# 2017

# Year in Review

Presented by John Klor

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# 2017

## Areas of Review:

- WA Court Updates
- BIIA Legal Updates

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# 2017

# WA Courts Updates

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# 3RD PARTY RECOVERY
## *Carrera v. Olmstead*, 401 P.3d 304 (Wash., 2017)

- This is a 3rd party recovery case where injured worker assigned cause of action to the Department of Labor and Industries. The trial court entered partial summary judgment in favor of the defendants. The Court of appeals reversed and remanded, holding that the Department could recover damages in the 3rd party action and that the action was not statutorily time barred.

- Held: The Supreme Court held that the action was not statutorily time barred because the statute of limitations does not apply. The state is exempt under RCW 4.16.160. The Court distinguished this case from *Tobin* because the Department was seeking recovery versus worker seeking damages in own right.

# FIREFIGHTER'S PRESUMPTION

## *Spivey v. City of Bellevue*, 389 P.3d 504 (Wash. 2017)

- Firefighter's presumption cases, including *Larson*, adopted the **Morgan theory** to the presumption: once a firefighter shows that he or she suffers from a qualifying disease, RCW 51.32.185(1) imposes on the employer the burden of establishing otherwise by a preponderance of the evidence.

- To be clear, this is a burden both to produce contrary evidence and to persuade the finder of fact otherwise. The court narrowly applied this rule to the presumption in RCW 51.32.185, not a broad general application. The Court held that the statute thus shifts the burden of production and persuasion to the employer.

# OCCUPATIONAL DISEASE EVIDENCE

## *Street v. Weyerhaeuser Co.*, 339 P.3d 1156 (Wash., 2017)

- This case raised the issue whether medical expert testimony is required to show that a contended occupational disease "arose naturally" from the distinctive conditions of employment, just as medical testimony is required to demonstrate a disease "arose proximately" from employment.

- WSIA and a number of allied employer organizations filed an *amici curiae* brief supporting Weyerhaeuser's position that the court should, like L&I and the Board, require such testimony. The Court instead held on a 9-0 basis that expert medical evidence is not required to prove an occupational disease arose from the distinctive conditions of a claimant's particular employment. The court would allow, as in this case, lay testimony from supervisors, co-workers, and so on to satisfy the requirement.

# COMPENSATION COMPUTATION

## *James L. Miller v. Dept. Of L&I*, Et Al, 392 P.3d 1170 (Wash. Ct. App., 2017)

- This is a Cockle case. Health care benefits were not provided at the time of injury because the Claimant had not completed his 90 day orientation waiting period. The Superior Court ruled that health care benefits should have been included because the benefits would be established once waiting period was over.

- Held: The Court reversed based on plain reading of RCW 51.08.178(1) which specifies …"the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed…"

# APPEALING EXTENT OF DISABILITY

## *John G Gehman, App vs. Department Of L&I*, Dckt. No. 75409-2-1 (Wash. Ct. App., Oct. 9, 2017) (unpublished opinion)

- The worker was injured when he fell and landed on his outstretched hand. The Department allowed the claim and later closed it with PPD for his right arm and a category 2 mental health impairment. The Board affirmed the Department order and the trial court affirmed the Board's decision.

- Claimant appealed and contended there were: "multiple contradictory medical opinions accepted as valid determinations."Claimant did not present any medical witnesses on his appeal. He attempted to offer certain medical records but they were not allowed under the rule against hearsay.

- Held: <u>When an appeal involves the extent of disability produced by an injury, the claimant must produce expert medical witness testimony to support his or her claim of eligibility for benefits of coverage.</u>

# SPECIFICITY OF PROTEST LETTER

## *Andrew R. Ahrens v. Department of L&I*, Dckt. 48390-4-II (Wash. Ct. App., Mar. 14, 2017) (unpublished opinion)

- Following Claimant's industrial injury, the Department issued three orders: 1) an order stating that the Department was responsible for the lumbar strain; 2) an order superseding the first order and segregating the lumbar strain, and 3) the wage order at issue.

