Nimietz on December 22, 2006, **only two days after the injury**. Ms. Woods did not make any major changes in her "story" of what happened to her or what caused the injury, which is also a factor in determining that she did not fabricate the injury in order to obtain benefits.

Ms. Nite indicated that Ms. Woods violated the company policy by not reporting the injury within 48 hours. However, it is not clear that Ms. Woods herself understood that she had a workers' compensation claim until Ms. Nimietz explained that to her on January 5, 2007, at her second appointment. The claimant immediately called Ms. Nite from her provider's office, which appears to us to be an attempt to follow the employer's policy.

We do not find Ms. Nite's testimony regarding her contacts with Ms. Woods to be particularly probative in this appeal. Her own notes did not specifically identify the date she was informed of the claim by the claimant. Her testimony revealed that she was uncertain as to the date she was first informed about the claim. Ms. Nite also admitted that she did not specifically record the contents of her discussions with the claimant about how she had been hurt, which reduces its value to the extent that she questioned the mechanism of injury or the job duties the claimant was engaged in when she initially was injured.

The proximate causal link between the diagnosed cervical and lumbar strains and her injury at work were endorsed by a physician, whose opinion comes in through notations on the Application for Benefits, Exhibit No. 1. This exhibit was admitted into the record without objection, thus the information it contains may be used for all purposes, including establishing medical diagnosis and causation. The Application for Benefits was signed not only by Ms. Nimietz, but also by "Attending physician" Jerry L. Hiner, M.D. (Boxes 55 and 58, Exhibit No. 1). Dr. Hiner presumably is the physician who performs the required "prefectorship" role testified to by

[2] The record is silent as to whether the claimant was working on Wednesday, December 20, 2006. We presume that if she was not working on that date, then the Department and/or employer would have presented proof of that fact because they did present such proof regarding December 15, 2006.

Ms. Nimietz and required by WAC 296-20-01501(1) ("control and supervision of a licensed physician").

The only provider who **testified** regarding medical causation was Ms. Nimietz, a certified physician's assistant. WAC 296-20-01501(4) permits a certified physician's assistant to fill out an application for benefits such as Exhibit No. 1. That Department form requires the provider to list diagnoses and render an opinion regarding the causal link, if any, between those conditions and the industrial injury or occupational disease in question. (Boxes 42 and 48, Exhibit No. 1). Because the Department permits a physician's assistant to render these opinions despite the fact that they do not meet the definitions of "doctor" or physician" in WAC 296-20-01002, it follows that a physician's assistant's opinion on one of these forms should be considered sufficient expert opinion to prove causation of the condition that was diagnosed. We recently implied that, in dicta, in *In re Daniel Bihary*, Dckt. No. 07 13258 (August 8, 2008). Such an inference is also supported by the lack of any such prohibition in WAC 296-20-01501(5), which specifically lists the medical tasks that physician's assistants are not allowed to perform when examining and/or treating injured workers.

FINDINGS OF FACT

1. On January 22, 2007, the claimant, Evelyn C. Woods, filed an Application for Benefits with the Department of Labor and Industries in which she alleged she sustained injury to her back, neck, and hands during the course of her employment with Tri-City Herald on December 15, 2006. On September 19, 2007, the Department issued an order in which it rejected the claim for the reasons that at the time of injury the claimant was not in the course of employment; that the claimant's condition is not the result of an industrial injury; and that the claimant's condition is not the result of the injury alleged. On October 12, 2007, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department order dated September 19, 2007. On November 5, 2007, the Board granted the appeal under Docket No. 07 23506 and agreed to hear the appeal.

2. Evelyn C. Woods is a 46-year-old woman who graduated from high school and completed a year of community college. Beginning September 16, 2004, she worked at Tri-City Herald, working as an inserter, loading a machine that placed advertisements and sales documents between the pages of the newspaper. She also manually inserted flyers that fell onto a conveyor belt instead of being placed between the pages of the newspaper.

3. On or about December 20, 2006, Ms. Woods twisted her back and neck during the course of her employment with the Tri-City Herald, which resulted in the onset of spinal strain symptoms that required medical treatment.

4. As a proximate result of the on-the-job injury that occurred on or about December 20, 2006, Ms. Woods sustained cervical and lumbar strains.

CONCLUSIONS OF LAW

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

2. On or about December 20, 2006, Evelyn C. Woods sustained an industrial injury during the course of her employment with Tri-City Herald as defined by RCW 51.08.100.

3. The order of the Department of Labor and Industries dated September 19, 2007, is incorrect and is reversed. This matter is remanded to the Department to allow the claim as an industrial injury and to provide benefits as indicated by the facts and the law.

Dated: February 3, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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