

Mesan, Smajo

TREATMENT

Fixity of condition

A worker's refusal to undergo recommended treatment may result in a finding that the conditions are medically fixed. ...*In re Smajo Mesan, BIA Dec., 08 22054 (2010)*
Editor's Note: The Board's decision was appealed to superior court under Benton County Cause No. 10-2-03101-1.]

Scroll down for order.

1 We grant review because we disagree with the result reached in the Proposed Decision and
2 Order. The industrial appeals judge remanded Mr. Mesan's claims to the Department with
3 directions to accept certain conditions as occupational diseases; to take such other and further
4 action as authorized or required; to determine that the surgeries offered to Mr. Mesan were proper
5 and necessary treatment; and to inquire of Mr. Mesan if he would undergo these surgeries.
6 Although we can appreciate our industrial appeal judge's concerns about Mr. Mesan refusing
7 proper and necessary treatment, we believe that the case law supports fully resolving all the issues
8 raised by Mr. Mesan within our scope of review in this case. Both parties contend that Mr. Mesan is
9 medically fixed and stable.

10 Smajo Mesan is a 56-year-old Bosnian man who has had a difficult life. After the war broke
11 out in Bosnia, Mr. Mesan went to Germany as a refugee. He lived there in an encampment for
12 about four years, during which time he was not allowed to work. In Bosnia, he had worked as a
13 mechanical engineer for about 15 years doing mostly paperwork and being the "boss." Mr. Mesan
14 does not understand English very well and does not speak German. Once he came to America, he
15 worked as a machine operator for an engineering company in Kent, Washington for about a year.
16 This job ended when the Boeing layoffs occurred. He worked briefly in the warehouse for Office
17 Depot in 2002, was laid off, then moved to Kennewick and went to work cutting meat for Tyson
18 Foods, Inc. (Tyson) in September 2002.

19 Despite difficulties with his shoulder, arms, and wrists, Mr. Mesan managed to work for
20 Tyson until October 2006, when his shift was laid off. He contends that he has pre-existing neck
21 and back problems aggravated or related to his work at Tyson. After Mr. Mesan began
22 experiencing problems with his wrists and shoulder, he declined surgery by his attending physician,
23 Owen M. Higgs, M.D. He testified that although he has a mechanical engineering degree from
24 Bosnia, he does not think that he could work "because of my back." He also has problems with his
25 hearing

26 Dr. Higgs, a certified orthopedic doctor, testified about his patient. He first saw Mr. Mesan
27 for his hands and shoulder in October 2005, which included a trigger finger on his left hand.
28 Dr. Higgs diagnosed bilateral carpal tunnel syndrome based on moderate findings on nerve
29 conduction studies. Dr. Higgs prescribed braces and anti-inflammatory medication, and offered
30 surgery, for which he felt the prognosis was "very good" but Mr. Mesan did not want the surgery.
31 Dr. Higgs also diagnosed right shoulder impingement and recommended arthroscopic shoulder
32 surgery for that condition. Mr. Mesan did not want surgery for his shoulder either. By the time

1 Dr. Higgs testified in this matter, he had not seen Mr. Mesan in three years. Like most of the other
2 doctors who testified in this matter, Dr. Higgs questioned Mr. Mesan's motivation and whether he
3 was being straightforward about his complaints. Dr. Higgs testified that he worked with a vocational
4 counselor, Maui Garza, on Mr. Mesan's vocational issues, but in the end agreed that Mr. Mesan
5 could return to his job of injury.

