Overby, Judith

SANCTIONS

Discovery

The sanction chosen for violation of a discovery rule must be the least severe sanction necessary to remedy prejudice caused by noncompliance with discovery rules. If the only prejudice shown by failure to comply with the discovery was additional attorney's fees, striking the testimony of a witness was excessive. ***….In re Judith Overby,* BIIA Dec., 09 19369 (2011)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 11-2-11646-8 KNT.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JUDITH M. OVERBY	)	**DOCKET NO. 09 19369**
	)	
CLAIM NO. W-859080	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Judith M. Overby, by
Casey & Casey, P.S., per
Gerald L. Casey

Self-Insured Employer, Kroger Co., by
Eims & Flynn, P.S., per
Deborah K. Flynn

The claimant, Judith M. Overby, filed an appeal with the Board of Industrial Insurance Appeals on September 4, 2009, from an order of the Department of Labor and Industries dated August 28, 2009. In this order, the Department affirmed the February 23, 2009 order in which it closed the claim with time loss compensation benefits as paid through October 11, 2008, and directed the self-insured employer to pay a permanent partial disability award of 5 percent of the amputation value of the right arm and 5 percent of the amputation value of the left arm, at or above the deltoid insertion or by disarticulation at the shoulder. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The self-insured employer filed a timely Petition for Review of a Proposed Decision and Order issued on September 28, 2010, in which the industrial appeals judge reversed and remanded the Department order dated August 28, 2009. We have granted review in order to rule on objections and motions in the deposition of Dr. Haq, discuss costs assessed against the claimant's attorney and other directions of the May 14, 2010 Interlocutory Order, republish the assessment of costs, and explain the bases of our determination to affirm the Department's August 2, 2009 order.

PRELIMINARY CONSIDERATIONS

The Board has reviewed the evidentiary rulings in the record of proceedings. In the deposition of Abid Haq, M.D., all objections are overruled and motions denied except: the motion at page 19 is granted and the reference to social security benefits in the preceding answer is stricken; the objections at page 26, lines 21 and 25 are sustained. We find that no prejudicial error was

committed in the other evidentiary rulings within the Proposed Decision and Order. Those rulings are affirmed.

In November 2009, the self-insured employer served interrogatories and requests for production on the claimant. No responses or objections were received within the time periods set forth in CR 33(a) and CR 34(b). The employer sought copies of vocational notes and/or reports relied upon by Ms. Overby. However, John Berg, the claimant's vocational witness, did not see her until March 2010. Afterward, the notes and/or report were not produced for a variety of different reasons, according to the claimant's counsel. On April 23, 2010, after a CR 26(i) conference was held to no avail, the employer's attorney filed a CR 37 Motion to Compel Discovery, which included a request for terms.

Just prior to the May 5, 2010 hearing on the employer's motion to compel discovery, the claimant's attorney produced the documents requested. At that time our industrial appeals judge reserved ruling on the issue of terms until the Proposed Decision and Order was issued, pending her receipt of a more specific statement of the basis for the amount of costs requested. That statement sets forth costs totaling $1,111.50, all of which were attorneys' fees. On May 14, 2010, our industrial appeals judge issued an Interlocutory Order in which she assessed costs of $500 payable by the claimant's attorney to the self-insured employer. In the order the industrial appeals judge also included the following direction: "Consideration of any further evidence on behalf of claimant is conditional on payment of this award." As of May 14, 2010, all of the claimant's witnesses had testified, except Mr. Berg.

The $500 had not been paid as of June 14, 2008, the date the perpetuation deposition of Mr. Berg was taken by Ms. Overby. Later that month the claimant's attorney filed with our industrial appeals judge a motion for reconsideration of the interlocutory order assessing costs. Such a motion was not timely. WAC 263-12-045(3). The May 14, 2010 Interlocutory Order was affirmed in the section of the Proposed Decision and Order titled "Procedural and Evidentiary Matters," but the direction to the claimant's attorney to pay the $500 in costs to the employer was not republished in the conclusions of law. Mr. Berg's deposition testimony was considered and relied on, to some extent, as a basis for the disposition reached in the Proposed Decision and Order. There is no information in the record stating whether the $500 in costs awarded by the interlocutory order had been paid by the claimant's attorney to the employer. We infer from the Petition for Review of the self-insured employer, which asks that the testimony of Mr. Berg be stricken, that the costs have yet to be paid.

