Smith, Emmett

EVIDENCE

Psychologist-patient privilege

Although the privilege exemption of RCW 51.04.050 applies only to communications made to physicians and not to those made to psychologists, statements made by a worker to a psychologist in the course of treatment under an industrial insurance claim are not privileged, as the worker had no reasonable expectation that such communications would be kept confidential. ***….In re Emmett Smith,* BIIA Dec., 70 253 (1987)** [*Editor's Note*: The Board's decision was appealed to superior court under. The Board's decision was appealed to superior court under Snohomish County Cause No. 87-2-01158-3.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EMMETT L. SMITH	**)**	**DOCKET NO. 70,253**
	)	
CLAIM NO. H-843058	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Emmett L. Smith, by
Norman W. Cohen and Associates, per
Norman W. Cohen and Verlaine Keith-Miller

Employer, Beck Mill Company, None

Department of Labor and Industries, by
The Attorney General, per
James Kallmer, Francois L. Fischer, and William R. Strange, Assistants

This is an appeal filed by the claimant on April 8, 1985 from an order of the Department of Labor and Industries dated March 29, 1985 which closed the claim with a permanent partial disability award equal to 10% as compared to total bodily impairment, and time-loss compensation as paid. Department order is **AFFIRMED**.

PROCEDURAL AND EVIDENTIARY MATTERS

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 Department of Labor and Industries to a Proposed Decision and Order issued on July 3, 1986 in which the order of the Department dated March 29, 1985 was reversed, and this claim remanded to the Department with direction to place the claimant on the pension rolls as a permanently totally disabled worker and provide all benefits concomitant to that status.

The Board has reviewed the evidentiary rulings in the record of the proceedings and the Proposed Decision and Order, and affirms the rulings with the following exceptions:

> Deposition of Thomas Howard, objections on page 6, line 4 and line 16, page 7, line 2, line 8, line 17, page 30, lines 8 through 18, page 31, line 25 are overruled.
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> Deposition of Jerry Bolyard, objections on page 9, line 11 and 22 and page 10, line 1, are overruled.
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> Deposition of Dr. Norman Zook, objections on page 27, line 18, page 28, line 8, sustained; motion on page 28, line 19 is granted; objections on page 29, lines 5 and 21 and page 31, line 11, are sustained.

Deposition of Dr. Marion Merrill, objection on page 63, line 16 is overruled; motion granted on page 64, line 22; objection sustained and motion granted on page 71, line 5.

Deposition of Dan McKinnon, motion to strike denied on page 8, line 3, and page 44, line 10; objections overruled on page 14, line 22, page 15, line 6, page 16, line 1, page 20, line 9, page 43, line 24; objection sustained on page 16, line 5.

Deposition of Dr. John Dennis, objections overruled on page 13, lines 5 and 7, page 18, line 13, page 33, lines 13 and 22.

Deposition of Jennifer Osborne, objections sustained on page 8, line 20, page 18, line 21, page 19, line 8, page 35, lines 1 and 20, page 69, line 23, page 80, line 24, page 82, line 5, page 87, line 14.

The claimant asserts a patient-psychologist privilege and objects to the presentation of Dr. McKinnon's testimony. Dr. McKinnon, a clinical and neuro-psychologist, performed a clinical evaluation and interpreted psychological tests taken by Mr. Smith at the behest of Dr. Feher and in conjunction with Mr. Smith's admission to the Providence Hospital Pain Clinic. Mr. Smith was referred to this pain clinic by his physician, Dr. Zook, who was treating him for conditions related to the industrial injury. Dr. McKinnon's reports and evaluation were sent to the Pain Clinic administrators and presumably Dr. Feher and those administering Mr. Smith's rehabilitation program at the clinic, as well as Dr. Zook. These records were presumably then sent to the Department of Labor and Industries and used as part of their administration of Mr. Smith's industrial insurance claim.

RCW 51.04.050 exempts examining and treating physicians from the physician-patient privilege in hearings, actions, or proceedings before the Department, Board, or court on appeal from the Board. However, psychologists are not physicians, and cannot be said to be specifically covered by the exemption in RCW 51.04.050.

Unlike other medically related professions such as nursing, the psychologist-patient privilege as contained in RCW 18.83.110 makes the confidential communications between a client and a psychologist privileged against compulsory disclosure to the same extent as confidential communications between an attorney and a client, even though logically they are more akin to a physician-patient communication.

