Wanmer, Wesley

SCOPE OF REVIEW

Employer's appeal of order that holds the claim open

Where the issue before the Board is whether the worker's conditions are fixed and stable or in need of treatment, the parties may not enter into a stipulation to remove a particular treatment recommendation from the Board's consideration. ***….In re Wesley Wanmer,* BIIA Dec., 10 19407 (2012)** [*Editor's Note*: The Board's decision was appealed to Thurston County Superior Court No. 12-2-00210-7.]

TREATMENT

Proper and necessary medical and surgical services (RCW 51.36.010)

In an appeal from an order holding the claim open for treatment, the Board's scope of review extends to whether the worker's condition is fixed and stable and the expected effect of particular treatment. ***….In re Wesley Wanmer,* BIIA Dec., 10 19407 (2012)** [*Editor's Note*: The Board's decision was appealed to Thurston County Superior Court No. 12-2-00210-7.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WESLEY W. WANMER	)	**DOCKET NO. 10 19407**
	)	
CLAIM NO. SB-73562	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Wesley W. Wanmer, by
Law Offices of James Rolland, P.S., per
Roger C. Cartwright and Elijah M. Forde

Self-Insured Employer, Interstate Brands Corp., by
Law Office of Robert M. Arim, PLLC, per
Robert M. Arim

Department of Labor and Industries, by
The Office of the Attorney General, per
Robert Hatfield, Assistant

The self-insured employer, Interstate Brands Corp., filed an appeal with the Board of Industrial Insurance Appeals on August 5, 2010, from an order of the Department of Labor and Industries dated June 7, 2010. In that order, the Department affirmed a March 5, 2010 order in which it canceled a December 9, 2009 order, allowed Wesley W. Wanmer's claim for an injury on November 15, 2008, and held the claim open for authorized treatment and action as indicated. The Department order is **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

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 1, 2011, in which the industrial appeals judge affirmed the Department of Labor and Industries order dated June 7, 2010.

Our industrial appeals judge accepted a stipulation attempting to limit matters at issue in this appeal. The stipulation was apparently agreed to by all counsel off the record and then recited on the record by the industrial appeals judge in material part as follows:

> The issue is limited to whether the industrial injury of November 15, 2008 was a proximate cause of the claimant's need for further and necessary and proper medical treatment.
>
> The specific recommendation by Doctor Wood of a left knee total knee replacement has not been ruled upon by the department.

> Therefore, the sole issue will not be whether the claimant's request for a left knee replacement as a method of therapy or a matter of therapy whether rehabilitative is more controversial (sic) will not before the Board in this appeal.
>
> The sole issue is whether the residual effects of industrial injury of November 15, 2008 was the proximate cause of the claimant's need for necessary and proper medical treatment as of June 7, 2010.

6/14/11 Tr. at 4-5. We reject this stipulation.

This stipulation is premised on a misconception of the scope of the Board's review authority. We are directed by statute to make findings and conclusions as to each contested issue of fact and law in the appeals before us. RCW 51.52.104 and 106. The scope of the Board's jurisdiction is limited by the Department order on appeal, the Notice of Appeal, and the issues raised thereby. *Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956); *Lenk v. Department of Labor & Indus.*, 3 Wn.App. 977 (1970). The self-insured employer, Interstate Brands, appeals from the Department's decision that Mr. Wanmer's claim should not have been closed as of December 12, 2009, and, rather, should remain open for authorized treatment and action as indicated, continuing through and as of the date of the appealed order, June 7, 2010. Interstate Brands contends that Mr. Wanmer's condition proximately caused by his November 15, 2008 industrial injury was fixed and stable and that his claim should have remained closed as December 9, 2009.

