Thrasher, Harold

SANCTIONS

Failure to attend CR 35 medical examination

It was proper to require the worker's attorney to personally pay the employer the cancellation fee incurred when, on the advice of the attorney and without notice to the employer, the worker failed to appear at a Board ordered CR 35 examination.
….*In re Harold Thrasher,* BIIA Dec., 55,183 (1982)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HAROLD M. THRASHER	**)**	**DOCKET NOS. 55,183 & 55,633**
	)	
CLAIM NOS. S-274493 & S-260068	**)**	**DECISION AND ORDER**

Appeals filed by the claimant in Claim No. S-260068 on November 5, 1979, from an order of the Department of Labor and Industries dated October 9, 1979; and in Claim No. S-274493 on August 28, 1979, from an order of the Department of Labor and Industries dated August 9, 1979, which orders closed each claim with time-loss compensation as paid but with no award for permanent partial disability. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on December 30, 1981, which sustained the Department orders dated August 9, 1979 and October 9, 1979.

The Board has reviewed the evidentiary rulings in the appeal record and finds that, with the exception of the items specifically discussed in this order, no prejudicial error was committed and those rulings are hereby affirmed.

During the course of the proceedings in this matter exhibits were marked and offered but not identified in a consecutive or logical manner. In order to differentiate between the exhibits offered, some of which bear the same numbers, they will be re-marked to include the date of the hearing at which they were offered with the identifying number of letter with which they were originally marked. All of the exhibits so marked which have been previously identified and admitted will remain admitted and all other exhibits will be rejected.

Claimant in his Petition for Review again raises his contention that the Board is compelled to honor his affidavit of prejudice filed in this matter. It has long been the policy of this agency, regardless of the changing membership of the Board, that absent a showing of good cause or actual bias or prejudice, affidavits of prejudice would not be granted. The nature of the Board's proceedings, vesting final decision-making authority in all appeals with the Board members themselves, provides sufficient protection of a party's interests, a circumstance not present in the superior courts of this state. While the showing of actual prejudice may require re-assignment of an appeal to a different hearing office, we are not compelled to do so on the bare assertions made in a general form affidavit of prejudice.

During the pendency of this appeal, the Board has made this policy explicit in its rules of practice and procedure, WAC 263-12-045 and 263-12-125. No attempt was made by the claimant's counsel to support an allegation of actual bias or prejudice. The affidavit was, therefore, properly denied. Moreover, it would appear that such motion became moot. Although the hearing officer originally assigned to conduct proceedings in the appeal did eventually preside over much of the contest, that employee left state service for private law practice. Another hearing examiner was assigned to and completed the proceedings and authored the Proposed Decision and Order. Since no specific matters of procedure or evidentiary ruling are raised in the petition for review, it is difficult to conceive that the claimant earnestly asserts that bias or prejudice affected his ability to proceed. Having raised no such matters in his petition, they will be deemed waived. WAC 263-12-145(2). RCW 51.52.104.

During the course of the hearing held on September 29, 1981, claimant's attorney, Norman W. Cohen, testified regarding certain conversations he had with Dr. Alan G. Brobeck prior to taking his deposition. The purpose of Mr. Cohen's testimony was to establish that Dr. Brobeck, the claimant's witness, had expressed opinions more favorable to the claimant's position than that established by his testimony. Although Mr. Cohen's testimony may impeach the credibility of Dr. Brobeck, the only admissible opinions are those expressed by the doctor in his own testimony. The supreme court, in Strmich v. Department of Labor and Industries, 31 Wn. 2d 598, at 604 (1948), dealt with this question and determined that this type of testimony was admissible only for the purposes of impeachment. We must conclude from the record that Mr. Cohen offered this testimony to establish Dr. Brobeck's opinions and not for the purposes of impeachment, and accordingly, it will be stricken from the record.

In the course of the proceedings held in this matter, certain rulings on objections and motions were either not made or reserved for consideration at a later date. All of the objections and motions other than those specifically mentioned in the Proposed Decision and Order, or in this order, are hereby overruled and denied.

