Farr, Adelbert

DISCOVERY

Applicability of civil rules -- medical experts

There is no physician/patient privilege in workers' compensation claims. RCW 51.04.050. RCW 51.36.060 only applies during claims administration; it is not a discovery tool to be used during an appeal before the Board. During the pendency of such an appeal, the civil rules of discovery apply. However, a party is not required to use the discovery rules in order to confer with a witness identified, in good faith, as that party's own witness. In addition, because of the absence of the physician/patient privilege pursuant to RCW 51.04.050, doctors are not precluded from having ex parte contact with the Department or the employer. At the same time, however, RCW 51.36.060 cannot be used to require a doctor to engage in such ex parte contact. If a doctor decides not to engage in ex parte contact, the discovery rules must be used. CR 26 and relevancy considerations may impose further restrictions with respect to physicians who are not named as witnesses. **….*In re Adelbert Farr,* BIIA Dec., 88 0699 (1989)** [*Editor's Note*: *Affirmed on other grounds, sub nom, Weyerhaeuser v. Farr*, 70 Wn. App. 759 (1993). Holding on collateral source rule overruled by *Johnson v. Weyerhaeuser*, 134 Wn.2d 795 (1998) *See also*, legislative restriction on contact with medical providers, RCW 51.52.063.]

Physician-patient privilege

There is no physician-patient privilege with respect to workers' compensation claims. RCW 51.04.050. **….*In re Adelbert Farr,* BIIA Dec., 88 0699 (1989)** [*Editor's Note: Affirmed on other grounds, sub nom, Weyerhaeuser v. Farr*, 70 Wn. App. 759 (1993). Holding on collateral source rule overruled by *Johnson v. Weyerhaeuser*, 134 Wn.2d 795 (1998).]

EVIDENCE

Collateral source rule

To be admissible, evidence of receipt of benefits from a collateral source (*e.g.*, employer retirement or social security disability benefits) must be coupled with expert evidence tying the receipt of those benefits to a lack of motivation to return to work or some other relevant issue. **….*In re Adelbert Farr,* BIIA Dec., 88 0699 (1989)** [*Editor's Note*: *Affirmed on other grounds, sub nom, Weyerhaeuser v. Farr*, 70 Wn. App. 759 (1993). Holding on collateral source rule overruled by *Johnson v. Weyerhaeuser*, 134 Wn.2d 795 (1998).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ADELBERT V. FARR	)	**DOCKET NO. 88 0699**
	)	
CLAIM NO. S-198685	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Adelbert V. Farr, by
Jorgen E. Schleer, Attorney at Law

Self-Insured Employer, Weyerhaeuser Company, by
Gail Lindley, Technical Supervisor, and
Kathryn Fewell, Attorney at Law, and Sheryl Harding, Paralegal

This is an appeal filed by the claimant on February 18, 1988 from an order of the Department of Labor and Industries dated February 8, 1988 which set aside and held for naught a prior Department order dated April 7, 1986. The February 8, 1988 order reopened the claim effective July 16, 1985 for treatment to March 28, 1986 and closed the claim with a permanent partial disability award equal to Category 3 of WAC 296-20-240 for cervical impairment, less prior awards paid on this claim. **REVERSED AND REMANDED**.

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 claimant to a Proposed Decision and Order issued on March 29, 1989 in which the order of the Department dated February 8, 1988 was affirmed.

I. Publication of Earl Anderson's Deposition

The deposition of Earl Anderson, taken on November 30, 1988, is hereby published and made part of the record. The employer's objection to the relevance of Mr. Anderson's testimony is overruled as are all of the objections contained in the deposition with the exception of those found at page 8, line 7; page 8, line 14; and page 9, line 21, all of which are sustained.

II. Publication of Claimant's Rebuttal Deposition

At the hearing held on December 12, 1988, the Industrial Appeals Judge determined that Mr. Farr would be permitted to present his own testimony in rebuttal with respect to the amount of money he was receiving in income from collateral sources. Claimant's counsel attempted to informally set up a date and time for the deposition in a December 19, 1988 telephone call to Sheryl Harding, a paralegal working for Kathryn Fewell, employer's counsel. On December 19, 1988, Ms. Harding conditionally agreed to the proposed date and time of December 22, 1988 at 2:00 P.M., with the caveat that Ms. Fewell would have to be consulted.

Jorgen Schleer, claimant's counsel, mailed written notice of deposition on December 20, 1988. On the morning of December 22, 1988, Ms. Fewell called Mr. Schleer's office and left a message indicating that she would not be able to attend the deposition. Mr. Schleer received that note at 2:00 P.M. and called Ms. Fewell, who reiterated her inability to attend. Claimant's deposition was taken at 2:20 P.M., despite Ms. Fewell's absence, and on December 27, 1988 claimant moved for publication of the deposition or, in the alternative, an opportunity to retake the deposition. The employer filed a motion opposing publication of the deposition on January 30, 1989. In her March 29, 1989 Proposed Decision and Order the Industrial Appeals Judge denied claimant's motion, for failure to provide adequate notice of the deposition. Written notice of the deposition was clearly not timely pursuant to CR 30(b)(1). Yet claimant's counsel argues that employer's counsel is estopped from objecting to publication of the deposition. However, in the absence of any agreement by employer's counsel to waive the requisite notice pursuant to CR 30(b)(1), neither estoppel nor waiver apply.

In his Supplemental Petition for Review claimant argues that the employer's opposition to the publication of the December 22, 1988 deposition of Mr. Farr was waived under CR 32(d)(1), because written notice of the employer's objection was not promptly served on the claimant. Claimant's counsel did receive oral notice from Ms. Fewell of her objection on December 22, 1988, prior to the deposition, as well as the transcribed telephone message to the same effect. In addition, Ms. Fewell filed a written objection with the Board and claimant's counsel on January 30, 1989.

