

Murphy, Anthony

APPEALABLE ORDERS

Department agreed exam

In an employer's appeal taken from a closing order based on a medical examination through which the Department and the worker agreed to resolve the claim, the issue is limited to the appropriateness of the award for permanent partial disability. The decision to resolve the matter by stipulation could not be appealed because RCW 51.52.050 only authorizes appeals from final determinations. The final determination was the order resulting from the examination, not the decision to examine.*In re Anthony Murphy*, BIIA Dec., 94 1233 (1996)

DEPARTMENT

Agreed examination

Employer inclusion in claims administration

A closing order based on an examination agreed to by the worker and the Department is not ultra vires simply because no regulation authorized an agreed examination. Citing *In re Rafael Rodriguez*, BIIA Dec., 90 3308 (1991), such agreements are encouraged although the employer should be included in the process.*In re Anthony Murphy*, BIIA Dec., 94 1233 (1996)

SCOPE OF REVIEW

Closing order

In an employer's appeal taken from a closing order based on a medical examination through which the Department and the worker agreed to resolve the claim, the issue is limited to the appropriateness of the award for permanent partial disability. The decision to resolve the matter by stipulation could not be appealed because RCW 51.52.050 only authorizes appeals from final determinations. The final determination was the order resulting from the examination, not the decision to examine.*In re Anthony Murphy*, BIIA Dec., 94 1233 (1996)

Scroll down for order.

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

1 **IN RE: ANTHONY W. MURPHY**) **DOCKET NO. 94 1233**
2)
3 **CLAIM NO. N-246853**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

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7 Claimant, Anthony W. Murphy, by
8 Law Offices of Mark C. Wagner, per
9 Mark C. Wagner

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11 Employer, Northwest Forest Products, by
12 Timber Operators Counsel, per
13 Paul H. Proctor

14
15 Department of Labor and Industries, by
16 The Office of the Attorney General, per
17 Robert A. Battles and Jennifer Browning, Assistants
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19 The employer, Northwest Forest Products, filed an appeal with the Board of Industrial
20 Insurance Appeals on February 23, 1994, from an order of the Department of Labor and Industries
21 dated December 30, 1993. The order corrected and superseded a Department order dated
22 September 29, 1993, and closed the claim with an award for permanent partial disability consistent
23 with Category 2 of WAC 296-20-280. **AFFIRMED.**
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29 **DECISION**

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31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
32 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order
33 issued on June 12, 1995, in which the order of the Department dated December 30, 1993, was
34 affirmed.
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39 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
40 prejudicial error was committed and the rulings are affirmed.
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43 Employer, Northwest Forest Products (Northwest), takes issue with the Department of Labor
44 and Industries' evaluation whether claimant Anthony W. Murphy's industrial injury of July 13, 1992,
45 resulted in any degree of permanent impairment. Northwest is not only concerned that a rating of
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01/12/96

1 Category 2 of WAC 296-20-180 does not fairly represent Mr. Murphy's physical condition, but also
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3 that the process by which the Department arrived at that rating was irregular and infringed on the
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5 employer's right to be actively involved in the administration of the claim. Although we are
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7 persuaded by the record in this appeal that the Department's resolution of the claim was ultimately
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9 correct, we take this opportunity to address the employer's concern. A brief review of the facts will
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11 serve to illustrate our discussion.

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13 At all times relevant to this appeal, Northwest was represented at the Department by Claims
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15 Management Services (CMS), a contractor which services employer members of the Timber
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17 Operators Council (TOC). TOC qualifies as a retrospective ratings group as authorized by WAC
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19 296-17-910. CMS actively monitors the Department in the administration of workers' compensation
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21 claims involving TOC employers. Ordinarily, CMS requests that the Department provide
22
23 information concerning all aspects of claims administration, including copies of all medical reports
24
25 generated in the course of claims administration. TOC employers, like other retrospective rating
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27 groups, often participate in decisions to obtain independent medical examinations of injured
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29 workers.

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31 Mr. Murphy strained his back while working in a bent over position at Northwest. His
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33 attending physician Dr. Thomas Miskovsky was not asked to rate the claim until after a panel exam
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35 was performed. Dr. J. Michael Egglin, who participated in the panel exam, testified that Mr. Murphy
36
37 had a low back impairment best represented by Category 1 of WAC 296-20-280 and that he could
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39 return to heavy labor. While Dr. Miskovsky did not dispute the category rating, he advised the
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41 Department that Mr. Murphy could not return to heavy labor.