6 Thomas L. Gritzka, M.D., a certified orthopedic doctor, examined Mr. Mesan on May 6, 2009,
7 at Mr. Mesan's attorney's request. Dr. Gritzka found a positive impingement sign in Mr. Mesan's
8 right shoulder. He also found upper extremity sensory impairment consistent with diabetic
9 peripheral neuropathy. Dr. Gritzka agreed with Dr. Higgs that Mr. Mesan had a type 3 acromion
10 and that he would be a reasonable candidate for arthroscopic shoulder surgery and
11 acromionectomy. Dr. Gritzka was clear that he felt Mr. Mesan would benefit from surgery, but felt it
12 would be the patient's choice whether to have the surgery. In addition to bilateral carpal tunnel
13 syndrome and shoulder impingement, Dr. Gritzka diagnosed chronic cervical and lumbosacral
14 sprains but noted that on examination of the back and neck, Mr. Mesan's exam was essentially
15 normal. He felt that no treatment was needed for the carpal tunnel syndrome. Dr. Gritzka rated
16 Mr. Mesan at 8 percent impairment for the right upper extremity per the AMA Guides. On cross-
17 examination, Dr. Gritzka conceded that Mr. Mesan could do sedentary to sedentary-light work.

18 Mr. Mesan also called vocational rehabilitation counselor, Jill Falk, VRC, who met with
19 Mr. Mesan twice at the request of counsel. Ms. Falk did a thorough records review and had a good
20 understanding of Mr. Mesan's work history and the job picture at Tyson. She testified as to why
21 Mr. Mesan is unable to work. On cross-examination, Ms. Falk agreed that all of the medical
22 providers had indicated that they felt Mr. Mesan was capable of work in some capacity.

23 Walter Daniel Fife, M.D., certified orthopedic doctor, examined Mr. Mesan as part of a panel
24 examination in May 2008. Dr. Fife noted non-organic complaints. He diagnosed arthritis in the
25 neck (not related to industrial exposure), shoulder weakness (not related), and trigger finger (not
26 related). Dr. Fife indicated that Mr. Mesan could perform medium work or lower and he approved
27 three of five job analyses submitted for his review. In his opinion, Mr. Mesan was medically fixed
28 and stable at the time he examined him. On cross-examination, Dr. Fife stated that he did not
29 agree with Dr. Higgs that Mr. Mesan had an impingement syndrome in his right shoulder, but he
30 agreed that Mr. Mesan had bilateral carpal tunnel syndrome. He would not agree with a Physical
31 Capacities Evaluation (PCE) that showed that Mr. Mesan should avoid repetitive work.

1 William Bozarth, M.D., neurologist, examined Mr. Mesan as part of a panel on May 4, 2007.
2 On examination, Dr. Bozarth noted many instances of pain magnification/non-organic responses.
3 In his estimation, Mr. Mesan's effort was poor. The panel diagnosed right shoulder pain due to
4 impingement caused by congenital type 3 acromion; multiple and diffuse pain complaints; and no
5 findings of carpal tunnel syndrome or trigger fingers. Dr. Bozarth would place no restrictions on
6 Mr. Mesan based on this examination. At that time, Mr. Mesan was medically fixed and stable and
7 had no impairment proximately caused by his occupational exposures. Dr. Bozarth felt that
8 Mr. Mesan's unhappiness with his job and his feeling that he had been treated unfairly at Tyson
9 contributed greatly to his overall picture.

10 Maui Garza, a vocational rehabilitation counselor, was assigned by Tyson to work with
11 Mr. Mesan after Mr. Mesan was laid off in October 2006. Mr. Garza testified to meeting with
12 Dr. Higgs, and that Dr. Higgs felt Mr. Mesan could perform the "pick bone sparse lean" job without
13 limitations. This was Mr. Mesan's job of injury. Dr. Higgs also had concurred with Dr. Fife's
14 Independent Medical Examination (IME) report in which Dr. Fife found Mr. Mesan capable of
15 working. Mr. Garza subsequently reviewed all of the medical reports and testimony in this appeal
16 and indicated that Mr. Mesan was capable of work based on either his attending physician's opinion
17 or a preponderance of the medical evidence related to his appeals.

18 A preponderance of the evidence in this appeal supports the conclusion that Mr. Mesan is
19 capable of substantial gainful employment, and has been since his time-loss compensation benefits
20 were ended.

21 The parties agreed that Mr. Mesan has consistently and adamantly opposed the only
22 treatment offered by his attending physician: surgeries for bilateral carpal tunnel syndrome and for
23 his right shoulder impingement syndrome. Their contentions are supported by this record. Mr.
24 Mesan did not testify that he would undergo surgery of any kind. He testified that he was "scared"
25 of an operation and chooses to wear wrist splints instead, and there were no guarantees he would
26 be better off with the surgery.

