Platzer, David

AGGRAVATION (RCW 51.32.160)

Over seven years after initial closure (RCW 51.32.160)

The exercise of the director's discretion to provide permanent partial disability benefits in a claim reopened over seven years after the first closure does not make decisions to deny temporary or permanent total disability benefits reviewable under a preponderance of the evidence standard. **….*In re David Platzer,* BIIA Dec., 18 26897 (Order Vacating Proposed Decision and Order) (2020)**

STANDARD OF REVIEW

Over-seven reopening

The exercise of the director's discretion to provide permanent partial disability benefits in a claim reopened over seven years after the first closure does not make decisions to deny temporary or permanent total disability benefits reviewable under a preponderance of the evidence standard. **….*In re David Platzer,* BIIA Dec., 18 26897 (Order Vacating Proposed Decision and Order) (2020)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID A. PLATZER	)	**DOCKET NOS. 18 26897, 18 26898 & 18 26899**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEALS**
CLAIM NO. H-151006	)	**FOR FURTHER PROCEEDINGS**

David A. Platzer sustained an industrial injury in 1977. His claim was allowed for multiple lumbar spine conditions, in addition to other physical and mental health conditions. Mr. Platzer's claim was closed in1987 with an award for permanent partial disability. Almost 15 years later, Mr. Platzer applied to reopen his claim. The Department granted Mr. Platzer's application and in so doing, the Director communicated to Mr. Platzer that he was exercising his discretionary authority to find him eligible for an increased permanent partial disability award, but he declined to exercise his discretionary authority to find Mr. Platzer eligible for time-loss compensation or pension benefits. Mr. Platzer appealed seeking additional benefits. Following Board precedent, our industrial appeals judge applied a preponderance of the evidence standard and determined that Mr. Platzer established entitlement to time-loss compensation and a pension. On further analysis, we depart from our prior preponderance of the evidence standard and instead apply the abuse of discretion standard under these circumstances. The Proposed Decision and Order dated January 16, 2020, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

David Platzer was born on February 8, 1947. On May 5, 1977, he fell and injured his low back. His claim was allowed and benefits provided. Mr. Platzer underwent surgery to his low back, after which he began to suffer from bowel and urinary incontinence and pain in the perineal and perianal areas.

From 1977 to 1987, Mr. Platzer attempted carpentry work, but he was unable to perform full-time work due to pain. Mr. Platzer obtained vocational retraining as an electronics technician. Due to market and technological changes, he was unable to secure employment in this field. Mr. Platzer started his own business repairing VCRs, but he was unable to develop a successful business. He tried other vocational pursuits, such as carpentry and working as a handyman, but he was unable to perform the physical work necessary to sustain the business. In addition to physical pain and mobility problems, Mr. Platzer suffered from depression. Mr. Platzer's claim was closed in 1987 with an award for permanent partial disability for his low back and a mental health condition.

Almost 15 years later, in August 2002, Mr. Platzer filed an application to reopen his claim. In December 2002, the Department reopened the claim effective July 29, 2002, for medical treatment only. Mr. Platzer appeals one order and one letter determination providing that the Director has decided not to exercise his discretionary authority to find Mr. Platzer eligible for time-loss compensation or pension benefits, but will continue to exercise his discretionary authority to find Mr. Platzer eligible for permanent partial disability benefits in the interest of equity and good conscience. Mr. Platzer also appeals a Department order awarding permanent partial disability benefits consistent with the Director's determination that Mr. Platzer is eligible for those benefits. Mr. Platzer seeks time-loss compensation and permanent partial disability benefits.

Applicable Law

Because Mr. Platzer's application to reopen his claim was granted more than seven years after the date of the last closing of his claim, his claim is referred to as an "over-seven" claim. Under RCW 51.32.160(1)(a), the Director is granted authority to "readjust" the worker's rate of compensation at any time on his or her own motion. The statute states in relevant part:

> If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules of this section provided for the same, or in a proper case terminate the payment; PROVIDED, That the director may, upon application of the worker made at any time, provide proper and necessary medical and surgical services as authorized under RCW 51.36.010.

RCW 51.32.160 does not directly address the standard of proof applicable to the Director's decisions to reopen time-barred claims or make benefit determinations. These concepts have developed over the decades through Board and court decisions interpreting the above-quoted provision of the statute.

Most significantly, in *Cascade Valley Hospital v. Stach*,[1] the Washington State Court of Appeals, Division 2, sought to clarify the authority of the Director of the Department to reopen over-seven claims. In that case, Ms. Stach injured her back while working for the self-insured employer, Cascade Valley Hospital. The claim was allowed, benefits provided, and the claim was closed in 1991 with a permanent partial disability award. In 1993, Ms. Stach applied to reopen her claim. The Department approved reopening and Ms. Stach received conservative treatment. The claim was closed in 1994 with no additional disability award.

