King, Susan

SCOPE OF REVIEW

Employer's appeal of order that holds the claim open

The Department issued an order closing the claim that was protested by the worker and, in response, the Department issued an order that cancelled the closure and held the claim open. The employer appealed and presented a prima facie case for closure. In rebuttal, the worker is allowed to present evidence on medical fixity as well as unresolved vocational and time-loss compensation issues encompassed in the original closure order. **….*In re Susan King*, BIIA Dec.,98 10527 (2000)** [*Editor's Note*: The Board's decision was appealed to superior court in King County, Cause No. 00-2-21596-7KNT.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SUSAN A. KING	)	**DOCKET NO. 98 10527, 98 15136 & 98 21636**
	)	
CLAIM NO. T-775671, W-169224 & W-054287	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Susan A. King, by
Leggett & Kram, per
Richard C. Martin and James F. Leggett

Self-Insured Employer, Federal Way School District/
Puget Sound Workers' Compensation Trust, by
Thomas G. Hall & Associates, per
Thomas G. Hall

Department of Labor and Industries, by
The Office of the Attorney General, per
Anastasia Sandstrom, Assistant

The self-insured employer, Federal Way School District, filed an appeal with the Board of Industrial Insurance Appeals on January 23, 1998 (Docket No. 98 10527), from an order of the Department of Labor and Industries dated November 10, 1997 (Claim No. T-775671). The order cancelled prior orders dated June 19, 1997 and October 13, 1997, and ordered that the claim remain open for treatment and action as indicated. **REVERSED AND REMANDED.**

The claimant, Susan A. King, filed an appeal with the Board on June 18, 1998 (Docket No. 98 15136), from a Department order dated June 10, 1998, which rejected the claim (Claim No. W-169224). **AFFIRMED**.

The claimant filed another appeal with the Board on December 7, 1998 (Docket No. 98 21636), from a Department order dated October 30, 1998 (Claim No. W-054287). The October 30, 1998 order closed the claim with no increased award for permanent right knee impairment on the grounds that there was no increased impairment in addition to that previously awarded under Claim No. T-775671. **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 timely Petitions for Review filed by the claimant and the self-insured employer to a Proposed Decision and Order issued on March 30, 2000, in which the orders of the Department dated November 10, 1997, in Claim No. T-775671 (Docket No. 98 10527); June 10, 1998, in Claim No. W-169224 (Docket No. 98 15136); and October 30, 1998, in Claim No. T-775671 (Docket No. 98 21636) were affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings. All rulings not specifically listed are affirmed. For the reasons discussed in the body of this order, the rulings listed below are reversed and any testimony stricken from the record in connection with those objections is hereby restored to the record. 5/18/99 Tr. at page 27, lines 35 and 45; page 42, line 50; page 43, line 26; and 6/28/99 Deposition of David M. Kieras, M.D., page 22, line 3. The testimony of Susan King placed in colloquy in the 5/18/99 Tr. at pages 34-37, is restored to the record.

The Board exhibits are not numbered correctly. There are two exhibits marked Exhibit No. 1. The first Exhibit No. 1 (application for benefits in Claim No. W-169224) was also offered and admitted later as Exhibit No. 2. To preserve the chronology of the exhibits, the earliest Exhibit No. 1 will retain that number. The document formerly designated as Exhibit No. 2 is rejected as cumulative of Exhibit No. 1 and removed from the record. The second document designated as Exhibit No. 1 (application for benefits in Claim No. T-775671) is hereby renumbered as Exhibit No. 2. Exhibit No. 4 is hereby admitted.

We specifically uphold the industrial appeals judge's exclusion of Dr. Kieras' medical records, which were not introduced or offered into evidence by the claimant at the time of Dr. Kieras' preservation deposition. There is no showing that any extenuating circumstance

prevented the claimant form making an appropriate offer at the time of the deposition. There is no basis for admitting the records when submitted at a later time.

On December 14, 1998, Industrial Appeals Judge Linda Tobin issued an Interlocutory Order Establishing Litigation Schedule. For the reasons discussed below, that order is reversed to the extent that it limited the issues on appeal in a manner inconsistent with this Decision and Order.