- Claimant wrote a first protest letter to the Department which did not include any discussion of the wage order, but only addressing the segregation order. After the Department affirmed the segregation order, claimant wrote a second letter protesting the wage order, which was not written within 60 days of the wage order issuance. Claimant contended that the Department should have realized his first letter constituted a protest of the wage order as well because the issues were connected.

- Held: The Court found that the plain text of Claimant's first protest letter did not refer to the wage order and that there was nothing in that letter to suggest he was protesting the wage order as well. It found a reasonable person would not have concluded that the first protest letter intended to protest the wage order as well. Therefore, the Court affirmed summary judgment on part of the Department.

# ODD LOT JOB DOCTRINE AND PTD

## *Brandon Foster v. Frito Lay, Inc.*, Dckt. 49475-2-II (Wash. Ct. App., Oct. 3, 2017)(unpublished opinion)

- Claimant appealed affirmation of the Board's determination that he was not totally and permanently disabled.

- Claimant's vocational expert witness submitted exhibits outlining 5 positions and testified claimant's injury impeded his ability to work in each of the 5 occupations. The burden remains with claimant to show PDT unless he makes a prima facie cause showing under the odd lot doctrine that he cannot maintain employment of a general/light or sedentary nature. If claimant shows this, the burden shifts to the employer to show that special work of a non-general nature would be available.

- Held: There was evidence claimant was able to perform jobs other than the 5 occupations he listed, conflicting evidence whether he was able to perform the 5 occupations and office work, and expert opinion that claimant exaggerated his visual impairment during testing.

- Claimant did not successfully show he could not obtain and maintain employment of general light or sedentary nature, therefore the burden did not shift to the employer under the odd lot doctrine.

- Supreme Court review has been requested and is pending.

# JONES ACT

## *Jeremy Gibson v. American Construction Company*, 402 P.3d 928 (Wash. Ct. App. 2017)

- A worker was injured aboard a vessel moored at his employer's dock. Plaintiff and employer entered into an agreement to settle under Federal Longshore and Harbor Workers' Compensation Act (LHWCA) that did not expressly resolve plaintiff's status as a maritime worker as a non-seaman.

- Therefore, plaintiff was not precluded to file a negligence action as a seaman under the Jones Act. Further, election of remedies, equitable estoppels, and collateral estoppels did not apply to bar his Jones Act claim.

# DISTRIBUTION OF RECOVERY

## *Timothy Nelson v. Department Of L&I*, 392 P.3d 1138 (Wash. Ct. App., 2017)(published in part)

- Claimant settled part of his claim against the at fault motorist. At the time of distribution, there were still unresolved claims for product liability and highway design defects that were not likely to be successful.

- Claimant objected to the distribution order on the theory that the costs and fees allocated were overstated in light of the overall ultimate outcome.

- Held: The 3rd party distribution order was upheld because the plain meaning of RCW 51.24.060 indicates that a distribution of a recovery only requires inclusion of the attorney fees and costs associated with the resolved claims that caused the recovery and triggered the distribution.

# COMMUNICATION OF DEPARTMENT ORDER

## *Renton School District #403 v. Daniel D. Dolph, Et Al*, Dckt. No. 75379 (Wash. Ct. App., Nov. 27, 2017)(unpublished decision)

- The Department failed to mail plaintiff a copy of the closing order. 2 years later, the Department obtained the current address and sent plaintiff the order. Plaintiff appealed within 60 days. The employer contends the appeal was untimely because plaintiff's receipt of the closing order from a third party, the TPA, triggered the 60-day deadline to appeal.

- Held: Only the Department can communicate an order. The employer cannot cure the Department's failure to properly mail a closing order to an injured worker by sending him a copy of the order.

# WAGE ORDER – LEGAL MARRIAGE

## *Alonso Veliz v. Department of L&I*, Dckt. No.33303-5-III ( Wash. Ct. App., Jul. 11, 2017)(unpublished opinion)

- This decision followed the Supreme Court's decision in *Birrueta v. Department of L&I*, 186 Wn.2d 537, 379 P.3d 120 (2016) and affirmed a Department order that corrected a previous final wage order on the basis that claimant was not legally married.