However, since the psychologist-client privilege protects only confidential communications, the privilege only applies if the client has a reasonable expectation that communications are to be kept confidential. See McCormick on Evidence, Sec. 95, and In re Henderson, 29 Wn. App. 748 at 752,

630 P. 2d. 944 (1981). Application of the psychologist-client privilege requires balancing of the client benefit of the privilege against the public interest of a full revelation of all the facts.

In applying these principles to this case, we must conclude that Dr. McKinnon's testimony is admissible. Under the circumstances of treatment for his industrial insurance claim, Mr. Smith was directed to a pain clinic where other health care professionals referred him for a psychologist's clinical examination and assessment. Mr. Smith could not have reasonably expected that his communications with the psychologist would be kept confidential, since the examinations were performed for the purpose of providing some third party with the results. While relatively unsophisticated, Mr. Smith must have been aware that the purpose of Dr. McKinnon's evaluations was to generate additional information for those offering Mr. Smith treatment at the pain clinic. Additionally, in balancing Mr. Smith's interests in suppressing the testimony against the public interest of making an informed decision regarding Mr. Smith's rights to industrial insurance benefits, we must conclude that Mr. Smith's interest is outweighed. We therefore admit Dr. McKinnon's testimony into the record.

ISSUE

The substantive issue presented by this appeal is the extent of Mr. Smith's permanent disability, either total or partial, causally related to the industrial injury of March 31, 1981, as of March 29, 1985, when the Department closed his claim with additional permanent partial disability. Picictis v. Department of Labor and Industries, 59 Wn. 2d 467 (1962). Mr. Smith contends that the residuals from the industrial injury have left him permanently totally disabled from any employment. The Department contends that he has a permanent partial disability for his cervical condition not exceeding a Category II, which does not render him totally unable to return to employment. After thoroughly evaluating the entire record, we conclude that the preponderance of evidence establishes that Mr. Smith is capable of employment despite the permanent partial disability to the neck.

DECISION

Mr. Smith was born in January, 1940. Prior to his March 31, 1981 industrial injury, Mr. Smith worked in a variety of short-term employments, ranging from dishwasher, janitor, apartment maintenance man, truck driver, and fry cook, to working in a cannery, in a furniture plant, and at a lumber mill. His school report card indicates that after the second grade, he received very low grades and was "socially promoted" from third through ninth grade at which time he left school. He claims he received the "equivalent" of a G.E.D. or general education degree, but explains on cross-examination that the military recognized twenty credits for a CETA custodian job training in addition to twenty

credits in general mathematics and art to accord him the "equivalency" of a G.E.D. He did not take a G.E.D. examination.

Mr. Smith was working on the green chain at Beck's Lumber Mill when a heavy gate fell on his head while he was unjamming some lumber, injuring his neck. After a few days off work, he returned to work on the green chain for approximately nine months until he was laid off for lack of work in late December, 1981. He has not returned to work since. He then sought medical attention from Dr. Zook.

The medical findings expressed by the various physicians and psychologists are not significantly different in this case. However, Mr. Smith's attending general practitioners -- Drs. Zook and Merrill -- were of the opinion that the industrial injury caused Mr. Smith to be permanently unable to engage in employment. Dr. Zook, who saw the claimant approximately twelve times between January, 1982 and July, 1983, made no objective findings and no findings of muscle spasm himself, although a referral doctor reported findings of paraspinal muscle spasm in June, 1982. The tests conducted by this referral doctor, however, showed no evidence of a disc or radiculopathy. Dr. Zook's opinion about Mr. Smith's inability to be employed appears based on his opinion that Mr. Smith is psychologically crippled by pain and not specifically due to any physical residuals from the industrial injury.

Dr. Merrill saw Mr. Smith twelve times starting September 13, 1983, offering treatment consisting of pain medication and instruction on minimizing pain. Dr. Merrill felt Mr. Smith was unable to work at any "conventional" employment because of his mental function and because he would not be able to work in any continuous activity. He recommends physical restrictions contained on deposition exhibit I, based on what Mr. Smith related to him, his own observations, and Mr. Smith's physical condition. Dr. Merrill is unaware of jobs whose activity requirements are within Mr. Smith's physical restrictions and feels that assembly line jobs permitting a change in position throughout the day do not exist. Dr. Merrill offers insight into the claimant's motivation to return to work and Mr. Smith's demonstrated need to show continuing disability. His opinion is that there is both a psychological and physiological basis to Mr. Smith's returning to work and from a purely physical standpoint, if Mr. Smith's psychological motivations could be redirected, his physical disability would probably be diminished. Dr. Merrill did not feel the mental aspects of Mr. Smith's disability were due to the industrial injury.