Counsel for the employer, in a written motion filed with the Board on March 3, 1980, and on a number of occasions subsequently during proceedings in this matter, asked the Board to direct claimant's counsel to pay the employer the sum of $350.00 as the cost of a medical examination which the claimant failed to attend on the advice of his attorney. Inspection of the record reveals that a motion for a Rule 35 examination was filed by the employer on January 3, 1980, and on

January 18, 1980 an order granting this motion was mailed to the claimant and his attorney. Rather than challenging this order in proceedings before the Board, claimant's attorney elected to advise his client to ignore this order as it had been granted without a hearing on its merits. Counsel for the employer was not advised of Mr. Cohen's position regarding the examination until he received a letter on February 5, 1980, at which time he cancelled the examination, which resulted in a charge of $350.00 to the employer by the physicians who had been scheduled to perform the examination. Employer incurred the $350.00 cancellation charge as a direct result of the failure of claimant's attorney to challenge the order granting the Rule 35 examination at the proper time and in the appropriate manner. Accordingly, the employer's motion is granted and claimant's attorney, Norman W. Cohen, is directed to personally pay to the employer the sum of $350.00 as a fee for forced cancellation of the medical examination.

During the course of these proceedings, claimant's attorney moved to strike certain evidence presented by the employer and for the imposition of sanctions for failure to respond to interrogatories. Inspection of the record reveals that the employer responded in a timely fashion to the claimant's interrogatories and also filed supplemental answers to interrogatories as these were required by the on-going nature of the interrogatories originally proposed. We feel that the employer has fairly and completely responded to the claimant's interrogatories in a timely fashion and the claimant's motion is denied.

By his direct appeals from the Department orders of August 9, 1979 and October 9, 1979, Mr. Thrasher has raised the question of the correctness of those orders. Specifically, he contends that a hearing loss he suffered in his left ear is causally related to the industrial injury of July 25, 1978, and that he was permanently totally disabled by the effects of the industrial injuries when the claims were closed.

Mr. Thrasher, a 59 year old high school graduate, has been a truck driver for many years. While in Portland, Oregon on January 4, 1978, he slipped on an icy fuel island and fell, injuring his low back. As the result of this injury, he sought medical treatment and was required to be off work for a period of time. On July 25, 1978, after he had returned to truck driving, he suffered an injury in British Columbia, Canada, when he hit a cow. As he struggled to keep the truck under control after striking the animal, he was jostled and thrown against his seatbelt injuring his neck and low back.

Following each of the injuries, Mr. Thrasher sought treatment from Dr. Charles J. Gehlen, a general practitioner who had been his physician for approximately 20 years. Since March 27, 1978,

when he first saw the claimant for the industrial injury of January 4, 1978, Dr. Gehlen has prescribed medication and managed Mr. Thrasher's condition with conservative treatment. Although he did not record findings, for the most part, he did note that on almost every occasion muscle spasms were detectable. Neither did Dr. Gehlen specify any physical limitations he would impose on the claimant, but he did feel that the effects of the industrial injuries had rendered the claimant unable to perform any form of continuous gainful employment of a heavy nature, such as truck driving.

When Mr. Thrasher failed to respond adequately after an extensive period of conservative treatment, he was referred to Dr. Alan G. Brobeck, a board-certified orthopedic surgeon. Dr. Brobeck first examined the claimant on August 17, 1979, and arranged for the claimant to have an electromyogram administered by Dr. Ernest A. Ager. This was for the purpose of determining the cause of claimant's neck and upper extremity complaints. The electromyogram, which was performed by Dr. Ager on August 22, 1969, demonstrated abnormalities establishing pressure on the C-7 or C-6 nerve root. When Dr. Brobeck reviewed these findings, he formed the opinion that the claimant might require a cervical fusion and referred him to Dr. William M. Cohn, a neurosurgeon who examined the claimant on August 29, 1979. Based on his examinations of the claimant, Dr. Brobeck diagnosed the claimant as having radiculopathy caused by foramenal encroachments in the lower cervical area. He felt that it was probable that the industrial injuries had aggravated the pre-existing osteoarthritic condition in the cervical spine, which was causing the condition diagnosed. Dr. Brobeck specifically refused to express an opinion regarding the claimant's ability to work.

Based on his evaluation of the claimant for treatment of low back and neck pain, Dr. Cohn diagnosed him as having low back and neck derangements related to arthritic changes of a wear and tear nature. He recommended to the claimant that he have a myelogram and a possible operation for cervical or lumbar disc pathology. Dr. Cohn felt there was a direct causal relationship between the conditions he diagnosed on August 29, 1979 and the industrial injury of July 25, 1978. He felt that as the result of the claimant having been badly jostled about in the cab of the truck, he had aggravated his pre-existing arthritic condition and rendered it symptomatic. Although Dr. Cohn did not express any opinion regarding impairment or physical limitations, he did feel that the claimant was prevented from performing any forms of continuous gainful employment by the effects of the industrial injuries.

