Baker, James

DEPOSITIONS

Prior Appeals

CR 32(a) contemplates use of depositions from prior actions if they involve the same parties, subject matter, and issues. Where the issues in prior appeals differed from the issues in the present appeals, the prior depositions don't meet the narrow strictures of CR 32 and may be excluded. **….*In re James Baker*, BIIA Dec., 16 17782 (2017)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JAMES G. BAKER	)	**DOCKET NOS. 16 17782, 16 17983 & 16 18688**
	)	
CLAIM NO. SC-29373	)	**DECISION AND ORDER**

James G. Baker herniated a disc in his low back in 2008 while operating a street sweeper for Kitsap County, Washington. The Department allowed the claim in 2008, closed it with a Category 2 low back permanent partial disability award in 2009, and reopened it in 2010. Mr. Baker appealed three Department orders. In the first order, the Department declined to impose a penalty against Kitsap County after it failed to cover chiropractic treatment visits at Kingston Crossing Wellness. In the second order, the Department altogether denied chiropractic treatment for Mr. Baker from Kingston Crossing Wellness. In the third order, the Department closed Mr. Baker's claim without an award for further permanent partial disability. Mr. Baker argues that chiropractic treatment restored his ability to function and his claim should remain open. In the alternative, he requests an increased permanent partial disability award. Our industrial appeals judge affirmed the three Department orders. We grant review solely to reject the depositions of Carter Maurer, M.D., and Joseph R. Lynch, M.D., taken in different appeals before the Board in 2011 and 2014. These depositions do not meet the admissibility requirements of CR 32. Because the preponderance of the evidence ultimately failed to establish that chiropractic treatment improved Mr. Baker's function or that Mr. Baker was entitled to further permanent partial disability, the Department orders are **AFFIRMED**.

DISCUSSION

Sixty-six-year-old James "Gary" Baker was injured on February 11, 2008, while driving a street sweeper for Kitsap County after a winter storm. He was ultimately diagnosed with a herniated disc at L1-2, which was accepted under this claim. Mr. Baker seeks ongoing chiropractic treatment and a penalty against the self-insured employer after it declined to cover similar services from November 2015. In the alternative, Mr. Baker seeks increased permanent partial disability. Although we agree that the preponderance of the evidence did not establish Mr. Baker's entitlement to further relief, we grant review to address our industrial appeals judge's ruling admitting the depositions of two medical witnesses from two prior Board appeals.

At the scheduling phase of this litigation and in witness confirmations, Kitsap County indicated its intent to call two medical experts by "prior deposition." On March 31, 2017, the self-insured employer filed the depositions. The first deposition, taken of Carter Maurer, M.D., on April 7, 2014, in Docket No. 13 11290, pertained to the Department's July 1, 2013 closing order (which we ultimately

reversed). The second deposition, taken of Joseph R. Lynch, M.D., on July 14, 2011, in Docket No. 11 10390, pertained to Mr. Baker's August 18, 2010 aggravation application (which we ultimately denied).

CR 32 governs the use of depositions in court proceedings. The rule provides:

> (a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof . . .
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> . . .
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> (B)…[w]hen an action has been brought in any court of the United States or of any state and another action involving the same issues and subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

CR 32(a)(5)(B) contemplates use of the prior deposition in another action if it involves same parties, subject matter and issues. Here, Dr. Maurer and Dr. Lynch's depositions address a four-year-old closing order and a seven-year-old application to reopen. Their testimony related to these distinct issues is likely to cause confusion or to instill prejudice. Otherwise admissible evidence may be excluded if its probative value is substantially outweighed by the danger of confusion or unfair prejudice.[1] Our industrial appeals judge should have excluded these depositions from the record.

