Walster, Sandra (II)

BOARD

Appearance of fairness doctrine

A Board member may participate in the decision on an appeal from a Department order entered when he was the Supervisor of Industrial Insurance where the appeal raised only a legal issue and, despite the fact that his name appeared on the Department order, he was not personally involved in the Department action on the claim. **….*In re Sandra Walster* (II), BIIA Dec., 43,049 (11/73)** [special concurrence]

Petition for review

An order denying an appeal cannot be petitioned to the Board but must be appealed to superior court. [RCW 51.52.080] **….*In re Sandra Walster* (II), BIIA Dec., 43,049, (11/73)**

PETITIONS FOR REVIEW (RCW 51.52.104; RCW 51.52.106)

Order denying appeal

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SANDRA LUCILLE WALSTER **Scott Paper Company, Petitioner**	**)** **)**	**DOCKET NO. 43,049**
CLAIM NO. S-117733	**)** **)**	**ORDER DENYING REQUEST FOR RECONSIDERATION**

The above-entitled matter concerns an appeal filed with this Board by the Scott Paper Company, a self-insured employer, on August 27, 1973, from an order of the Department of Labor and Industries dated July 31, 1973, adhering to a prior Department order of June 28, 1973, which directed the said employer to pay temporary disability compensation to which the claimant may be entitled in accordance with RCW 51.32.190.

On October 26, 1973, this Board entered its Order Denying Appeal (with one Board member dissenting), and mailed it to all parties on October 31, 1973, confirming the Department's order of July 31, 1973, and denying the employer's appeal therefrom. It was clear to us that there were no issues of fact in this appeal, and it raised solely a question of law.

We conclude that the Department's order of July 31, 1973 was proper and lawful under what we viewed as the clear intent of two new pertinent statutory sections, now codified as RCW Secs. 51.32.190 and 51.32.210, and that the self-insured employer was thus required to pay time-loss compensation to the claimant for whatever period between May 21 and August 28, 1973, that she was in fact temporarily totally disable due to the back condition for which she had filed this claim. In view of this legal conclusion, we made final disposition of the appeal by our above-mentioned Order Denying Appeal, pursuant to the authority of RCW 51.52.080 providing that if an appeal "raises no issue or issues of fact and the board finds that the department properly and lawfully decided all matters raised by such appeal it may, without further hearing, deny the same and confirm the department's decision" based on the department record.

Thereafter on November 8, 1973, this Board received from the employer a document entitled Petition for Review, asking this Board to review our Order Denying Appeal of October 26, 1973, and after such review, to reach a contrary conclusion and reverse the Department's orders in question. It appears from the format of this document that it may have been intended to invoke the review procedures provided in RCW 51.52.104 and 51.52.106. Those statutes apply only to cases where proposed decisions and orders are issued by hearing examiners, and Board review is then requested and made, and final Board decisions issued based on such review. However, as pointed out above, our Order Denying Appeal in this case was entered pursuant to RCW 51.52.080, and it was the Board's <u>final</u> decision on this particular matter. This fact has now apparently been

recognized, inasmuch as the employer filed an appeal from said order to the Snohomish County Superior Court on November 15, 1973, under Cause No. 120320.

We have, nevertheless, considered the Petition for Review as a request for reconsideration of our order, and we have carefully noted the various arguments therein. In light thereof, it appears there may have been a partial misconception by the employer as to the import of our order, and we feel further comments should be made on certain points.

First, as to the statutory and case law citations made in support of the employer's argument that there is never any obligation to pay temporary total disability compensation prior to determination that an industrial injury occurred which caused the disability, we of course are familiar with those citations and recognize the continued applicability of the several judicial opinions in appropriate cases (such as the claimant's pending appeal under docket no. 43,109). However, as we attempted to make clear in our order of October 26, 1973, we are concerned here with the 1971 and 1972 amendments to the Act which created the new sections, RCW 51.32.190 and 51.32.210. These new sections indicate, in our opinion, a new legislative intent to guarantee a prompt initial determinative order as to allowance or rejection of the claim.

It should again be pointed out that the only period for which compensation is to be paid prior to a determination is the period which may be consumed until the entry of the Department's determinative order as to allowance or rejection of the claim. Once such an order is entered, whether it is to allow or to reject which then is challenged by way of an appeal by the employer or the claimant, as the case may be, there is no requirement to continue any payments while the issue of allowance is being litigated to a final conclusion before this Board and the courts.

Furthermore, this whole question of possible erroneous "pre-payment" of compensation can easily be rendered completely moot in any case -- namely, by adhering to the expressed legislative intent that the Department's determinative order as to claim allowance or rejection by issued promptly, by assuring that the same is issued within 14 days after receipt of the claim. In view of the considerable investigative staffs and information- gathering facilities possessed both by self-insurers and the Department, it clearly cannot be said that this is an unreasonable period of time within which to expect such a determination in the vast majority of cases.

