

Wheeler, Leon

AGGRAVATION (RCW 51.32.160)

Temporary worsening

Although the evidence established that the worker's condition was fixed and that there was no increase in permanent disability as of the date the application to reopen the claim was denied, the worker was still entitled to benefits for a temporary worsening of his condition which occurred within the aggravation period. ...*In re Leon Wheeler, BIA Dec., 70 344 (1986)*

EXPERT TESTIMONY

Scope of expertise

An orthopedic surgeon, even though not licensed to practice chiropractic, is qualified to testify regarding a worker's need for continued chiropractic treatment. ...*In re Leon Wheeler, BIA Dec., 70 344 (1986)*

Scroll down for order.

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

1 **IN RE: LEON WHEELER**) **DOCKET NO. 70,344**
2)
3 **CLAIM NO. H-317867**) **DECISION AND ORDER**
4

5 APPEARANCES:

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7 Claimant, Leon Wheeler, by
8 Stiley & Kodis, per
9 Patrick K. Stiley

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11 Employer, Dix Corporation, None

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13 Department of Labor and Industries, by
14 The Attorney General, per
15 Gregory M. Kane, Assistant
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17 This is an appeal filed by the claimant on April 19, 1985 from an order of the Department of
18 Labor and Industries dated March 29, 1985 which adhered to the provisions of a prior order dated
19 November 2, 1984 denying an application to reopen the claim for aggravation of condition.

20 **REVERSED AND REMANDED.**
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23 **PROCEDURAL STATUS AND EVIDENTIARY RULINGS**

24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
26 issued on April 8, 1986 in which the order of the Department dated March 29, 1985 was affirmed.
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28 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
29 prejudicial error was committed and said rulings are hereby affirmed.
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32 In his Petition for Review the claimant takes specific exception to those rulings of the Industrial
33 Appeals Judge relating to the ability of an orthopedic surgeon to express an opinion as to the need for
34 chiropractic treatment. The claimant contends that since he has received only chiropractic treatment
35 for his condition, only a chiropractor is qualified to give an opinion with respect to his need for
36 continued treatment. In support of his contention the claimant has brought to the attention of the
37 Board a transcript of the Superior Court's oral opinion in the case of Stevens v. Department of Labor
38 and Industries, Spokane County Superior Court, No. 81-2-04032-7 (April 29, 1982). In that case, the
39 Honorable William J. Grant struck the testimony of a neurologist with respect to the plaintiff's need for
40 chiropractic treatment. It was the opinion of the court that a neurologist, who is only licensed to
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1 practice medicine and not chiropractic, should not be allowed to testify to the need or lack of need for
2 chiropractic treatment.
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4 The opinion of a Superior Court is of course not binding on this Board. With all due respect to
5 Judge Grant, we cannot adopt his analysis of this evidentiary issue. As the cases cited in Judge
6 Grant's opinion indicate, it is the general rule that a practitioner of one form of the healing arts is not
7 permitted to comment or give an opinion as to the standard of practice in another form of the healing
8 arts which he or she is not licensed to practice. We believe this rule is limited to actions for
9 malpractice. The issues in this case do not concern the qualifications of Dr. Steve Jukich, D.C., or Dr.
10 Bruce Powell or Dr. D. Scott Redman, orthopedists, to practice their respective forms of health care.
11 Nor is the issue whether any of these doctors has breached some standard of care with respect to the
12 treatment of the claimant. Rather, the issues in this case are whether the claimant's condition causally
13 related to the industrial injury of April 22, 1978 has become aggravated and, if so, whether he has an
14 increased disability or a need for further treatment because of his condition.
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21 The claimant does not have a chiropractic, as opposed to an orthopedic, problem. He has a
22 back problem. Chiropractors and orthopedic surgeons often disagree as to the diagnosis of particular
23 back problems as well as the proper method of treatment for such problems. As long as the
24 legislature recognizes that both professions are qualified to treat such conditions according to the
25 principles of their respective schools of thought, this Board will frequently be faced with the
26 responsibility of being the arbiter of any conflicts of opinion between members of these professions.
27 We cannot resolve such conflicts by simply excluding the opinions of practitioners of a particular
28 school of thought. Rather, it is our responsibility to consider and weigh these differing opinions in the
29 factual and legal context of a particular case, and to reach our decisions based upon the
30 reasonableness, plausibility and credibility of the various opinions offered. Our decision-making
31 process is aided more by artful cross-examination of a particular expert's lack of qualifications to
32 administer certain forms of treatment than by attempts to simply exclude the expert's opinions
33 altogether.
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40 **DECISION**