Even without these depositions, however, a preponderance of the evidence supports the Department orders. Although necessary and proper medical treatment is a "benefit"[2] that, if unreasonably delayed, would support a penalty under the Act,[3] treatment measures must be curative or rehabilitative to be covered. Curative treatment leads to a permanent elimination or decrease of the effects of the condition caused by the industrial injury. Rehabilitative treatment leads to a return or increase of functional activity.[4]

Conceding that his chiropractic treatment was not "curative," as defined by WAC 296-20-01002, Mr. Baker admitted the treatments would not cure him. Instead, Mr. Baker argues that chiropractic treatments at Kingston Crossing Wellness improved his function.[5]

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[1] ER 403.
[2] *In re James Coston*, BIIA Dec., 11 12310 (2012).
[3] RCW 51.48.017.
[4] WAC 296-20-01002 and *Roller v. Department of Labor and Indus.*, 128 Wn. App 922 (2005).
[5] *In re Susan Pleas*, BIIA Dec., 96 7931 (1998); *In re Sheri L. Hopkins*, Dckt. Nos. 02 18502 & 02 20307 (December 17, 2003).

While an increase in the ability to work is among those factors that demonstrate a treatment is rehabilitative,[6] proof of pain relief is not enough. Here, Mr. Baker's testimony provided only vague assertions that Dr. Gill's chiropractic treatments allowed him to continue his job. But bare assertions that a treatment is able to keep a claimant going is insufficient.

Further, treatment must lead to permanent changes.[7] Recently, we determined that injection treatments which provided up to two weeks of relief from headaches were neither curative nor rehabilitative.[8] Here, Mr. Baker's own testimony shows that his pain had continue to resurface despite the treatment. Further, Mr. Baker said the pain was resurfacing more quickly as time went on. Because Mr. Baker offered no other evidence that treatment was necessary and proper as of July 15, 2016, the record supports claim closure.

The only remaining issue is whether Mr. Baker is entitled to an increased permanent partial disability award. Mr. Baker's claim was previously closed on March 9, 2009, with a permanent partial disability award consistent with Category 2 of WAC 296.20.280. Because Mr. Baker's application to reopen his claim was deemed granted, it is presumed that there was at least a temporary worsening in his condition. But to receive a further permanent disability award, Mr. Baker must prove a permanent worsening of his claim-related conditions between the date of the earlier claim closure, March 9, 2009, and the date of the closing order on appeal, July 15, 2016.[9] Because the record fails to show permanent worsening, we hold that Mr. Baker's level of permanent lumbar impairment remained at Category 2.

Two non-treating physicians offered opinions on the question of permanent impairment and worsening. Guy Earle, M.D., a family medicine physician examined Mr. Baker on February 25, 2014, and again on January 4, 2017. He felt Mr. Baker's impairment had increased from Category 2 to Category 3. Dr. Earle's Category 3 rating focused on Mr. Baker's left leg external rotator motor weakness. James F. Harris, M.D., an orthopedic surgeon who conducted an independent medical examination of Mr. Baker on January 14, 2016, found no objective motor loss on examination to support a higher permanent partial disability award.

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[6] *In re In re Susan Pleas,* BIIA Dec., 96 7931 (1998)
[7] WAC 296-20-01002 and *Roller,* at 931.
[8] *In re Silvia L. Chavez*, Dckt. Nos. 15 10277 & 15 10780 (January 22, 2016).
[9] *Dinnis v. Department of Labor and Indus.*, 67 Wn.2d 654 (1965); In re Margaret Casey, BIIA Dec., 90 5286 (1992).

Having considered this conflicting testimony of two non-treating physicians, we are most persuaded by Dr. Harris. Dr. Earle's hip rotator weakness testing was subjective to the extent it relied on Dr. Earle's judgment regarding Mr. Baker's use of force. And, Dr. Earle assumed Mr. Baker used his full strength during the test. The preponderance of the evidence shows our hearing judge properly denied Mr. Baker's request for increased permanent partial disability.

DECISION

In Docket No. 16 17782, the claimant, James G. Baker, filed an appeal with the Board of Industrial Insurance Appeals on July 27, 2016, from an order of the Department of Labor and Industries dated May 31, 2016. In this order, the Department affirmed its order dated March 22, 2016. In that order, the Department declined to issue a penalty against the self-insured employer for failing to pay for ten chiropractic treatments supplied by Kingston Crossing Wellness over the course of ten appointments from November 30, 2015, through January 22, 2016. This order is correct and is affirmed.