The only vocational witness to testify in this matter was Constance Matteson, who interviewed and tested the claimant on September 29, 1980. Ms. Matteson, who has an extensive background in vocational rehabilitation and counseling, also testified that she had had experience and training in evaluating and interpreting medical reports. Although she testified that her opinion regarding the claimant's physical limitations was based on his representations to her in this regard, she did review the medical reports of Dr. Brobeck, Dr. Cohn and Dr. J. Harold Brown. Her opinion that the claimant is permanently totally disabled is based upon the claimant's representation that he could no longer perform any form of substantial physical exertion, and her test results which demonstrated that the claimant had poor manual dexterity and poor ability to perform mathematical computations. She did note that the claimant had good reading and spelling skills and should have the ability to handle the academic work necessary for retraining. However, she did not feel this offered a reasonable alternative because of the claimant's age.

In support of his contention that his hearing loss in the left ear was caused by the industrial injury of July 25, 1978, the claimant presented the testimony of Dr. Alan L. Keaton, a board-certified otolaryngologist. He testified that the claimant was referred to him by Dr. Gehlen on January 29, 1980, at which time he received a history that the claimant had suffered a significant loss of hearing in the last week. He was also told by the claimant that he had suffered a loss of hearing at the time of the industrial injury in July of 1978, and experienced tinnitus in his left ear commencing a few weeks later. Based on hearing tests, Dr. Keaton diagnosed the claimant as having a nerve-induced hearing loss in the left ear which was moderately severe in nature and caused by the industrial injury of July 25, 1978. He was quite firm in his opinion regarding the relationship between the industrial injury and the hearing loss, but felt that if Mr. Thrasher had no hearing loss until a month after the industrial accident, he would have to look for another cause.

In opposition to the claimant's asserted occupational hearing loss, the self-insured employer presented the testimony of Dr. Bernard R. Levinthal, a board-certified otorhinolaryngologist, who examined the claimant on September 26, 1980. At the time the claimant appeared for his examination, he was accompanied by his wife and his attorney. Claimant related a history of a sudden hearing loss in his left ear occurring in November of 1978, at which time he noted a sound which was like the sound made by air escaping from a balloon. Claimant also stated that he had had no hearing loss prior to the incident of November 1978, but since that time had suffered from tinnitus in his left ear. Hearing tests performed at the direction of Dr. Levinthal achieved essentially

the same results as those performed at the Northwest Hospital at the direction of Dr. Keaton. Based on an accurate and complete hypothetical question propounded to him, Dr. Levinthal expressed the opinion that there was no causal relationship between the claimant's hearing loss and the industrial injuries he suffered in 1978. The principle basis for Dr. Levinthal's opinion was the lapse in time between the injury and the sudden hearing loss. We find Dr. Levinthal's testimony convincing, and agree that there is no causal relationship between the claimant's hearing loss and the industrial injuries.

Also testifying were two physicians who had examined the claimant at the request of the self-insured employer. Dr. J. Harold Brown, a board-certified specialist in aviation and industrial medicine, examined the claimant on March 19, 1979 and came to the conclusion that the claimant had no objective findings to substantiate his complaints other than x-ray evidence of degenerative changes in the spine. He interpreted x-rays as showing narrowing in the C-5 through C-7 interspaces and osteophytes or spurring protruding slightly into the intervertebral foramina at those levels. He also expressed the opinion that these changes had been present for somewhat more than a year prior to his examination. Dr. Brown could recommend no medical treatment but felt that the claimant should pursue a 60-day period of physical reconditioning and that following this he would be able to return to work as a truck driver. Other than the need for conditioning caused by the claimant's lack of activity, he felt there was no disability or impairment which was attributable to the industrial injuries of 1978.

Also testifying on behalf of the employer was Dr. David M. Chaplin, a board-certified orthopedic specialist, who examined the claimant on October 10, 1980. Based on a complete and detailed examination he diagnosed the claimant as having degenerative changes in the cervical and lumbosacral spine, peripheral neuropathy in both lower extremities, cervical and lumbosacral strain and hypertension. The only condition which he felt was causally related to the industrial injuries was the claimant's cervical and lumbosacral strains. He did not feel that the claimant would benefit from further treatment and although he felt the claimant had impairment caused by the degenerative changes in the neck and low back, he felt none of this was causally related to the industrial injuries. Dr. Chaplin felt that the claimant was capable of continuous gainful employment, but did impose certain physical restrictions on his activity. He felt that the claimant should not lift any weights greater than 40 to 50 pounds, should not stand in one position for periods in excess of four hours, and should do no prolonged stooping or bending. He felt that the claimant should have

no restriction on the length of time that he would be able to sit. On cross-examination, Dr. Chaplin stated that the injuries suffered by claimant during the course of his employment in 1978 had precipitated, prolonged, worsened or exacerbated the symptoms caused by claimant's osteoarthritic condition.

