# Hansen, Michael

## PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

### Category rating

Because the category system requires the finder of fact to evaluate impairment by comparing the category descriptions with the objective findings and physical restrictions, it is erroneous to make a rating based solely on the presence of surgical procedures. **….*In re Michael Hansen*, BIIA Dec., 95 4568 (1996) [**dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 96-2-20447-1SEA.]

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

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| **IN RE: MICHAEL A. HANSEN** | **)** | **DOCKET NO. 95 4568** |
| | **)** | |
| **CLAIM NO. T-509018** | **)** | **DECISION AND ORDER** |

**APPEARANCES:**

Claimant, Michael A. Hansen, by
Stephen R. Powell

Self-Insured Employer, The Boeing Company, by
Law Office of Gary D. Keehn, per
Gary D. Keehn and Amy L. Arvidson

Department of Labor and Industries, by
The Office of the Attorney General, per
W. Stuart Hirschfeld, Assistant

The self-insured employer, The Boeing Company, filed an appeal with the Board of Industrial Insurance Appeals on July 28, 1995, from an order of the Department of Labor and Industries dated May 31, 1995. The order closed the claim with time loss compensation as paid through April 4, 1991, and with a permanent partial disability award for a Category 3 permanent dorso-lumbar and or lumbosacral impairment (WAC 296-20-280), to be paid by the self-insured employer, less the prior permanent partial disability awards paid on this claim. **AFFIRMED.**

## PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the worker to a Proposed Decision and Order issued on March 27, 1996, in which the order of the Department dated May 31, 1995, was reversed and the claim remanded to the Department with directions to set aside the order dated May 31, 1995, and to close the claim with time loss compensation as paid to April 4, 1991, and with an award for permanent partial disability of Category 3, permanent dorso-lumbar and/or lumbosacral impairments, less a Category 3 permanent dorso-lumbar and/or lumbosacral impairments pre-existing.

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

## DECISION

The Boeing Company, a self-insured employer, has by its appeal challenged the Department's closure of this claim with a permanent partial disability award for a Category 3 low back impairment. Boeing contends that Mr. Hansen had a Category 3 low back impairment that existed prior to the industrial injury of December 17, 1990, and that any permanent partial disability award for the industrial injury should be reduced by the amount of pre-existing permanent partial disability. If this contention is established, The Boeing Company would not have to pay any permanent partial disability award as Mr. Hansen's impairment would be the same before and after the industrial injury covered by this claim, Category 3 of WAC 296-20-280.

The party filing a Notice of Appeal from a Department order takes on the burden of proving the order incorrect. As this appeal was filed by the self-insured employer, RCW 51.52.050 and WAC 263-12-115(2)(a) and (c) charge The Boeing Company with proceeding initially with evidence sufficient to establish a prima facie case for the relief sought. The only witnesses to testify in this matter were presented by the self-insured employer's representative. Both Mr. Hansen and the Department of Labor and Industries rested without presenting any evidence, other than cross-examination of the self-insured employer's witnesses. Resolution of this appeal, therefore, depends on whether the self-insured employer presented a prima facie case that the Department's permanent partial disability award was incorrect, thus shifting the burden to Mr. Hansen to prove by a preponderance of the evidence that the Department order on appeal was correct. *Olympia Brewing Co. v. Department of Labor & Indus.,* 34 Wn.2d 498 (1949); *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).

The self-insured employer has failed to provide a prima facie case supporting its contention that Mr. Hansen's impairment was the same after the industrial injury as it was before. The

Department order, dated May 31, 1995, established Mr. Hansen's level of permanent impairment proximately caused by the industrial injury as falling within Category 3 of WAC 296-20-280. In order to avoid paying the appropriate permanent partial disability award for a Category 3 low back impairment, the self-insured employer had to present medical evidence establishing that there was no increase in impairment due to the industrial injury, or that the impairment caused by the industrial injury should be rated in a lower category. Through the testimony of Dr. Lawrence Murphy, a neurologist and the only medical expert called, the self-insured employer has attempted to establish a prima facie case by showing that Mr. Hansen's low back impairment fell within Category 3, both before and after the industrial injury. If this were the case, Mr. Hansen would not be entitled to a permanent partial disability award.