In Docket No. 16 17983, the claimant, James G. Baker, filed an appeal with the Board of Industrial Insurance Appeals on August 1, 2016, from an order of the Department of Labor and Industries dated July 14, 2016. In this order, the Department affirmed its order dated March 25, 2016. In that order, the Department denied treatment at Kingston Crossing Wellness for dates of service from November 30, 2015, to March 25, 2016. This order is correct and is affirmed.

In Docket No. 16 18688, the claimant, James G. Baker, filed an appeal with the Board of Industrial Insurance Appeals on August 22, 2016, from an order of the Department of Labor and Industries dated July 15, 2016. In that order, the Department affirmed its order dated April 1, 2016, closing Mr. Baker's claim with time-loss compensation benefits paid through February 11, 2015, and with no award for increased permanent partial disability. This order is correct and is affirmed.

FINDINGS OF FACT

1. On September 28, 2016, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. James G. Baker sustained an industrial injury on February 11, 2008, when he was driving a street sweeper for an extended period of time and sustained a herniated disc at L1-2.

3. As of November 30, 2015, James G. Baker's conditions proximately caused by the industrial injury did not require further necessary and proper chiropractic treatment.

4. In Docket No. 1617782, Kitsap County was not required to pay for James G. Baker's November 30, 2015; December 11, 2015; December 18, 2015; December 23, 2015; December 28, 2015; December 31, 2015; January 4, 2016; January 8, 2016; January 19, 2016; and January 22, 2016 chiropractic treatments at Kingston Crossing Wellness.

5. As of July 14, 2016, (Docket No. 1617983) and as of July 15, 2016, (Docket No. 16 18688) James G. Baker's condition proximately caused by the industrial injury was fixed and stable and did not need further proper and necessary treatment, including chiropractic treatment at Kingston Crossing Wellness.

6. As of July 15, 2016, James G. Baker had a herniated disc at L1-2 proximately caused by the industrial injury with no significant objective motor loss.

7. On March 9, 2009, and on July 15, 2016, James G. Baker had a permanent partial disability proximately caused by the industrial injury equal to Category 2 permanent dorso-lumbar and lumbosacral impairment (WAC 296-20-280).

8. James G. Baker's condition proximately caused by the industrial injury did not permanently objectively worsen between March 9, 2009, and July 15, 2016.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. As of November 30, 2015, James G. Baker was not entitled to further proper and necessary treatment, including the chiropractic treatment at Kingston Crossing Wellness, as contemplated by RCW 51.36.010.

3. As of July 14, 2016, (Docket No. 1617983) and as of July 15, 2016, (Docket No. 1618688), James G. Baker's condition proximately caused by the industrial injury was fixed and stable and he was not entitled to further proper and necessary treatment, specifically, chiropractic treatment at Kingston Crossing Wellness, as authorized by RCW 51.36.010.

4. The self-insured employer did not unreasonably delay or refuse to pay for chiropractic treatment for James G. Baker after those benefits became due as contemplated by RCW 51.48.017.

5. Between March 9, 2009, and July 15, 2016, James G. Baker's condition proximately caused by the industrial injury did not permanently worsen as shown by objective findings within the meaning of RCW 51.32.160.

6. On July 15, 2016, James G. Baker's permanent partial disability, within the meaning of RCW 51.32.080, proximately caused by the industrial injury, remained equal to a Category 2 permanent dorso-lumbar and lumbosacral impairment (WAC 296-20-280).

7. The Department orders dated May 31, 2016, July 14, 2016, and July 15, 2016, are correct and are affirmed.

Dated: August 29, 2017.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

Addendum to Decision and Order
In re James G. Baker
Docket Nos. 16 17782, 16 17983 & 16 18688
Claim No. SC-29373

Appearances

Claimant, James G. Baker, by Casey & Casey, P.S., per Gerald L. Casey

Self-Insured Employer, Kitsap County, by Deputy Prosecuting Attorney, per Deborah A. Boe

Department of Labor and Industries, by Office of the Attorney General, per Sharon James

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on May 11, 2017, in which the industrial appeals judge affirmed the orders of the Department dated May 31, 2016, July 14, 2016, and July 15, 2016. Kitsap County filed a response to the Petition for Review.

Evidentiary Rulings

Except as discussed above, all other evidentiary rulings in the record of proceedings are affirmed.