Furthermore, while CR 32(d)(1) states that "all errors and irregularities in the notice for a deposition are waived unless written objection is promptly served upon the party giving the notice", this provision must be read in the context of CR 30(b) (1). The latter requires reasonable written notice of "not less than five days (exclusive of the day of service, Saturdays, Sundays and court holidays)." Only the court may enlarge or shorten the time for taking a deposition. CR 30(b)(3). A party giving untimely notice of a deposition pursuant to CR 30(b)(1) cannot, in effect, shorten the time for taking a deposition by arguing that the opposing party has failed to timely object to a notice of deposition which is itself untimely. To hold otherwise, would be to permit claimant to circumvent CR 30(b)(3). In any event, we conclude that Ms. Fewell did promptly object to the inadequate notice of deposition and that the deposition should not be published.

III. Collateral Source Rule

Claimant challenges the Industrial Appeals Judge's ruling permitting testimony with respect to Mr. Farr's receipt of a retirement pension from Weyerhaeuser as well as a social security disability

pension, contending that such evidence violates the collateral source rule. The employer argues that claimant's failure to return to work was due to lack of motivation, that receipt of collateral benefits affected Mr. Farr's desire to return to work, and that the receipt of those benefits is therefore relevant on the issue of motivation. The employer presented the testimony of Dr. Richard McCollum, Dr. Phillip Suver, and vocational counselor John Berg in support of this theory.

Because the evidence of receipt of collateral benefits was specifically tied by expert testimony to the employer's theory that Mr. Farr lacks motivation to return to work, the Industrial Appeals Judge correctly allowed the testimony under our reasoning in In re Lawrence Musick, BIIA Dec., 48,173 (1978). This is not to say, however, that we would condone attempts to interject evidence of receipt of collateral benefits to improperly suggest that a claimant's receipt of those benefits precluded him from receiving a pension under the Workers' Compensation Act. The mere receipt of collateral benefits, in the absence of expert testimony tying the receipt of those benefits to lack of motivation or some other relevant issue, is not sufficient to warrant admissibility of such evidence. Further, while evidence of collateral benefits may be proper before us, before a jury the probative value of such evidence might well be outweighed by "the danger of unfair prejudice ...." See ER 403. Therefore, the evidence might be properly excluded in the event of a superior court appeal; Mr. Farr is certainly free to renew his argument in that forum.

IV. Voluntary Retirement

The question of whether claimant voluntarily retired from his employment as a faller and bucker for Weyerhaeuser has been raised at different stages of the proceedings by both parties. While the question may have some bearing on claimant's motivation to return to work, voluntary retirement, in and of itself, would not preclude Mr. Farr from receiving a workers' compensation pension.

In 1986, the legislature amended RCW 51.32.060 to provide as follows:

> (17)In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

Laws of 1986, ch. 59 § 1, p. 200. Claimant's industrial injury occurred on June 15, 1976 and his application to reopen for aggravation of condition was filed on July 24, 1985. The effective date of the 1986 amendment was June 11, 1986. Therefore, the above- quoted amendment does not apply here.

However, based on Mr. Farr's and Earl Anderson's testimony, as well as the fact that all witnesses agree that the industrial injury of June 15, 1976 prevents Mr. Farr from returning to his prior

employment as a faller and bucker, we conclude that Mr. Farr's retirement was not in fact voluntary. To the contrary, he took early retirement because his industrial injury left him no choice.

V. Issues with respect to Dr. Richard McCollum's Testimony

A number of issues have been raised with respect to Dr. McCollum's testimony. For ease of understanding, a brief chronology of Dr. McCollum's involvement with Mr. Farr and with this claim is essential.

On June 15, 1976, Mr. Farr sustained the industrial injury which is the subject of this claim. Dr. McCollum had previously treated him in 1975 for an unrelated knee condition, and first saw Mr. Farr with respect to the June 15, 1976 injury on March 11, 1977. Dr. McCollum became the treating physician and performed the original closing examination on August 25, 1978. Based on that examination, the claim was closed with a Category 2 permanent partial disability award for cervical impairments on October 16, 1978.

On September 10, 1979, low back surgery was performed, not by Dr. McCollum. The claim was reopened and, on July 25, 1980, reclosed with time loss compensation for the period of December 18, 1979 through July 20, 1980, and with an additional permanent partial disability award of 25% as compared with total bodily impairment for low back residuals attributable to this industrial injury.

Effective July 30, 1980, Mr. Farr retired from Weyerhaeuser. On July 23, 1985, further surgery was performed, this time on the neck. Again, Dr. McCollum had no involvement in the surgery. On July 24, 1985, the application to reopen which is the subject of this appeal was filed. That application was initially denied, but on April 7, 1986, after claimant had been examined by Dr. Phillip Suver on March 28, 1986, the claim was reopened effective July 16, 1985 for treatment and reclosed with no additional permanent partial disability award.

Claimant timely protested and, during the pendency of that protest, his attorney referred him to Dr. McCollum for an examination on August 3, 1987. Dr. McCollum had last seen Mr. Farr nine years previously, when he performed the first closing exam in August, 1978. As a result of the August, 1987 examination, Dr. McCollum concluded that Mr. Farr's industrially related condition had worsened, i.e., that his cervical impairment had increased from Category 2 to Category 3. Dr. McCollum's reports were forwarded to the Department by claimant's attorney and, relying on those reports, the Department issued an order on February 8, 1988 reopening the claim effective July 16, 1985, directing

payment for treatment through March 28, 1986 and reclosing the claim with an additional permanent partial disability award consistent with Category 3 for cervical impairments, less prior awards.

