Bell, Michael

AGGRAVATION (RCW 51.32.160)

Discretionary reopening by Director

Over seven years after initial closure (RCW 51.32.160)

STANDARD OF REVIEW

Aggravation

When an application to reopen is filed more than seven years after the first closing order became final, the reopening of the claim for aggravation is not at the discretion of the director. Only the decision to award time-loss compensation or other disability benefits are committed to the director's discretion. **….*In re Michael Bell*, BIIA Dec., 11 15598 (2012)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MICHAEL J. BELL	**)**	**DOCKET NO. 11 15598**
	)	
CLAIM NO. T-840446	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Michael J. Bell, Pro Se

Self-Insured Employer, Lanoga Corporation, by
Law Office of Gress & Clark, LLC, per
James L. Gress

Department of Labor and Industries, by
The Office of the Attorney General, per
Dilek F. Aral-Still, Assistant

The self-insured employer, Lanoga Corporation, filed a protest with the Department of Labor and Industries on February 22, 2011, from an order of the Department dated December 23, 2010. In this order, the Department affirmed its May 19, 2010 order in which it reopened the claim effective January 25, 2010, for medical treatment only. On May 20, 2011, the Department forwarded the protest to the Board of Industrial Insurance Appeals as a direct appeal. The Department order is **REVERSED AND REMANDED.**

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 March 23, 2012, in which the industrial appeals judge affirmed the Department order dated December 23, 2010.

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 in this appeal because we disagree with the decision of our industrial appeals judge to direct reopening of the claim. The record before us does not establish that worsening of the claimant's industrially-related conditions between the dates of April 15, 2004, and December 23, 2010, was proximately caused by his industrial injury. We also wish to clarify the process and the legal standard in an over-seven-year claim reopening, such as this one.

The claimant, Michael Bell, was 23 years old on August 7, 1996, when he was injured while lifting one end of a 32-foot, 6- by 12-inch wooden beam while working for Lumbermen's lumber

yard, owned by Lanoga Corporation. He felt "incredible shooting pain," and his back stiffened up. He filed a workers compensation claim through his chiropractor and had physical therapy. The claim was closed three months later by a self-insured order in November 1996. It was reopened in September 1997. Dr. Richard Wohns performed an L5-S1 microdiskectomy in November 1997. The claim closed again in April 1999. Reopening applications were denied in 2001 and most recently on April 15, 2004, but on December 23, 2010, the Department affirmed an order in which it granted an application to reopen. The self-insured employer appealed the decision to reopen the claim. Therefore, the first terminal date was April 15, 2004. The second terminal date was December 23, 2010, and the date of first closure was November 26, 1996.

RCW 51.52.050 and WAC 263-12-115(2)(a) and (c) charge the employer with proceeding initially with evidence sufficient to establish a prima facie case for the relief sought. *In re Michael Hansen*, BIIA Dec., 95 4568 (1996). Once the employer has presented a prima facie case that the Department order is incorrect, the burden shifts to the claimant and Department to prove by a preponderance of the evidence that the Department order on appeal is correct. *Olympia Brewing Co. v. Department of Labor & Indust.*, 34 Wn.2d 498 (1949), *overruled on other grounds, Windust v. Department of Labor & Indus.,* 52 Wn.2d 33 (1958); *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).

Here, the employer-appellant established its prima facie case with the testimony of Lewis Almarez, M.D., neurologist, and Richard G. McCollum, M.D., orthopedic surgeon. Both doctors agreed that Mr. Bell had decreased disk height during the aggravation period at L5-S1 as shown on x-rays, but they said that this was due to degenerative disk disease, not the industrial injury. They found that there was no objective worsening due to the industrial injury.

The Department presented the claimant's testimony, and that of Robert B. Kaler, M.D., Mr. Bell's current treating physician. Dr. Kaler first saw Mr. Bell on June 10, 2010, about six months before the second terminal date. Dr. Kaler had no records prior to June 2010; he did not know the details of the industrial injury itself; and he knew little about Mr. Bell's condition in 2004. Dr. Kaler agreed with Drs. Almarez and McCollum's diagnosis of degenerative disk disease. But he was quite vague about his conclusion that there had been objective worsening between 2004 and 2010, and he never said that any worsening was due to the industrial injury.

It must be shown that worsening of the condition was proximally related to the industrial injury for a claim to be reopened. *In re Arlen Long,* BIIA Dec., 94 2539 (1996); *Phillips v.*

Department. of Labor & Indus., 49 Wn.2d 195 (1956). Therefore, we cannot agree that the evidence herein established a case for reopening.

We have also granted review to clarify the legal standard in analyzing an over-seven-year reopening. Our industrial appeals judge continuously indicated that the Department's decision to reopen the claim was discretionary in nature because the application was received more than seven years after the first closing order had become final. This is not correct. It is not the reopening that is discretionary. In an over-seven case, whether to award time-loss compensation or other disability benefits from the accident fund are committed to the Director's discretion. In an over-seven case, the claimant receives only medical treatment unless the Department Director, in her discretion, allows full benefits. Regardless of whether the reopening was more or less than seven years after the first closing order became final, it must still be shown by objective medical evidence that the claimant's condition worsened as a proximate cause of the industrial injury between the first and second terminal dates. RCW 51.32.160(1)(a).

The Department order on appeal in which the Department reopened the claim should be reversed, and the claim remanded to the Department to issue an order in which it denies the reopening application.

FINDINGS OF FACT

1. On June 30, 2011, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History, as amended, in the Board record solely for jurisdictional purposes.

2. On August 7, 1996, while in the course of employment with Lanoga Corporation, the claimant, Michael J. Bell, suffered an industrial injury when he was lifting a heavy beam to put onto a truck and he felt pain in his low back. He sustained a herniated disk at L5-S1 as a result of that injury.

3. On April 15, 2004, the claimant had objective findings in his low back that were proximately caused by his industrial injury including radiological findings indicative of his L5-S1 microdiskectomy and degenerative disk disease, loss of left ankle reflex, diminished left leg sensation, and positive straight leg raising. He had a permanent partial disability proximately caused by his industrial injury equal to Category 3 of WAC 296-20-280 for permanent dorso-lumbar/lumbosacral impairments.

4. On December 23, 2010, Mr. Bell had no objective findings of worsening proximately caused by the industrial injury.

5. Between April 15, 2004, and December 23, 2010, Mr. Bell's conditions proximately caused by the industrial injury did not objectively worsen.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.

2. Between April 15, 2004, and December 23, 2010, Mr. Bell's conditions proximately caused by the industrial injury of August 7, 1996, did not objectively worsen within the meaning of RCW 51.32.160.

3. The Department order dated December 23, 2010, is incorrect and is reversed. This matter is remanded to the Department of Labor and Industries to deny the application to reopen the claim.

DATED: June 11, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member