On June 20, 2000, the claimant filed a Motion to Reconsider Wage Loss and Stay in the appeals assigned Dockets No. 98 10527, 98 15136 and 98 21636.[1] The body of the motion appears to request that the Board and the Department simultaneously reconsider the claimant's time loss rate and stay the reconsideration pending the publication of the Washington State Supreme Court's review of the decision in *Cockle V. Department of Labor & Indus.*, 96 Wn. App. 69 (1999). As we have not yet issued a final order in the consolidated appeals, CR 59 regarding reconsideration does not apply. The motion to reconsider is denied.

With respect to the request for a stay, RCW 51.52.106 requires the Board to issue its final order within 180 days from the date a Petition for Review is filed. Barring direction from a superior tribunal, we are not inclined to stay the issuance of a final order. To the extent the request for a stay is directed to the Department, we note that in the absence of a court order staying the implementation of a Board order, the Department may take further action to administer a claim even if the Board order is on appeal to the Superior Court. *In re Harold Heaton,* BIIA Dec. 68,701 (1986). We certainly cannot direct the Department to stay administration of the claim based on an appeal in an *unrelated* matter.

Nor can we consider the claimant's motion as an amendment to the claimant's Petition for Review to include the issue of time loss rate calculation. The calculation of Ms. King's time loss

[1]We acknowledge receipt of the motion by including reference to it in this Decision and Order.

compensation rate was not included among the multiple issues the claimant raised on appeal. We will not consider it for the first time on review.

DECISION

We grant review because we believe that the hearing judge improperly limited the issues on appeal, because we find that the claimant's left knee condition is proximately related to the accepted industrial injury to her right knee, and because the Department needs to rule specifically on issues left unresolved by the order of January 23, 1998, in Claim No. T-775671 (Docket No. 98 10527).

The factual and procedural histories of these appeals are somewhat complicated, so we summarize them here to aid in the understanding of our decision. Claim Nos. T-775671 and W-054287 both address the right knee condition, so we discuss them together.

Claim No. T-77561 (Docket No. 98 10527) is a claim for a 1994 right knee injury (meniscal tear) that resulted in three surgeries. Before the injury, Ms. King (who has a high school education and some college classes) held two part-time jobs. She worked as a retail cashier and as an elementary school paraeducator for the Federal Way School District. Her injury occurred in the course of the paraeducator job. The job required that she frequently bend, stoop, kneel, run, walk and sit on the floor with small children. As a result of the industrial injury, her attending physician, Dr. David Kieras, restricted Ms. King from frequent bending and kneeling. The school district could not modify the paraeducator job to eliminate those requirements, and Dr. Kieras recommended vocational services. Ms. King was transferred to an on-call pool of secretarial workers. Since September 1996, she estimates that she has worked less than 15 hours per week in that capacity. She had to stop working her cashier job at some point because the extensive standing was hard on her knee. According to the school district, paraeducators work 3 to 7 hours per day, 5 days per week, 180 days per year.

In February 1997, the Department issued an employability determination adverse to Ms. King's claim that she could no longer work as a paraeducator. She filed a dispute on March 26, 1997. The Department issued another letter (with dispute language) restating her employability on April 15, 1997. The claimant filed a timely dispute. On June 10, 1997, the Director upheld the employability determination. On June 17, 1997, the claimant filed another dispute. This should have been forwarded to the Board as an appeal but was not. If the Department had taken any action inconsistent with the Director's vocational determination, that action could have been construed as though the Department opted to treat the June 17, 1997 letter as a protest. *In re Donzella Gammon*, BIIA Dec., 70,041 (1985). However, the Department did not take any action inconsistent with the Director's determination. The June 10, 1997 vocational determination did not include any language limiting the time for the claimant to appeal. Therefore, her appeal filed on December 7, 1998, could legitimately include the issue of vocational services. In fact, under *In re Tony Mandrell*, BIIA Dec., 92 2819 (1993), the claimant's appeal of the vocational issue may be considered to have been filed as of June 17, 1997, when the Department received the claimant's letter.