Based in part on these facts, claimant makes three arguments. He contends that Dr. McCollum's testimony and Mr. Berg's opinions based on Dr. McCollum's physical capacities evaluation (PCE) should be stricken under the rationale of Mothershead v. Adams, 32 Wn.App 325, 647 P.2d 525 review denied 98 Wn. 2d 1001 (1982) and Crenna v. Ford Motor Co., 12 Wn. App 824, 532 P.2d 290 review denied, 85 Wn.2d 1011 (1975); he contends that Dr. McCollum's testimony should also be stricken under Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988); and he argues that the Proposed Decision and Order incorrectly accorded preference to Dr. McCollum's testimony as the attending physician, even though Dr. McCollum had ceased to serve in that capacity as of August, 1978. See, Groff v. Dept. of Labor & Indus., 65 Wn.2d 35, 395 P.2d 633 (1964).

A. The admissibility of Dr. McCollum's testimony under the Mothershead/Crenna rationale

Claimant contends that, because Dr. McCollum was retained as his expert in August of 1987 and because he later decided not to present Dr. McCollum's testimony, the self-insured employer was precluded from presenting that testimony and the employer's vocational witness, John Berg, was precluded from relying on Dr. McCollum's PCE in reaching his opinions with respect to claimant's employability.

There is no merit in claimant's argument. Dr. McCollum was consulted by the claimant prior to the issuance of the February 8, 1988 Department order which is on appeal. The parties stipulated that that order was based on Dr. McCollum's reports, which were forwarded to the Department by claimant's counsel. Indeed, it was because of Dr. McCollum's opinions that the Department directed the self-insured employer to pay an increased permanent partial disability award. Dr. McCollum had also been the treating physician and had performed the original first terminal date closing examination on August 25, 1978. Furthermore, Dr. McCollum had originally been identified as a possible witness by the claimant at the June 16, 1988 conference. The Industrial Appeals Judge was therefore entirely correct in denying claimant's motion to exclude Dr. McCollum's testimony under the Mothershead/Crenna rationale.

Based on that determination, she should also have removed certain portions of the testimony from colloquy. Since she neglected to do so, we make the following rulings: the testimony appearing at page 15, line 20 through page 16, line 12, of the November 1, 1988 transcript is taken out of colloquy; the testimony appearing at page 28, line 19 through page 32, line 19 of the November 1,

1988 transcript is removed from colloquy; and the testimony appearing at page 40, line 25 through page 43, line 10 of the November 28, 1988 transcript is removed from colloquy, with all objections overruled and all motions denied.

B. Applicability of Loudon v. Mhyre to Workers' Compensation Appeals

On June 9, 1988 the Washington Supreme Court decided Loudon v. Mhyre, 110 Wn. 2d 675, 756 P.2d 138 (1988), holding that, in the context of a personal injury law suit, defense counsel may not engage in ex parte contacts with a plaintiff's treating physicians. Mr. Farr argues that Loudon precluded the self-insured employer's attorney from communicating ex parte with Dr. Richard G. McCollum, who had been identified and was called as the employer's witness. Because employer's counsel spoke with Dr. McCollum for 15 minutes just prior to his testimony on November 28, 1988, preparing him for the questions she would ask, claimant argues that Dr. McCollum's testimony should be stricken.

The situation is further complicated by the fact that the Industrial Appeals Judge issued an order on November 18, 1988 specifically providing:

> that counsel for the self-insured employer must apply the rules of discovery of the Superior Court of the State of Washington to seek information by means of a personal interview with claimant's treating physician where the claimant or claimant's representative has not given permission for such a personal interview.

The question therefore arises whether, regardless of the merits of claimant's argument under Loudon, the employer, or Ms. Fewell as the employer's representative, should be sanctioned under CR 37(b)(2) and WAC 263-12-125 for violating that order by communicating ex parte with Dr. McCollum on November 28, 1988. However, the Industrial Appeals Judge in her Proposed Decision and Order determined that her order of November 18, 1988 had not been violated because "there was no impermissible contact between the doctor and Ms. Fewell in that no discovery was asked for or obtained." We will not disturb that determination.

The specific question before us is whether Loudon applies in a workers' compensation case to preclude the limited ex parte contact which occurred here between the employer's counsel and the employer's witness, Dr. McCollum; if so, claimant requests that we strike Dr. McCollum's testimony as a remedy. In order to decide this appeal, we need not go beyond this narrow issue. However, the scope of the Department's, employer's, and claimant's ability to obtain information ex parte from doctors who have treated or examined the claimant is of considerable interest to parties appearing

before the Board and the Loudon decision has generated substantial uncertainty in the day-to- day practice of workers' compensation law. For that reason we take this opportunity to provide some general guidelines with respect to the extent to which a claimant or employer or the Department may engage in ex parte communication or contact with physicians who have treated or examined an injured worker once an appeal to the Board has been granted under RCW 51.52.080 and .090.

The Supreme Court stated the basis for its holding in Loudon succinctly as follows:

> We hold that ex parte interviews should be prohibited as a matter of public policy. The physician-patient privilege prohibits a physician from being compelled to testify, without the patient's consent, regarding information revealed and acquired for the purpose of treatment. RCW 5.60.060(4). [Footnote omitted]. A patient may waive this privilege by putting his or her physical condition in issue. See Randa v. Bear, 50 Wn.2d 415, 312 P.2d 640 (1957); Phipps v. Sasser, 74 Wn.2d 439, 445 P.2d 624 (1968). [Footnote omitted]. Waiver is not absolute, however, but is limited to medical information relevant to the litigation. See CR 26(b)(1).
>
> The danger of an ex parte interview is that it may result in disclosure of irrelevant, privileged medical information.

Loudon, at 677-678 (Emphasis added). Thus the holding was firmly based on the existence of a physician- patient privilege under RCW 5.60.060(4) and the extent to which that privilege could be waived in a civil action.

RCW 5.60.060(4) as it read when Mr. Loudon filed his wrongful death action stated:

> A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient ...."