41 The issues presented by this appeal and the evidence presented by the parties are adequately
42 set forth in the Proposed Decision and Order. We do not believe the claimant has established that as
43 of March 29, 1985 he had a permanent worsening of his condition resulting in increased disability, or
44 that he had a temporary worsening of his condition which required continued medical treatment. While
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1 Dr. Jukich was of the opinion that with extensive chiropractic manipulations he could promote a
2 permanent improvement in the claimant's condition, his inability to achieve such a result in the long
3 period following the industrial injury persuades us that his opinion is based more on hope than
4 probability. We note also, that Dr. Powell is no stranger to the claimant, having seen and examined
5 him on three separate occasions. Dr. Powell's opinions with respect to the claimant's impairment and
6 need for treatment as of March 29, 1985 are further confirmed by Dr. Redman's evaluation.
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10 While we are persuaded by the evidence that the claimant has not sustained a permanent
11 worsening of his condition and was not in need of further treatment at the time of the Department's
12 order in March 1985, that does not end our inquiry. Left unresolved is the question of whether the
13 claimant had sustained at least a temporary aggravation of his condition during the aggravation period.
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16 Leon Wheeler testified that since his claim was closed in December 1982 there has been an
17 increase in the frequency of "flare-ups" he suffers as a result of his injury. He states that he has these
18 flare-ups at least once per year and that they are due to what feels like a slippage in a vertebrae in his
19 back. He states that his back "snaps". This complaint of having once-yearly incidents of a pop in the
20 thoracolumbar area was also related by the claimant to Dr. Redman. It was Dr. Redman's opinion that
21 this popping was caused by a laxity in the facet joints.
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25 Interestingly, Dr. Redman, an orthopedic surgeon, indicated that he has on occasion referred
26 patients to chiropractors. When asked what people he would refer to a chiropractor, he stated
27 "someone like this with a popping facet pain type of thing". His testimony further suggests that while
28 he did not think the claimant needed treatment at the time of his examination (January 5, 1984),
29 treatment for a "flare-up" may have been something he would have recommended.
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33 Delay is an inherent problem in our system of worker's compensation. By the time the
34 Department has scheduled an examination on an application to reopen the claim, the condition which
35 is claimed to have become aggravated may have been successfully treated or improved through
36 passage of time. The findings made in an evaluation performed at a time when a claimant's condition
37 is stable may not accurately reflect the status of the claimant's condition at other times during the
38 aggravation period.
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42 It is our conclusion that during the aggravation period the claimant did sustain a temporary
43 worsening of his condition. This conclusion finds support in the testimony of the claimant, Dr. Jukich,
44 and also Dr. Redman, who simply by virtue of the date of his examination was denied the opportunity
45 to assess the claimant's need for treatment during one of the claimant's flare-ups. While the
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1 Department's closure of the claim on March 29, 1985 without award for permanent disability was
2 appropriate, we believe the Department order should be reversed to the extent that payment should
3 be made for such chiropractic treatments as the claimant received for flare-ups which occurred during
4 the period beginning 60 days preceding the date on which the application to reopen the claim was
5 filed, and ending March 29, 1985. The Department should also consider whether, during any such
6 periods of treatment, the claimant was entitled to time loss compensation.
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10 FINDINGS OF FACT