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43 The Department issued a September 29, 1993 order closing the claim with no permanent
44
45 partial disability award. The claimant protested. The Department did not issue an abeyance order.
46
47 Nevertheless, it communicated with Mr. Murphy's attorney, who suggested that the parties address

1 Dr. Miskovsky's concerns by consulting a third physician. The Department agreed on a consultation
2
3 with Dr. Roy Broman. The Department did not inform TOC of its contacts with Mr. Murphy's
4
5 attorney or of the scheduled medical appointment.
6

7 Dr. Broman found spasm in Mr. Murphy's low back and recommended a Category 2
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9 permanent partial disability award. The Department adopted Dr. Broman's recommendation in the
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11 order on appeal. In his testimony at hearing, Dr. Miskovsky testified that he agreed with Dr.
12
13 Broman's rating because he was satisfied that the presence of spasm at the time of Dr. Broman's
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15 exam satisfied the requirement of intermittent objective findings of impairment.
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17 TOC complains that it was not included in the negotiations which followed the claimant's
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19 protest of the September 29, 1993 order. There is no regulatory requirement that the Department
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21 notify an employer's retrospective rating group that it will be acting on a claimant's protest and
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23 request for reconsideration. The only response required of the Department when a protest has
24
25 been filed is the issuance of a further appealable order within 90 days of the receipt of the protest.
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27 In re Clarence Haugen, BIIA Dec., 91 1687 (1991). An abeyance order is only one of the possible
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29 responses the Department may make when a protest is received. The Department may instead
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31 opt to directly "modify, reverse or change . . ." the order from which the protest has been taken.
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33 RCW 51.52.060. In Mr. Murphy's case, the Department elected to proceed without issuing an
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35 abeyance order. In light of the spirit of WAC 296-17-910, however, CMS is understandably
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37 concerned that the Department in this case deviated from past practice which would have alerted
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39 the employer that some course of action was under consideration.
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41 While we cannot direct the Department as to which choice to make among the menu of
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43 options provided by the legislature in response to a protest and request for reconsideration, we are
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45 concerned that the representative TOC was not kept advised of the status of Mr. Murphy's claim.
46
47 The key function of the Board of Industrial Insurance Appeals is to resolve disputes that workers

1 and employers may have with decisions of the Department. Sometimes disputes arise because
2 parties get lost in the decision making "process." When a worker or an employer does not
3 understand how a decision is made or is not able to fully participate, there is natural concern that
4 the decision is unfair and perhaps even wrong. The Department can reduce challenges to its
5 decisions by carefully adhering to its own regulations and policies in managing claims. As a matter
6 of good faith, the Department should want to honor its commitment to allow employers'
7 retrospective ratings groups the opportunity to improve the quality of claims handling by soliciting
8 input on the resolution of protests by means of additional medical investigation. While this may not
9 have avoided an appeal of the Department's order in this case, it would most certainly have
10 narrowed the focus of the dispute and saved all concerned precious resources.

11 This is not to say the additional medical investigation undertaken in this case was
12 inappropriate. Rather, the **process** of obtaining the additional medical examination has itself come
13 under challenge. The employer has appealed from Mr. Murphy's permanent partial disability award
14 on the basis that it was essentially *ultra vires* for the Department to engage in "agreed or agreeable
15 exams." The employer cites a long list of WAC provisions in its Motion for Summary Judgment,
16 none of which say the Department is restricted from attempting to resolve claims in this manner.
17 The Petition for Review cites In re Rafael Rodriguez, BIIA Dec., 90 3308 (1991) as authority for
18 the fact that the Department cannot enter into binding examinations. Therefore, the employer
19 reasons, the order of December 30, 1993, is void. In fact, the Board in Rodriguez, encourages the
20 Department to take the risk of settling claims in this fashion, but makes it clear that if the
21 agreement falls through, the Board will not deny any party the right to appeal an order embodying
22 the failed agreement. There is no such thing as a binding examination at the Department level. In
23 Rodriguez, the claimant backed out of the agreement and exercised his right to appeal. In the
24 present case, TOC wanted to be included in any agreement. It was not. It was dissatisfied with the

