

## **Fish, Paul**

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### **TREATMENT**

#### **Department guidelines**

Department guidelines for determining if surgery is medically proper and necessary treatment do not provide the legal basis for the Board to determine if the treatment is proper and necessary. ...*In re Paul Fish*, BIA Dec., 10 18494 (2011)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1 **IN RE: PAUL J. FISH** ) **DOCKET NO. 10 18494**  
2 )  
3 **CLAIM NO. Y-342141** ) **DECISION AND ORDER**

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4 INDUSTRIAL APPEALS JUDGE: Michael E. Metzger

5 APPEARANCES:

6 Claimant, Paul J. Fish, by  
7 Robinson & Kole, P.S., Inc., per  
8 David W. Robinson

9 Employer, Country Homes Construction & Design,  
10 None

11 Department of Labor and Industries, by  
12 The Office of the Attorney General, per  
13 Sarah L. Martin, Assistant

14 The claimant, Paul J. Fish, filed an appeal with the Board of Industrial Insurance Appeals on  
15 August 13, 2010, from an order of the Department of Labor and Industries dated August 10, 2010.  
16 In this order, the Department denied authorization for surgical treatment for Mr. Fish's neurogenic  
17 thoracic outlet syndrome. The Department order is **AFFIRMED**.

**DECISION**

18 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
19 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and  
20 Order issued on August 12, 2011, in which the industrial appeals judge reversed and remanded the  
21 Department order dated August 10, 2010. On October 12, 2011, the claimant filed a Response to  
22 Petition for Review.

23 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
24 no prejudicial error was committed. The rulings are affirmed.

25 Mr. Fish's appeal from the Department order, in which the Department denied authorization  
26 for surgical treatment of his neurogenic thoracic outlet syndrome, raises the issue of whether this  
27 treatment was medically proper and necessary. Our industrial appeals judge's determination that  
28 this treatment was not medically proper and necessary is fully supported by the record and we  
29 adopt his determination. However, in Finding of Fact No. 9 the industrial appeals judge references  
30 the Department's guidelines for determining if surgery is medically proper and necessary treatment  
31

1 for neurogenic thoracic outlet syndrome. The Department's guidelines do not provide the basis for  
2 this determination. We are required to base our determination on the medical evidence presented  
3 by the parties. The basis for this decision is set forth in the findings of fact that precede Findings 9  
4 and 10, which are not relevant to that determination. We have granted review to delete Findings of  
5 Fact No. 9, and 10, and to eliminate Conclusion of Law No. 3, renumber Conclusion of Law No. 4  
6 as No. 3. Conclusion of Law No. 3 is redrafted and restricted to an affirmation of the denial of  
7 surgical treatment of Mr. Fish's neurogenic thoracic outlet syndrome, as it was not proper and  
8 necessary treatment on August 10, 2010.

9 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto  
10 by the Department of Labor and Industries, the claimant's Response to Petition for Review, and a  
11 careful review of the entire record before us, we are persuaded that the Proposed Decision and  
12 Order's determination denying surgical treatment of Mr. Fish's neurogenic thoracic outlet syndrome  
13 as it was not proper and necessary treatment on August 10, 2010, is supported by the  
14 preponderance of the evidence and is correct as a matter of law.

#### 15 **FINDINGS OF FACT**

- 16 1. On October 9, 2003, the claimant, Paul J. Fish, filed an Application for  
17 Benefits with the Department of Labor and Industries in which he  
18 alleged he sustained an industrial injury on January 2, 2003, during the  
19 course of his employment with Country Homes Construction  
20 Development. On November 20, 2003, the Department rejected the  
21 claim. On April 12, 2004, following timely Protest and Request for  
22 Reconsideration and appeals, the Department affirmed its order of  
23 November 20, 2003. On April 15, 2004, Mr. Fish filed a Notice of  
24 Appeal with the Board of Industrial Insurance Appeals, and on May 12,  
25 2004, the Board granted, and agreed, to hear the appeal under Docket  
26 No. 04 14396.

27 On September 17, 2004, the Board issued an Order on Agreement of  
28 Parties in Docket No. 04 14396, in which it reversed the Department  
29 order of April 12, 2004, and remanded the claim to the Department with  
30 direction to allow the claim and take such further action as indicated by  
31 the facts and the law. On October 5, 2004, the Department allowed the  
32 claim.