Dr. John Dennis, a neurosurgeon, examined Mr. Smith on February 28, 1985 and diagnosed a head injury without loss of consciousness by history; cervical and thoracolumbar strain by history;

suspected functional problem; anomalous articulation at C2-3; and possible evidence of trauma at C-6 shown on x-ray. The anomalous articulation at C2-3 was felt to be congenital and unrelated to the industrial injury, and the x-ray change at C6 was felt to be unlikely a significantly contributing factor to the symptoms complained of. Dr. Dennis was of the opinion that Mr. Smith's condition related to the industrial injury was stationary and that further treatment was not appropriate. He rated Mr. Smith's residuals from the industrial injury as a Category II, cervical impairment, based on the radiographic changes. Dr. Dennis felt that from a physical standpoint Mr. Smith could return to sedentary gainful employment such as assembly line work, although it seemed extremely unlikely from a psychological standpoint.

Dr. Norman Janzer, a psychiatrist, evaluated Mr. Smith on February 28, 1985 and assessed his intelligence level at less than average. He was unable to diagnose a psychiatric disorder related to the March 31, 1981 industrial injury and felt Mr. Smith's intelligence level pre-dated the March 31, 1981 industrial injury.

Dr. Dan McKinnon, a clinical and neuro-psychologist, assessed Mr. Smith through the Providence Hospital Pain Center program in July and September, 1982. At that time Mr. Smith strongly expressed to Dr. McKinnon the opinion that he would never be able to work again. Dr. McKinnon concluded that at the time of his evaluation, Mr. Smith was "quite desirous of establishing the permanence and totality of his disability" and was "minimally motivated for rehabilitation," and therefore Dr. McKinnon recommended to the treating physicians that unnecessary extension of Mr. Smith's claim status should be avoided.

The only vocational expert to testify, Jennifer Osborne, never interviewed or performed an evaluation of Mr. Smith, but merely viewed Mr. Smith during testimony and reviewed certain medical and vocational records. Ms. Osborne had an incomplete understanding of the variety of his past employments, but felt that Mr. Smith would be unable to return to working as a green chain, cat or forklift operator, assistant apartment manager, janitor, or skidder, given his physical limitations. She felt he had a nominal degree of transferable skills but that given his intelligence Mr. Smith could perform simple one and two step operations without a high degree of decision-making. Such jobs exist in the competitive labor market and in sheltered workshop situations.

Ms. Osborne's opinion concerning Mr. Smith's unemployability appears to be largely based on Dr. Merrill's judgment that Mr. Smith is not able to work. When asked to assume the physical restrictions of Dr. Dennis, Ms. Osborne still felt Mr. Smith was not employable "because he is not

demonstrating competitive levels of work behavior." However, Ms. Osborne admits that the ability to sit, stand and walk in combination between eight to twelve hours would not preclude electronics and assembly type jobs and that the training for such jobs is available with on-the-job training. She recommends that Mr. Smith attempt training and light work such as electronics and mechanical assembly given the physical limitations recommended by Dr. Dennis. She further recommends a rehabilitation plan which would start with an assessment in a sheltered workshop with the expectation that Mr. Smith would move on to something else such as possibly bench and mechanical assembly work.

Dr. Rabkin's testimony merely adds other possible interpretations of the psychological results obtained by Dr. McKinnon, than the interpretation offered by Dr. McKinnon of these tests. However, without a clinical examination, Dr. Ravkin admits he is at a disadvantage, and we cannot give his testimony more weight than Dr. McKinnon's.

The overall record leaves us with a picture of a man of low intelligence who has been marginally attached to the labor market in a variety of jobs, and who, at age 41, injuries his neck, continues to work nine months at a physically hard job, is laid off for lack of work, and who then seeks medical treatment, and who, within eight months of his lay-off, views himself as permanently totally disabled. The record is filled with expressions and actions demonstrating a lack of motivation to return to any type of employment. While the industrial injury causes him a mild physical disability in his neck equivalent to a Category II, we conclude that the real cause of Mr. Smith's professed inability to return to work is not such mild residuals from his 1981 industrial injury, but his lack of motivation to seek and retain employment.