CR 37(d) lists sanctions available when a party ignores interrogatories and requests for production. It is within the authority of our industrial appeals judges to award costs when those discovery rules have been violated. WAC 263-12-045(2)(c) and WAC 263-12-125. Having reviewed the facts pertaining to the discovery dispute, we affirm the $500 cost assessment against the claimant's attorney as an appropriate exercise of our industrial appeals judge's discretion. However, we are concerned that by not including language within the findings of fact and conclusions of law directing payment of the $500 assessed by the Interlocutory Order, the award for costs could be perceived as extinguished. We have added to this Decision and Order a finding of fact supporting the imposition of costs as stated by the industrial appeals judge in the Proposed Decision and Order, as well as a conclusion of law ordering payment pursuant to CR 37(d).

While we affirm the Interlocutory Order's assessment of $500 in costs, we disagree with its other proposed sanction: conditioning the consideration of any further testimony on behalf of Ms. Overby to the payment of the award for costs. Such a remedy is within the power of our industrial appeal judges, as noted earlier. However, when sanctioning actions or inactions that constitute a violation of discovery rules, the sanction or sanctions chosen must be the least onerous ones necessary to remedy prejudice caused by the offending party's non-compliance with the discovery rules. In this case, we find that the only prejudice shown by the employer was that it incurred additional attorneys' fees. The employer's counsel did not plead or prove any other prejudice to her client's case; thus striking the testimony of the claimant's lone vocational witness would be excessive.

Causation of Hand/Wrist Conditions

Four doctors testified in this appeal: For the claimant, Daniel Brzusek, D.O., a physiatrist who evaluated the claimant once, over four months after the closing order was issued. The self-insured employer called three medical experts, all of whom saw the claimant in 2008, just before her time loss compensation benefits were terminated. They are Peter Mohai, M.D., a rheumatologist, Abid Haq, M.D., an occupational medicine specialist who saw the claimant twice, and Patrick Bays, D.O., an orthopedist who also saw the claimant twice.

On September 26, 2005, Ms. Overby saw a Dr. Jolley for problems with her hands that she believed were due to repetitive heavy use at work. MRIs of both upper extremities were performed in October 2005 that revealed diffuse and pronounced tenosynovitis of both the flexor and extensor regions in her wrists and forearms. Nerve conduction studies performed in December 2005 showed severe slowing in the right median nerve and moderate slowing in the left median nerve.

On March 17, 2006, Dr. Singh performed a right-sided carpal tunnel release and tenosynovectomy. On May 18, 2006, Dr. Singh performed the same surgery, this time on the left. Ms. Overby testified that the surgery did not help her much, if at all. However, nerve conduction studies on March 17, 2008, reflected improvement in the CTS inasmuch as the slowing of the right median nerve was now rated as moderate and that of the left median nerve was now only mild.

Blood tests performed on October 11, 2005, and afterward were positive for the presence of an inflammatory process within Ms. Overby's body. Findings of biopsies of the claimant's wrist synovium following the 2006 surgeries were consistent with the earlier MRI findings of thickening of the synovium, and led to the conclusion that the claimant suffered from rheumatoid arthritis of the joints in her wrists, hands and digits. Ms. Overby insisted that she never was told that she had this condition and never received treatment for it. The medical records do not show that this condition was diagnosed or treated before September 25, 2005, but they also prove that she was subsequently told of this condition and provided treatment for it. Following the biopsies, she underwent a consultation with a rheumatologist, Dr. Kowalski, in June 2006. Eventually she was prescribed prednisone and methotrexate, two powerful drugs used to treat rheumatoid arthritis. All of the physicians who testified, including Dr. Brzusek, diagnosed either rheumatoid or inflammatory arthritis. Rheumatoid arthritis is a type of inflammatory arthritis. Dorland's Medical Dictionary, 30th Ed., p.149. Often the terms are interchangeable as can be seen in the testimony of the physicians. In any event, those conditions are within the specialty of a rheumatologist. Dr. Mohai was the only rheumatologist who testified.