[1] 152 Wn. App. 502 (2009).

In 2004, Ms. Stach applied to reopen the now "over-seven" back claim. On March 3, 2004, the Department issued an order reopening the claim for medical benefits only. The order also indicated that the Director had decided not to reopen Ms. Stach's claim for disability benefits.[2] This order was not appealed. The Department subsequently issued an order authorizing two surgeries. Ms. Stach then made a request for time-loss compensation. On February 3, 2006, the Director wrote Ms. Stach and informed her that she was "eligible" to receive time-loss benefits from the day her physician requested authorization for surgery. He also advised her that she "may" also be eligible to receive a permanent partial disability award and she would be contacted by the claims manager regarding that decision.[3] On February 9, 2006, the Department issued an order reopening Ms. Stach's back claim "for such additional disability benefits as are authorized by law."[4] At that point, Cascade appealed.

In a separate set of events following the 1991 closure of the back claim, Ms. Stach injured her knee while working for a state fund employer. This claim resulted in additional surgeries, time-loss compensation benefits, and vocational training well into the reopening of her over-seven back claim.

Cascade appealed the February 9, 2006 order to the Board and ultimately to the Washington State Court of Appeals, Division 2, where it argued that the Director's actions were tantamount to assigning it responsibility for Ms. Stach's state fund knee claim. Cascade further argued that the March 3, 2004 order reopening the over-seven claim for medical benefits only was res judicata; that RCW 51.32.160 limits the Director's authority in over-seven claims to medical benefits only; that the proper standard of review was by a preponderance of the evidence; and that it was improper for the Director to reopen the claim first by determining eligibility and then in a second order determining entitlement to time-loss compensation benefits. The court rejected all of these arguments finding that the finality of the March 3, 2004 order did not preclude the Director from determining that Ms. Stach could be awarded additional benefits at a later time based on new medical information. The court stated:

> In sum, the director's decision to review an over-seven claim is discretionary. Whether to reopen a claim for additional benefits is also discretionary, provided there is aggravation. Once the director reopens a claim on grounds of aggravation, he or she may grant additional benefits only "in accordance with the rules in this section provided for the same."[5]

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[2] *Cascade* at 505.
[3] *Cascade* at 505.
[4] *Cascade* at 505.
[5] *Cascade* at 512.

The court then stated:

> The parties agree, and we concur, that the director's grant or denial of specific benefits is to be reviewed under the preponderance standard.[6]

The court did not elaborate on the nature of the parties' agreement for which it concurred.[7] We note that *Ruse*, which was also cited in support of the preponderance standard, is an appeal of an order rejecting the claimant's application for workers' compensation benefits. It is not an over-seven case, and it merely recites the standard of review under RCW 51.52.115.

The *Stach* court then reviewed the specific language of the order on appeal, which stated:

> In claims such as yours which have been closed over seven years (or ten years for eye injuries), only the director of the department has the discretion to grant benefits such as time-loss compensation or disability awards. The director has decided to reopen your claim for such additional disability benefits as are authorized by law, effective 06/02/05.[8]

The court affirmed the Department order stating:

> The order reopened Stach's over-seven claim but did not grant any benefits, and therefore the Board and the superior court correctly reviewed it for abuse of discretion and found none. We agree. Stach suffered an aggravation of her back injury, requiring two surgeries in August 2005. It was within the director's discretion to reopen her claim for disability benefits under RCW 51.32.160.[9]

While the court refers to an agreement regarding the preponderance of evidence standard, the actual holding of the case is that the abuse of discretion standard should ultimately be applied to Ms. Stach's particular circumstances. In *In re George H. Higgins Sr.*[10] we applied the *Stach* holding to the identical circumstances presented by the Platzer appeal. We held that when the Director specifically grants disability benefits in the form of an increased permanent partial disability award, the Director's grant or denial of other specific benefits, such as temporary or permanent total disability, must be reviewed under the preponderance standard. In short, we interpreted *Stach* as supporting an "all or nothing" approach to the decision to reopen for disability benefits. At the time, we were mindful that the facts in *Stach* ultimately invoked the abuse of discretion standard. The *Stach* opinion appeared to articulate an agreed upon standard of proof for the circumstances presented by both *Higgins* and Mr. Platzer. At the time we issued *Higgins*, we felt bound by the stare

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[6] *Cascade* at 512, citing *Ruse v. Dep't of Labor & Indus*., 138 Wn.2d 1, 5 (1999).
[7] *Cascade* at 512.
[8] *Cascade* at 513.
[9] *Cascade* at 514.
[10] Dckt. No. 17 16301 (May 29, 2019).

decisis effect of an opinion outlining the standard of review from our own Division 2 court. We believed that the court's statement articulating the preponderance standard for specific types of benefits should be viewed as more persuasive than dicta.

