Conelly, Gail

STANDARD OF REVIEW

Claims Administration

When there is a dispute regarding claim administration not related to the actual adjudication of entitlement to benefits, the standard of review is abuse of discretion. **….*In re Gail Conelly*, BIIA Dec., 97 3849 (1998)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GAIL CONELLY	)	**DOCKET NO. 97 3849**
	)	
CLAIM NO. T-599918	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Gail Conelly, by
Law Office of Todd Renda, per
Todd R. Renda

Self-Insured Employer, Target Stores, by
Law Offices of Madden & Crockett, per
Carol J. Molchior

Department of Labor and Industries, by
The Office of the Attorney General, per
Kay A. Germiat, Assistant

The self-insured employer, Target Stores, filed an appeal with the Board of Industrial Insurance Appeals on May 13, 1997, from an order of the Department of Labor and Industries dated April 30, 1997. The order affirmed the Department order dated April 23, 1997, that directed the self-insured employer to schedule an independent medical examination with Dr. Ralph K. Zech, approved examiner, and further directed the claimant to attend that examination. **AFFIRMED.**

PROCEDURAL AND EVIDENTIARY CONSIDERATIONS

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 August 18, 1998, in which the order of the Department dated April 30, 1997, was affirmed.

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.

The evidence in this appeal is limited to that stated in the "Stipulation of Parties" filed on January 12, 1998. However, this stipulation did not contain a statement by the parties that they were resting their respective cases. The hearing that was scheduled to occur after the stipulation

was received was cancelled without the parties having rested. Nonetheless, we conclude that each party rested its case in chief upon the filing of this stipulation. We do so in part based upon our belief that any prejudice to the parties caused by our closing the record would be greatly outweighed by that caused by the additional delay entailed in: (1) remanding this appeal to the hearing process merely to obtain statements by the parties that they had rested; (2) issuing a new Proposed Decision and Order; and (3) any further review of this matter upon receipt of a Petition for Review. Also supporting our decision to close the record is the fact that none of the parties moved to keep the record open in order to present additional evidence.

We note that the Employer's Motion and Brief contained several pages from a 1995 deposition of Dr. Zech that the employer obviously believed to be part of the evidence in this appeal. We do not consider this portion of the prior deposition of Dr. Zech as evidence in this appeal. It was never offered into evidence and the other parties were not given the opportunity to object to it or to offer other evidence in response to it.

DECISION

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the disposition of this appeal recommended by the Proposed Decision and Order was correct. We have granted review to discuss the scope of our review in this appeal, the standard of review to be applied in this type of dispute, and to clear up the procedural matter discussed above.

Ms. Conelly sustained her industrial injury on December 9, 1991, when she was struck on the left side of her head by a shoplifter. The claimant has been receiving treatment for a temporomandibular joint (TMJ) condition from several providers including most recently Dr. Farrand Robson, a dentist. The employer scheduled an independent medical examination (IME) for August 2, 1996, at which time the claimant was to be evaluated by Dr. Edmund Truelove. Both the

claimant and Dr. Robson wrote to the self-insured employer (through its service company), advising it that she would not attend the IME with Dr. Truelove based on Dr. Robson's opinion that it would be "against good medical advice." From August through December 1996 the employer sent a series of letters to the Department demanding that an order be issued directing the claimant to attend an IME performed by Dr. Truelove. The Department's response was that Dr. Truelove was not an "approved examiner" (See WAC 296-23-265, since amended), but that even if he was, his only office was in Seattle and the IME needed to be done in Tacoma. The only listed "approved examiner" in the relevant specialty in the greater Seattle and the southwest Washington area was Dr. Ralph Zech. Early in 1997, Dr. Truelove completed an application to become an "approved examiner." However, in April 1997 the Department issued an order directing the employer to schedule an IME with Dr. Zech. The Department's rationale for this action was that Dr. Truelove's involvement with the claim might impede the resolution of the dispute inasmuch as the attending physician, Dr. Robson, did not want him to conduct the IME. Dr. Truelove is a full professor and chairman of the oral medicine department at the University of Washington as well as the author of numerous articles about temporomandibular joint (TMJ) disorders. Dr. Zech is an oral and maxillofacial surgeon with offices in Seattle and Woodinville, but not Tacoma.