Dr. Murphy's testimony was based primarily upon an examination of Mr. Hansen performed on March 21, 1995. Dr. Murphy expressed the opinion that the only objective findings present on examination that would support category ratings for impairment in Mr. Hansen's low back were the laminectomies that had been performed at the L5-S1 and L4-L5 disc spaces. Based on what we believe is an incorrect interpretation of WAC 296-20-280, Dr. Murphy rated Mr. Hansen's permanent impairment as falling within Category 3 before the industrial injury, solely on the basis of the laminectomy performed at the L4-L5 level. He also rated Mr. Hansen's permanent impairment following the industrial injury as being in Category 3, once again, solely on the basis of the laminectomy performed at the L5-S1 level for treatment of the industrial injury. Dr. Murphy was also of the opinion that Mr. Hansen's ongoing low back complaints were related to the natural progression of degenerative disc disease that pre-existed the industrial injury, and that they were not related to the conditions caused by the industrial injury. Thus the exclusive, objective medical finding supporting a Category 3 permanent partial disability award was evidence of the surgeries

performed on Mr. Hansen. Dr. Murphy noted that in spite of a second surgery, there was no other objective medical evidence to support a greater permanent partial disability award.

Permanent partial disability awards for the low back are based on categories of impairments found in the Washington Administrative Code. The categories of impairment for the low back are, as follows:

> (1) No objective clinical findings. Subjective complaints and/or sensory losses may be present or absent.
>
> (2) Mild low back impairment, with mild intermittent objective clinical findings of such impairment but no significant x-ray findings and no significant objective motor loss. Subjective complaints and/or sensory losses may be present.
>
> (3) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment but without significant x-ray findings or significant objective motor loss.
>
> This and subsequent categories include: The presence or absence of reflex and/or sensory losses; the presence or absence of pain locally and/or radiating into an extremity or extremities; the presence or absence of a laminectomy or discectomy with normally expected residuals.
>
> (4) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment, with mild but significant x-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.
>
> This and subsequent categories include the presence or absence of a surgical fusion with normally expected residuals.
>
> (5) Moderate low back impairment, with moderate continuous or marked intermittent objective clinical findings of such impairment, with moderate x-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.
>
> (6) Marked low back impairment, with marked intermittent objective clinical findings of such impairment, with moderate or marked x-ray findings and with moderate motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.
>
> (7) Marked low back impairment, with marked continuous objective clinical findings of such impairment, with marked x-ray findings and with

> marked motor loss objectively demonstrated by marked atrophy and weakness of a specific muscle or muscle group.
>
> (8) Essentially total loss of low back functions, with marked x-ray findings and with marked motor loss objectively demonstrated by marked atrophy and weakness of a muscle group or groups.

WAC 296-20-280. Note that Category 3 provides for a variety of objective findings, including the presence or absence of a laminectomy as being one element to consider in deciding on this level of impairment. It is not necessary to have all of the descriptive clinical findings present before a worker is entitled to a particular category rating. Similarly, a worked is not entitled to a particular category rating simply because one element of a particular category is present on clinical examination. Instead, the category selected by the physician is based on a "best fit" determination as to which category most accurately represents the worker's impairment in the doctor's judgment. This is consistent with rules set forth to utilize the category rating scheme. WAC 296-20-220(f), provides:

> The method of evaluating impairment levels is by selection of the appropriate level of impairment. These descriptive levels are called "categories." Assessments of the level of impairment are to be made by comparing the condition of the injured workman with the conditions described in the categories and selecting the most appropriate category.

The "most appropriate" category may be a category that includes some, but not all, of the clinical descriptive elements of that category.

In attempting to meet its burden to present a prima facie case, Boeing has relied on medical testimony that is based upon an incorrect interpretation of WAC 296-20-280. We do not believe that, **standing alone**, the presence or absence of a laminectomy justifies placement of low back impairment in a particular category. The presence or absence of a laminectomy is simply one of the factors to be considered in determining the category that most accurately describes a worker's condition. In expressing his opinion, Dr. Murphy has stated clearly and unequivocally that the only factor he relied upon in rating Mr. Hansen's low back impairment was the existence of the

laminectomies. This is set forth in an exchange between Dr. Murphy and Boeing's attorney during a deposition. Asked to rate Mr. Hansen's impairment under WAC 296-20-280, Dr. Murphy stated that it falls in Category 3. In explanation of his rating, Dr. Murphy testified:

> Certainly. The WAC guidelines and their category rating state specifically under Category 3 that, quote, this and subsequent categories include the presence or absence of reflex and/or sensory losses; the presence or absence of pain locally and/or radiating into an extremity or extremities; the presence or absence of a laminectomy or diskectomy with normally expect [sic] residuals.
>
> Q And can you describe how that applies to Mr. Hansen?
>
> A Well, I think it sort of perfectly characterizes his condition at the time that I examined him. Namely, he had no evidence of any reflex or sensory loss. He did complain of some pain locally.
>
> Q Meaning locally in the low back?
>
> A In the low back, that is correct. And had, in fact, had a laminectomy and diskectomy.
>
> Q Did Mr. Hansen have any significant motor loss demonstrated by atrophy and weakness of a specific muscle or muscle group as required for a Category 4 rating?
>
> A No, he did not.
>
> Q Did you -- did he have significant x-ray findings? Or did he have significant x-ray findings in your opinion?
>
> . . . .
>
> A Well, I would say that he had the changes compatible with his surgery, but had no other significant x-ray findings.
>
> Q When you are using the term x-ray, what do you understand that to mean?
>
> A Radiographic studies including not only plain x-rays but also CAT scans, myelograms, and MRI's.
>
> Q Had you had radiographic information for your review as part of the medical history and chart notes that you saw?
>
> A Yes.