The Department issued a June 19, 1997 order closing Claim No. T-775671 with time loss compensation as paid to December 1996, and with an award for permanent partial disability equal to 15 percent of the amputation value of the right leg with a short thigh stump. Ms. King filed a timely protest. In response to the protest, the Department issued an October 13, 1997 affirmance order, which it designated as appealable only. The claimant filed a protest from the appealable only closing order. The Department opted to accept the protest as allowed under *In re Donzella Gammon*, BIIA Dec., 70,041 (1985.) It issued an order on November 10, 1997, that "canceled" the orders of June 19, 1997 and October 13, 1997, and held the claim open for treatment and action as indicated. The self-insured employer appealed from the order canceling the closing order.

Claim No. W-054287 (Docket No. 98 21636) is before the Board on an appeal filed by the claimant. The claim arises from an exacerbation of the claimant's right knee condition in June 1997 while she worked in the on-call secretarial position at the Federal Way School District. There is no dispute about the relationship between the exacerbation and the employment. The claim was closed on October 30, 1998. There is no testimony that the knee returned to its state before the exacerbation, and the claimant's medical testimony, as discussed below, supports the need for further treatment for the knee. Furthermore, the Department order of October 30, 1998 closed Claim No. W-054287 with "no increase in permanent partial disability over that previously awarded under Claim No. T-775671." In fact, as of October 30, 1998, there was no final order making an award for permanent impairment in Claim No. T-775671 due to the November 10, 1997 order in that claim which "canceled" the orders of June 19, 1997 and October 13, 1997, and held the claim open for treatment and action as indicated.

In connection with the appeals in Docket Nos. 98 10527 and 98 15136, the industrial appeals judge issued a litigation order on December 14, 1998, that limited the issue on appeal of the claims involving the right knee to medical fixity. The claimant responded with a motion for clarification of the litigation order, to include issues of loss of earning power (LEP), vocational services, treatment or increased permanent partial disability. The hearing judge ruled that the issue was limited as set forth in the litigation order. The claimant requested an interlocutory review of that decision and an assistant chief industrial appeals judge affirmed the ruling that the claimant could not raise these issues because she did not file a cross appeal. The hearings went forward without testimony on the issues raised on the claimant's motion.

We disagree with the assumption that medical fixity was the only consideration in closing Ms. King's claims. The claimant had an ongoing vocational dispute with the Department.

RCW 51.32.095 provides:

> (1) One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers shall utilize the services of individuals and organizations . . . as may be reasonable to make the worker employable consistent with his or her physical and mental status. Where, after evaluation and recommendation by such individuals or organizations **and prior to final evaluation of the worker's permanent disability** and in the sole opinion of the supervisor or supervisor's designee, whether or not medical treatment has been concluded, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment, the supervisor or supervisor's designee may, in his or her sole discretion, pay or, if the employer is a self-insurer, direct the self-insurer to pay the cost as provided in subsection (3) of this section.

(Emphasis added.)

Furthermore, in *In re Merle E. Free, Jr.,* BIIA Dec. 89 0199 (1990), the Board discussed the scope of review on appeal as follows:

> The scope of the Board's jurisdiction is limited by the Department order on appeal, the notice of appeal, and the issues raised thereby. *Lenk v. Dep't of Labor & Indus*., 3 Wn. App. 977, 478 P.2d 761 (1970); *Brakus v. Dep't of Labor & Indus*., 48 Wn.2d 218, 292 P.2d 865 (1956).

Free, at 2-3.

The Department order canceling the claim closing order in Docket No. 98 10527 is silent as to the basis for that action. Our only guide is to look back to the subject matter raised in the orders underlying the order on appeal. Based on the language of the June 19, 1997 closing order, issues considered by the Department at claim closing included time loss, medical fixity and percentage of disability. The record is also clear that the claimant repeatedly and timely contested the Department's vocational determination before the issuance of the closing order.

The self-insured employer's entire case on appeal is that the claim should be closed because the claimant's medical condition had reached fixity. In response to the self-insured employer's prima facie case, the burden shifted to the claimant to show that the Department acted properly in holding the claim open. She could do that by rebutting the medical evidence. She could

also prevail by raising the unresolved vocational issue. If the Department disposed of the vocational issue improperly, then under the terms of RCW 51.32.095, closure was premature. Finally, if the Department erred with respect to the stated ending date of time loss compensation in the canceled order, Ms. King could establish that the cancellation order was incorrect by presenting evidence on that issue. Evidence on entitlement to loss of earning power would also be relevant to the latter determination.