- There is a long and interesting dissent that would have reversed based on claimant's good faith belief that he was legally married according to Mexican custom where people are frequently unable to obtain or afford the proper civil documentation of marriage. The dissent would have remanded the matter to the Department to determine if they had a legally recognizable relationship under the laws of Mexico where they initially cohabitated and bore children.

- The dissent has to get around the fact that Mexico is a code nation that does not recognize the common law. Several code nations including some states in Mexico recognize concubinage relationships that afford rights similar to marriage. The dissent also discusses law in Washington that has recognized "committed intimate relationships" for the purpose of protecting property rights.

# SAFETY VIOLATION

## *Western Oilfields Supply, d.b.a. Rain for Rent v. Dept Of Labor & Industries*, 2017 Wash. App. LEXIS 2625 (November 20, 2017)

- A worker suffered a hand injury after reaching in a pipe fusion machine to remove shavings without deactivating the machine's hydraulics . The manufacturer's manual instructs users to turn off hydraulics before reaching in unit. Employer did not provide the manual with the machine nor instruct the worker to read it. The Department cited the employer under WAC 296-155-040(2).

- Held: The Court upheld the Board's upholding of a citation for the employer because: 1) the employer failed to provide a workplace free of hazard, 2) the hazard was recognized, 3) the hazard caused serious physical harm, and 4) there were feasible means to eliminate or materially reduce the hazard.

- Feasible means to reduce the hazard would include attaching the operating manual to the machinery, insisting employees read the manual, or providing instructions on how to safely operate a dangerous machine.

# LIBERAL INTERPRETATION OF THE IIA

## *Lisa K. Johnson v. Liberty Mutual Insurance Co.*, Dckt. 76026-2-1 (Wash. Ct. App., Jan. 17, 2017)(unpublished opinion)

- The employer appealed the trial court's judgment reversing the Board's affirmation of the Department's decision to deny claimant benefits for neurological thoracic outlet syndrome.

- Held:
- 1) The court agreed with the Department that the trial court made a prejudicial error when instructing the jury that: "the benefit of the doubt belongs to the injured worker." While courts liberally interpret ambiguities in the Industrial Insurance Act in favor of its beneficiaries they do not apply liberal construction to determine facts.

- 2) The court disagreed with the Department that the trial court made a prejudicial error when instructing the jury to: "give the benefit of the doubt" to plaintiff and "disregard pre-existing frailties and infirmities. The Department claimed this statement shifted the burden of proof from the worker to the Department. The Court disagrees with the Department and stated that the statement accurately reflects the idea that a claimant is to be taken the way he or she is.

# SUBSTANTIAL EVIDENCE TO PROVE PPD/PTD

## *Randy Johnson v. Clark Construction Group Inc.*, Dckt. 75858-6-1 (Wash. Ct. App., Nov. 20, 2017)(unpublished opinion)

- Claimant was a carpenter who developed carpal tunnel syndrome. He had pre-existing depression and anxiety and his mental health deteriorated after the injury. The employer challenges sufficiency of the evidence to support jury findings that: 1) claimant's occupational disease proximately caused his mental condition, 2) he was temporarily totally disabled at one point, and 3) that he became permanently totally disabled.

- When claimant's mental health expert witnesses initially formed their opinions, they were unaware of some information relevant to claimant's mental health. Their opinions remained the same after learning the additional information. Because the expert witnesses' affirmed their original conclusions about causation after they had all the material information, substantial evidence supports the jury's finding of proximate cause.

- Furthermore, although claimant's testimony that he was "willing and able to work" during the relevant period does not establish ability to work or negate medical testimony that claimant was not able to work. Lastly, while now witness testified that Plaintiff was permanently and totally disabled, the record as a whole contains enough evidence for the jury to infer he was permanently and totally disabled.