11 The Board makes the following Findings of Fact:

- 12 1. On May 5, 1978, a claim for benefits was filed with the Department of
13 Labor and Industries on behalf of the claimant, Leon Wheeler, alleging an
14 injury as having occurred on April 22, 1978 during the course of his
15 employment with Dix Corporation. The claim was accepted, benefits
16 provided, and on November 21, 1978, the Department issued an order
17 closing the claim without an award for permanent partial disability. On
18 November 30, 1978, a letter of protest and request for reconsideration was
19 filed with the Department on behalf of the claimant. On December 5,
20 1978, the Department issued an order holding the prior order of November
21 21, 1978 in abeyance. On May 17, 1979, the Department issued an order
22 modifying the prior order of November 21, 1978 from a final to
23 interlocutory order, allowing treatment to date, and closing the claim
24 without an award for permanent partial disability.
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26 On July 15, 1982, an application to reopen the claim for aggravation of
27 condition was filed with the Department on behalf of the claimant. On
28 December 1, 1982, the Department issued an order reopening the claim
29 effective June 22, 1982 for authorized treatment, and closed the claim with
30 treatment to date without an award for permanent partial disability.
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32 On August 8, 1983, an application to reopen the claim for aggravation of
33 condition was filed with the Department on behalf of the claimant. On
34 September 16, 1983, the Department issued an order denying the
35 application for aggravation of condition. On October 4, 1983, a letter of
36 protest and request for reconsideration was filed with the Department on
37 behalf of the claimant. On October 26, 1983, the Department issued an
38 order holding the prior order of September 16, 1983 in abeyance. On
39 March 24, 1984, the Department issued an order adhering to the
40 provisions of its prior order dated September 16, 1983. On April 9, 1984,
41 notice of appeal was filed with the Board on behalf of the claimant. On
42 April 10, 1984, the Board entered an order granting the appeal. On
43 August 13, 1984, the Board issued an Order on Agreement of Parties
44 reversing the Department order of March 24, 1984 and remanding the
45 claim to the Department to reconsider claimant's application to reopen the
46 claim for aggravation of condition and take further action as indicated. On
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1 August 30, 1984, the Department issued an order pursuant to the order of
2 the Board dated August 13, 1984. On November 2, 1984, the Department
3 issued an order denying the application to reopen the claim for
4 aggravation of condition on the basis there was no adequate objective
5 evidence that the injury had become aggravated. On December 17, 1984,
6 a letter of protest and request for reconsideration was filed with the
7 Department on behalf of the claimant. On December 27, 1984, the
8 Department issued an order adhering to the provisions of the prior order
9 dated November 2, 1984. On February 28, 1985, a letter of protest and
10 request for reconsideration was filed with the Department on behalf of the
11 claimant. On March 29, 1985, the Department issued an order adhering
12 to the provisions of the prior order dated November 2, 1984. On April 19,
13 1985, a notice of appeal was filed with the Board on behalf of the claimant.
14 On May 10, 1985, the Board issued an order granting the appeal,
15 assigning it Docket No. 70,344 and directing that proceedings be held on
16 the issues properly raised in the appeal.
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- 18 2. On April 22, 1978, the claimant, Leon Wheeler, while in the course of his
19 employment with Dix Corporation, struck his back on a valve handle
20 causing immediate back pain.
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- 22 3. As a proximate result of the injury on April 22, 1978 claimant suffers from
23 conditions which can be described as mechanical low back pain and a
24 laxity of the facet joints in the thoracolumbar area, without involvement of
25 the nerve roots.
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- 27 4. As of December 1, 1982 claimant's condition caused by his industrial
28 injury of April 22, 1978 was fixed and stable, required no further treatment,
29 and resulted in no permanent impairment.
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- 31 5. Between December 1, 1982 and March 29, 1985 the claimant suffered
32 occasional temporary worsening of his condition causally related to the
33 industrial injury of April 22, 1978, and such worsening necessitated and
34 was amenable to chiropractic treatment.
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- 36 6. As of March 29, 1985 the claimant's condition causally related to his
37 industrial injury of April 22, 1978 was fixed, required no further treatment,
38 and did not result in any permanent impairment.
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- 40 7. As of March 29, 1985 the claimant's condition causally related to his
41 industrial injury of April 22, 1978 had not permanently and objectively
42 worsened since December 1, 1982.
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CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law:

1. The Board has jurisdiction of the parties and the subject matter of this appeal.
2. Between December 1, 1982 and March 29, 1985 the claimant's condition causally related to the industrial injury of April 22, 1978 became temporarily aggravated within the meaning of the Industrial Insurance Act.
3. As of March 29, 1985 the claimant's condition causally related to the industrial injury of April 22, 1978 was neither temporarily nor permanently aggravated within the meaning of the Industrial Insurance Act.
4. The Department order of March 29, 1985 which adhered to the provisions of a prior order dated November 2, 1984 which denied claimant's application to reopen his claim for aggravation of condition, should be reversed, and the claim remanded to the Department with direction to pay for such treatment as the claimant received for temporary exacerbations of his condition between June 9, 1983 and March 29, 1985 to pay time loss compensation, if any, as certified and occasioned by such temporary exacerbations, and to thereupon close the claim effective March 29, 1985, as paid, and without award for permanent partial disability.

24 It is so ORDERED.

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26 Dated this 8th day of August, 1986.

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28 BOARD OF INDUSTRIAL INSURANCE APPEALS

29
30 /s/ _____
31 GARY B. WIGGS Chairperson

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33 /s/ _____
34 FRANK E. FENNERTY, JR. Member

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36 /s/ _____
37 PHILLIP T. BORK Member
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