The symptoms of carpal tunnel syndrome are caused by the compression of the median nerve in the carpal tunnel in the wrist and base of the hand. The physiological cause of that compression is the swelling of soft tissues in and around the carpal tunnel. In Ms. Overby's case, that swelling was from two sources: the enlargement of the synovium around the wrist joints caused by the inflammatory arthritis and swelling of tendons and other soft tissue by their overuse in performing work activities. Following the surgical releases, the claimant's ongoing carpal tunnel syndrome, and wrist, hand and digit arthritis continued to progress as manifested by increased pain, swelling, numbness and tingling of the hands and digits. This progression occurred even though the median nerves had been at least partially decompressed by the surgeries as proven by the 2008 nerve conduction test findings and even though she ceased working around the time of the release surgeries.

No attending physician testified in this case (although Dr. Haq comes close because at least one of his examinations was as a consultant for treatment purposes). We give the most weight to the testimony of Dr. Mohai, who is the only rheumatologist who testified in this matter. His specialty is important because the claimant is suffering from an active inflammatory or rheumatologic condition, thus making Dr. Mohai especially qualified to render opinions regarding the causation of the rheumatoid arthritis as well as its progression and the effects, if any, that it had on non-rheumatologic conditions.

The great weight of the medical testimony, that of Drs. Mohai and Haq (and to a lesser extent Dr. Bays), supports a finding that the claimant's carpal tunnel syndrome was caused in part by both her work activities and the inflammatory or rheumatoid arthritis. The claimant ceased working when the release surgeries occurred in early 2006. She did not return to work thereafter, thus ending any ongoing work-related aggravation of that condition. Her rheumatoid arthritis continued to be treated and progressed nonetheless. The claimant's carpal tunnel syndrome never did resolve entirely, and its symptoms were joined by other symptoms consistent with synovitis and tenosynovitis. The best explanation of the increase of the symptoms in the claimant's wrists, hands, and digits was provided by Dr. Mohai. He concluded that the worsening and progression of the carpal tunnel syndrome and other symptoms, in spite of the cessation of job activities for several years, proved that the increase and progression was due to the ongoing inflammatory arthritis. Dr. Brzusek's testimony did not materially dispute the explanation above except for his belief that the work activities continued to be causative of the progression of the claimant's complaints and disability. His opinions on that matter are discounted because he saw the claimant only several months after the closing order was issued and also because he did not adequately explain the basis for his belief in the continued causative effect several years after the claimant's work activities had ceased.

In addition to the pain, swelling, numbness, and tingling in the claimant's wrists, hands and digits, she began to develop "clubbing" or "spooning" of the end of her fingers. This finding was first observed by Dr. Mohai in April 2008 and again by Dr. Haq in June 2008. In regard to the clubbing of the end of Ms. Overby's digits, Dr. Mohai did not believe that this finding was related to osteoarthritis or rheumatoid arthritis, but instead was a physical finding. Dr. Haq, an occupational medicine specialist, agreed. He noted that the clubbing can have many causes, including cardiac conditions and COPD. He also noted that smoking can cause that condition. Ms. Overby had a 35-year history of smoking, which only ended in 2008. Because this condition did not develop until

the claimant had been off work for at least two years, it is unlikely that it was caused by the work activities that were the source of her occupational disease.

