

Bond, Jennifer

SCOPE OF REVIEW

Willful misrepresentation

The scope of review in willful misrepresentation appeals extends to consideration of the effect of innocent misrepresentations on the worker's entitlement to benefits and whether the Department can recoup any overpayment of them.*In re Jennifer Bond*, BIA Dec., 18 11296 (2019)

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

IN RE: JENNIFER M. BOND) **DOCKET NO. 18 11296**
)
CLAIM NO. SK-43621) **DECISION AND ORDER**

Jennifer Bond injured her low back while working for The Boeing Company. The claim was allowed, and she received treatment and time-loss compensation benefits. She was released to work with no restrictions at her own request. A man attempted to sexually assault Ms. Bond in an incident unrelated to work. After learning of the assault, Boeing scheduled an independent medical examination that ultimately found Ms. Bond's worsened symptoms were related to the assault and not to the claim. The Department investigated and found Ms. Bond had willfully misrepresented the cause of her aggravated symptoms by failing to disclose the assault. Our industrial appeals judge found Ms. Bond had not willfully withheld information about the assault in order to fraudulently secure benefits under the claim, and he reversed the Department order. Boeing requests reinstatement of the willful misrepresentation order. We agree with the decision of our industrial appeals judge on the issue of willful misrepresentation; but, we grant review to address the issue of innocent misrepresentation. We find Ms. Bond failed to establish by a preponderance of the evidence that she was otherwise entitled to further benefits under the claim. We also find the Department does not have the authority to seek recoupment of medical treatment costs from Ms. Bond. The Department order is **REVERSED AND REMANDED** to the Department to find that the payment of time-loss compensation benefits and treatment was not induced by willful misrepresentation; to vacate the penalty; to find the payment of time-loss compensation benefits and treatment was induced by innocent misrepresentation; to find Ms. Bond was not entitled to time-loss compensation and treatment benefits from March 31, 2017, through June 25, 2017; to order recoupment of time-loss compensation in the amount of \$3,426; and to close the claim.

DISCUSSION

We do not find sufficient evidence to prove Ms. Bond willfully misrepresented or omitted the fact of the assault with the intent to fraudulently secure benefits under the claim when applying the clear, cogent, and convincing standard. To that extent we agree with the Proposed Decision and Order. However, the analysis of this appeal should not end with the determination that Ms. Bond did not willfully misrepresent the facts. Our scope of review in willful misrepresentation appeals extends to consideration of the effect of innocent misrepresentations.¹

¹ *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477 (2012).

1 RCW 51.32.240(1)(a) provides that when benefits are paid as a result of an innocent
2 misrepresentation, the recipient must repay the benefits if not otherwise entitled to them. The
3 evidence in this appeal establishes that Ms. Bond innocently withheld information about the assault.
4 In order to avoid repaying the benefits that she received, Ms. Bond must prove by a preponderance
5 of the evidence that she was entitled to those benefits, notwithstanding the assault. That evidence
6 must come from competent medical experts.²
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10 Ms. Bond's attending physician, Ray F. Smith, M.D., initially recommended work restrictions
11 and treatment believing that the aggravation of Ms. Bond's industrial injury was related to the
12 resumption of her work duties. In hindsight, with full knowledge of the details of the assault, he cannot
13 now say with reasonable medical certainty that the aggravation was related to Ms. Bond's work duties
14 after returning to work or to her industrial injury.
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18 Dean S. Ricketts, M.D., is a retired orthopedic surgeon who examined Ms. Bond on May 24,
19 2017. In reviewing the records, Dr. Ricketts noted no abnormalities on x-ray or MRI. He noted that
20 she was released back to her job of injury without restriction as of March 16, 2017, although she was
21 still experiencing low back pain at that time. She reported a worsening of her low back pain radiating
22 into her right leg after she returned to work. Dr. Ricketts was aware she had been assaulted on
23 March 24, 2017, and that the employer alleged her worsened condition was related to the assault
24 rather than the industrial injury.
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28 On examination, Dr. Ricketts found Ms. Bond was tender at the L5-S1 level, but there was no
29 muscle spasm. Testing revealed possible piriformis syndrome, but did not confirm radiculopathy. He
30 did note decreased range of motion in the lumbar spine and he thought his findings were valid. He
31 diagnosed lumbosacral/sacroiliac strain with possible piriformis syndrome, history of assault in late
32 March 2017 aggravating industrial injury-related diagnosis, and meralgia paresthetica on the right.
33 He found Ms. Bond's condition was not fixed and stable and recommended work restrictions and
34 further treatment.
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39 A misreading of a therapist's chart note caused Dr. Ricketts some confusion about the date of
40 the assault; therefore, he was initially uncertain whether the assault played a role in the aggravation.
41 His recommendations regarding physical restrictions and treatment under the claim were contingent
42 on receiving additional information about the assault. After receiving further details, including
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² *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896 (1966), and *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631 (1979).