Q Did Mr. Hansen have any significant objective motor loss when you saw him?

A No.

Q In your opinion, did he have any objective clinical findings of impairment?

A No.

Q What was the -- did you form an opinion about whether Mr. Hansen had any permanent impairment in his low back prior to the December 17, 1990 industrial injury?

A Yes.

. . . .

Q What was that opinion?

A That he had permanent impairment of his lumbar spine best categorized as Category 3 impairment following Washington Administrative Code Guideline 296-20-280.

Q And what was the basis of your opinion?

A That he had prior lumbar laminectomy and diskectomy?

Q Are you referring to the 1986 surgery?

A Yes, that is correct.

Q The claimant told you that he had not had subjective difficulties following his 1986 injury; is that correct?

A That is correct.

Q Okay. If that were true, would that affect your opinion about whether he had permanent impairment due to the 1986 injury?

A No.

Q Why not?

A Primarily because the laminectomy and diskectomy that he had at L4-5 makes him a Category 3, period.

Murphy Dep. at 25-28.

Considering only that factual information contained in Dr. Murphy's testimony, we find no basis for any rating under the category system, either before or after the industrial injury. In making findings of fact, we can arrive at category ratings based on the medical testimony provided in the record. We have consistently held that, as finders of fact we can evaluate impairment under the category system by comparing the objective findings to the descriptions contained in the individual categories in order to find the most accurate fit. *In re Donald Woody*, BIIA Dec., 85 1995 (1987); *In re Linda Donnelly*, BIIA Dec., 54,669 (1981). More specifically, *In re Catherine Schmidt*, BIIA Dec., 57,001 (1981) we held that the appropriate category of permanent impairment could be determined even in the absence of medical testimony rating permanent partial disability. This determination would be based upon a comparison of the appropriate category descriptions with the medical evidence of the workers physical restrictions and findings. In this instance, however, the self-insured employer has failed to provide sufficient medical testimony to serve as the basis for a category rating of Mr. Hansen's low back impairment either before or after the industrial injury.

We would digress here to note that we understand that Dr. Murphy's conclusions may be based on a common misconception about the application of the category system. Frequently, when an individual has a laminectomy there may be residual clinical, *objective*, findings which, together with the laminectomy, would be sufficient to support a Category 3 award. It is perhaps a short step to simply conclude that the presence of a laminectomy warrants, automatically, a Category 3 award. This is not the wording of the Department's rules as expressed in the Washington Administrative Code, nor does such an assumption make sense in the logical and fair administration of the industrial insurance system. Disability includes concepts of impairment and loss of function. Where a surgical intervention succeeds in repairing a medical condition, resulting in a reduction of impairment and little or no loss of function, it would make no sense to

automatically award a Category 3, or any other category, simply because the worker underwent surgery.

We believe that Dr. Murphy's opinions regarding a Category 3 (due solely to the existence of two surgical procedures), is based on the erroneous assumption that a worker is entitled to a Category 3 for simply having undergone the surgery. As we have stated, this is erroneous. Therefore, there is insufficient medical evidence in this record, based on the balance of Dr. Murphy's testimony, to conclude that Mr. Hansen had any permanent partial disability, either before or after the industrial injury. Indeed, Dr. Murphy's conclusion as to the existence of a permanent impairment runs as cross-purposes with his clinical findings that do not support any impairment. It is for this reason the self-insured employer has failed to make a prima facie case.

Consideration of the Proposed Decision and Order, the Petition for Review filed thereto on behalf of the claimant, Michael Hansen, the Self-Insured Employer's Response to Petition for Review, and a careful review of the entire record before us, leads us to the conclusion that the self-insured employer has failed to meet its burden to present a prima facie case as required by RCW 51.52.050 and WAC 263-12-115(2)(a) and (c), and that the Department order dated May 31, 1995, must be affirmed.