Treatment/Permanent Partial Disability Benefits

The industrial appeals judge is clearly correct regarding her conclusions that the claimant's occupational disease had reached maximum medical improvement and resulted in permanent partial disability ratings of 5 percent of each upper extremity. The only treatment recommendation from any doctor was from Dr. Brzusek. He agreed with the other physicians that no further treatment of the carpal tunnel syndrome was available, but he indicated that medications were available to treat the inflammatory arthritic conditions. He then deferred that recommendation to a rheumatologist. Dr. Mohai, the only rheumatologist who testified, agreed that treatment was available for the rheumatologic condition, but not for the conditions caused by work activities. All of the physicians who testified agreed with the 5 percent rating for each upper extremity, which was supported by the continued nerve conduction abnormalities. That objective test was specific for median nerve slowing, which would be due to the carpal tunnel syndrome, which was partially caused by the occupational disease. Dr. Brzusek at one point testified to a 10 percent rating, but he later clarified this to indicate that he had added the two extremity ratings together.

Time-loss Compensation and Permanent Total Disability Benefits

When considering the claimant's bilateral carpal tunnel syndrome without the unrelated progression of her inflammatory arthritis and symptoms emanating therefrom, the weight of the evidence supports a finding that she was able to work during the time loss compensation benefits period and as of August 28, 2009, the date of the closing order.

We compared Ms. Overby's physical restrictions suggested by Drs. Haq and Mohai with the job requirements listed in the job analyses in the record. It is clear that the claimant could no longer perform her job of injury, that of deli clerk/assistant manager despite the qualified endorsement of that job by Drs. Mohai and Haq. Exhibit No. 6 confirms that this job requires too much lifting and carrying as well as handling and grasping items. Exhibit No. 1 also supports our determination. In that exhibit the employer stated it would not offer such a job to the claimant because her vocational counselor said she could not return to work at the job-of-injury.

It is also clear that the claimant could not obtain or perform the job of social worker in the field of domestic violence. The problem with the social worker job is not the claimant's physical restrictions, but whether she is, in fact, qualified for such a high-stress job that requires specialized expertise. A bachelor's degree in special education followed by an out-of-date work history

performing administrative tasks in programs for low income and disabled adults, minorities and seniors, as described in Exhibit No. 9, cannot logically be said to suffice.

We conclude that the parking lot cashier job, as described by Exhibit No. 5, is within Ms. Overby's physical capacities. That job analysis was approved without modifications by both Drs. Mohai and Haq. In addition to that job, both doctors concluded that the claimant could perform sedentary level job activities in general.

The only expert testimony that supported total disability during these periods was from Dr. Brzusek, and John Berg, who did not see the claimant until several months after the closing order was issued. Dr. Brzusek's opinion on this matter is not helpful because when giving it he did not factor out the ongoing and increasing wrist, hand and digit symptoms caused by the post-occupational disease progression of the unrelated rheumatoid arthritis. Because the evidence is clear that the claimant's bilateral upper extremity symptoms and disabilities increased after she left the employment that had caused this occupational disease, and these increases were related to a condition that was not caused nor aggravated by the conditions of employment, the increases may not be considered when determining whether the additional restrictions or inability to work was caused by the occupational disease. Mr. Berg's testimony is entitled to very little weight because he believed that both Dr. Mohai and Dr. Haq had concluded that the claimant could not work when in fact, those doctors' opinions were exactly the opposite. Thus, Mr. Berg had a complete misunderstanding about the preponderance of the medical opinion on this issue.

FINDINGS OF FACT

1. On November 15, 2005, the claimant, Judith M. Overby, filed an Application for Benefits with the Department of Labor and Industries in which she alleged that she sustained an injury or disease while in the course of her employment with QFC (hereinafter "Kroger Co.") on or about September 26, 2005. The claim was allowed and benefits were paid. On February 23, 2009, the Department issued an order in which it closed the claim with time loss compensation benefits paid through October 11, 2008, and directed the self-insured employer to pay a permanent partial disability of 5 percent of the amputation value of the right and left arms, at or above the deltoid insertion or by disarticulation at the shoulder. On April 15, 2009, the claimant filed a Protest and Request for Reconsideration. On August 28, 2009, the Department issued an order in which it affirmed its order dated February 23, 2009. On September 4, 2009, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On October 16, 2009, the Board issued an order granting the appeal under Docket No. 09 19369, and agreed to hear the appeal.