1 Ms. Bond's description to her physical therapist of low back pain when lying face down during the
2 assault, he determined the aggravation was more likely than not caused by the assault.
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4 Dr. Smith and Dr. Ricketts were the only medical witnesses, and neither of them provide a
5 basis for granting Ms. Bond time-loss compensation or treatment benefits after March 31, 2017.
6 Ms. Bond failed to establish her entitlement to those benefits, so she must repay those costs; but
7 only the payments she received directly.
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10 RCW 51.32.240(3) authorizes the Department to recoup medical benefit payments after an
11 erroneous adjudication that the claimant was entitled to benefits, provided that recoupment is sought
12 from the actual recipient of the payments.³ Here, Ms. Bond was the beneficiary of the medical
13 treatment, but she did not receive payment for those services. Ms. Bond is not responsible for
14 repayment of the medical costs.
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18 **DECISION**

19 In Docket No. 18 11296, the claimant, Jennifer M. Bond, filed an appeal with the Board of
20 Industrial Insurance Appeals on February 12, 2018, from an order of the Department of Labor and
21 Industries dated January 22, 2018. In this order, the Department found Ms. Bond had willfully
22 misrepresented material facts pertinent to her claim by failing to disclose that she had been assaulted
23 on March 24, 2017, ordered her to repay the benefits she received from March 31, 2017, through
24 June 25, 2017, in addition to a penalty equal to half the benefits she received, and closed the claim.
25 This order is incorrect and is reversed and remanded.
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30 **FINDINGS OF FACT**

- 31 1. On May 4, 2018, an industrial appeals judge certified that the parties
32 agreed to include the Jurisdictional History in the Board record solely for
33 jurisdictional purposes.
- 34 2. Between March 31, 2017, and June 25, 2017, Jennifer Bond received
35 time-loss compensation in the amount of \$3,426 and medical treatment
36 costing \$5,096.
- 37 3. Despite her continuing low back and right buttock symptoms, Ms. Bond
38 requested release to full duty at her job of injury without restriction
39 effective March 16, 2017. On or about March 21, 2019, while attempting
40 to perform her regular duties, climbing into a wing tank, she aggravated
41 her low back condition. On March 24, 2017, Ms. Bond sustained injuries
42 to her head and face from an unrelated assault by a stranger. On
43 March 25, 2017, Ms. Bond emailed Dr. Smith relating she left work on
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³ See also *In re Anthony Lajcin*, BIIA Dec., 99 12440 (2000).

1 March 21, 2017, when she experienced a recurrence of low back
2 symptoms; she did not mention the assault in the email.