# SOCIAL SECURITY OFFSET

## *Owen M. Henderson v. Department of L&I*, Dckt. No. 73561-6-1 (Wash. Ct. App., Jan. 17, 2017) (unpublished opinion)

- Claimant sustained an injury in the course of work and his claim was allowed. 20 years after the injury, claimant notified the Department that he was authorized to receive Social Security retirement benefits.

- Under RCW 51.32.220 and 51.32.225, workers' compensation benefits must be reduced by the amount a person receives in Social Security benefits or by an amount calculated under the Social Security Act, whichever is less. Claimant argued that because only state law provides an offset for Social Security retirement income, average current earnings should be defined by the definition of wages in Title 51.

- Held: RCW 51.32.220 and 51.32.225 unambiguously require the Department to calculate the offset under 42 U.S.C. 424(a) using average current income as defined by the statute.

# JURY INSTRUCTIONS – AP SPECIAL CONSIDERATION

## *Neil Beck v. Glacier Northwest, Inc.*, Dckt. No. 49246-6-II (Wash. Ct. App., May 23, 2017)(unpublished decision)

- Claimant appealed from a jury verdict affirming closure of his claim. He argued the court erred in instructing the jury that special consideration should be given to the testimony of the attending physician.

- Held: The court followed *Clark County v. McManus* Supreme Court decision that the instruction that special consideration should be given to the testimony of the attending physician is mandatory. Even where the instruction is given, the weight and credibility given to the attending physician's testimony is up to the jury. Here, the employer was relying on the attending physician's opinion.

- Primary justification for the rule is that an attending physician is not a paid expert but an unbiased expert who is "better qualified

# JURY INSTRUCTIONS - PROXIMATE CAUSE

## *Alla Koval v. Auburn Regional Medical Center, Inc., Et Al.*, Dckt. No. 74664-2-1 (Wash. Ct. App., November 6, 2017)(unpublished opinion)

- Claimant injured her right knee at work. Her claim was allowed and closed in 2010. The Department denied claimant's application to reopen her claim in 2013. In 2011 claimant fell at work again and injured both knees. That claim was closed in 2012 with no PPD. Claimant appealed the denial of reopening and the closure of the second claim.

- Claimant argued that the trial court's instruction on proximate causation and pre-existing conditions misstated the law of proximate cause. The jury instruction read, in relevant part, "… There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence."

- Held: The Court upheld both Department orders after finding the jury instruction correctly stated the law on proximate cause and pre-existing conditions. The court said this is consistent with Washington's "multiple proximate cause theory."

- Supreme Court review has been requested and is pending.

# UNEMPLOYMENT AS WAGES

## *Margaret M. House v. Department of L&I*, 395 P.3d 1056 (Wash. Ct. App., 2017)

- When claimant's hours were temporarily and involuntarily reduced, she filed for and received unemployment compensation based on the reduction of her hours.

- The worker then injured herself and was unable to work so she began receiving TTD benefits. As a result, her unemployment compensation was terminated. The Department issued a wage order that did not include her unemployment compensation.

- Held: Unemployment compensation payments are not wages for the purpose of time loss benefit calculation.

# WHAT CONSTITUTES A PROTEST

## *Boyd v. City of Olympia and Dept of L & I*, 403 P.3d 956 (Wash. Ct. App., 2017)

- An injured worker did not protest an order closing his claim. Within the protest period one of his doctors sent a chart note and bill to the City that was not construed as a protest. Later, claimant appealed the Department's final order and argued the receipt of the chart note by the City constituted a timely protest. The Board ruled that the chart note and bill in question did not put the City or the Department on notice that Boyd was protesting claim closure.

- Held: The Court affirmed summary judgment in the City and Department's favor. The Board's standard of review as articulated *in re Lambert, 91 0107(1991),* generally requires that to be considered a protest, the communication must be one that reasonably puts the Department on notice that the worker is taking issue with some Department action.

- These kinds of cases are necessarily very fact driven. In this case, the main thrust of the chart note and bill in question were addressing conditions not allowed under the claim. There was an indirect reference to the allowed low back injury, which was not sufficient in the Court's opinion to put a self-insured employer or a Department adjudicator reasonably on notice that the claimant was protesting closure of his claim.