2. Before September 26, 2005, the claimant had progressive inflammatory arthritis of her wrists, hands, and digits that had not affected her ability to work or otherwise resulted in disability and had not required medical treatment. This condition caused thickening of the tenosynovium and other soft tissues in the wrists, hands, and digits. This condition was not proximately caused or aggravated by the claimant's work activities or other conditions of her employment with Kroger, Co.

3. The repetitive work of loading and unloading up to 60 pounds and pushing up to 400-pound carts as part of her job duties at Kroger, Co. caused inflammation and swelling to soft tissues in the claimant's wrists, hands, and digits. By September 26, 2005, this inflammation and swelling, when combined with the changes in the synovium and other soft tissues related to the claimant's progressive inflammatory arthritis, proximately caused bilateral carpal tunnel syndrome as well as diffuse synovitis and tenosynovitis in her wrists, hands, and digits. These conditions were treated surgically with a right carpal tunnel release and tenosynovectomy on March 17, 2006, and a left carpal tunnel release and tenosynovectomy on May 18, 2006. The surgeries were only partially successful. The claimant's symptoms continued, but electrodiagnostic testing showed improved nerve conduction in both arms.

4. After 2006, the claimant's wrist, hand, and digit symptoms worsened and included greater weakness, pain, swelling, numbness, and tingling bilaterally. The increase in these symptoms and the restrictions in physical activities therefrom were caused by the progression of the claimant's inflammatory arthritis, unrelated to her occupational activities and conditions.

5. In April 2008, physicians first observed "clubbing" or "spooning" of the ends of the claimant's fingers. This condition was not caused by or otherwise related to either the claimant's occupational disease or her inflammatory arthritis.

6. As of August 28, 2009, claimant's occupational carpal tunnel syndrome, diffuse synovitis, and tenosynovitis in her bilateral upper extremities had reached maximum medical improvement, with no curative medical treatment available. The non-occupational portion of these conditions required further medical treatment.

7. As of August 28, 2009, claimant's upper extremity impairments, proximately caused by her Kroger Co., work activities, was best described as 5 percent of the amputation value of both the right and left arms at or above the deltoid insertion or by disarticulation at the shoulder.

8. As of August 28, 2009, claimant was a 57-year-old right-handed woman who had attended college to obtain a bachelor's degree in special education in 1978, but had never taught, obtained a teaching degree or a license to teach. Instead, she worked in social services for disabled

people that included training them by demonstrating physically demanding work such as janitorial and bulk mailing. She later worked in retail and cashiering, ending with her Kroger Co., employment as a deli worker and manager.

9. From October 12, 2008 through August 27, 2009, and as of August 28, 2009, when considering the upper extremity residuals of her occupational disease, the claimant was limited to sedentary activities, with lifting and carrying limited to no more than 10 pounds on an occasional basis, pushing and pulling limited to no more than 10 pounds on an occasional basis, and frequent grasping and fine manipulation. Additional activity limitations were unrelated to her occupational disease, but instead were due to the progression of her pre-existing non-occupational inflammatory arthritis.

10. Between October 12, 2008 and August 27, 2009, inclusive, and considering the disabilities and physical limitations proximately caused by the injurious exposure at Kroger Co., but not the post-exposure progression of her inflammatory arthritis, the claimant was able to perform reasonably continuous work at a gainful occupation, in light of her age, education, and work experience.

11. As of August 28, 2009, when considering the disabilities and physical limitations proximately caused by the injurious exposure at Kroger Co., but not the post-exposure progression of her inflammatory arthritis, the claimant was able to perform reasonably continuous work at a gainful occupation, in light of her age, education, and work experience.

