Update 2022

DLI to BIIA

2021 BIIA Sig Dec

2021 Appellate Dec

Grand Compromise

Common Law v. Industrial Insurance Act

- Fault
- Burden
- Defense
- Costs

1911 Industrial Insurance Act

- Support by business and labor
- Exclusivity and Certainty
- Suit against State of Washington not employer
- Extra-hazardous employment

Department of Labor and Industries

- Administrative agency v. court
- Joint Board
  - Voluntary
  - Mandatory
- Hearing Examiners

Board of Industrial Insurance Appeals

- Independent agency created by Legislature
- Rules of Evidence and Civil Rules
- Exhaustion of Administrative Remedy
- Jurisdiction
- Sole Record

Where Are We Now

What Do You Prefer

Cordova v. City of Seattle, 20 Wash.App. 139 (2021)

- The “sum” of communications must notify the Department of a claim for benefits or amount to an application for benefits.
- The Department did not engage in misconduct when it failed to advise the beneficiary of her rights because the Department’s statutory duty was not triggered.

Smith v. Dep't of L&I, 22 Wash.App.2d 500

- Only the worker can "set forth in writing the name and address" of their representative
- The duty to communicate letters, orders, and other communications to the representative is not triggered until a signed authorization is received

Bradley v. City of Olympia, 19 Wash.App.2d 968

- Presumption cannot be rebutted “with evidence that firefighting activities in general do not cause bladder cancer”
- Employer must show cancer was caused by non-occupational factors on a more probable than not basis, e.g. use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and other activities.

In re Darla Ellinghausen, BIIA Dec. 194229 (2021)

- Vocational expert testimony that a worker does not have the vocational skills to perform a job is sufficient for a prima facie case and preponderance of evidence that the worker is unable to work and entitled to time loss or a pension.
- There can be a worsening of the condition, even if there is not a worsening of PPD.

In re Glenn Hannaman
BIIA Dec., 19 12787

- In Hanford presumption cases, the DOE has the burden of production and the burden of persuasion.
- **Production:** burden to produce sufficient evidence to justify a finding or avoid a contrary ruling, i.e. a prima facie case
- **Persuasion:** burden to convince the fact finder to view facts in their favor.
- “As the party most able to monitor employee exposure to the chemicals it asked employees to work with, and the party most able to retain those records for later use, DOE can also meet its higher burden of persuasion by creating, maintaining, and producing records which demonstrate that its employees are not exposed to hazardous substances in sufficient quantities to result in conditions covered by the Hanford presumption statute.”

In re Randall Pruden
BIIA Dec. 20 14546 (2021)

- RCW 51.32.240: Requires the order on appeal to be the order that actually paid the benefits, i.e. the final and binding 2007 order which paid the PPD and properly paid the PPD
- RCW 51.32.080: Requires deduction of PPD from pension, and does not have a waiver provision
- RCW 51.32.220: allows waiver of recovery if against equity and good conscience
- If the legislature intended to grant authority to waive under RCW 51.32.080, it would say so
- The authority to waive repayment is to correct Department mistakes and errors, not attorney's mistakes, misconduct, or fraud

In re Kathleen Houlihan
BIIA Dec. 19 26282 (2021)

- If the position is a full-time telework position, the "job is not one that is constrained by geographic boundaries as is typically the case"; WAC 296-19A-010(4) is not to be interpreted so "narrowly". The market place may be "nationwide" if the positions are available nationally.

In re Robert Backstein
BIIA Dec., 20 10293 (2021)

- RCW 51.28.070 & RCW 51.04.080 requires “signed authorization before the Department is allowed to send orders to a representative of an injured worker”; even if the Department knew, or should have known, about the representation.
- The inappropriate mailing of an order in one claim contrary to the statute, is a mistake, not establishment of custom and practice/policy
- “Liberal construction applies to interpretation of statutes, not the weighing of facts.”

In re Brent Klein, BIIA Dec., 19 16443 (2021)

- You should not infer additional facts from a stipulation of parties.
- “A finder of fact is not required to accept a medical expert's opinion merely because the parties agree what the medical expert's opinion is.”
- The Board can only take judicial notice of final Board orders; i.e. order that “identify specific facts that have been established through the adjudicative process”

In re Katherine Bard, BIIA Dec., 19 22559 (2021)

- An order states the status of a claim as of the date of the order. A subsequent order is a “different and new claim determination and is not one that can be considered res judicata”.
- Although one cannot re-litigate acceptance of the condition as of the date of the original order or original closing order, one can litigate whether they developed a claim related new or aggravated condition since the date of the previous order through the date of the current order.
- May be difficult to prove “became related in the interim or developed in the interim”. Can you think of ways that can be proved?