In short, the appeal before the Board concerns whether Mr. Wanmer's claim should be open or closed. Thus, the issue placed before us by Interstate Brand's appeal is whether condition(s) caused by Mr. Wanmer's industrial injury are most appropriately deemed fixed and stable (medically stationary) or whether "proper and necessary" medical treatment is available for the conditions caused by the industrial injury. RCW 51.36.010(2)(a). Determination of this appeal necessarily requires that we consider the character of Mr. Wanmer's condition caused by his industrial injury and the expected effect of particular treatment. *In re Lyle Rilling*, BIIA Dec., 88 4865 (1990).

There is no dispute over the fact that Mr. Wanmer's claim is for a left knee injury. The offered stipulation attempts to remove from the Board's consideration a form of treatment, a left total knee replacement recommended by P. Brodie Wood, M.D., ostensibly because the Department had not yet ruled on that particular treatment recommendation. We have previously noted that, in reviewing determinations made by the Department, the Board may be required to determine matters not explicitly reached by the Department when those matters are within the

purview of the decision made by the Department in its order, the appeal from that order, and the evidence presented by the parties. *See*, for instance, *In re Merle Free, Jr.*, BIIA Dec., 89 0199 (1990) and *In re Anton Worklan*, BIIA Dec., 26,538 (1967).

Prior to offering the stipulation at hearing on June 14, 2011, the parties had taken the perpetuation deposition of Dr. Wood on May 3, 2011, and had taken the perpetuation Deposition of Michael R. Coe, M.D., on May 9, 2011. The depositions have been submitted to the Board in their entirety, published, and made part of the Board's evidentiary record in this appeal. Dr. Wood and Dr. Coe provided the only medical testimony in this appeal. In his deposition, Dr. Wood was asked whether, as of the date of the appealed Department order, June 7, 2010, Mr. Wanmer's left knee condition was "fixed or in need of further treatment." Dr. Wood testified, "No, at that point I was petitioning for revision to a total knee arthroplasty," which Dr. Wood clarified was "conversion of this partial to a complete knee replacement." Wood Dep. at 13-14.

Dr. Coe testified that Mr. Wanmer's industrial injury did not cause the need for any treatment as of June 7, 2010, including the recommended left total knee replacement. In sum, the parties had tried the issue of whether the recommended left total knee replacement was proper and necessary medical treatment for Mr. Wanmer's industrial injury within the meaning of RCW 51.36.010. In addition, we note that the **only** form of treatment contested by the parties by way of evidence presented in this is appeal is the recommended left total knee replacement (revision of a prior partial to a total). Indeed, there was no testimony by either Dr. Wood or Dr. Coe that focused on whether any other form of medical service was proper and necessary treatment for Mr. Wanmer's industrial injury between December 9, 2009, and June 7, 2010, other than the left total knee replacement surgery recommended by Dr. Wood. Finding of Fact No. 4 and Conclusion of Law No. 2 in the Proposed Decision and Order convey the industrial appeals judge's determination that Mr. Wanmer's industrial injury was in need of further "medical treatment" as of June 7, 2010. The finding of fact and the conclusion of law are without evidentiary support and are meaningless in the context of the record before us unless they reflect a determination that the recommended left total knee replacement is proper and necessary treatment for Mr. Wanmer's industrial injury. The stipulation attempting to remove the left total knee replacement recommendation from the Board's consideration is rejected.

The Board has reviewed the remaining evidentiary rulings in the record of proceedings. No prejudicial error was committed by these rulings. These remaining rulings are affirmed.

ISSUE

The issue in this appeal is whether any condition caused by Mr. Wanmer's November 15, 2008 industrial injury to his left knee was in need of further proper treatment as of December 9, 2009, continuing through and as of the appealed Department order dated June 7, 2010. In this regard, the specific issue presented by the evidence is whether the industrial injury proximately caused the need for a recommended conversion of Mr. Wanmer's previous partial left knee replacement to a total left knee replacement. We determine that the November 15, 2008 industrial injury did not cause the need for the conversion to a total knee replacement, and that Mr. Wanmer's claim should have been closed as determined by the Department's order of December 9, 2009.