12. The claimant did not timely respond to interrogatories and requests for production of Kroger Co. In order to obtain this discovery, the employer's attorney scheduled a CR 26(i) conference which was held to no avail. The discovery was provided to the employer's attorney only after a CR 37 motion to compel discovery was scheduled. The employer incurred attorney's fees totaling $1,111.50 in order to obtain discovery. Under the circumstance of this case, the assessment of $500 in costs to be paid by the claimant's attorney to the employer is reasonable.

CONCLUSIONS OF LAW

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

2. Between October 12, 2008 and August 27, 2009, inclusive, the claimant was not a temporarily totally disabled worker within the meaning of the Industrial Insurance Act and RCW 51.32.090.

3. As of August 28, 2009, claimant was a not a permanently totally disabled worker within the meaning of the Industrial Insurance Act and RCW 51.08.160.

4. Pursuant to CR 37(d), the claimant's attorney shall pay the employer $500 as costs incurred by the employer due to the untimely responses

to discovery requests. This amount shall be paid within 60 days after this order becomes final.

5. The order of the Department of Labor and Industries dated August 28, 2009, is correct and is affirmed.

DATED: March 14, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
LARRY DITTMAN Member

DISSENT

While I agree with the majority that the monetary sanctions assessed in the Proposed Decision and Order should be affirmed and republished within our Decision and Order, I disagree with its substantive determinations that Ms. Overby has not been a totally disabled worker since October 12, 2008. I conclude that she has been totally disabled throughout the period in question and entitled to time-loss compensation benefits from that date through August 27, 2009, and thereafter the benefits accorded to a permanently and totally disabled worker. I would adopt the reasoning and determinations contained in the Proposed Decision and Order regarding the substantive issues.

It should be noted from the outset that Ms. Overby had been classified as a totally and temporarily disabled worker since the onset of her occupational disease in September 2005 through October 11, 2008, without any gaps in that status during those three years. There is no medical evidence whatsoever that her multiple upper extremity conditions, caused at least in part by the conditions and activities of her employment, have improved in the slightest. Instead, the majority indicates that her upper extremity conditions worsened, but that such worsening was not related to any condition of her employment. Even if the latter conclusion is true, it ignores the facts stated earlier, that conditions related to her employment, which did not improve, were a proximate cause

of her inability to work for over three years. Logically it would seem evident that she remains unable to work, in part due to her occupational disease.

The majority correctly notes that Ms. Overby could no longer perform her job of injury or any other employment with Kroger Co. (*See* Exhibit No. 1.) That company is a very large company with many different types of positions available, including light-duty and sedentary positions. It is telling that it could not find any positions for which Ms. Overby was qualified and also physically capable of performing. The majority also is correct in determining that Ms. Overby was incapable of performing the job of social worker. This leaves only one job that has been identified by the employer as being within Ms. Overby's physical capacities; that of parking lot cashier (Cashier II).

The job analysis for parking lot cashier (Exhibit No. 5) clearly states that this job requires handling, grasping, fine finger motion, and fingering on a frequent basis. The job analysis itself defines "occasional" use as up to one-third of the work day, while "frequent" use is up to two-thirds of the work day. Dr. Haq, whose estimate of Ms. Overby's physical restrictions was endorsed by Dr. Mohai, initially testified that for her the on-the-job hand and finger motions needed to be limited to "occasional." Thus, the parking lot cashier job is also beyond Ms. Overby's physical capacities. When faced with this inconsistency Dr. Haq waffled, attempting to equate "occasional" use with "frequent" use. Like the industrial appeals judge, I find the distinction between "occasional" use and "frequent" use to be significant vocationally. Why else would the job analysis forms make a distinction between these terms?

In summary, I would find that Ms. Overby has been totally disabled since October 12, 2008, when her time-loss compensation benefits were terminated, and is entitled to time-loss compensation benefits through August 27, 2009, and permanent total disability benefits thereafter.

Dated: March 14, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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