We agree with the industrial appeals judge that the claimant established a need for further treatment of her right knee that is likely to improve her functioning. Both Dr. Kieras and Dr. Kevin McNamara (the self-insured employer's forensic examiner) concluded that further treatment was appropriate. Dr. James Smith, a second forensic examiner, felt no treatment was appropriate. Dr. MacNamara recommended surgery for what he diagnosed as bilateral chronic degenerative tears of the menisci. However, this extreme measure seems to be outweighed by mild findings on diagnostic imaging. More reasonable is Dr. Keiras' suggestion that intra-articular injections are worth a trial to see if they relieve the pain and limitations in the claimant's right knee. While the self-insured employer tried to characterize the injections as "not curative," the definition of medically necessary treatment includes measures that will restore function even if they do not reduce disability.

Because we remand the case to the Department with direction to provide treatment and to allow the left knee condition under Claim No.T-775671 as discussed below, we will not remand the appeal to the hearing process for further evidence on the time loss, loss of earning power, and vocational issues. The allowance of the left knee condition may well affect the Department's consideration of those matters.

Claim No. W-169224 (Docket No. 98 15136) involves the claimant's left knee, which began aching and giving way about the time of the third arthroscopic surgery on her right knee. Whether

one accepts that the condition is a meniscal tear as posited by Dr. McNamara or that it is degenerative arthritis as diagnosed by Dr. Kieras, both of those physicians testified that the left knee condition is due in whole or in part to the claimant favoring[2] her right knee due to the industrial injury. We, again, find the analysis of Dr. Kieras as the attending physician to be the more reasonable of the two.

In the order on appeal, the Department rejected the left knee condition as an independent injury. The Department did not pass on whether the condition might be related to the right knee injury. The Department was not required to issue a joint order under WAC 296-14-420 because both claims arose with the same employer. In the Proposed Decision and Order, the industrial appeals judge opined that the Department may choose to adjudicate whether there is a relationship between the right and left knee conditions. In fact, causation was litigated at hearing, and the right knee condition is more probably than not causally related to the industrial injury of December 8, 1994. On remand, the Department is directed to accept the left knee condition as a consequence of that injury and to provide benefits as appropriate.

There is testimony in the record that Ms. King's obesity was also a factor in the development of her left knee condition and in ongoing symptoms in her right knee. With respect to the former, the residuals of the original injury need only be one of the causes of the left knee condition to invoke coverage. With respect to the latter, Ms. King was obese when she was injured. We take the claimant as we find her. On the other hand she has lost in the neighborhood of 60 pounds on her own since the injury, so her request for a medically supervised weight loss program is not well taken.

[2] The PD&O consistently refers to the claimant "favoring" her left knee. As defined in the Merriam Webster Collegiate Dictionary, one definition of favor is "c : to treat gently or carefully <~ed his injured leg>." We believe the industrial appeals judge meant to say the claimant testified that she favored her *right* leg after the injury.

On remand, we are concerned that the Department not perpetuate the ambiguity inherent in its November 10, 1997 order in Claim No. T-775671. The order canceled prior orders dated June 19, 1997 and October 13, 1997, and ordered that the claim remain open for treatment and action as indicated, but it did not directly address the reasons for the reversal. It did not specifically reinstate the time loss compensation ended on December 3, 1996, or indicate whether vocational services were being re-evaluated or whether loss of earning power was under review for any period. All of these issues remain viable and subject to re-evaluation by the Department in light of the allowance of the left knee condition. As in any instance, where a dispute arises at the Department level over the nature and extent of the benefits to be provided, the Department must respond to these concerns by entering a written decision as required by RCW 51.32.055(6).