## FINDINGS OF FACT

1. On February 21, 1991, an application for benefits was received alleging an injury to the low back and left leg incurred by Michael A. Hansen in the course of his employment with The Boeing Company on December 17, 1990. On March 20, 1991, the claim was denied. On July 10, 1992, following a timely protest and request for reconsideration filed by the claimant, the March 20, 1991 order was affirmed. On February 3, 1993, the Board of Industrial Insurance Appeals affirmed the July 10, 1992 order. On April 5, 1993, the Board denied claimant's Petition for Review. On January 25, 1994, the King County Superior Court reversed the April 5, 1993 Board order and remanded the claim to the Department of Labor and Industries with directions to accept the claim and provide benefits to the claimant. On September 23, 1994, the Department closed the claim with time loss compensation as paid to April 4, 1991, and paid an award for permanent partial disability of

Category 3 low back impairments, less Category 2, pre-existing. On May 31, 1995, following a timely protest and request for reconsideration filed by the claimant, the September 23, 1994 order was canceled and the claim was closed with time loss compensation as paid through April 4, 1991, and paid an award for permanent partial disability of Category 3 permanent dorso-lumbar and/or lumbosacral impairments, less prior permanent partial disability paid. On July 28, 1995, the self-insured employer filed an appeal from the Department order dated May 31, 1995. On August 23, 1995, the Board granted the appeal and assigned it Docket No. 95 4568.

2. On December 17, 1990, Michael A. Hansen injured his low back while working as a chrome plater for The Boeing Company.

3. As a result of the December 17, 1990 industrial injury to his back, Michael A. Hansen suffered a herniated disc at the L5/S1 level and underwent a laminectomy and diskectomy to repair the disc herniation.

4. On October 24, 1986, Michael A. Hansen underwent a laminectomy diskectomy to surgically repair a herniated disc at the L4/5 level that was the result of an injury to his low back suffered by Mr. Hansen while repairing his automobile.

5. As of May 31, 1995, Michael A. Hansen's condition proximately caused by the industrial injury of December 17, 1990, was fixed and no longer in need of treatment.

6. There is insufficient evidence to determine the level of Michael A. Hansen's permanent impairments attributable to the injury of October 24, 1986, and to the industrial injury of December 17, 1990, as impairment is rated under the categories for rating permanent dorso-lumbar and/or lumbosacral impairments, WAC 296-20-280.

## CONCLUSIONS OF LAW

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

2. The order of the Department of Labor and Industries dated May 31, 1995, that canceled a September 23, 1994 order and closed the claim with time loss compensation as paid through April 4, 1991, and with an award for permanent partial disability of Category 3 permanent dorso-lumbar and/or lumbosacral impairments, less prior permanent partial disability paid, is correct and is affirmed.

It is so **ORDERED.**

Dated this 17th day of July, 1996**.**

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

**DISSENT**

The claimant's Petition for Review should be denied. The Proposed Decision and Order result is correct and should not be disturbed. Our industrial appeals judge, based on the evidence in this record, reversed the Department order that closed Mr. Hansen's claim with an award for permanent partial disability of Category 3. I agree with the Proposed Decision and Order's result, but for different reasons.

The issue is extent of Mr. Hansen's recovery from the back condition that resulted from the industrial injury and what permanent partial disability award, if any, appropriately reflects that recovery. The issue has been clouded by the majority factual analysis, which fails to give any weight to the only medical evidence in the record, the testimony of Dr. Murphy. Dr. Murphy's opinion is clear regarding Mr. Hansen's recovery from this injury and the previous back injury. Dr. Murphy's opinion on recovery is unequivocal, and stands unrebutted in this record. Mr. Hansen recovered from both injuries without objective medical residuals. His recovery from both injuries was the result of the treatment he received, which in both injuries included surgical procedures, known in medicine as laminectomy. Dr. Murphy, based on his examination of Mr. Hansen and expert interpretation of his medical history, determined that the only objective finding residual to both back injuries is the presence of evidence of surgery. There is no provision in the category

system for a permanent disability award based solely, as here, on a surgical procedure (laminectomy). The majority agrees with this proposition. The majority, at page 6 of this Decision and Order, concludes: "We do not believe that, **standing alone**, the presence or absence of a laminectomy justifies placement of low back impairment in a particular category. The presence or absence of a laminectomy is simply one of the factors to be considered in determining the category that most accurately describes a worker's condition." I agree, disability in our exclusive remedy industrial insurance system is based in the theory of recovery from an injury or disease and not in recovery for injury or disease. The majority, having agreed that surgery (laminectomy) "standing alone" does not support a category rating, sidesteps the issue and lets such an award stand, by finding that The Boeing Company failed to make a prima facie case. I disagree. The Department order was properly reversed in the Proposed Decision and Order and should be affirmed by denying the claimant's Petition for Review.

Dated this 17th day of July, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
ROBERT L. McCALLISTER Member