In re Todd Saeger, BIIA Dec., 19 18448 (2021)

- The segregation of the depressive condition on 12/6/17 is “inconclusive as to segregation of the condition”; it is “limited to a declaration that Mr. Saeger did not have depression as of the date of the order”.
- Preponderance of evidence that the worker later has claim related depression during the aggravation period, is prima facie evidence of aggravation

In re Matthew Riggs, BIIA Dec., 19 23004 (2021)

- “Neither a positive diagnosis nor recommended curative treatment is required to establish entitlement to further diagnostic treatment”

In re Jeremy Parsons, BIIA Dec., 19 22500 (2021)

- The use of either a 6 month or 12 month period is allowed under RCW 51.08.178(1), and “may be fair and reasonable, depending upon the circumstances, as the Department's witness, Ms. Kuntz testified”
- “Washington's workers' compensation system is "to be designed to focus on achieving the best outcomes for injured workers." The Department chose a six-month period, in part, to avoid penalizing Mr. Parsons for the time he was on strike. Considering that RCW 51.08.178(1) does not state specifically how the Department is to calculate the number of hours a worker normally is employed, and Lakeside has not shown that the result using a 6-month period to determine Mr. Parsons' hours is significantly different from using a 12-month period, the Department's method was reasonable”

Clark County v. Maphet
10 Wash. App. 2d 420

- “If the SIE authorizes surgery, it has accepted the condition”
- If the SIE authorizes surgery, the SIE has accepted the condition treated; and is therefore responsible for the next surgery for the condition
- “A SIE may authorize treatment only for conditions proximately caused by the industrial injury and conditions related to treatment provided under the claim”.
- The 5th surgery was authorized to remove scar tissue related to the injury, “the fact that the doctor performed a release during that surgery that led to complications is a consequence of that authorized surgery” and led to the need for the 9th surgery – Compensable Consequences

Magdaleno v. Dep't of Labor & Indus. 15 Wash.App. 2d 1031 (Unpublished)

- If a worsened condition is not proximately traceable to the industrial injury or a surgery allowed for the injury, then it is not a consequence of treatment.
- WAC 296-20-01002 is not triggered when the surgery which caused a new problem was due to an unrelated condition and was not authorized under the claim

In re Janice Brinson-Wagner, BIIA Dec., 20 27444 (2021)

- If surgery is authorized as an aid to recovery, and the surgery leads to further complications in a non-related condition that previously impeded recovery of a related condition, once the related condition is fixed and stable, there is no ongoing responsibility to treat complications arising from the unrelated condition; i.e. the compensable consequences doctrine does not apply.

- WAC 296-20-055: "The department or self-insurer will not pay for treatment of an unrelated condition when it no longer exerts any influence upon the accepted industrial condition."

In re Jeremy Carrigan, BIIA Dec., 20 12899 (2021)

- Authorization of epidural injections, which can be therapeutic and diagnostic, does not constitute acceptance of degenerative conditions
- Worker must establish causation based on a preponderance of evidence; or that the employer, when it authorized and paid for the injections, accepted the conditions.

In re Samuel Pena, BIIA Dec., 19 14287 (2021)

- Payment for medication does not require acceptance of a condition.
- Express authorization of numerous surgeries, as in *Maphet*, is distinguished from paying for medicine.
- The worker must show that payment was made for expressly authorized treatment; it is the authorization, not the payment alone that triggers acceptance. Otherwise, the payment could be made for a variety of reasons, e.g. aid to recovery, or adjudicator error

Ellerbroek v. CHS INC, 13 Wash.App.2d 278 (2020)

- Benefits are due the date the Department order is issued
- The employer must pay benefits “immediately without regard to its intention to seek a stay”
- A penalty “shall be paid” if there is an unreasonable delay or refusal to pay benefits.

In re Josannah Hopkins, BIIA Dec., 13 21202 (2015)

- This decision was removed from the significant decision list due to legislative amendment of RCW 51.48.017
- If there is an unreasonable delay or refusal to pay, the SIE shall pay a penalty of *"(a) the amount due or (b) each underpayment made to the claimant. For purposes of this section,* 'the amount due' means the total amount of payments due at the time of the calculation of the penalty."