These observations negate, in our opinion, the "horrible example" arguments made by the employer that compensation might have to be paid in some cases for a disability which is immediately obvious as being unrelated to a person's employment, or might have to be paid for "months or even years" for a disability which is finally adjudicated to be non-industrial. These situations simply will not happen. Of course, it is recognized that occasional claims will raise more complex problems such as a difficult causal relationship question, so that the initial investigative period in some claims will exceed 14 days. As to such cases, we reiterate the observation made in our order of October 26, 1973, namely, that the new sections of the law intend that the economic burden of any delayed initial determination be placed on the workmen's compensation system rather than on the temporarily disabled claimant or other social welfare program.

In the instant case, of course, a period of three months transpired between notice of claim and the Department's determinative rejection order. However, it would seem that most of the information which was obtained by concentrated investigative efforts in July and August, upon which it was determined, in August, that there was no proof of an injury at a definite time and place in the course of employment in April, was available to be investigated and obtained in the 14 days following claimant's filing of her claim on May 22, 1973. Indeed, the Legislature has declared that a self-insurer must give written notice of its denial of a claim, with reasons therefor, within seven days after notice of it (RCW 51.32.190(1)), thus indicating that seven days is deemed to be sufficient time for a self-insurer to gather all its information on whether or not an injury did occur. The whole controversy raised by this particular appeal would not have arisen if there had been an expeditious gathering of the available information immediately after May 22, 1973, so that the Department's determinative order could have been entered by June 5 rather than by August 28.

Secondly, as to the contention that the conclusion reached in our Order Denying Appeal is in violation of Constitutional provisions regarding due process of law, we reiterate that the issue is moot where the statutes' intent is followed and a determinative order as to allowance or rejection is entered within 14 days after receipt of the claim. In any event, this constitutional issue will presumably be argued in the employer's pending Court appeal, and the final decision on such an issue should properly come from the courts rather than from an administrative tribunal.

Finally, we must comment on the employer's challenge to the participation of the Board Chairman, Phillip T. Bork, in the decision on this appeal, because he was the Supervisor of Industrial Insurance in the Department at the time of issuance of the appealed orders and his name appears thereon, and this fact allegedly constitutes a violation of the "appearance of fairness" doctrine as set forth by the Supreme Court in Chrobuck v. Snohomish County, 78 Wn. 2d 858 (1971).

We have carefully considered the Chrobuck case, as well as the prior decision of Smith v. Skagit County, 75 Wn. 2d 715 (1969), upon which the Chrobuck case relied and which first set forth the "appearance of fairness" principle. Both of these cases were concerned with public hearings before the Planning Commissions and Boards of County Commissioners of the respective counties, on applications by corporations for amendments to the counties' comprehensive plans and for rezoning under their zoning ordinances of certain land areas from rural and residential classifications to industrial classifications. Under the state's zoning laws, hearings are required on such matters, to afford the public and any interested parties the opportunity to present their views and factual evidence to the Planning Commissions in their fact-finding role, on the basis of which findings of fact and recommendations are made as to whether the planning and zoning changes should be granted. The majority of the Court in each of these cases stated that such public hearings must be fair and impartial, and that there must be fairness not only in substance, but the appearance of fairness as well. In both cases, the Court held that there was a lack of the essential appearance of fairness in the hearing processes -- because of the manner in which a closed session was held in the Smith case, and, in the Chrobuck case, because of participation in the Planning Commission's hearings and deliberations by three members thereof who had some prior business and social relationships which appeared to indicate a partiality toward the rezoning being requested. Because of the lack of apparent fairness, the Court held that due process was not accorded, and the rezoning in both cases was declared void.

The instant case before this Board is different in many ways from the zoning and planning proceedings involved in Chrobuck and Smith, and there is serious doubt that those cases are applicable here. For one thing, there was no fact-finding hearing necessary in this appeal since there are no disputed issues of fact, and our Order Denying Appeal was rendered solely on a question of law and statutory interpretation, based on review of the Department's file and without a hearing, which is a procedure specifically authorized by RCW 51.52.080.

Also, the Court in those decisions placed considerable emphasis on the wide public impact of, and the necessity for the highest public confidence in, planning and zoning decisions which govern the uses to which land may be put and thus are often controversial and affect the lives of many segments of our complex society; and because of these factors, the appearance of fairness in such matters, in the words of Justice Finley in the Chrobuck case, becomes of paramount importance." Query, whether the same sort of public impact is present in this case, involving a rather narrow legal issue of statutory interpretation, with no factual dispute?