This Board's jurisdiction over any workers' compensation matter, including a dispute over the administration of a claim, is appellate only, not original. The scope of our review is limited by the order under appeal, the subject matter of which may not be expanded by the Notice of Appeal. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970); *Hanquet v. Department of Labor & Indus.*, 75 Wn. App. 657 (1994). Here the Department order under appeal only determined that the self-insured employer must schedule an IME with Dr. Zech and then directed the claimant to attend it. The employer believes the Department's direction to use Dr. Zech as the examining physician in the IME is incorrect and requests that the order be reversed. Up to this point, the controversy is

within the scope of our review. However, the employer, by requesting the Board to direct the Department to suspend the claimant's benefits for non-cooperation or require her to specify "good cause" for non-cooperation, asks us to go beyond the scope of our review in this matter. Clearly, we have no jurisdiction to consider **any** issue regarding the claimant's alleged non-cooperation with an IME inasmuch as the Department order did not make any determination regarding non-cooperation.

The self-insured employer contends that the Department's selection of Dr Zech, instead of Dr. Truelove, contrary to its request, constitutes a violation of RCW 51.32.110(1). The relevant portion of that statute states:

> Any worker entitled to receive any benefits or claiming such under this title shall, if requested by the department or self-insurer, submit himself or herself for medical examination, at a time and from time to time, at a place reasonably convenient for the worker and as may be provided by the rules of the department.

There is another statute that is applicable to the circumstances of this dispute. RCW 51.36.070 also addresses the procedure for scheduling IMEs. This statute states, in relevant part:

> Whenever the director or the self-insurer deems it necessary in order to resolve any medical issue, a worker shall submit to examination by a physician or physicians selected by the director, with the rendition of a report to the person ordering the examination.

The employer points to the language in RCW 51.32.110(1) as support for its right to select the physician to conduct the IME. The Department and claimant contend that choice of the examining physician is left up to the director of the Department by RCW 51.36.070. We do not believe that these statutes necessarily conflict. As noted by our industrial appeals judge, the relevant statutory language in both statutes was enacted at the same time, in the same legislative action. (Laws of 1971, Ex. Sess., ch. 289, § 13 & 54). We choose to read these statutes together for the purpose of preventing any conflict between them and with the goal of effectuating the intent

of the Legislature. *Gilbert v. Sacred Heart Med. Center*, 127 Wn.2d 370 (1995) and *State v. Yakima County Comm'rs.*, 123 Wn.2d 451 (1994). Thus, we conclude that while self-insured employers have the statutory right to require an injured worker to submit to a medical examination, the director of the Department retains the right to select the examining physician(s) should there be a conflict between the employer and the injured worker, as is the case here.

The question then arises, to what extent is a decision of the director of the Department regarding the selection of an examining physician subject to review by this Board? Put another way, what standard of review should the Board follow when reviewing a dispute such as this one? Although there is no law specifically addressing the issue of standard of review in disputes over claims administration, the parties and our industrial appeals judge all assumed that the director's choice of the examining physician is to be reviewed by an "abuse of discretion" standard. (See, Petition for Review, pages 5 & 8; Employer's Motion and Brief, page 7; Claimant's Response to Employer's Motion and Brief, pages 6-7; and the Proposed Decision and Order, page 6.) We agree that in matters of claims administration, not involving the actual adjudication of entitlement to benefits, the actions of the director of the Department should be reviewed using an abuse of discretion standard.

We conclude that the director's choice of Dr. Zech to perform the IME of Ms. Conelly was not an abuse of discretion. The stipulated facts show that Dr. Zech is a "qualified approved examiner" (see WAC 296-23-265, et seq.) whose specialty, oral and maxillofacial surgery, includes the evaluation and treatment of TMJ. We need not compare the respective qualifications of Drs. Zech and Truelove because there is no statute, regulation or case law that requires the Department to select the most qualified physician to perform an IME. Contrary to the assertions contained within the employer's Petition for Review, the Department did explain the rationale for its selection of

Dr. Zech. (Stipulations of Fact No's. 10, 13 & 15) The fact that the Department's rationale has varied over time does not, in and of itself, prove an abuse of discretion occurred.