FINDINGS OF FACT

1. The claimant, Susan A. King, filed an application for benefits with the Department of Labor and Industries on April 11, 1995, alleging that she sustained an injury on December 8, 1994, during the course of her employment with the Federal Way School District. The claim was allowed and benefits were provided (Claim No. T-775671). On November 10, 1997, the Department issued an order canceling the orders of June 19, 1997 and October 13, 1997, and ordering that the claim remain open for authorized treatment and action as indicated. On December 30, 1997, the self-insured employer filed an appeal with the Department. The Department forwarded the appeal to the Board on January 23, 1998. On March 4, 1998, the Board granted the appeal subject to proof of timeliness, assigning it Docket No. 98 10527.

2. The claimant, Susan A. King, filed an application for benefits with the Department on February 11, 1998, alleging that she sustained an injury or developed an occupational disease on or about June 4, 1996, during the course of her employment with the Federal Way School District (Claim No. W-169224). On June 10, 1998, the Department issued an order affirming an order dated February 20, 1998, that denied the claim on the following grounds: no proof of a specific injury at a definite time and place in the course of employment, worker's condition is not the result of an industrial injury, and bills for services or treatment rejected except those used to make this decision. On June 18, 1998, the claimant filed an appeal with the Board of Industrial insurance Appeals. On August 3, 1998, the Board issued an order granting the appeal, assigning it Docket No. 98 15136.

3. On June 23, 1998, the claimant filed an application for benefits with the Department alleging that she sustained an injury on June 18, 1997, during the course of her employment with the Federal Way School District. The claim was allowed and benefits were provided (Claim No. W-054287). On October 30, 1998, the Department issued an order closing the claim with no award for permanent impairment. The order indicated that there was no increase in the claimant's permanent impairment over that previously awarded under Claim No. T-775671. On December 7, 1998, the claimant filed an appeal with the Board of Industrial Insurance Appeals. On January 4, 1999, the Board issued an order granting the appeal, assigning it Docket No. 98 21636.

4. On December 8, 1994, the claimant injured her right knee during the course of her employment as a teacher's assistant with the Federal Way School District. While chasing a student who was leaving the school grounds, Ms. King experienced a painful popping sensation in her right knee. As a proximate cause of the December 8, 1994 industrial injury, the claimant suffered a right meniscal tear status post right arthroscopy and medial and lateral meniscectomies.

5. As of November 10, 1997, the claimant's condition proximately caused by the December 8, 1994 industrial injury was not fixed and stable and had not reached maximum medical improvement. Necessary and proper medical treatment does not include a program of medically supervised weight loss.

6. On or about June 18 1997, the claimant was working as a library clerk with the Federal Way School District when she stepped off a chair and experienced a pop in her right knee. As a proximate cause of this injury, the claimant suffered an exacerbation of her right knee condition.

7. As of October 30, 1998, the claimant's right knee condition proximately caused by the June 18, 1997 industrial injury was not fixed and stable and had not reached maximum medical improvement. Necessary and proper medical treatment does not include a program of medically supervised weight loss.

8. On or about June 4, 1996, the claimant began to develop symptoms in her left knee. These symptoms were proximately caused by the effects of the right knee injury of December 8, 1994.

CONCLUSIONS OF LAW

1. The appeals were timely filed. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of these appeals.

2. As of November 10, 1997, the claimant was in need of further necessary and proper medical treatment for the right knee condition proximately caused by the December 8, 1994 industrial injury within the meaning of RCW 51.36.010.

3. The claimant's left knee condition is the result of the December 8, 1994, industrial injury within the meaning of RCW 51.08.100.

4. With respect to Docket No. 98 10527, the order of the Department of Labor and Industries dated November 10, 1997 (Claim No. T-775671) is reversed. The claim is remanded to the Department with direction to issue a further order which directs the self-insured employer to provide further necessary and proper medical treatment; to accept the claimant's left knee condition as proximately caused by the industrial injury of December 8, 1994; and to provide further benefits as is appropriate under the law and facts.

5. With respect to Docket No. 98 10527, the order of the Department dated June 10, 1998 (Claim No. W-169224) is incorrect and is reversed. The claim is remanded to the Department with direction to the self-insured employer to provide further necessary and proper medical treatment.

6. The order of the Department dated October 30, 1998 (Claim No. W-054287), is correct and is affirmed (Docket No. 98 21636).

It is so ORDERED.

Dated this 10th day of August, 2000.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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