This section was amended in 1986 and 1987, but the Supreme Court specifically noted that those amendments were not applicable in Loudon. The 1986 and 1987 amendments changed RCW 5.60.060(4) so that it currently reads:

> (4) Subject to the limitations under RCW 71.05.250, a physician or surgeon or osteopathic physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:
>
> . . .
>
> (b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician

> or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

Laws of 1986, ch. 305, § 101, p. 1355.
Laws of 1987, ch. 212, § 1501, p. 797.
Laws of 1987, ch. 439, § 11, p. 1792.

Prior to the 1986 and 1987 amendments, the physician-patient privilege was not automatically waived by any particular event, such as the filing of a civil law suit or the setting of a trial date. Rather, the question of when a waiver had occurred was a factual matter to be decided on a case by case basis. Phipps v. Sasser, 74 Wn.2d 439, 446, 445 P.2d 624 (1968).

However, the 1986 and 1987 amendments dramatically altered how the privilege is now waived in a civil action. The privilege is now deemed waived ninety days after the plaintiff files an action for personal injuries or wrongful death. In addition, those amendments seem to make the waiver absolute, i.e., as to all physicians or conditions, subject to conditions imposed pursuant to court rules. Had the 1986 and 1987 amendments to RCW 5.60.060(4) been applicable in Loudon, the outcome might well have been different. Thus we doubt if Loudon retains much precedential value in the face of the subsequent substantial amendments to RCW 5.60.060(4).

However, whether or not the 1986 and 1987 amendments to RCW 5.60.060(4) affect the extent to which defense counsel in a personal injury action may have ex parte contact with the plaintiff's treating physician does not affect our determination here. For, since Loudon was premised on the existence of a physician-patient privilege under RCW 5.60.060(4), it has no application to a workers' compensation appeal.

In 1911, when the Legislature established the workers' compensation system, it explicitly abolished all civil actions for personal injuries occurring in the work place. RCW 51.04.010. The physician-patient privilege set forth in RCW 5.60.060(4) has no common law antecedents; it is purely a creature of statute. Phipps, at 444; Randa v. Bear, 50 Wn.2d 415, 420, 312 P.2d 640 (1957). The statutory physician-patient privilege established by RCW 5.60.060(4) for civil actions was not imported into the workers' compensation scheme. As the Supreme Court pointed out in Phipps:

> The legislature not only created the physician- patient privilege for civil actions and limited its scope, as we have seen, but acted with equal clarity and certainty in designating the areas in which it shall not be operative -- for an example see our workmen's compensation act which contains the following provision:

> In all hearings, actions or proceedings before the department or the board of industrial insurance appeals, or before any court on appeal from the board, any physician having theretofore examined or treated the claimant may be required to testify fully regarding such examination or treatment, and shall not be exempt from so testifying by reason of the relation of physician to patient. (RCW 51.04.050)

Phipps, at 445.

There has never been a statutory physician-patient privilege within the workers' compensation system and in 1915 the explicit language quoted above by the court in Phipps was added to the Act, clearly establishing that no such privilege applies. Laws of 1915, ch. 188, § 4, p. 688. While the words "board of industrial insurance appeals" have been substituted for "commission", RCW 51.04.050 reads essentially the same today as it has for 74 years.

Indeed, when the Legislature established our workers' compensation system, the difficulties of proof imposed by the statutory physician-patient privilege in civil actions must have been well known. Court cases decided prior to the establishment of the workers' compensation system had held that when a worker sued his employer, the statutory physician-patient privilege for civil actions applied. Noelle v. Hoquiam Lbr. & Shingle Co., 47 Wash. 519, 92 P. 272 (1907). Thus, we can only assume that the decision not to include a physician-patient privilege within the Worker's Compensation Act and indeed to specifically state otherwise was a carefully considered determination by the Legislature.

Obviously the proper payment of benefits under the Worker's Compensation Act requires that the Department or self-insured employer receive information from physicians who have treated or examined the worker; the statute and accompanying WAC's recognize and accommodate this need. Through the years a vast statutory and regulatory framework has developed requiring the disclosure of all sorts of medical information. A critical distinction must be made here. RCW 51.04.050 by itself simply permits any physician who has treated or examined a worker to disclose information gleaned during that contact. Other sections of the statute and the regulations go further and impose an affirmative duty upon physicians to supply information.

RCW 51.04.030 requires the Department to supervise the provision of medical care to workers. RCW 51.28.020 requires the physician to assist the worker in filing his claim. RCW 51.28.055 requires the physician to file written notice of an occupational disease claim with the Department. RCW

51.32.110 authorizes the Department or self-insurer to require a worker claiming benefits under the Act to appear at a medical examination. RCW 51.36.060 provides:

> Physicians examining or attending injured workmen under this title shall comply with rules and regulations adopted by the director, and shall make such reports as may be requested by the department or self-insurer upon the condition or treatment of any such workman, or upon any other matters concerning such workmen in their care. All medical information in the possession or control of any person and relevant to the particular injury in the opinion of the department pertaining to any workman whose injury or occupational disease is the basis of a claim under this title shall be made available at any stage of the proceedings to the employer, the claimant's representative, and the department upon request, and no person shall incur any legal liability by reason of releasing such information.

In addition to these statutory provisions, the medical aid rules, WAC 296-20, impose a multitude of reporting requirements on physicians who treat or examine injured workers. RCW 51.48.060 imposes a penalty not to exceed $250.00 on any physician who:

> fails, neglects or refuses to file a report with the director, as required by this title, within five days of the date of treatment, showing the condition of the injured worker at the time of treatment, a description of the treatment given, and an estimate of the probable duration of the injury, or who fails or refuses to render all necessary assistance to the injured worker, as required by this title ....

This is not an all-inclusive or exhaustive list by any means. Suffice it to say that, in light of the clear statement of RCW 51.04.050 as well as the positive duty placed on physicians to provide information and assistance to claimants, the Department, and employers, it is amply clear that there is no physician-patient privilege applicable to workers' compensation claims.