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4 4. Ms. Bond was embarrassed about the assault based on its nature and
5 was hesitant to discuss it or seek treatment for it, until her mother insisted
6 she do so late on March 25, 2017.
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8 5. When Ms. Bond saw her attending physician, Dr. Smith, on March 31,
9 2017, the visible injuries to her face from the assault were obvious and
10 discussed with Boeing's Nurse Case Manager, who was present at the
11 appointment, and with Dr. Smith. The bruising about her face was
12 documented in the physical examination portion of Dr. Smith's March 31,
13 2017 chart note, but he did not document any discussion regarding the
14 assault, nor did he have any independent recollection of such a
15 discussion, though he acknowledged it was possible he had that
16 discussion with her. On receipt of further information regarding the
17 assault, Dr. Smith was unable to relate Ms. Bond's worsened condition to
18 the claim.
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20 6. Ms. Bond underwent an independent medical examination with Dr. Dean
21 Ricketts on May 24, 2017, who found valid/objective decreased range of
22 motion in her low back and right hip, provided physical restrictions based
23 on those findings, and determined additional treatment was required for
24 those conditions. On receipt of further information regarding Ms. Bond's
25 assault, Dr. Ricketts determined her worsened symptoms were
26 proximately caused by the assault and were not related to the claim.
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28 7. Ms. Bond's statements were not willful misrepresentations of material fact.
29 She did not attempt to conceal any material fact or omit any material fact
30 in an effort to receive benefits.
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32 8. Ms. Bond did not intend for the Department to rely on the omission in order
33 to receive benefits.
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35 9. Ms. Bond is a 37-year-old woman who works for The Boeing Company as
36 an integral in-tank fuel technician.
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38 10. Ms. Bond had no physical restrictions proximately caused by the industrial
39 injury from March 31, 2017, through June 25, 2017.
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41 11. Considering her claim-related conditions, Ms. Bond was able to perform
42 her job of injury from March 31, 2017, through June 25, 2017.
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44 12. Considering her claim-related conditions, Ms. Bond was able to perform
45 and obtain gainful employment on a reasonably continuous basis from
46 March 31, 2017, through June 25, 2017.
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48 13. As of March 31, 2017, Ms. Bond's conditions proximately caused by the
49 industrial injury were fixed and stable and did not need further proper and
50 necessary treatment.
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52 14. Ms. Bond did not receive payments for the medical benefits she received
53 under the claim.

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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. The Department of Labor & Industries' payment of time-loss compensation and medical benefits for the period from March 31, 2017, through June 25, 2017, was not induced by willful misrepresentation, on the part of the claimant, within the meaning of RCW 51.32.240(5).
3. Jennifer Bond was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from March 31, 2017, through June 25, 2017.
4. Ms. Bond's conditions proximately caused by the industrial injury were fixed and stable as of March 31, 2017, and she is not entitled to further treatment. RCW 51.36.010.
5. Ms. Bond is not a recipient of payments for medical benefits within the meaning of RCW 51.22.240(3).
6. The Department order dated January 22, 2018, is incorrect and is reversed. This matter is remanded to the Department to find that the payment of time-loss compensation benefits and treatment was not induced by willful misrepresentation; to vacate the penalty; to find the payment of time-loss compensation and treatment benefits was induced by innocent misrepresentation; to find Ms. Bond was not entitled to time-loss compensation benefits and treatment from March 31, 2017, through June 25, 2017; to order recoupment of time-loss compensation in the amount of \$3,426; and to close the claim.

Dated: May 23, 2019.

BOARD OF INDUSTRIAL INSURANCE APPEALS


LINDA L. WILLIAMS, Chairperson


JACK S. ENG, Member

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Addendum to Decision and Order
In re Jennifer M. Bond
Docket No. 18 11296
Claim No. SK-43621

Appearances

Claimant, Jennifer M. Bond, Self-Represented

Self-Insured Employer, The Boeing Company, by Gress, Clark, Young & Schoepper, per James L. Gress

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 employer filed a timely Petition for Review of a Proposed Decision and Order issued on March 12, 2019, in which the industrial appeals judge reversed and remanded the Department order dated January 22, 2018.