- Supreme Court review has been requested and is pending.

- Bill Masters of Wallace, Klor, Mann, Capener & Bishop, P.C. briefed and argued this case on appeal. Bill can be reached bmasters@wkmcblaw.com.

# CONSTITUTIONALITY OF HTTC

## *Murray v. Dept. of L & I*, 403 P.3d, 949 (Wash. Ct. App., 2017)

- Worker appealed the Superior Court's order granting the Department's motion for summary judgment affirming the Board's decision to deny payment for hip surgery. The Health Technology Clinical Committee (HTTC) concluded the proposed surgery was not a covered procedure under state health care law.

- Held: The court affirmed the Board's decision to uphold the Department's decision that based on the HTTC's decision, the proposed hip surgery was not a covered procedure under state health care law. Self Insured Employers in Washington are included in HTTC decisions. Essentially, the Court affirmed that individualized challenges to HTTC decisions will not be allowed. Because claimant had no vested right protected by procedural or substantive due process, the legislature's delegation of power to the HTCC was constitutional.

- Supreme Court review has been requested and is pending.

# EMPLOYER/EMPLOYEE RELATIONSHIP

## *Judson D. Forks v. Encon Washington LLC*, Dckt. No. 48852-3-II (Wash. Ct. App. March 21, 2017) (unpublished opinion)

- In the course of employment with Aerotek, a staffing agency, worker was injured while working on the job site for EnCon Washington, LLC. Plaintiff sued EnCon for negligence. The trial court dismissed the complaint relying on the IIA's bar of suits against employers for negligence. Claimant argued that he was not EnCon's employee.

- Claimant was assigned to EnCon under an agreement between EnCon and Aerotek. The agreement read that for worker's compensation purposes only, claimant was considered to be an employee of Aerotek client Encon. The agreement also assigned responsibility to EnCon to control, manage and supervisor work of contract employers.

- Held: Respondent's summary judgment granted and affirmed. Employer/employee relationship exists when: 1) the employer has the right to control the servant's physical performance of his duties, and 2) there is consent by the employee to this relationship. Plaintiff's argument that he did not consent to the relationship fails because the contract expressly stated he would be an employee of EnCons; the agreement specified it was EnCon's responsibility to control, manage, supervisor the work of contract employees; and EnCon paid plaintiff's wages.

# 2017 Board of Industrial Insurance Appeals Tentative Significant Decisions

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# TOTAL DISABILITY/LIGHT-DUTY/ TRAINING AS WORK

## *In re Aaron E. Richardson, Dckt. No. 15 17069 (January 11, 2017)*

- The Board held that a training program offered by the employer's retro group at a resource center for various employers was a valid light-duty job offer under RCW 51.32.090(4). The Board rejected the notion that training isn't meaningful or respectful work. This job offer of training was in keeping with the legislative goal that employers maintain an employment relationship with their injured workers who are receiving TLC benefits.

# PROCEDURE/JUDICIAL NOTICE

*In re Virginia C. Peterson, Dckt. No. 15 21676 (March 3, 2017)*

- The Board won't take judicial notice of the diagnostic criteria for CRPS found in the AMA Guides to the Evaluation of Permanent Impairment because permanent impairment was not an issue in this appeal. Significantly, there is no WAC instructing physicians to use the AMA Guides for diagnostic purposes as in the case of permanent impairment evaluation under WAC 296-20-2015. [Contrast with *In re Bertha Ramirez, BIIA Dec., 03 14933 (2004)*.]

# AGGRAVATION/SPINAL CORD STIMULATORS PREVIOUSLY IMPLANTED

## *In re Steven G. Rochelle, Dckt. No. 15 24143 (March 15, 2017)*

- Under a pilot project, the Department had paid to implant a spinal cord stimulator ("SCS") in the worker's spine. After claim closure, the SCS's battery failed and the worker applied for claim reopening. The Department denied reopening because Washington law has since prohibited the Department from paying for SCS devices. The Board held that notwithstanding the new Health Care Authority law barring SCS devices, the Department remains obligated to repair or replace the SCS's battery. Once the worker received implantation of the SCS, he obtained a vested right to repair or replacement under WAC 296-20-1102 (governing equipment malfunction).

