

Pike, Bette

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Fixity of all conditions required

SCOPE OF REVIEW

Fixity of all conditions required

When the worker suffers from a psychiatric condition which is not fixed and stable and requires further treatment, the worker is not entitled to an award for permanent partial disability for a low back condition even though it is medically fixed. Awards for permanent disability are made at the time the claim is closed and a claim cannot be both open and closed at the same time. *Citing Franks v. Department of Labor & Indus.*, 35 Wn.2d 763 (1950).*In re Bette Pike, BIIA Dec.*, **88 3366 (1990)**

Scroll down for order.

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

IN RE: BETTE PIKE)	DOCKET NO. 88 3366
)	
<u>CLAIM NO. S-400033</u>)	DECISION AND ORDER

APPEARANCES:

Claimant, Bette Pike, by
William C. Decker (Withdrawn);
Cohen & Keith-Miller, per
Verlaine Keith-Miller (Withdrawn);
Law Offices of Norman Cohen, per
Norman Cohen

Self-Insured Employer, Lake Washington School District, by
Graham & Dunn, per
Clemens H. Barnes

Department of Labor and Industries, by
The Attorney General, per
William A. Garling, Jr., Assistant

This is an appeal filed by the employer on August 26, 1988 from an order of the Department of Labor and Industries dated June 24, 1988 which set aside and held for naught a Department order dated September 21, 1987 and ordered that the Department order dated January 13, 1987 be affirmed. The order of January 13, 1987 ordered the self-insured employer to pay for psychiatric treatment provided to the claimant by Dr. Hondl for the period December 20, 1985 through September 2, 1986 inclusive and also ordered the self-insured employer to pay time loss compensation for the period November 13, 1983 through August 26, 1984, inclusive, November 26, 1984 through March 13, 1985, inclusive, and from October 4, 1985 to the present. The order further ordered that time loss compensation be paid until such time that the claimant is medically stable and found employable in accordance with industrial insurance laws of Washington State. **AFFIRMED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on October 13, 1989 in which the order of the Department dated June 24, 1988 was affirmed, in part, and reversed, in part, and the claim was remanded to the Department to issue an order affirming the determination that the claimant is in need of further psychiatric treatment, and to require the self-insured employer to pay the claimant time loss compensation for the period November

1 3, 1983 through June 24, 1988, less amounts of time loss compensation previously paid. The
2 Proposed Decision and Order also reversed the June 24, 1988 Department order "with respect to the
3 determination that the claimant's back condition was not fixed and stable and no further treatment was
4 indicated for that condition" and remanded with direction to award the claimant a permanent partial
5 disability award equal to Category 1 of WAC 296-20-280 for lumbosacral impairments and to take
6 such further action as indicated or required by law.
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10 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
11 prejudicial error was committed and said rulings are hereby affirmed. In particular, the Industrial
12 Appeals Judge did not err in denying the employer's request to present rebuttal testimony.
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14 We agree with that portion of the Proposed Decision and Order affirming the Department order
15 insofar as it directed the self-insured employer to pay for Ms. Pike's psychiatric treatment and time loss
16 compensation. The Proposed Decision and Order does an adequate job explaining the reasons for
17 this decision and we will not elaborate at length here.
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21 Bette Pike injured her low back on March 2, 1981 when the school bus she was driving went
22 into a ditch. She has been treated for a major depressive disorder, aggravation of a mixed personality
23 disorder and a chronic pain disorder by Dr. Edeltraud Hondl, a psychiatrist, for five years, since
24 September, 1984. Dr. Hondl causally related these psychiatric conditions to the 1981 industrial injury.
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27 The Industrial Appeals Judge relied on Dr. Hondl's opinion as the treating psychiatrist, based
28 on Groff v. Dep't of Labor & Indus. 65 Wn.2d 35, 395 P.2d 633 (1964). We also find Dr. Hondl's
29 opinion persuasive. The testimony of Dr. David Hong, a psychiatrist, and Dr. Santosh Kumar, a
30 specialist in physical medicine and rehabilitation, support Dr. Hondl's opinions. The only opinion
31 contrary to Dr. Hondl's was that of Dr. John Hamm, a psychiatrist. Dr. Hamm only saw Ms. Pike on
32 two occasions, in April, 1989, some ten months after the date of the Department order on appeal. It
33 appears that he discounted or ignored Ms. Pike's previous treatment and evaluations. There are no
34 specific reasons in the record to reject Dr. Hondl's opinion as to the causal relationship of Ms. Pike's
35 psychiatric condition to the industrial injury or that Ms. Pike was unable to work due to her psychiatric
36 condition from November 3, 1983 through June 24, 1988.
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41 We do disagree with the Industrial Appeals Judge's decision finding that Ms. Pike's back
42 condition is fixed and stable and rating her condition within Category 1 of WAC 296-20-280.
43 Arguably, in light of the texts of the June 24, 1988 and January 13, 1987 Department orders, the issue
44 of whether claimant's back condition is fixed and productive of permanent partial disability is not
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1 properly within the scope of this appeal. Even if it is, our resolution of this question must be consistent
2 with our determination that the claim should remain open for psychiatric treatment and payment of
3 time loss compensation. A claim cannot be both open and closed; . . ."a claimant cannot at one and
4 the same time be classified as temporarily totally disabled and permanently partially disabled."
5 Franks v. Dep't of Labor & Indus., 35 Wn.2d 763, 767, 215 P.2d 416 (1950). Unfortunately, the
6 Proposed Decision and Order would create this anomalous situation. Since we are affirming that
7 portion of the Department Order which awards the claimant time loss compensation until she is
8 medically stable, it would be premature for us to, at the same time, determine the extent of claimant's
9 permanent partial disability. The Department order must therefore be affirmed in its entirety.