However, on further examination we do not believe the court's decision in *Stach* requires an all or nothing approach to the application of the appropriate standard of review to the Director's decision to provide disability benefits. Nothing in the *Stach* decision prevents the Director from an exercise of his discretion to grant specific disability benefits and deny others; nor does the holding require the exercise of that specific discretion be reviewed under an abuse of discretion standard. *Stach* supports review of a decision to provide disability benefits under a preponderance standard when the Director's determination provided only the direction that the claim would be reopened for such additional disability benefits as are authorized by law. The holding of that decision does not require that a preponderance of evidence standard must be applied when the Director's exercise of discretion is explicit to the types of disability benefits to be provided, only dicta in that decision supports that analysis. We determine that we will not be constrained by the dicta in the *Stach* decision to apply the preponderance standard in this appeal.

We note that the Department appealed our *Higgins* decision to superior court and the matter was heard before the Honorable James J. Dixon under Cause No. 19-2-02868-34. The superior court agreed with the Department's determination that an abuse-of-discretion standard applies. Judge Dixon's order does not provide further analysis. While we are bound to obey the superior court's remand order and apply the abuse of discretion standard in the *Higgins* case, we are not bound to do so in the Platzer appeal.[11] Nonetheless, we reviewed the arguments presented in the parties' briefs before the superior court in *Higgins*, and we revisited some of the policy considerations presented by the application of the preponderance standard under these circumstances.

RCW 51.32.160(1)(a) grants the Director the authority to readjust the worker's rate of compensation on his or her own motion. This broad grant of discretionary authority does not have any particular qualifiers or restrictions. The Department points out that discretion of this sort allows the Director to take the circumstances of an individual worker into account. There may be a number of equities to consider in every worker's case, none of them being identical. In such a case, the

[11] *In re Lisa Soden*, BIIA Dec., 85 2993 (1987).

Director should be allowed to compensate the worker for the unanticipated loss of function without also paying unneeded wage replacement benefits.

Also pertinent, though, are the policy considerations should we adhere to the preponderance standard. Curtailing the Director's discretion by requiring him or her to take an "all or nothing" approach might well lead the Director to find a worker ineligible for any disability benefits when the Director would have found the worker to be eligible for some benefits but not others had such a decision been within the Director's discretionary authority. It would be anomalous to use the liberal construction standard to justify a view of the law that leads to workers being found ineligible for all benefits rather than eligible for at least some of them.

In reexamining the law and policy, we now understand why Judge Dixon agreed with the Department and remanded *Higgins*. Nearly simultaneously, the Platzer case came before the Board on review. We are mindful that there are issues of judicial economy and efficiency that should be considered. We have a duty to engage in the efficient management of litigation so as to minimize duplication of effort. While we do not have to follow the *Higgins* superior court order in Platzer, we decline to apply two different standards in final orders of the Board. If either matter is appealed further, there will be consistent holdings of this Board for the appellate courts to consider. Though silent, the superior court necessarily concluded the preponderance standard mentioned in *Stach* was dicta. Technically speaking, it was a statement by the court that did not embody the resolution or determination of the *Stach* appeal. While we gave it authority in the *Higgins* decision, we are now convinced that the reference to the preponderance standard should be considered as extraneous material that is merely explanatory. What we considered guidance previously, we now view as dicta as it concerns the appeals before us.

This matter is remanded to the hearings process to re-determine the claimant's entitlement to wage replacement benefits using the abuse-of-discretion standard of review of the Director's determinations.

ORDER

These appeals are remanded to the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104.

This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

Dated: August 4, 2020.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

DISSENT

This case is separate and distinct from the *Higgins* case cited by the majority. The *Higgins* case was remanded by superior court and that determination has been appealed to the court of appeals. While the superior court, sitting in its appellate capacity over decisions of the Board of Industrial Insurance Appeals (Board), has the authority to remand the *Higgins* decision to the Board to apply a different standard of review and render a new decision, that decision has no precedential import until the court of appeals renders its decision. Because I believe the superior court's decision in *Higgins* conflicts with the court of appeals decision in *Stach*, I would not reverse *Platzer* based on the superior court's decision in *Higgins*.

Originally, in *Higgins*, the Board cited to *Stach* "The parties agree and we concur that **the director's decision to grant or deny specific benefits to be received should be analyzed under the preponderance of evidence standard**,"[12] as the basis for finding that the standard of review in *Higgins* was preponderance of the evidence rather than abuse of discretion. Now that *Higgins* has been remanded, the majority calls that statement dicta and remands this case for another decision based on the higher abuse of discretion standard. But the above statement is not only found in the paragraph cited by the majority. In the opening paragraph of *Stach* the court states, "Where aggravation is shown, the director has discretion to reopen over-seven claims for consideration of medical and time loss benefits**. A grant of specific benefits must be supported by a**

[12] *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 504, 215 (2009). (Emphasis added.)

preponderance of the evidence."[13] This is a clear indication that the court meant the later statement as more than just dicta.