# PROXIMATE CAUSE OF INABILITY TO WORK

## *In re Sista Leetta, Dckt. No. 15 24959 (May 1, 2017)*

- The Board overrules the 1982 significant decision In re Carlton Hague, BIIA Dec., 59,31 (1982), and in doing so clarifies that the legal standard requirement for showing a sufficient causal nexus between and industrial injury and an inability to work to receive total disability benefits is proximate cause not significantly contributing cause.

# WISHA/SERVICE OF CITATION AND NOTICE

## *In re Stoneridge Contractors, Dckt. No. 16 W0085 (July 5, 2017)*

- The delivery of a citation and notice by certified mail to the proper address for an employer creates a rebuttable presumption of communication to the employer. Here the employer successfully rebutted the presumption by showing that the party who received the certified mail wasn't an authorized agent. The party who received the mail was the UPS Store, a mail agent for the employer, and the employer proved it had directed the UPS Store to refuse acceptance of all certified mail. The UPS Store failed to do so.

# WISHA/DEPARTMENT'S RIGHT TO VACATION CITATION

## *IN RE Sposari, Inc., dba Mr. Rooter Plumbing, Dckt. No. 15 W0358 (July 27, 2017)*

- In an appeal from a CNR, when the Department requests that the Board vacate the citation and abandon it, the Board lacks statutory authority to deny the motion. The Board cannot compel the Department to pursue enforcement of its citation.

# PETITIONS FOR REVIEW

## *In re Muhamed Mujic, Dckt. No. 16 15373 (October 9, 2017)*

- The Board agreed with the IAJ that a preponderance of medical evidence supported the acceptance of lumbar disc displacement, lumbar degenerative disc disease, lumbar spondylolysis, and right lumbar spondylosis with radiculopathy, and the worker failed to show that continued opioid coverage is proper and necessary treatment for accepted conditions. The Board issued the D&O to note that the worker's counsel failed to comply with RCW 51.52.104 and WAC 263-12-145. The Petition for Review doesn't detail any grounds for relief, and sets forth no legal theory relied on and no citation of authority and/or argument in support of any legal theory.

# EVIDENCE/PHYSICAL THERAPISTS/JUAN MUNOZ OVERRULED

## *In re Adele Palmer, Dckt. No. 16 16600 (December 15, 2017)*

- Because the physical therapist statute allows physical therapists to diagnose conditions for physical therapy, they are not per se prohibited from testifying about the causation of a condition. Instead, the Board will use the analysis from Frausto v. Yakima HMA. If a physical therapist is qualified to independently diagnose a particular medical condition, he or she may have the requisite expertise under Evidence Rule 702 to discuss medical causation of that condition. Such determinations must be made on a case-by-case basis.

# 2017
# Board of Industrial Insurance Appeals

## Interesting Cases
## Courtesy of Jack Eng

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# FIREFIGHTERS PRESUMPTION

## *In re Andrew Leitner*, BIIA Dec., 15 18574 (February 8, 2017)

- Worker was a firefighter who experienced a mild heart attack. He claimed the heart attack was occupational related by way of the statutory firefighter presumption, which reads: **"any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous exertion due to firefighting activities are occupational diseases…"**

- Claimant presented evidence that he was exposed to diesel fumes within 72 hours of his heart attack. The City of Tacoma argued claimant did not suffer an occupational disease because his heart attack was the result of an underlying condition, coronary artery disease, which develops over a long period of time. Claimant last worked on February 25. While he suffered some symptoms at work, the heart attack not begin until the morning of February 28. It was likely the breakage of the plaque that led to his total artery blockage occurred no earlier than 24 hours before the heart attack.