The "Employer's Motion and Brief" contained a motion that the Board order the claimant to attend an independent medical evaluation pursuant to CR 35. However, this motion must be denied as being untimely and also not authorized by CR 35 due to the limited issue in this appeal. A CR 35 motion is a discovery motion. Since the written stipulation of facts of the parties had been received prior to the employer making this motion, it obviously is not timely. CR 35(a) authorizes a court ordered medical examination only when the physical condition of the party "is in controversy." While the physical condition of the claimant is an issue between these parties, it is not at issue **in this appeal**. As noted earlier, the scope of our review in this appeal is limited to the question of whether the Department was correct to order the employer to schedule the independent medical examination with Dr. Zech. The subject matter of this appeal is limited to one type of claims administration practice by the Department; we do not have jurisdiction in this appeal to make any determination regarding the claimant's physical condition.

In summary, we conclude that the selection of the IME physician, when a dispute arises, ultimately rests with the director of the Department. The director's selection of Dr. Zech to perform the IME in this case, is reviewed by us on an abuse of discretion standard and is affirmed since the employer did not prove an abuse of discretion occurred. It is not within the scope of our review to issue an order directing the Department to suspend the claimant's benefits for alleged non-cooperation or to require her to show "good cause" for her alleged non-cooperation with the medical examination process. The employer's request for a CR 35 examination of the claimant is denied as untimely and not authorized by CR 35.

FINDINGS OF FACT

1. On December 17, 1991, the claimant, Gail Conelly, filed an application for benefits with Target Stores, the self-insured employer, alleging the occurrence of an industrial injury on December 9, 1991. The self-insured employer accepted the claim. On February 26, 1992, the self-insured employer issued an order closing the claim with medical benefits only as provided. On August 13, 1992, the claimant filed an application to reopen the claim with the Department of Labor and Industries. On December 2, 1992, the Department issued an order reopening the claim. On April 30, 1997, the Department issued an order that affirmed its April 23, 1997 order, that directed the self-insured employer to schedule an independent medical examination with Dr. Ralph K. Zech, approved examiner, and further directed the claimant to attend that examination. On May 13, 1997, the self-insured employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On June 12, 1997, this Board issued an order granting the appeal, assigning it Docket No. 97 3849, and directing that further proceedings be held.

2. On December 9, 1991, during the course of her employment with Target Stores, the claimant sustained injuries to her left ear, jaw and shoulder when a shoplifter struck her. Since this industrial injury, the claimant has received treatment for temporomandibular joint dysfunction from multiple medical providers.

3. On June 22, 1996, the self-insured employer notified the claimant that an independent medical examination (IME) was scheduled for her on August 2, 1996, with Dr. Edmund Truelove, a physician and professor in oral medicine at the University of Washington.

4. In July 1996, the claimant informed the self-insured employer that she would not attend the IME on advice of Dr. Farrand C. Robson, her attending dentist. In a letter dated August 15, 1996, Dr. Robson informed the employer that, "I have advised Ms. Conelly that it would be against good medical advice for her to go to this IME performed by Dr. Edmund Truelove."

5. The self-insured employer referred this dispute to the Department for its intervention, requesting that the claimant's benefits be suspended pending her attendance at an IME.

6. On April 23, 1997, the Department determined that the self-insured employer should schedule an IME of the claimant to be performed by Dr. Ralph K. Zech, a specialist in oral and maxillofacial surgery and an approved examiner. The Department's determination was not arbitrary and capricious.

7. During 1996, Dr. Zech was an approved examiner within the meaning of WAC 296-23-265, while Dr. Truelove was not. By April 23, 1997, both Dr. Zech and Dr. Truelove were approved examiners as defined by that regulation.

CONCLUSIONS OF LAW

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

2. The scope of the Board's review in this appeal does not extend to give it jurisdiction to adjudicate issues regarding the alleged non-cooperation by the claimant with the medical examination process of RCW 51.32.110.

3. The director of the Department did not abuse his discretion in ordering the self-insured employer to schedule an IME for the claimant with Dr. Ralph Zech.

4. The order of the Department of Labor and Industries dated April 30, 1997, that affirmed the Department order dated April 23, 1997, that directed the self-insured employer to schedule an independent medical examination with Dr. Ralph K. Zech, approved examiner, and further directed the claimant to attend that examination, is correct and is affirmed.

It is so ORDERED.

Dated this 30th day of December, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member