In *Stach* the employer argued in its appeal that the standard of review for the entire case should be preponderance of the evidence for both the original determination that the Director was granting benefits and the secondary order that defined what benefits were being granted. In response to this argument the court specifically delineated the standard of review between a general grant of disability benefits and a grant of a specific benefit as stated by the court twice in its decision. The majority states that the court ultimately applied the abuse of discretion standard in *Stach*, however that was specifically for the general determination that Ms. Stach was eligible for disability benefits as a whole, not for specific benefits, so that decision is not support for the Board's change in this particular case. The court also cited to our significant decision, *In re Bernard James*,[14] where we determined back in 1955 that once the Director had exercised his discretion to grant benefits, the claimant had the same rights as a claimant whose claim had not exceeded the statute of limitations. Because the superior court's decision in *Higgins* does not address these prior decisions, it should not be used as a basis to overturn precedent until a higher court affirms it.

The implication of the Department's briefing in *Higgins* that argues that a decision to uphold the preponderance standard for individual benefits might have the effect of the Director limiting the number of cases in which he exercises his authority to grant any benefits to claimants in over-seven cases is extremely concerning. The Director is charged with the welfare of injured workers and ensuring their sure and certain relief whether their cases have been closed for 2 years or 20. As the court stated in *Stach*, "even when acting sua sponte, the director may not grant benefits arbitrarily, but must do so according to the rules in Title 51."[15] A decision to deny benefits to an injured worker who would normally qualify for those benefits solely on the basis that it would be easier to defend that decision in court goes against over a century of Title 51 statutes, case law, and indeed the very basis of the Industrial Insurance Act as a whole.

Additionally, there is no judicial efficiency gained in this decision to backpedal on the Board's reasoning in *Higgins* prior to a precedential ruling on that case. Rather, this decision further muddies the waters. *Higgins* is being briefed to the court of appeals based on our reasoning in the original

[13] *Stach,* at 504. (Emphasis added.)
[14] BIIA Dec., 04,394 (1955).
[15] *Stach*, at 512.

decision. But in the midst of that briefing we are throwing the issue into disarray by stating that the ruling in *Stach*, on which we based our original decision, no longer means what we stated it meant even though that decision has not been overturned. The only case that currently has precedential value is Division 1's ruling in *Stach*. Should Division 2 follow Division 1's interpretation of *Stach*, then this case will come back again for another decision based on a different standard of review, rendering the majority's argument about judicial efficiency moot.

Because I would adopt the Proposed Decision and Order as the decision of the Board, I dissent.

Dated: August 4, 2020.

BOARD OF INDUSTRIAL INSURANCE APPEALS

ISABEL A. M. COLE, Member

Addendum to Decision and Order
In re David A. Platzer
Docket Nos. 18 26897, 18 26898 & 18 26899
Claim No. H-151006

Appearances

Claimant, David A. Platzer, by Putnam Lieb Potvin, per Kathryn N. Potvin

Employer, Kipper & Sons Engineers, Inc. (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Steve Vinyard

Department Order(s) Under Appeal

1. In Docket No. 18 26897, the claimant, David A. Platzer, filed an appeal with the Board of Industrial Insurance Appeals on December 11, 2018, from an order/letter of the Department of Labor and Industries dated October 23, 2018. In this order, the Director corrected and superseded his letter dated August 24, 2018, stating that he continued to exercise his discretionary authority and find him eligible for permanent partial disability.
2. In Docket No. 18 26898, the claimant, David A. Platzer, filed an appeal with the Board of Industrial Insurance Appeals on December 11, 2018, from an order of the Department of Labor and Industries dated October 24, 2018. In this order, the Department corrected and superseded its orders dated July 7, 2016; May 9, 2018; and August 29, 2018, and stated that the Director continued to exercise his discretionary authority over the claim.
3. In Docket No. 18 26899, the claimant, David A. Platzer, filed an appeal with the Board of Industrial Insurance Appeals on December 11, 2018, from an order of the Department of Labor and Industries dated October 25, 2018. In this order, the Department took a deduction for the assessed overpayment and paid a permanent partial disability award for a Category 3 permanent dorso-lumbar and/or lumbosacral impairments; a Category 2 permanent mental health impairments; paid 20 percent of compensation for unspecified disabilities of 100 percent as compared to total bodily impairment; and paid a Category 4 permanent impairments of bladder function

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 Department filed a timely Petition for Review of Proposed Decision and Order issued on January 16, 2020. The claimant filed a response to the Petition for Review.