Commencing in October of 1980, the self-insured employer hired a private investigator to observe the claimant's activities. On a number of occasions the investigator, Windsor Olson, without Mr. Thrasher's knowledge, observed the claimant engaging in physical activities about his home which were considerably more strenuous than the activities he related to the physicians examining him or to Constance Matteson, the claimant's vocational witness. In addition, Mr. Olson followed the claimant as he drove his camper from his residence in Montlake Terrace to a point north of the Canadian border. He testified that during this drive he was able to observe Mr. Thrasher closely on a number of occasions and saw no indication that the claimant was in pain or distress as the result of his activities.

Additionally, each party presented a number of witnesses relating to an "investigation" of the claimant allegedly performed personally by the employer's attorney, Mr. Dickinson. This testimony generated considerable heat between the parties, but shed little light on the issues presented by these appeals. One thing however, is abundantly clear from this testimony, and that is the claimant's allegations regarding the alleged surreptitious activities of employer's counsel have no basis in fact and are specious.

Considering the range of physical limitations testified to by Dr. Chaplin and the activities observed by Mr. Olson in the course of his investigation, it appears to this Board that Harold Thrasher is capable of performing the physical activities of a number of forms of continuous gainful employment. The physical restrictions imposed by Dr. Chaplin would not preclude Mr. Thrasher from resuming employment as a truck drive. In view of this testimony, we find it difficult to accept Mr. Thrasher's self-imposed limitations which are based upon a multitude of complaints and symptoms unsubstantiated by objective findings.

Dr. Gehlen's testimony would ordinarily be accorded great weight in view of his long-time relationship with the claimant as attending physician. However, we do not find it as persuasive as the testimony of Dr. Chaplin. Dr. Gehlen holds the opinion that the claimant is unable to work, but it appears that opinion relates mainly to the claimant's ability to return to work as a truck drive. He does not state any specific physical limitations or restrictions that lead him to this conclusion.

Although Dr. Gehlen has seen the claimant on numerous occasions, his records and testimony reflect little in the way of objective findings which would substantiate Mr. Thrasher's disability relative to the 1978 industrial injuries. It is also significant to note that this general practitioner referred the claimant to specialists with superior training and expertise when he had not responded adequately to conservative treatment. We are, however, convinced by the testimony of Drs. Cohn, Ager, and the cross-examination of Dr. Chaplin, that the industrial injuries acted upon claimant's pre-existing osteoarthritic condition in such a way as to light it up or render it symptomatic. Although Dr. Gehlen had previously treated the claimant for this problem, it had been asymptomatic for some period of time prior to the industrial injury of January 4, 1978. Accordingly, the Department orders closing these claims are incorrect and these claims will be remanded to the Department with directions to pay permanent partial disability awards consonant with the category 2 rating of WAC 296-20-240 and WAC 296-20-280, as testified to by Dr. Chaplin in regards to the claimant's neck and lumbosacral spine.

FINDINGS OF FACT

Based on a careful review of the entire record, this Board finds as follows:

1. On September 7, 1978 claimant, Harold M. Thrasher, filed a report of accident with the Department of Labor and Industries alleging that he had suffered an industrial injury on July 25, 1978, during the course of his employment as a truck driver with T.I.M.E. DC, a self-insured employer, which was assigned Claim No. S-274493. On August 9, 1979, the Department of Labor and Industries issued an order closing the claim with time-loss compensation as paid to May 26, 1979, inclusive, but with no award for permanent partial disability. On August 28, 1979 claimant filed a notice of appeal from the Department's order of August 9, 1979, which was assigned Docket No. 55,183. On September 12, 1979, the Board of Industrial Insurance Appeals issued an order granting the appeal and directed that proceedings be held on the issues raised by the appeal.