However, that determination does not necessarily mean that once the Board has granted an appeal from a Department order, physicians who have treated or examined the worker are required to engage in ex parte contact with claimants or the Department or employers or their representatives. As we have noted, there is a qualitative difference between the freedom to speak accorded by RCW 51.04.050 and the duty to provide information imposed by RCW 51.36.060 and the accompanying medical aid rules.

We conclude that the latter, that is, RCW 51.36.060 and related medical aid rules, are not applicable to the appeals process before the Board. Once an appeal is granted, the civil rules of discovery, not RCW 51.36.060, apply.

RCW 51.36.060, which is set forth above, was amended in 1975 with the addition of the phrases underlined below:

> Physicians examining or attending injured workmen under this title shall comply with rules and regulations adopted by the director, and shall make such reports as may be requested by the department or self-insurer upon the condition or treatment of any such workman, or upon any other matters concerning such workmen in their care. All medical information in the possession or control of any person and relevant to the particular injury in the opinion of the department pertaining to any workman whose injury or occupational disease is the basis of a claim under this title shall be made available at any stage of the proceedings to the employer, the claimant's representative, and the department upon request, and no person shall incur any legal liability by reason of releasing such information.

Laws of 1975, ch. 224, § 15, p. 741. An argument might be made that "at any stage of the proceedings" includes appeals to the Board. However, several factors militate against such an interpretation.

RCW 51.36.060 does not mention the Board of Industrial Insurance Appeals nor purport to lay down rules of procedure before the Board. Indeed, it appears within the medical aid portion of the statute, which sets forth the Department's or self-insurer's obligations and authority on medical matters during claims administration and adjudication. Further, RCW 51.36.060 specifically grants the Department the authority to determine the relevance of the medical information which is sought. Obviously the Department, as a party to litigation before the Board, cannot be vested with the responsibility of overseeing pretrial discovery by the other parties once an appeal has been filed. It is equally obvious that we, not the Department, are vested with the responsibility and authority for making any necessary determinations on pretrial discovery matters with respect to appeals pending before us. We therefore conclude that "at any stage of the proceedings" must mean when the claim is still before the Department, either after the filing of an accident report, an application to reopen for aggravation of condition, or a protest; or after the reassumption of jurisdiction; or during dispute resolution, etc.

We recognize that there may be instances when a claim is both before the Board on appeal and simultaneously being administered by the Department or self-insured employer. In those instances, RCW 51.36.060 may apply during the pendency of an appeal to the Board, but only if the claim is actually being administered, i.e., benefits or treatment are actually being provided or sought

during that period. The Department or self-insured employer cannot, on the one hand, terminate benefits during the pendency of an appeal and, on the other, use RCW 51.36.060 and the medical aid rules as a discovery tool to assist in preparation for litigation. RCW 51.36.060 is not a discovery mechanism. Its sole function is to authorize the Department and the self-insured employer to obtain all information necessary to properly administer or adjudicate a claim. It cannot be misused to help parties prepare for trial.

Having decided that neither the Department nor employers nor claimants can require physicians to furnish information under RCW 51.36.060 as a discovery tool during the pendency of an appeal before the Board, we turn to the question of what rules do apply before us. RCW 51.52.140 provides: "Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter." WAC 263-12-125 similarly provides: "Insofar as applicable, and not in conflict with these rules, the statutes and rules regarding procedures in civil cases in the superior courts of this state shall be followed . . . ."

As is well known by parties appearing before us, we have interpreted these provisions to mean that the civil rules of discovery apply to proceedings before us. Obviously, however, a party's access to that party's own witnesses is not limited by the discovery rules. In other words, a party need not go through the formal discovery process in order to talk with that party's own witness.

This of course raises the spector of each party identifying every physician as that party's own witness in order to circumvent the formal discovery process. The vast majority of the parties who appear in front of us will not engage in such behavior. In the unlikely event a dispute does arise as to whose witness the physician is, or whether the physician has been appropriately identified as a witness, our judges are well equipped to resolve that dispute. Throughout claims administration all parties should have had ready access to all medical information pursuant to RCW 51.36.060 and RCW 51.28.070. Thus, when an appeal is filed, it should generally be fairly obvious which party will be calling which medical witnesses.

Furthermore, it really does not matter which party lists the physician as a witness. As we have already pointed out, RCW 51.04.050 does not require a physician to talk with the claimant, the Department, the employer or any of their representatives during the pendency of an appeal to the Board. It merely permits the physician to do so. This is true regardless of who actually calls the physician as a witness. So whether the physician is the claimant's or the Department's or the employer's witness is irrelevant. The physician cannot be forced to engage in ex parte contacts

outside the discovery rules. On the other hand, the discovery rules are always available (like RCW 51.36.060 during the claims administration/adjudication phase) to require disclosure of information, within a protected format, if that is what the physician chooses.

It is therefore up to the physician to choose whether or not to engage in ex parte contacts with any of the parties or their representatives once an appeal to the Board has been granted. A physician cannot be coerced to engage in ex parte communications under the guise of RCW 51.36.060. At the same time, if the physician feels comfortable with conversing or communicating in an ex parte format, he or she is free to do so.