DECISION

The claimant, Wesley Wanmer, a thirty-six year old truck driver, sustained the industrial injury on November 15, 2008, when he experienced knee pain while jumping down from a truck. Mr. Wanmer had a pre-existing left knee injury from an April 2006 motor vehicle accident, and had multiple knee procedures prior to his industrial injury. He had a patellofemoral arthroplasty (partial knee replacement) in April 2007. Mr. Wanmer had a softball-related knee sprain in September of 2007. According to his attending orthopedic surgeon, Dr. Wood, Mr. Wanmer had always been ambivalent about having the partial knee replacement, rather than a total knee replacement, the latter of which had been considered before Mr. Wanmer's industrial injury.

Following the November 15, 2008 industrial injury, Mr. Wanmer was provided pain medication and received physical therapy. Dr. Wood testified that on February 26, 2009, he performed an open retinacular release and medial reefing realignment of Mr. Wanmer's prior patellofemoral arthroplasty. The record does not suggest that this procedure was performed because of Mr. Wanmer's industrial injury. It appears that through this time Dr. Wood had viewed the November 15, 2008 injury as in the nature of a sprain and did not think the industrial injury had caused any internal derangement or affected the prior unrelated, partial knee replacement. Dr. Wood testified that Mr. Wanmer was treated with physical therapy and pain medication with expectation that his symptoms would quiet down to the baseline that existed before the industrial injury.

Dr. Wood acknowledged that he examined Mr. Wanmer's prior partial knee replacement that was not related to the industrial injury when the February 26, 2009 procedure was performed. The procedure involved surgically opening Mr. Wanmer's left knee rather than being only an

arthroscopic procedure. Contemporaneous with this, Dr. Wood reported that everything looked in order. At hearing, Dr. Wood characterized his observations as reflecting "no obvious or gross loosening." Wood Dep. at 21.

It appears that treatment for the effects of Mr. Wanmer's industrial injury remained conservative and the eventual December 9, 2009 Department order in which the Department closed his claim was at least in part prompted by an independent medical examination conducted by Dr. Coe on June 11, 2009. Dr. Coe reported that the effects of the November 15, 2008 injury had resolved without the need for further treatment and without associated residual impairment. At the time, Dr. Wood had concurred with this assessment.

However, after the independent medical examination and prior to the issuance of the closing order, Mr. Wanmer had returned to Dr. Wood with complaints of lateral joint pain. Dr. Wood advised Mr. Wanmer that a bone scan would be in order to explore what was happening in Mr. Wanmer's knee. Mr. Wanmer protested the December 9, 2009 closing order and it was held in abeyance. The bone scan was completed. Dr. Wood testified that the bone scan was such that he could say that Mr. Wanmer should go ahead with his total knee replacement. At hearing, Dr. Wood expressed the opinion that Mr. Wanmer's jump from the truck on November 18, 2008, must have been severe enough to his left knee to create some loosening leading to the justification of a left total knee replacement.

Dr. Coe testified that partial knee replacements, such as Mr. Wanmer had before his November 15, 2008 industrial injury, are controversial in that they end up requiring a total knee replacement about 25 percent, of the time. Dr. Coe also thinks it is significant that Dr. Wood had inspected the prior partial knee replacement directly (after the November 18, 2008 injury) when he opened the knee in February 2009, and did not find anything wrong with the previously placed hardware, including no loosening. Dr. Coe also testified that the results of the bone scan did not provide convincing evidence that there had been loosening of the prior partial knee replacement. Thus, Dr. Coe stated his opinion that the effects of the November 18, 2008 industrial injury remained stationary. The industrial injury had caused a sprain that had resolved.

Interstate Brands, through the testimony of Dr. Coe, established its prima facie case that the effects of Mr. Wanmer's industrial injury were medically stationary, and that Mr. Wanmer's claim was properly closed without award for permanent partial disability by the December 9, 2009 Department order. The burden then shifted to Mr. Wanmer and the Department to establish by the

preponderance of the evidence that the Department was correct in canceling the December 9, 2009 order and holding the claim open. *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn. 2d 498 (1949); *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).