27 The attending physician, Dr. Higgs, testified he offered both carpal tunnel surgery and
28 arthroscopic shoulder surgery to Mr. Mesan, who declined even though the prognosis for surgery
29 was very good. If Mr. Mesan were to change his mind about having surgery at this point, Dr. Higgs
30 would have to reevaluate him to ensure he remains a candidate for surgery. Finally, Dr. Higgs
31 indicated that when he met with VRC Garza in October 2007, Mr. Mesan was medically fixed and
32 stable if he were not to have surgery.

1 Dr. Gritzka, who examined Mr. Mesan at the request of his attorney, testified that Mr. Mesan
2 would be a reasonable candidate for arthroscopic shoulder surgery and that he would likely benefit
3 from the surgery, but that having surgery is the patient's choice. As to carpal tunnel surgery,
4 Dr. Gritzka indicated that Mr. Mesan's carpal tunnel syndrome was not active at the time of his
5 examination, in which case the results of surgery would be unpredictable. As of May 6, 2009, when
6 Dr. Gritzka examined Mr. Mesan, he felt that no treatment was needed for carpal tunnel syndrome.

7 Although Dr. Fife agreed that Mr. Mesan has bilateral carpal tunnel syndrome, he felt
8 Mr. Mesan was fixed and stable and without impairment. Dr. Bozarth made no findings related to
9 carpal tunnel syndrome but did diagnose right shoulder impingement. He felt Mr. Mesan was
10 medically fixed and stable.

11 Our industrial appeals judge determined that Mr. Mesan's medical conditions were not fixed
12 and stable within the meaning of *Miller v. Department of Labor & Indus.*, 200 Wash. 674 (1939).
13 However, the *Miller* court actually determined that because the only treatment that would improve
14 Mr. Miller's industrially-related condition was refused by Mr. Miller, the Department was correct to
15 have found his condition to be fixed. (*Miller* at 681-682.) The *Miller* court also disposed of the
16 Department's contention that because Mr. Miller had refused the surgery on his back, he should not
17 be permitted to recover for his impairment. Citing to the suspension of benefits statute, the *Miller*
18 court indicated that the statute applies only to suspension of benefits during periods of
19 "recuperation from an injury." It does not apply after the worker's condition is fixed. As to
20 Mr. Miller's contention that his condition was not fixed:

21 The record discloses that the first report was made on the assumption that an
22 operation would be performed, from which the doctors concluded that appellant's
23 condition was not fixed, because, in their opinions, surgical treatment would either
24 rectify or materially improve his condition; while the second report was made upon
25 the assurance that no operation would be had and upon the doctors' belief and
26 decision that the condition was permanent. Moreover, regardless of any prior
27 reports, there is ample evidence to support the finding of the department that
28 appellant's condition had become fixed, because, without an operation, no
29 improvement could be expected. Appellant's condition having become fixed, it was
30 necessary for the department to determine whether the disability was total or partial.
31 Upon that question, the evidence abundantly supports the finding that the fixed
32 condition was one of permanent partial disability. We, therefore, conclude that the
classification made by the department should be affirmed.

Miller at 681, 682.

1 The *Miller* court also considered a suspension of benefits issue because the Department had
2 taken the position that because Mr. Miller refused surgery, he should not be permitted to recover at
3 all. The *Miller* court stated:

4 That provision of the statute has reference only to a reduction or suspension of
5 monthly payments which are being made to an injured workman during the period of
6 recuperation from an injury. It does not apply to a lump sum settlement for a
7 permanent partial disability which has been determined by the department after the
condition of the workman has become fixed. For these reasons, it becomes
unnecessary to discuss further the question suggested by the department.

8 *Miller* at 685, 686.

9 In other words, where a worker refuses or declines surgery, even when proper and
10 necessary, the Department is then authorized to close the worker's claim and deem the worker's
11 medical condition to be fixed.