1 result. TOC, therefore, exercised its right to appeal the order which resulted from the agreement
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3 between Mr. Murphy and the Department.
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5 Because the Department did not advise TOC that it was seeking additional medical
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7 information, the employer wants the Board to hold that the Department was not entitled to rely in
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9 any way on the results of Broman's exam. Citing RCW 51.52.050, which permits appeals to be
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11 taken from "any action or . . . any decision made relating to any phase of the administration of this
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13 title . . .", TOC asks this Board to look beyond the order of December 30, 1993, to the
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15 administrative decision to consider an examination by Dr. Broman. In fact, as interpreted by the
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17 Washington Supreme Court in Lee v. Jacobs, 81 Wn.2d 937 (1973), appeals taken under the
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19 auspices of RCW 51.52.050 are limited to final orders, decisions, and awards issued in the course
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21 of administration of a claim with notice to all parties. The Department's agreement to obtain
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23 additional medical information, while reached without input from the employer's representative, was
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25 not a final decision or action. The first such final order, decision, or award issued in response to
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27 Mr. Murphy's protest was the order of December 30, 1993, which is currently on appeal.
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29 The hearing judge properly limited the issue presented on appeal to the question of whether
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31 the permanent partial disability award was correct. The employer alleges that it was in some way
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33 prevented from exploring the legitimacy of Dr. Broman's medical opinion. In fact, the hearing judge
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35 specifically permitted inquiry into bias on the part of Dr. Broman. 12/7/94 Tr. at 63, 82-86.
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37 At the time of the September 29, 1993 closing order, the Department had two opinions, Dr. Egglin
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39 at Category 1 of WAC 296-20-280 and Dr. Miskovsky at more than Category 1 but not quite
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41 Category 2. Later, Dr. Broman independently found spasm which was consistent with a Category 2
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43 rating. Reinforced by an independent examiner making that finding, Dr. Miskovsky felt that he was
44
45 justified in reassessing the appropriate disability rating and raising it to Category 2 as well.
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1 The employer could, and did, argue that Dr. Miskovsky's opinion was a little too easily
2 swayed. The employer could, and did, explore whether Dr. Broman thought he was examining the
3 claimant at the request of the claimant or the Department (Broman could not remember). The
4 employer could have, but did not, obtain its own medical opinion. The record as constituted has
5 the attending physician endorsing a Category 2 rating arrived at by an independent examiner.
6 There is no factual or procedural reason to disturb the Proposed Decision and Order's affirmance
7 of the closing order.
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15 FINDINGS OF FACT

- 16
17 1. On July 24, 1992, the Department of Labor and Industries received an
18 application for benefits filed on behalf of the claimant, Anthony W.
19 Murphy, alleging the occurrence of an industrial injury on July 13, 1992,
20 during the course of his employment with Northwest Forest Products.
21 The claim was subsequently allowed by a Department order dated
22 August 10, 1992, and benefits, including time loss compensation and
23 loss of earning power benefits were provided by the Department. On
24 September 29, 1993, the Department issued an order closing the claim
25 with time loss compensation ended as paid to May 26, 1993, and
26 without an award for permanent partial disability. On October 5, 1993,
27 the claimant filed a protest and request for reconsideration of the
28 September 29, 1993 order with the Department. On December 30,
29 1993, the Department issued an order correcting and superseding the
30 order of September 29, 1993, and closing the claim with an award for
31 permanent partial disability consistent with Category 2 of WAC 296-20-
32 280, categories for permanent dorso-lumbar and lumbosacral
33 impairments. On February 23, 1994, the employer, Northwest Forest
34 Products, filed a Notice of Appeal from the December 30, 1993
35 Department order with the Board of Industrial Insurance Appeals and
36 thereafter, on March 23, 1994, the Board issued an order granting the
37 appeal, assigning Docket No. 94 1233, and ordering that further
38 proceedings be held in this matter.
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- 40 2. On July 13, 1992, while employed by Northwest Forest Products, the
41 claimant injured his low back when he stood up after being in an
42 awkward position for a long period of time marking boxes with a marking
43 pen and experienced a sharp pain in his back. The claimant thereafter
44 received treatment consisting of chiropractic care, anti-inflammatory
45 medication, and physical therapy.
46
- 47 3. As of December 30, 1993, the claimant's condition proximately related
to his industrial injury on July 13, 1992, consisted of a lumbosacral

1 strain/sprain. As of December 30, 1993, this condition was fixed and
2 stable and the claimant's permanent impairment resulting therefrom was
3 best described by Category 2 of WAC 296-20-280, categories for
4 permanent dorso-lumbar and lumbosacral impairment.
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6 **CONCLUSIONS OF LAW**
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- 8 1. The Board of Industrial Insurance Appeals has jurisdiction over the
9 parties and the subject matter of this appeal.
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11 2. The order of the Department of Labor and Industries dated December
12 30, 1993, which corrected and superseded the Department order dated
13 September 29, 1993, and closed the claim for an award for permanent
14 partial disability consistent with Category 2 of WAC 296-20-280 is
15 correct and is affirmed.
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17 It is so **ORDERED**.
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36 Dated this 12th day of January, 1996.
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38 BOARD OF INDUSTRIAL INSURANCE APPEALS
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42 /s/ _____
43 S. FREDERICK FELLER Chairperson
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45
46 /s/ _____
47 FRANK E. FENNERTY, JR. Member

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/s/ _____
ROBERT L. McCALLISTER Member