Mr. Wanmer has not convinced us by a preponderance of the evidence that his condition caused by his industrial injury was in need of further proper treatment as of December 9, 2009, or at any other time through June 7, 2010. The evidence best supports the conclusion that the November 18, 2008 industrial injury caused only a sprain that was resolved without impairment and without adverse effect on Mr. Wanmer's prior partial knee replacement by December 9, 2009. After the industrial injury, Dr. Wood had examined the knee replacement during an open procedure and reported that it appeared in order.

It is doubtful whether the bone scan showed that anything had loosened in Mr. Wanmer's left knee. There is no reason to accept Dr. Wood's interpretation of the significance of the bone scan over that of Dr. Coe before the industrial injury. Dr. Wood and Mr. Wanmer had waivered on the wisdom of a total knee replacement. Even if the bone scan or other factors suggested Mr. Wanmer's partial knee replacement had loosened, we have been given no explanation as to why the industrial injury, rather than the prior softball injury, should be selected as a likely cause of loosening of the partial knee replacement. Both the softball injury and the industrial injury occurred after the partial knee replacement, and it was not established that Mr. Wanmer was asymptomatic after these injuries, which preceded the November 18, 2008 industrial injury.

We have considered the Proposed Decision and Order, the self-insured employer's Petition for Review and Mr. Wanmer's Reply to Petition for Review. Based upon a thorough review of the entire record before us, we make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On December 8, 2008, the claimant, Wesley W. Wanmer, filed an Application for Benefits with the Department of Labor and Industries and alleging he sustained an industrial injury on November 15, 2008, while he was in the course of employment with Interstate Brands Corp., a self-insured employer. On December 9, 2009, the Department ended time-loss compensation benefits as paid through May 25, 2009, and closed Mr. Wanmer's claim without award for permanent partial disability. After a timely protest, the Department on March 5, 2010, allowed the claim, canceled the December 9, 2009 order and held the claim open for authorized medical treatment and other benefits. After a timely protest, the Department on June 1, 2010, affirmed the March 5, 2010 order. On August 5, 2010, the self-insured employer, Interstate

Brands, Corp., filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the order dated June 7, 2010. The Board assigned the appeal Docket No. 10 19407, and on August 27, 2010, the Board issued an Order Granting Appeal.

2. On November 15, 2008, the claimant, Wesley W. Wanmer sustained an industrial injury when he exited the cab of this truck. The industrial injury cause a sprain of Mr. Wanmer's left knee.

3. The industrial injury of November 15, 2008, did not alter Mr. Wanmer's patellofemoral arthroplasty (partial knee replacement), which he had in April 2007 to treat the effects of an April 2007 motor vehicle accident, and following which he had a softball-related injury to his left knee in September 2007. Mr. Wanmer and his attending orthopedic surgeon, Dr. P. Brodie Wood, had considered a total left knee replacement before the industrial injury of November 15, 2008.

4. Mr. Wanmer's left knee sprain caused by his industrial injury of November 18, 2008, was medically stationary and not in need of proper treatment as of December 9, 2009, through and as of June 7, 2010. The recommendation, during this time, for conversion of Mr. Wanmer's prior partial left knee replacement to a total knee replacement was not proximately caused, nor was such recommendation made necessary, by the effects of the November 18, 2008 industrial injury.

CONCLUSIONS OF LAW

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

2. As of December 9, 2009, through and as of June 7, 2010, Mr. Wanmer's condition caused by his industrial injury of November 18, 2008, was not in need of further proper and necessary treatment within the meaning of RCW 51.36.010.

3. The order of the Department of Labor and Industries dated June 7, 2010, is incorrect and is reversed. This claim is remanded to the Department of Labor and Industries with directions to vacate its order dated March 5, 2010, and affirm the Department order dated December 9, 2009.

Dated: January 11, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member