- Held: Claimant presented sufficient evidence for the statutory presumption to apply. However, the city of Tacoma however provided sufficient evidence to rebut the presumption

- Board Member Fennerty dissented.

# MENTAL HEALTH PTD

## *In re Ruben Leon*, Dckt. No. 16 11510 (May 19, 2017)

- Hot oil discharged on worker's face, arm, and leg. He developed mental conditions and received a category 3 mental health impairment rating. Claimant contends that a category 4 impairment was appropriate and that his mental conditions made him PTD even though he was physically capable of work. He turned down a light duty job offer with the employer

- Held: Claimant did not present substantial evidence to prove he was PTD based on his mental condition. His expert witness relied too heavily on test results that he acknowledged would be considered invalid by the author of the criteria which mental health experts use in their interpretation of the results.

- The Board also stressed while this case focused on one job offer, a worker is not PTD unless he in unable to obtain any form on gainful employment.

# CREW EXCEPTION TO IIA

## *In re Shannon Adamson, Dckt. No. 16 11000 (September 12, 2017)*

- State of Alaska operated a car ferry between Washington and Alaska. Worker was third mate of the ferry. She sustained a work injury when the gangway fell and hit her head when the ship was docked in Washington. She applied for Washington Workers' Compensation benefits. The Department denied her claim because she was an Alaskan worker. The industrial appeals judge concluded the Department improperly denied her claim.

- The sole issue is whether the Washington Industrial Insurance Act (IIA) applied to the worker. The Department argued that she was excluded from the act because she was a member of a crew of a vessel under RCW 51.12.100(1), which excludes *masters and members of a crew of any vessel from provisions of the Washington State industrial insurance Act.*

- Held: The Department was correct in denying her claim. As a third mate, the worker was a member of the crew of a vessel and therefore excluded from the IIA under RCW 51.12.100(1).

# LIGHT WORK OFFER VALIDITY

## *In re Antonio Barrales Albino*, Dckt. Nos. 16 11444 & 16 11445 (April 21, 2017)

- Worker suffered an industrial injury. Claimant allegedly turned down a light duty job offer approved by his physician. Claimant contended the offer was not valid. The Department later assessed an overpayment of time loss compensation benefits and the Director found the worker was no longer eligible for vocational services.

- Claimant showed up to accept the job offer, but was sent home by the employer instead. Therefore, under RCW 51.32.090(4)(b), there was no return to work and time loss compensation benefits were still owed.

- Because the worker failed to establish what information the Department Director considered in exercising his discretionary authority to deny the worker vocational services, he failed to make a prima facie case that an abuse of discretion occurred.

# VOCATIONAL RETRAINING-CHANGE IN LABOR MARKET

## *In re Patricia Steagall*, Dckt. Nos. 15 20922, 15 20923 & 15 20924 (February 21, 2017)

- Worker suffered an industrial injury to her neck and back in 2013. She was not able to return to her JOI. Around the time claimant was supposed to begin her retraining plan, she suffered multiple strokes unrelated to the claim and was not able to complete retraining. Her claim was closed without TPD.

- Claimant contended TPD was appropriate because she would not have been able to obtain work even if she completed the retraining because the lacked a GED. A labor market survey completed in 2013 showed employers' willingness to hire someone without a GED. A labor market survey done in 2016 determined a GED to be the minimum requirement.

- Held: time loss compensation was not required because claimant would have finished the retraining program but for the unrelated injury. While the labor market changed, nothing in the record indicated a changed circumstance regarding the worker's industrial injury.

- Board Member Fennerty dissented.

# PROCEDURES NOT APPROVED BY HTCC
## *In re James Lewis*, Dckt. No. 16 10479 & 16 20879 (May 10, 2017)

- Worker injured his left ankle in the course of employment. He underwent a medical procedure notwithstanding the fact that the HTCC found it not proper and necessary in any Washington state health care program. Claimant then attempted to receive time loss benefits during the time he was recovering from surgery.