In sum:

1. There is no physician-patient privilege applicable to workers' compensation claims. RCW 51.04.050.
2. During claims administration or adjudication physicians who treat or examine injured workers are required to make reports to the Department or the self-insured employer. In addition, all medical information which is relevant to a particular injury in the Department's estimation must be made available to the employer, the claimant's representative, and the Department. RCW 51.36.060 and the medical aid rules, WAC 296- 20.
3. RCW 51.36.060 does not apply to proceedings before the Board. It only applies to claims administration or adjudication. It cannot be used as a discovery tool to coerce or force a physician to provide information to litigants appearing before the Board.
4. An injured worker's claim files must be made available to the worker's authorized representative; and to the worker's employer's authorized representative in connection with any pending claims. RCW 51.28.070.
5. The civil rules of discovery apply to proceedings before this Board.
6. A party is not required to use formal discovery to confer with that party's own witness.
7. While RCW 51.04.050 permits physicians to talk informally with claimants, employers or the Department or their representatives, it does not require them to do so.
8. Once an appeal to the Board is granted a physician may refuse to talk informally with the claimant, the employer, the Department, or any of their representatives so long as no claims administration or adjudication is occurring during the pendency of the appeal. (See No. 2).
9. If a physician refuses to talk informally with any party or that party's representative, the formal discovery procedures set forth in the civil rules may be used to require disclosure of relevant information.

10. The Board, not the Department, is authorized and required to assure compliance with discovery rules as they apply to appeals pending before the Board.

11. The relevancy considerations of CR 26 come into play when a physician is not listed as a witness by any party. Ex parte communication by the employer or the Department is permitted only with respect to physicians who are actually listed in good faith as witnesses by one of the parties. In order to seek further information with respect to claimant's medical condition, other than the information already disclosed by the listed witnesses, the Department or employer must use the discovery rules. This limitation might be relaxed with respect to multiple examiners at a panel examination where only one of the doctors is specifically listed as a witness.

12. This decision does not address discovery issues with respect to forensic experts under CR 26(b)(4) or CR 35. Additional discovery limitations apply in those situations, pursuant to the court rules.

13. This decision does not address all possible scenarios; it provides general guidelines which will have to be refined in particular cases.

Applying these rules to the instant appeal, we conclude that the Industrial Appeals Judge's order of November 18, 1988 was incorrect insofar as it concluded that RCW 51.36.060 applies to Board proceedings and insofar as it required the employer to use formal rules of discovery to seek information from its own witness, Dr. McCollum. At any rate, employer's counsel did not violate that order by meeting with Dr. McCollum for 15 minutes just prior to hearing to advise him of the issues she would cover and the questions she would ask. Claimant's request that Dr. McCollum's testimony be stricken is therefore denied.

C. Attending Physician -- Special Consideration

Claimant argues that Dr. McCollum's testimony should not receive special consideration since he was not in fact the attending physician for purposes of the February 8, 1988 claim closure. The attending physician preference set forth in Groff is neither a talisman nor a formula to be substituted for carefully weighing the evidence. While Dr. McCollum clearly was the attending physician in 1977 and 1978, he was not providing any treatment to the claimant in 1988 when the claim was again closed. Since the time Dr. McCollum had last seen Mr. Farr in August, 1978, Mr. Farr had undergone two surgeries; had had his claim reopened and again closed; and had quit work. There is a real question whether Dr. McCollum's early involvement in this claim gives him superior insight into claimant's condition as of February 8, 1988, especially in light of these intervening, significant events.

However, since all of the medical experts agree regarding the extent of Mr. Farr's permanent impairment, we do not view the question of whether Dr. McCollum is or is not the attending physician as critical to our ultimate resolution of this appeal. The attending physician preference is merely a guideline, it is not a substitute for evaluating the evidence. After weighing all the evidence, we disagree with Dr. McCollum's opinion that claimant is employable. Our reasons for this conclusion are set forth below.

VI. All Other Evidentiary Rulings

The Board has reviewed all other evidentiary rulings in the record of proceedings and finds that no further prejudicial error was committed and those rulings are hereby affirmed.

DECISION

We turn, then, to the substantive issue raised by claimant's Petition for Review -- whether Mr. Farr is entitled to a workers' compensation pension. This is a Picich/Collins aggravation case. Because he received an increased permanent partial disability award on the second terminal date, the permanent worsening of Mr. Farr's industrially related condition between July 25, 1980 and February 8, 1988 is conceded and need not be proved in this appeal. Picich v. Dept. of Labor & Indus., 59 Wn.2d 467, 368 P.2d 176 (1962); Collins v. Dept. of Labor & Indus., 50 Wn.2d 194, 310 P.2d 232 (1957). The evidence is accurately set forth in the Proposed Decision and Order and will not be repeated at length here.

Many facts are not in dispute. Mr. Farr is now 71 years old, having been born on July 15, 1918. He completed the ninth grade and has received no further formal education or vocational training. Mr. Farr began working as a logger in the 1930's. This employment was briefly interrupted in 1937 through 1939 and again in 1945 through 1946 by service in the Army, during which time Mr. Farr worked as a crane operator. After his discharge from the Army in 1946, he worked primarily in logging, with a brief stint as a crane operator at a cement plant in the 1950's. In July, 1963, he began working for Weyerhaeuser as a faller and bucker and worked in that capacity until June 15, 1976 when he sustained the industrial injury which is the subject of this appeal. He was able to return to work as a faller and bucker only periodically after the June 15, 1976 injury, and retired from Weyerhaeuser effective July 30, 1980. He has not been employed since.

All three medical experts agreed that Mr. Farr had sustained a permanent impairment equal to Category 3 for cervical impairments (20% as compared to total bodily impairment) and a Category 5

for lumbosacral impairments (25% as compared to total bodily impairment).[1] Claimant's cervical impairment worsened between July 25, 1980 and February 8, 1988 as evidenced by increased pain complaints, the need for surgery performed on July 23, 1985 and decreased range of motion. While the lumbar surgery which had previously been performed on September 10, 1979 was fairly successful with respect to pain complaints, it caused a decrease in the range of motion in the area of the fusion and Mr. Farr continued to experience some dull pain, especially with standing or sitting for any length of time.