On September 17, 2008, the Department denied responsibility for the  
condition diagnosed as thoracic outlet syndrome, determined by medical  
evidence to be unrelated to the industrial injury for which the claim was  
filed. On September 29, 2008, following timely Protest and Request for  
Reconsideration and appeals, the Department affirmed its order of  
September 17, 2008. On October 3, 2008, Mr. Fish filed a Notice of

1 Appeal with the Board of Industrial Insurance Appeals. On October 24,  
2 2008, the Board granted, and agreed to hear the appeal under  
3 Docket No. 08 19395.

4 On September 21, 2009, a Proposed Decision and Order was issued in  
5 Docket No. 08 19395 in which the industrial appeals judge reversed the  
6 September 29, 2008 order and remanded the claim to the Department  
7 with direction to allow Mr. Fish's right neurogenic thoracic outlet  
8 syndrome under the claim and to provide him with such benefits for that  
9 condition as he may be entitled to under the facts and the law. On  
10 October 20, 2009, the Board, in Docket No. 08 19395, issued an Order  
11 Adopting Proposed Decision and Order. On November 17, 2009, the  
12 Department issued an order in which it stated the notice of decision  
13 dated September 17, 2008 and the notice of decision dated  
14 September 29 2008 are canceled; the Department is responsible for the  
15 condition diagnosed as thoracic outlet syndrome, under this claim; this  
16 action is taken in accordance with the BIIA order dated October 20,  
17 2009.

18 On August 10, 2010, the Department issued a letter in which it denied  
19 authorization for the procedure(s) requested for the worker under  
20 notification #2501117275; and the Department found that claimant's  
21 condition did not meet the Department guidelines for when the  
22 procedure is appropriate and medically necessary.

23 On August 13, 2010, Mr. Fish filed a Notice of Appeal with the Board.  
24 On September 20, 2010, the Board granted, and agreed to hear the  
25 appeal under Docket No. 10 18494.

- 26 2. Mr. Fish was born on November 14, 1964. His work has included heavy  
27 manual labor. Mr. Fish, prior to January 2, 2003, had no symptoms in  
28 his right shoulder, right arm, or neck.
- 29 3. On January 2, 2003, Mr. Fish was employed by County Home  
30 Construction and Design as a framer. On that day and during the  
31 course of his employment, Mr. Fish, had, to carry a heavy beam on his  
32 shoulder with a co-worker. Mr. Fish's co-worker dropped the beam,  
causing injuries to Mr. Fish, including his right neck and shoulder.
4. One of the conditions proximately caused by Mr. Fish's January 2, 2003  
injury, which occurred during the course of his employment with County  
Home construction and Design, is right neurogenic thoracic outlet  
syndrome.
5. Mr. Fish's right neurogenic thoracic outlet syndrome is a physical  
condition that resulted from, and was proximately caused by, his  
industrial injury of January 2, 2003.
6. Mr. Fish came under the care of Kaj Johansen, M.D., a vascular  
surgeon who has recommend that Mr. Fish undergo surgery to treat his  
neurogenic thoracic outlet syndrome. Dr. Johansen has seen Mr. Fish

1 on two occasions; April 3, 2008, and January 19, 2010. Mr. Fish had a  
2 scalene block test that came back negative. Dr. Johansen, in the vast  
3 majority of cases, will not operate on a patient that has a negative  
4 scalene block test. The diagnosis of neurogenic thoracic outlet  
5 syndrome, as well as surgery for the condition, is controversial in the  
6 medical community.

7 7. As of August 10, 2010, the benefit of the surgery recommended by  
8 Dr. Johansen for Mr. Fish's neurogenic thoracic outlet syndrome was  
9 outweighed by the potential harm that the surgery would cause.

10 8. As of August 10, 2010, there were less invasive treatment measures  
11 available to treat Mr. Fish's right neurogenic thoracic outlet syndrome.

12 **CONCLUSIONS OF LAW**

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

15 2. As of August 10, 2010, the surgery recommended by Dr. Johansen was  
16 not proper and necessary treatment within the meaning of  
17 RCW 51.36.010.

18 3. The Department order in a Department letter dated August 10, 2010, is  
19 affirmed.

20 DATED: October 31, 2011.

21 BOARD OF INDUSTRIAL INSURANCE APPEALS

22 /s/ \_\_\_\_\_  
23 DAVID E. THREEEDY Chairperson

24 /s/ \_\_\_\_\_  
25 FRANK E. FENNERTY, JR. Member

26 /s/ \_\_\_\_\_  
27 JACK S. ENG Member