12 Although there are no significant decisions on point, *In re James L. Powers*, Dckt.
13 No., 93 2077 (July 18, 1994) addresses this issue under similar circumstances as the case before
14 us. In *Powers*, the Department closed Mr. Powers' claim with a permanent partial disability award
15 after Mr. Powers had declined an ankle fusion, the only treatment recommended by his attending
16 physician that might reduce his disability. The Board determined that under the circumstances, the
17 Department's closure of Mr. Powers' claim was appropriate:

18 While Mr. Powers has the **right to refuse any treatment**, his repeated and
19 continued refusal of the only treatment available can lead to only one conclusion.
20 As Mr. Powers has refused the only form of treatment available which might
21 reduce his disability, his condition is medically fixed. Whether Mr. Powers' refusal
22 of left ankle fusion surgery was reasonable is irrelevant to a determination of fixity
of condition. (Emphasis ours.)

23 *Powers* at 3, 4.

24 The *Powers* case, read in conjunction with the *Miller* case, leads to the conclusion that
25 Mr. Mesan's refusal of surgery, whether reasonable or not and whether medically necessary and
26 proper or not, gives the Department the authority to close his claims. In Mr. Mesan's case, the
27 Department obviously considered his condition to be fixed and stable. This could have been
28 because the preponderance of medical evidence in their view supported this result or it could have
29 been because the only treatment that might be of benefit to Mr. Mesan—carpal tunnel surgery or
30 surgery to correct his shoulder impingement—was repeatedly declined by Mr. Mesan. Thus, we
31 agree with counsel that to remand at this point to give Mr. Mesan the opportunity to once again
32 decline surgical intervention merely postpones the inevitable.

1 As noted above, we determine that a preponderance of the evidence supports a conclusion
2 that Mr. Mesan is capable of substantial gainful employment. However, we agree with Mr. Mesan
3 that a preponderance of the evidence supports a conclusion that repetitive work at Tyson
4 aggravated his right shoulder condition and made it symptomatic.

5 Dr. Gritzka is the only medical expert in this appeal to have rated Mr. Mesan's right shoulder
6 impairment under the AMA Guidelines. Dr. Gritzka found that Mr. Mesan's right shoulder was stiff,
7 with mild crepitus and a positive impingement sign, and measured decreased range of motion in all
8 planes. Dr. Gritzka determined that Mr. Mesan had an 8 percent impairment of his right upper
9 extremity per the AMA Guides.

10 Based on a thorough review of the Board record, we affirm the Department order of May 6,
11 2009, in Docket No. 09 16858, and we reverse and remand the November 21, 2008 order in Docket
12 No. 08 22054 to the Department to pay a permanent partial disability award consistent with 8
13 percent impairment of the right upper extremity.

14 **FINDINGS OF FACT**

- 15 1. **Docket No. 08 22054:** Under Claim No. W-957232, on January 28, 2005,
16 the claimant, Smajo Mesan, filed an Application for Benefits with the
17 Department of Labor and Industries. He alleged he had a right arm and
18 shoulder condition arising naturally and proximately out of distinctive
19 conditions of his employment with Tyson Foods, Inc., which condition
20 manifested on January 5, 2005. On December 14, 2006, the Department
21 issued an order allowing the claim. On November 21, 2008, the
22 Department closed the claim with time-loss compensation as paid to
23 November 3, 2008, and with no award for permanent partial disability. On
24 December 18, 2008, Mr. Mesan filed his Notice of Appeal with the Board
25 of Industrial Insurance Appeals from the November 21, 2008 Department
26 order. On January 6, 2009, the Board granted the appeal under Docket
27 No. 08 22054 and agreed to hear the appeal.
- 28 2. **Docket No. 09 16858:** Under Claim No. SA-65806, on February 27, 2006,
29 Mr. Mesan filed an Application for Benefits with the Department. He
30 alleged he had a left upper extremity condition arising naturally and
31 proximately out of distinctive conditions of his employment with Tyson
32 Foods, Inc., which condition manifested on between June 19, 2003, and
January 31, 2006. On May 6, 2009, the Department issued an order
allowing and closing the claim with no award for time-loss compensation
or permanent partial disability on the ground that the covered medical
condition was stable. On July 6, 2009, Mr. Mesan filed his Notice of
Appeal with the Board from the May 6, 2009 Department order. On
July 22, 2009, the Board granted the appeal under Docket No. 09 16858
and agreed to hear the appeal.