15 **FINDINGS OF FACT**

- 16 1. On March 18, 1981 an accident report for the claimant was received by
17 the Department of Labor and Industries alleging an industrial injury on
18 March 2, 1981 while in the course of employment with Lake Washington
19 School District No. 414.

20 On March 27, 1981 the Department issued an order allowing the claim for
21 treatment and other benefits as authorized by law.

22 On May 3, 1983 the Department issued an order terminating time loss
23 compensation as paid to April 13, 1983 and closed the claim with no
24 permanent partial disability award.

25 On May 23, 1983 a protest and request for reconsideration from the
26 claimant was received by the Department of Labor and Industries.

27 On June 20, 1983 the Department issued an order holding the order of
28 May 3, 1983 in abeyance.

29 On August 11, 1983 the Department issued an order adhering to the
30 provisions of the Department order dated May 3, 1983.

31 On October 7, 1983 a notice of appeal from the claimant was received by
32 the Board of Industrial Insurance Appeals.

33 On October 21, 1983 the Department issued an order reassuming
34 jurisdiction in the claim and holding the order dated August 11, 1983 in
35 abeyance.

36 On October 25, 1983 the Board issued an order returning the case to the
37 Department for further action.

38 On April 2, 1984 the Department issued an order setting aside and holding
39 for naught Department orders dated May 3, 1983 and August 11, 1983
40 and ordering the claim remain open for authorized treatment and action as
41 indicated.

1 On June 1, 1984 a notice of appeal from the employer was received by
2 the Board of Industrial Insurance Appeals.

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4 On June 22, 1984 the Board issued an order granting the appeal.

5 On September 21, 1984 the Board issued an order on agreement of
6 parties remanding the claim to the Department with direction to enter an
7 order directing that vocational rehabilitation assistance be provided in
8 accord with RCW 51.41, coupled with concurrent support of psychiatric
9 treatment and directing the self-insured employer to pay time loss
10 compensation to the claimant during the period of vocational assistance
11 and concurrent psychiatric treatment commencing August 27, 1984 and
12 such further action as is indicated or required by the law and the facts.

13 On October 19, 1984 the Department issued an order pursuant to the
14 Board's order of September 21, 1984 which ordered that the claim remain
15 open for the self-insured employer to provide vocational rehabilitation
16 assistance coupled with concurrent support of psychiatric treatment and
17 pay time loss compensation to the claimant during the period of vocational
18 assistance and concurrent psychiatric treatment commencing August 27,
19 1984 and take such further action as is indicated by the law and the facts.

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21 On September 23, 1986 claimant's counsel requested an order be issued
22 for time loss compensation from November 3, 1983 through August 26,
23 1984, from November 26, 1984 through March 13, 1985 and from October
24 4, 1985 through the present in addition to requesting that an order be
25 issued which specifically authorized psychiatric treatment of the claimant
26 from October 4, 1985 through the present.

27 On January 13, 1987 the Department issued an order which ordered the
28 self-insured employer to pay for psychiatric treatment provided to the
29 claimant by Dr. Hondl for the period December 20, 1985 through
30 September 2, 1986 inclusive and also ordered that the self-insured
31 employer pay time loss compensation for the period of November 3, 1983
32 to August 26, 1984 inclusive, November 26, 1984 to March 13, 1985
33 inclusive and from October 4, 1985 to present. The order further ordered
34 time loss compensation be paid until such time that the claimant is
35 medically stable and found employable in accordance with the Industrial
36 Insurance Laws of Washington State.