- Held: the Department is precluded from paying for a surgery that the HTCC has excluded from coverage by all state purchased health care programs. The Board lacks the authority to determine the HTCC decision is void. The board affirmed the denial of time loss associated with the prohibited procedure.

# COURSE OF EMPLOYMENT

## *In re James Snyder*, Dckt. No. 14 22627 (January 20, 2017)

- Claimant was a truck driver who was struck by a vehicle while walking along a highway. The Department rejected the claim on the grounds that the worker was not in the course of employment at the time of the injury.

- The worker claimed his truck was hijacked while on a planned route, and he was forced by the hijackers to drive elsewhere, hit on the head and eventually escaped. He was walking along the highway, confused and disoriented, when he was struck by a vehicle.

- A witness testified claimant concocted the false hijack story. Further, claimant had previous hospitalizations for psychotic like episodes caused by methamphetamine intoxication. Claimant's log book also proved to be inconsistent with the story.

- Held: overall, the evidence did not support claimant's story of hijacking. When claimant was struck, he was not walking as a truck driver acting in furtherance of the employer's business. His walking along the highway was not associated with the necessity of eating, sleeping, ministering to his personal needs as incident to employment as a traveling employee.

# EMPLOYABILITY

## *In re Eugene Harris*, Dckt. 15 18428 (February 2, 2017)

- A claim was closed with PPD. Claimant appealed and the Industrial Appeals Judge found the worker was permanently totally disabled and granted additional time loss compensation. Claimant was not physically capable of returning to his job of injury, but was physically capable of performing sedentary work. However, two barriers prevented claimant from returning to work: he lacked a college degree and typing skills.

- Claimant had initially reported he could type 40 words a minute but performed drastically worse during his assessment. Further, he had fabricated his educational background on an earlier resume and reported going to college. Lastly, a PCE report found claimant had demonstrated minimal effort.

- Held: the order granting PTD and time loss compensation was reversed. The Board determined the discrepancies in the worker's report of his education and typing skill, and inconsistent results in his PCE demonstrated the importance of credibility in this decision about entitled to time loss compensation and a pension.

# AGGRAVATION ENTITLEMENT PPD TO PTD
## *In re Norma Stein*, Dckt. 15 18785
## (January 11, 2017)

- Worker developed an occupational disease involving the left shoulder. This was a *Dinnis* agravation case, which describes a situation where a claim has been closed, reopened for further treatment, later closed with no increase in PPD award. The worker appealed seeking an increase from PPD to TPD.

- When a claim is reopened and then closed with no additional PPD award, claimant must present expert testimony on appeal to establish a permanent aggravation of her condition that occurred between the terminal dates and resulted in an increased in permanent disability in order to obtain an *increased PPD award*.

- Held: claimant did not prove permanent worsening in this case, so she was precluded from obtaining benefits for TPD. Claimant appealed the above decision and review was denied. The Board concluded that *Dinnis* applies equally when a worker requests PTD, as opposed to increase in PPD award.

- Board Member Fennerty dissented.

# EMPLOYER APPEAL OF ALLOWANCE ORDER

## *In re Robert S. Wilhoite, BIIA Dec., 16 16498 (October 9, 2017)*

- Employer appealed an allowance order and established a *prima facie* case that an injury, as defined by RCW 51.08.00, did not occur. The burden then shifted to claimant and the Department who failed to provide medical testimony that the incident resulted in a physical condition.

# 3RD BACK SURGERY DENIED

## *In re Yvette M. Landry, BIIA Dec., 16 5664 (August 15, 2017)*

- The Board upheld L&I's denial of a requested 3rd back surgery. Claimant argued that her neurosurgeon's experience and knowledge established that it was reasonable and necessary. The Board relied on Dr. Franklin's opinion that there had not been sufficient conservative treatment and that the risks associated with another surgery outweighed the potential benefit.

# 2017

## Questions?

John Klor
Wallace, Klor, Mann,
Capener & Bishop, P.C.
**jklor@wkmcblaw.com**
503-224-8949

Thanks to
Elizabeth Aaberg
Associate Attorney

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