- 1 3. Between September 2002 and October 2006, Mr. Mesan's work for Tyson
2 Foods, Inc., was fast-paced and required him constantly to reach and lift
3 pieces of meat and grasp with arms away from his body.
- 4 4. Mr. Mesan's work at Tyson was distinctive from all employments in
5 general in that it required continuous standing, repetitive reaching,
6 grasping continuously, and grasping and lifting and moving pieces of meat
7 weighing up to 30 pounds. This activity also was distinctive from activities
8 of everyday life.
- 9 5. As of November 21, 2008, Mr. Mesan had a right shoulder impingement
10 condition that arose naturally and proximately out of the distinctive
11 conditions of his employment at Tyson.
- 12 6. As of May 6, 2009, Mr. Mesan had bilateral carpal tunnel syndrome
13 conditions that arose naturally and proximately out of the distinctive
14 conditions of his employment at Tyson.
- 15 7. Mr. Mesan has chosen not to undergo proper and necessary medical
16 treatment for his conditions proximately caused by his occupational
17 exposures at Tyson, by declining surgery for his carpal tunnel syndrome
18 and his right shoulder impingement syndrome.
- 19 8. During the period November 4, 2008, through May 6, 2009, the claimant
20 was not prevented from performing reasonably continuous gainful
21 employment.
- 22 9. As of May 7, 2009, Mr. Mesan has not been permanently totally disabled.
- 23 10. Because Mr. Mesan has refused carpal tunnel surgery and right shoulder
24 surgery, there is no treatment available that would reduce his impairment
25 and, therefore, his causally-related conditions are medically fixed and
26 stable.
- 27 11. As a result of conditions causally related to Mr. Mesan's occupational
28 disease (Claim No. W-957232), Mr. Mesan has a permanent impairment
29 equal to 8 percent of the amputation value of the right arm.

CONCLUSIONS OF LAW

- 30 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
31 to and the subject matter of these appeals.
- 32 2. Mr. Mesan's right shoulder impingement condition is an occupational
disease within the meaning of RCW 51.08.140.
3. Mr. Mesan's bilateral carpal tunnel conditions are occupational diseases
within the meaning of RCW 51.08.140.
4. As of November 21, 2008, Mr. Mesan's right shoulder condition
proximately caused by his occupational disease was medically fixed and
stable, and had reached maximum medical improvement within the
meaning of WAC 296-20-01002.

- 1 5. As of May 6, 2009, Mr. Mesan's bilateral carpal tunnel syndrome
2 conditions were medically fixed and stable within the meaning of
3 WAC 296-20-01002.
4 6. Between November 4, 2008, and May 6, 2009, Mr. Mesan was not
5 temporarily totally disabled within the meaning of RCW 51.32.090.
6 7. As of May 7, 2009, Mr. Mesan was not permanently totally disabled within
7 the meaning of RCW 51.08.160.
8 8. As of November 21, 2008, Mr. Mesan's permanent partial disability was
9 equal to 8 percent of the amputation value of the right arm.
10 9. In **Docket No. 08 22054**, the order of the Department of Labor and
11 Industries dated November 21, 2008, is reversed. This matter is
12 remanded to the Department to require the self-insured employer to pay to
13 Mr. Mesan an award equal to 8 percent of the amputation value of the
14 right arm and to thereupon close the claim as otherwise provided.
15 10. In **Docket No. 09 16858**, the May 6, 2009 Department order is affirmed.

DATED: November 10, 2010.

16 BOARD OF INDUSTRIAL INSURANCE APPEALS

17 /s/ _____
18 DAVID E. THREEDY Chairperson

19 /s/ _____
20 FRANK E. FENNERTY, JR. Member
21
22
23
24
25
26
27
28
29
30
31
32