Dr. McCollum, who saw claimant on August 3, 1987, prepared a PCE a year later (Exhibit No. 3) on September 20, 1988. Dr. Aigner examined claimant on June 20, 1988 and filled out a PCE at that time (Exhibit No. 6). Dr. Suver, who examined claimant on March 28, 1986, essentially agreed with Dr. McCollum's PCE, with some modifications. He felt that Mr. Farr's work should be "principally of a light occupation." 11/14/88 Tr. at 45. Drs. McCollum and Suver felt Mr. Farr was employable; Dr. Aigner disagreed.

The vocational testimony is therefore critical. Based on both Dr. Aigner's and Dr. Suver's limitations, Kent Shafer, a vocational rehabilitation counselor, concluded that Mr. Farr was unemployable. Based on Dr. McCollum's PCE, he felt claimant might be employable as a security guard. However, he cautioned that Dr. McCollum's PCE was unclear regarding whether he was restricting the claimant to no climbing of stairs as well as ladders. If the climbing restriction applied to both stairs and ladders, Mr. Shafer felt claimant would be unable to be gainfully employed on a reasonably continuous basis as a security guard, even under Dr. McCollum's more liberal PCE.

When Dr. McCollum was specifically asked "Would Mr. Farr be able to climb stairs", he responded "Well, primarily it's for ladders, but it depends on the situation. I might restrict him to stairs, too." 11/28/88 Tr. at 29. Thus, while Dr. McCollum approved a security guard job description, it is not at all clear that his PCE would actually permit the claimant to return to that type of employment.

John Berg, a vocational rehabilitation counselor who testified on the employer's behalf, agreed that Mr. Farr could not return to work in his prior heavy occupation, as a faller and bucker. Apparently relying on the restrictions imposed by all three doctors, he felt there were five jobs Mr. Farr could perform: security guard; appointment setter; cashier; survey worker; and crane operator.

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[1] While Dr. B. Robert Aigner at first rated claimant's cervical impairment within Category 4, he conceded that this was based on a misapprehension of Dr. McCollum's first terminal date rating. It is apparent that he actually concurred in Dr.McCollum's and Dr.Suver's ratings. Indeed, Dr. Suver's rating is based on Dr. Aigner's findings.

Mr. Shafer gave short shrift to Mr. Berg's opinion that claimant could return to work as a crane operator. He highlighted the importance of recent work experience, i.e., within the last 15 years, in determining transferable skills. He also pointed out that it would be very unlikely for claimant to be able to get a job with a new employer as a crane operator, since such jobs are highly sought after and usually obtained by promotion from within a company. Mr. Berg acknowledged the 15 year rule of thumb for transferable skills and did not satisfactorily explain why that guideline was not applicable in Mr. Farr's case. We are persuaded by Mr. Shafer's more reasonable view that Mr. Farr's intermittent crane operating experience for several years in the 1930's, 40's and 50's, does not qualify him now to obtain and maintain employment as a crane operator in the current market.

Two of the other positions suggested by Mr. Berg involve sales -- telephone solicitation (survey worker) and appointment setter. There is nothing about Mr. Farr, other than his purported pleasant nature and involvement in social activities, which would lead us to believe he has any of the people skills necessary to succeed as a salesman. That a 70-year-old man who has worked most of his life in the woods could suddenly make the transition to sales work seems extremely unlikely. We agree with Mr. Shafer's assessment that, given Mr. Farr's lack of sales experience and aptitude, he would not be able to maintain employment in these fields.

Similarly, we find Mr. Shafer's assessment of Mr. Farr's capability for employment as a cashier more persuasive than Mr. Berg's. According to Mr. Shafer, in today's market cashiering, even at a self-service gas station, usually involves stocking inventory, which Mr. Farr is unable to do given his restrictions.

What remains, then, is Mr. Berg's suggestion that Mr. Farr obtain employment as a security guard. According to Mr. Shafer, only Dr. McCollum's PCE would arguably permit claimant to return to gainful employment in that capacity. We note two problems with Dr. McCollum's PCE. First, as indicated above, it is ambiguous with respect to stair climbing restrictions. Second, it was prepared a year after Dr. McCollum last examined Mr. Farr. This is in marked contrast to Dr. Aigner's PCE, which was prepared at the time of his June 20, 1988 examination. For all of these reasons, the slim possibility that Mr. Farr might be employable as a security guard is too thin a reed to support a conclusion that the industrial injury of June 15, 1976 has not rendered him permanently totally disabled. We feel Mr. Shafer summed it up best in the following exchange:

> A. Well, I think in Mr. Farr's situation, well, with any particular client you need to consider a number of variables besides just the physical limitations. You need to consider their area of residence. Do they have access to

labor market? In Mr. Farr's case, first of all, he's 70 years of age, and that in itself is a detriment to his employability, however, even given the age, there are some jobs that he could perform. Educationally he has a 9th grade education. Does not have a GED, so he has additional limitations there. Occupationally he's had a successful work history in the woods. Unfortunately those types of jobs and skills that he has utilized in the woods do not readily transfer into lighter forms of work, so taking the whole thing into consideration, absent the physical limitations, he had a limited pool of jobs within which he could compete, and we're talking about things like convenience store clerk, security guard, perhaps light delivery worker, fast food, those are the types of jobs that he would have had access to, and could have competed for.

Q. I don't understand -- that's the jobs that he could have competed for as a 70 year-old?

A. As a 70 year-old and given his educational background, prior work history, and assuming no physical limitations. <u>If we overlay the physical limitations on that fact pattern it further restricts the types of jobs that he could perform. He now is unable to perform the fast food work. He's unable to perform light delivery work. He's unable to perform positions such as, one doctor recommended that he look towards being a clerk in a hardware store, such as Ernst or Pay 'n Pak, or something of that nature. The physical limitations preclude that. The bottom line is that he comes down to a situation where he is so restricted in terms of the types of jobs that he could perform that the availability of those jobs has to be questioned, and I think on a more probable than not basis it results in a conclusion of unemployability.</u>

11/1/88 Tr. at 25-26 (Emphasis added).