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38 On March 16, 1987 a protest and request for reconsideration from the
39 employer was received by the Department.

40 On May 8, 1987 the Department issued an order holding the order dated
41 January 13, 1987 in abeyance. On September 21, 1987 the Department
42 issued an order which set aside and held for naught the Department order
43 dated January 13, 1987 and ordered that the employer pay the claimant
44 time loss compensation for the period November 26, 1984 through March
45 13, 1985 and ordered that the employer is not responsible and denies
46 responsibility for any supportive psychiatric care after September 2, 1985.
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1 On September 28, 1987 a protest and request for reconsideration from the
2 claimant was received by the Department.

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4 On November 2, 1987 the Department issued an order holding the order
5 dated September 21, 1987 in abeyance.

6 On June 24, 1988 the Department issued an order setting aside and
7 holding for naught the Department order dated September 21, 1987 and
8 ordered that the Department order dated January 13, 1987 hereby be
9 reaffirmed.

10 On June 28, 1988 the Department order dated June 24, 1988 was
11 received by the employer. On August 26, 1988 a notice of appeal from
12 the employer was received by the Board of Industrial Insurance Appeals.
13 On September 7, 1988 the Board issued an order granting the appeal
14 subject to proof of timeliness.

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16 2. The claimant is a 51 year old woman with a tenth grade education and
17 work experience as a school bus driver, and a charge nurse in a nursing
18 home.
- 19 3. On March 2, 1981 while in the course of employment with Lake
20 Washington School District, the claimant sustained an industrial injury to
21 her back when the school bus she was driving went into a ditch.
- 22 4. As a proximate result of the industrial injury of March 2, 1981, the claimant
23 sustained a condition diagnosed as a lumbar strain.
- 24 5. As a proximate result of the industrial injury of March 2, 1981, the claimant
25 sustained a psychiatric condition diagnosed as a major depressive
26 disorder, aggravation of a mixed personality disorder and a chronic pain
27 disorder. She has been treated for her psychiatric condition by Dr.
28 Edeltraud Hondl since September, 1984.
- 29 6. As of June 24, 1988 the claimant's psychiatric condition causally related to
30 the industrial injury was not fixed and stable and further psychiatric
31 treatment was indicated for that condition.
- 32 7. During the periods of November 3, 1983 through August 26, 1984,
33 inclusive; November 26, 1984 through March 13, 1985, inclusive; and
34 October 4, 1985 through June 24, 1988, the claimant was precluded from
35 gainful employment on a reasonably continuous basis as a result of her
36 psychiatric condition causally related to the industrial injury of March 2,
37 1981.

40 **CONCLUSIONS OF LAW**

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- 42 1. The employer's notice of appeal from the Department order dated June
43 24, 1988 was timely filed within the meaning of RCW 51.52.060.
- 44 2. The Board of Industrial Insurance Appeals has jurisdiction over the parties
45 and the subject matter to this appeal.
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3. During the periods of November 3, 1983 through August 26, 1984, inclusive; November 26, 1984 through March 13, 1985, inclusive; and October 4, 1985 through June 24, 1988, the claimant was a temporarily totally disabled worker within the meaning of RCW 51.32.090.
 4. The order of the Department of Labor and Industries dated June 24, 1988, which set aside and held for naught a Department order dated September 21, 1987 and reaffirmed a Department order dated January 13, 1987, which ordered the self-insured employer to pay for psychiatric treatment provided to the claimant by Dr. Hondl for the period December 20, 1985 through September 2, 1986 inclusive and also ordered the self-insured employer to pay time loss compensation for the period November 3, 1983 to August 26, 1984, inclusive; November 26, 1984 to March 13, 1985, inclusive; and October 4, 1985 to the present, and ordered that time loss compensation be paid until such time that the claimant is medically stable and found employable in accordance with Industrial Insurance Laws of Washington State, is correct and is affirmed.

18 It is so ORDERED.

19 Dated this 18th day of April, 1990.

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21 BOARD OF INDUSTRIAL INSURANCE APPEALS

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25 /s/ _____
26 SARA T. HRAMON Chairperson

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29 /s/ _____
30 FRANK E. FENNERTY, JR. Member

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33 /s/ _____
34 PHILLIP T. BORK Member