No medical testimony is presented to establish that any psychiatric or psychological problem that Mr. Smith has is due to the industrial injury. His lack of motivation to return to work cannot therefore reasonably be concluded to be caused by the industrial injury. His attending physicians place great emphasis on his psychological and mental inability when they express opinions that he is unemployable. When not taking into account the psychological element of Mr. Smith's condition, and remembering that Dr. Merill's recommended restrictions for physical activities are made within the cautionary note that the physical abilities will probably improve when the claim for disability is settled, we must conclude that the physical restrictions proposed by Dr. Dennis are far more in keeping with Mr. Smith's true permanent disability.

The physical restrictions enumerated by Dr. Dennis are not so great as to preclude a job with light repetitive duties such as bench or light mechanical assembly work, some of which are one to two step activities, within Mr. Smith's intellectual capability. Ms. Osborne concludes that such jobs exist in the labor market. In sum, the claimant is perfectly capable of re-entering the labor market, if and when he wants to.

After consideration of the Proposed Decision and Order and the Department's Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Department order closing this claim with a permanent partial disability award equal to 10% as compared to total bodily impairment is correct. We hereby enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On April 3, 1981 a Report of Accident was received by the Department of Labor and Industries alleging the occurrence of an industrial injury to Mr. Emmett Smith on March 31, 1981 while in the course of employment with Beck Lumber Company. On September 8, 1981 the Department issued an order allowing the claim and closing it without award for permanent partial disability. On February 2, 1982 the claimant filed an aggravation application, and on April 19, 1982 the Department entered an order reopening the claim effective January 19, 1982 for treatment and action as indicated. On March 29, 1985 the Department entered an order closing the claim with time-loss compensation as paid and with an award for permanent partial disability equal to 10% as compared to total bodily impairment. On April 8, 1985 the Board received Mr. Smith's Notice of Appeal, and on April 26, 1985 the Board entered an order granting the appeal, assigning it Docket 70,253.

2. Mr. Emmett Smith, a man born in 1940, dropped out of school after the ninth grade. Between the second and ninth grade, he was socially promoted rather than passing the academic requirements with any success. He does not have a General Education Degree (G.E.D.). He has worked in a variety of short-term employments ranging from dishwasher, apartment maintenance man, janitor, truck driver, fry cook, to working in a cannery, furniture plant and at a lumber mill.

3. On March 31, 1981 Mr. Smith injured his neck when a heavy gate fell on him. After going to the emergency room, he returned to work within a few days and continued to work on the green chain for beck Lumber Company until January, 1982 when he was laid off for lack of work. He thereafter sought treatment with Dr. Zook consisting of paid medication, referrals to medical specialists, and referrals to a pain clinic. He has not returned to work since his lay-off from Beck Lumber Company. In the summer of 1983 Mr. Smith moved from Camano Island, Washington, to Dayville,

Oregon, a rural community in Eastern Oregon. He continued treatment for his neck condition with Dr. Merrill who prescribed pain medication and instruction on minimizing pain.

4. As of March 29, 1985 the claimant's condition causally related to his industrial injury of March 31, 1981 was a cervical, thoraco-lumbar strain by history. As of March 29, 1985 the claimant's condition causally related to his March 31, 1981 industrial injury was fixed and stable and no further curative treatment was indicated.

5. As of March 29, 1985 the claimant's condition causally related to his March 31, 1981 industrial injury was best described as a mild cervical-dorsal impairment with clinical findings consistent with and most adequately expressed in Category II, WAC 296-20-240.

6. As of March 29, 1985, as a result of his industrial injury of March 31, 1981, superimposed upon the claimant as a whole person, the claimant was not precluded from full-time gainful employment of a sedentary light nature with one or two steps, which was available in the competitive labor market.

CONCLUSIONS OF LAW

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

2. As of March 29, 1985 Mr. Emmett Smith was not permanently and totally disabled within the meaning of the Washington Industrial Insurance Act.

3. As of March 29, 1985, the claimant herein sustained a permanent partial disability consistent with the level of impairment expressed in Category 2 of WAC 296-20-240 and, thereby, pursuant to WAC 296-20-680(1) exhibited a permanent partial disability equal to 10% as compared to total bodily impairment.

4. The order of the Department of Labor and Industries issued on March 29, 1985, closing the claim with time-loss compensation as paid and with a permanent partial disability award equal to 10% as compared to total bodily impairment, is correct and should be affirmed.

It is so ORDERED.

Dated this 9th day of February, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
GARY B. WIGGS Chairperson

/s/
PHILLIP T. BORK Member