For the foregoing reasons, we conclude that the industrial injury of June 15, 1976 has rendered Mr. Farr permanently totally disabled. The Department order of February 8, 1988 to the contrary must therefore be reversed.

After consideration of the Proposed Decision and Order and the Petition for Review and Supplemental Petition for Review filed thereto, and a careful review of the entire record before us, we make the following findings and conclusions:

FINDINGS OF FACT

1. On August 2, 1976, the Department of Labor and Industries received a report of accident alleging an industrial injury to the claimant on June 15, 1976 during the course of his employment with the Weyerhaeuser Company. On January 11, 1977, the Department issued an order allowing the claim. On October 16, 1978, the Department issued an order closing the claim with time loss compensation as paid on an intermittent basis and

awarding a permanent partial disability equal to 10% as compared with total bodily impairment for cervical impairment.

On January 3, 1979, the Department received an application to reopen the claim for aggravation of condition. On February 14, 1979, the Department issued an order reopening the claim effective to December 3, 1978 for authorized treatment and action as indicated. On July 25, 1980, the Department issued an order closing the claim with time loss compensation as paid for the period of December 18, 1979 through July 20, 1980 and awarding a permanent partial disability equal to 25% as compared to total bodily impairment above that previously awarded under this claim and Claim S-103562. This award was for low back impairment.

On July 24, 1985, the Department of Labor and Industries received an application to reopen the claim for aggravation of condition. On August 7, 1985, the Department issued an order denying the claimant's application. On August 27, 1985, a protest and request for reconsideration was filed on behalf of the claimant. On October 14, 1985, the Department issued an order holding in abeyance the prior Department order of August 7, 1985. On April 7, 1986, the Department issued an order setting aside and holding for naught the prior Department order of August 7, 1985 and reopening the claim effective July 16, 1985 for treatment to date and awarding no additional permanent partial disability and closing the claim. On April 17, 1986, a protest and request for reconsideration was filed on behalf of the claimant. On June 25, 1986, the Department issued an order holding the prior order of April 7, 1986 in abeyance. On February 8, 1988, the Department issued an order setting aside and holding for naught the prior Department order of April 7, 1986 and reopening the claim effective July 16, 1985 for treatment until March 28, 1986 and closing the claim with an additional permanent partial disability award for a Category 3 of cervical impairment, less prior awards. On February 18, 1988, a notice of appeal was filed on behalf of the claimant with the Board of Industrial Insurance Appeals. On March 2, 1988, the Board of Industrial Insurance Appeals issued an order granting the appeal, assigning it Docket No. 88 0699, and directing that proceedings be held on the issues raised in the appeal.

2. On June 15, 1976, while falling and bucking a fir tree in the forest, Mr. Farr was hit in the head when an adjoining alder tree measuring 4" in diameter fell during the course of his employment with Weyerhaeuser Company.

3. Mr. Farr received immediate treatment for his neck and back condition, and surgery on his lower back, consisting of a laminectomy, was performed on September 10, 1979. Furthermore, an anterior disc excision and interbody fusion at C6-C7 of the cervical spine was performed on July 23, 1985.

4. As of February 8, 1988, Mr. Farr was experiencing dull pain in his lower back, particularly with standing or sitting for any length of time, pain

associated with his cervical condition, and limitations in his range of motion in the cervico- dorsal and lumbar spine.

5. As of February 8, 1988, Mr. Farr's condition causally related to the industrial injury of June 15, 1976 were diagnosed as chronic cervico-dorsal sprain with disc herniation at C6-7 and status post anterior disc excision and interbody fusion; and chronic lumbosacral sprain, status post laminectomy.

6. As of February 8, 1988, the claimant's condition causally related to the industrial injury of June 15, 1976 was fixed and stable and not in need of further treatment of a curative nature and his permanent impairment was most consistent with that described by Category 3 for cervical and cervico-dorsal impairments (WAC 296-20-240), 20% as compared to total bodily impairment, and 25% as compared to total bodily impairment for the lower back disability.

7. As of February 8, 1988 Mr. Farr was 69 1/2 years old (date of birth July 15, 1918). He stands 5'9" tall and weighs 200 lbs. He has a ninth grade education and no further degrees or education. His work experience has been virtually all in heavy labor. He began working as a logger in the 1930's. This employment was briefly interrupted in 1937 through 1939 and again in 1945 through 1946 by service in the Army, during which time Mr. Farr worked as a crane operator. After his discharge from the Army in 1946, he worked primarily in logging, with a brief stint as a crane operator at a cement plant in the 1950's. In July, 1963, he began working for Weyerhaeuser as a faller and bucker and worked in that capacity until June 15, 1976, when he sustained the industrial injury. He was able to return to work as a faller and bucker only periodically after the June 15, 1976 injury, and retired from Weyerhaeuser effective July 30, 1980. He has not been employed since.

8. As of February 8, 1988, as a result of the June 15, 1976 industrial injury, Mr. Farr was limited to light/sedentary work.

9. As of February 8, 1988, Mr. Farr was not capable of gainful employment on a reasonably continuous basis taking into consideration his age, limited education, training, lack of transferable skills, and the substantial physical residuals from his industrial injury.

CONCLUSIONS OF LAW

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

2. Mr. Farr is a totally and permanently disabled worker within the meaning of RCW 51.08.160.

3. The provisions of RCW 51.32.060(17) (1986) are not applicable to this claim.

4. The order of the Department of Labor and Industries dated February 8, 1988 setting aside and holding for naught a prior Department order dated April 7, 1986, reopening the claim effective July 16, 1985 for treatment until March 28, 1986 and closing the claim with a permanent partial disability award equal to Category 3 for cervical impairment, less prior awards, is incorrect and is reversed and the claim is remanded to the Department with directions to place the claimant on the pension rolls.

It is so ORDERED.

Dated this 7th day of November, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member