It must be noted that the Court in the Chrobuck case, in commenting on the participation in the hearings by those Planning Commission members who apparently had some prior individual relationships and views, found no dishonorable or self-serving motives on the part of those individuals. But the Court concluded that the "unfortunate combination of these circumstances .... and the cumulative impact thereof ... cast an aura of improper influence, partiality, and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness condemned in Smith v. Skagit County, supra."

In the instant case, the employer specifically disclaims the inference of any self-serving or improper motives on Mr. Bork's part in participating in our decision on this appeal. Therefore, even if it is assumed that the above-quoted holding in Chrobuck applies to this case, the question comes down to whether or not the simple fact that Mr. Bork was Supervisor of Industrial Insurance for the Department at the time of issuance of the appealed orders, and his name appears thereon in printed-signature fashion, casts such an "aura of partiality or prejudgment" that has participation in this appeal creates an appearance of unfairness. We are convinced that this is not the case.

Mr. Bork was not personally involved in issuance of any of the Department's decisions or orders in this particular claim, and the claim record bears out this fact.

In accordance with RCW 43.22.020 and 43.22.030, the Supervisor of the Industrial Insurance Division of the Department is charged with administering the entire workmen's compensation system, and he has the authority to employ and retain all necessary additional people to carry out this assignment. It is a matter of common knowledge that the Industrial Insurance Division is, as its name implies, a large insurance organization; and it has several hundred employees, including experts in premium rates, classifications, and actuarial matters, fiscal analysts, underwriters, employer account auditors and premium collection personnel, medical consultants and medical treatment authorizers, field auditors, claims investigators, physical and vocational rehabilitation

experts, self-insurance regulators, several dozen claims examiners and adjudicators, and the necessary supervisory staff over these varied functional operations. The claims examiners and adjudicators are making literally hundreds of decisions on active claims on an every-day basis, on a total volume of claims which approaches 150,000 annually. It would be folly to expect that the manager of such an organization, whether Mr. Bork or anyone else, would or could get involved in the myriad of every-day individual claims decisions. To do so would be to virtually abdicate the managerial and broad decision-making functions necessary to see that the Division and its component parts are properly administering the entire workmen's compensation system. Recognizing these realities, we believe that the imprint of Mr. Bork's name on these appealed orders, because he held the position of Supervisor of Industrial Insurance prior to becoming Chairman of this Board on August 1, 1973, does not by itself give rise to an appearance of unfairness within the principles of Chrobuck and Smith.

Mr. Bork is quite conscious of the necessity to disqualify himself from participating in the decision on any appeal where it is apparent from the record that he had prior direct involvement with the case in his former position. He did in fact disqualify himself from a recent Board decision, because he was a principal witness called to testify on the Department's behalf at a hearing in the case held prior to the date he became Board Chairman. In re Herbert E. Thomas, Claim No. G-354780, Board Docket No. 42,061, Board Decision of 8-31-73. The final disposition of that case was that the Board issued its decision reciting that the two other Board members were split one-to-one on the legal issue raised by the appeal; and, since there was no Board majority for either sustaining or reversing the Department's order appealed from, said order must stand. The cases of Department of Ecology v. City of Kirkland, 8 Wn. App. 576 (1973), and State v. Beck, 56 Wn. 2d 474 (1960), were cited in support of that result. We fail to see how such a result would benefit the employer her, inasmuch as there would be a one-to-one split between the two other Board members on the legal issue herein; the Department order of July 31, 1973, accordingly would stand; and the employer would still have to seek reversal on appeal and review in the courts.

The employer's court appeal is now pending, in any event, under Snohomish County Cause No. 120320, and the "appearance of fairness" argument, which is grounded basically on constitutional due process provisions, will no doubt be argued and determined in that forum.

In light of all the foregoing, we adhere to the result reached in our Order Denying Appeal dated October 26, 1973; and the employer's Petition For Review filed on November 8, 1973, which we have treated as a request for reconsideration of that order, should be denied.

It is so ORDERED.

Dated this 30th day of November, 1973.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairman

/s/_____
R. H. POWELL Member

SPECIAL POSITION STATEMENT

Inasmuch as I dissented from the Board's majority opinion in the Order denying Appeal dated October 26, 1973, on the merits of the legal issue raised by this appeal, I am now dissenting from the majority's adherence to that opinion.

However, as to the employer's "appearance of fairness" argument, I heartily concur with the entire discussion on that subject as expressed by the other two Board members, and I likewise do not believe that the Chairman, Mr. Bork, must disqualify himself from participation in this appeal simply because he was Supervisor of the Industrial Insurance Division of the Department at the time of issuance of the appealed orders and his printed-signature name appears thereon.

Dated this 30th day of November, 1973.

/s/_____
R. M. GILMORE Member