2. On May 5, 1978 claimant, Harold M. Thrasher, filed a report of accident with the Department of Labor and Industries alleging that he had suffered an industrial injury during the course of his employment with T.I.M.E. DC, Inc., on January 4, 1978, which was assigned Claim No. S-260068. On May 30, 1978, the Department of Labor and Industries issued an order allowing the claim. On October 9, 1979, the Department issued an order closing the claim with time-loss compensation as paid to April 16, 1978, with no award for permanent partial disability. On November 5, 1979, claimant filed a notice of appeal from the Department's order of October 9, 1979, which was assigned Docket No. 55,633. On November 15, 1979, the Board of Industrial

Insurance Appeals issued an order granting the appeal and directed that proceedings be held on the issues raised by the appeal.

3. Harold M. Thrasher, the claimant, suffered an industrial injury to hi low back during the course of his employment with T.I.M.E. DC, Inc., as the result of slipping and falling when he stepped on an icy fuel island on January 4, 1978.

4. Harold M. Thrasher, the claimant, suffered an industrial injury to his low back and neck during the course of his employment with T.I.M.E. DC, Inc., as the result of being jostled and thrown against his seatbelt while trying to control his truck after striking a cow in British Columbia, Canada on July 25, 1978.

5. As of August 9, 1979 and October 9, 1979, claimant was suffering from cervical and lumbar strain, which conditions were causally related to the industrial injuries of January 4, 1978 and July 25, 1978, and which had lighted up or rendered symptomatic claimant's pre-existing degenerative arthritis in the neck and low back.

6. As of August 9, 1979 and October 9, 1979, there was no viable treatment designed to reduce the claimant's disability attributable to the industrial injuries of January 4, 1978 and July 25, 1978, other than surgery which the claimant had refused and without this surgery his conditions were fixed and permanent.

7. The claimant is a 59 year old high school graduate who has not been continuously gainfully employed since the industrial injury of July 25, 1978. Prior to the industrial injuries of January 4, 1978 and July 25, 1978, claimant had worked for almost 30 years as a truck driver. Claimant has poor manual dexterity and poor mathematical ability, but is able to read and spell well.

8. As of August 9, 1979 and October 9, 1979, as a result of the industrial injuries of July 25, 1978 and January 4, 1978, claimant had physical limitations which prevented him from performing prolonged stooping or bending, from standing in one position for more than four hours at a time, and from lifting over 40 to 50 pounds. Claimant's ability to sit was not significantly restricted.

9. As of August 9, 1979 and October 9, 1979, claimant in view of his disabling conditions attributable to the industrial injuries, was not precluded from performing gainful employment on a reasonably continuous bases within his capabilities and in view of his age, training, education and experience.

10. As of August 9, 1979, claimant's impairment attributable to the industrial injury of July 25, 1978 was most accurately described by Category II of WAC 296-20-240, Categories of Permanent Cervical and Cervicodorsal Impairments.

11. As of October 9, 1979, claimant's impairment attributable to the industrial injury of January 4, 1978 was most accurately described by Category II of WAC 296-20-280, Categories of Permanent Dorsal-lumbar and Lumbosacral Impairments.

12. Harold M. Thrasher, the claimant, several months subsequent to his industrial injury of July 25, 1978, suffered a moderately sever nerve hearing loss in the left ear. This hearing loss was not caused by or related to the industrial injuries of July 25, 1978 or January 4, 1978.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, this Board concludes as follows:

1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and subject matter of this appeal.

2. On August 9, 1979, claimant's permanent partial disability attributable to the industrial injury of July 25, 1978 to 10% as compared to total bodily impairment, per WAC 296-20-680(1).

3. As of October 9, 1979, claimant's permanent partial disability attributable to the industrial injury of January 4, 1978 was equal to 5% as compared to total bodily impairment, per WAC 296-10-680(3).

4. The orders of the Department of Labor and Industries dated August 9, 1979 and October 9, 1979 are incorrect and this matter must be remanded.

ORDER

It is hereby ORDERED that claimant's counsel, Norman Cohen, forthwith make personal payment to the employer, the sum of $350.00 for costs incurred during pendency of claimant's appeal, and that such sum shall not be made chargeable to the claimant, Harold Thrasher.

It is further ORDERED that the orders of the Department of Labor and Industries dated August 9, 1979 and October 9, 1979 in the claims of Harold Thrasher are reversed and the claims remanded to the Department with directions to reopen the claims and order the self-insured employer to pay the claimant a permanent partial dis- ability award of 10% as compared to total bodily impairment in Claim No. S-274493 and 5% as compared to total bodily impairment in Claim No. S-260068, to deny as unrelated to either of these industrial injuries claimant's left ear hearing loss, and thereupon close both claims.

Dated this 28th day of April, 1982.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____

MICHAEL L. HALL Chairman

/s/_____

PHILLIP T. BORK Member