

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: DONALD R. SKEWIS) DOCKET NOS. 11 12825 & 11 15221
2 CLAIM NO. AK-37625) DECISION AND ORDER

3 APPEARANCES:
4

5 Claimant, Donald R. Skewis, by
6 Williams, Wyckoff & Ostrander, PLLC, per
7 Wayne L. Williams

8 Employer, SGA Corporation, by
9 Employer Resources Northwest, Inc., per
10 Erin J. Dickinson

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Leslie V. Johnson, Assistant

14 In Docket No. 11 12825, the claimant, Donald R. Skewis, filed an appeal with the Board of
15 Industrial Insurance Appeals on March 22, 2011, from an order of the Department of Labor and
16 Industries dated March 18, 2011. In this order, the Department determined that the claimant was
17 capable of gainful employment on a reasonably continuous basis as an electronics/production
18 assembler. The Department order is **REVERSED AND REMANDED**.

19 In Docket No. 11 15221, the claimant, Donald R. Skewis, filed an appeal with the Board of
20 Industrial Insurance Appeals on May 12, 2011, from an order of the Department of Labor and
21 Industries dated April 28, 2011. In this order, the Department affirmed a Department order dated
22 April 22, 2011, in which it closed the claim with a permanent partial disability award of Category 3,
23 dorso-lumbar and/or lumbosacral impairments, less previously paid award of permanent partial
24 disability. The Department order is **REVERSED AND REMANDED**.

25 **DECISION**

26 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
27 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
28 Order issued on April 4, 2012, in which the industrial appeals judge affirmed the orders of the
29 Department dated March 18, 2011, and April 28, 2011. The Department filed a response to the
30 claimant's Petition for Review on June 11, 2012. Contested issues in these appeals include
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1 whether Donald Skewis is entitled to time-loss compensation benefits from March 18, 2011, through
2 April 21, 2011, and total permanent disability benefits as of April 22, 2011.

3 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
4 no prejudicial error was committed. The rulings are affirmed. We have granted review because we
5 find that Mr. Skewis was temporarily totally disabled from March 18, 2011, through April 21, 2011,
6 and totally permanently disabled as of April 22, 2011. The following is a summary of the evidence
7 necessary to explain our decision.

8 Donald Skewis was injured while in the course of his employment with SGA Corporation.
9 The injury occurred on September 30, 2009, when he bent over to pick up an item and stood up
10 into a floor truss. He felt pain in his lower back, across the right hip, and down his right leg into the
11 right foot. Mr. Skewis underwent surgery and subsequently participated in physical therapy and
12 work hardening.

13 Mr. Skewis was born on October 16, 1959. He obtained a high school diploma and
14 completed a semester of college at Saint Martin's University, where he took general classes. He
15 briefly ran his own carpentry business and his employment history primarily consists of residential
16 construction work. When Mr. Skewis owned the carpentry business, he solely kept track of invoices
17 and payments. Mr. Skewis has never performed clerical work. He uses a computer for the internet.
18 He completed a three-day class through WorkSource, where he used a computer to create a
19 resume. He described his typing skills as "not good," and testified that small objects are hard for
20 him to handle and that his dexterity is poor. Mr. Skewis did not believe he could physically perform
21 any of the jobs he had done in the past on a full-time basis.

22 As of March 18, 2011, Mr. Skewis spent a lot of time lying down to control his symptoms.
23 He had back pain just above his hips, and his right leg and foot would ache. He testified that
24 driving for an hour causes numbness and pain in his right leg. He did not feel that he could
25 commute from his home in Rochester, Washington to Kent, Washington or to the Seattle area, work
26 eight hours, and drive home due to the amount of sitting, which would cause leg numbness. His
27 limitations were the same on April 22, 2011, as they were on March 18, 2011.

28 Paul J. Allen, M.D., certified in physical medicine and rehabilitation, examined Donald
29 Skewis on October 19, 2011, and took a history from him. The history revealed that Mr. Skewis
30 had been referred to neurosurgeon Yoshihiro Yamamoto, M.D., who obtained a lumbar MRI
31 showing a disc extrusion affecting one of the nerves in the right lower extremity. Dr. Yamamoto
32 performed decompressive surgery, which Mr. Skewis reported had greatly reduced his right lower

1 extremity symptoms. He had a prior back injury in 2000 but did not have any prior problems
2 involving his legs.

3 At the time of Dr. Allen's examination, Mr. Skewis was 52 years old. Mr. Skewis reported
4 that he had residual numbness on the bottom of his right foot, with a decreased sensation down the
5 side of his right leg. Mr. Skewis had participated in about eight weeks of physical therapy, including
6 weight lifting, strengthening, work conditioning, and work hardening. He reported that using the
7 treadmill or doing certain aerobic activities would worsen the tingling in his right lower extremity. At
8 the end of work hardening, reports indicated that Mr. Skewis could sit, stand, or walk two hours
9 continuously, but Mr. Skewis told Dr. Allen that he was never physically tested for his ability to
10 continuously sit, stand, or walk.

11 Dr. Allen reviewed various medical records and job analyses, including an independent
12 medical examination by George R. Harper, M.D., who recommended no lifting and carrying greater
13 than 35 pounds, on a seldom basis, due to restrictions caused by the September 30, 2009 injury.
14 Mr. Skewis felt he could continuously sit, stand, or walk for only one hour; it was easier for him to
15 manage his pain if he was able to move around and walk. He told Dr. Allen he could work an
16 eight-hour day if he could change position every 60 minutes to help manage his pain. Mr. Skewis
17 completed a functional scale indicating his limitations, which included walking no more than a mile,
18 sitting no more than an hour, and standing no more than an hour. He could do household chores
19 but it would increase his pain.

20 Dr. Allen diagnosed lumbar disc displacement without myelopathy, and lumbar sprain/strain
21 as related to the work injury. The decompressive surgery of December 10, 2009, also was related
22 to the work injury. Mr. Skewis had reached maximum medical improvement and had a Category 3
23 impairment related to the injury; this was based on decreased right ankle reflex with normal motor
24 strength; abnormalities on the MRI that were at least moderate; and decreased sensation. Dr. Allen
25 felt it reasonable to limit any single continuous sitting, standing, or walking position to 60 minutes,
26 and Mr. Skewis should be allowed to change positions periodically throughout the workday to help
27 manage his pain. Dr. Allen considered the independent medical examiner's lifting restriction of
28 35 pounds on a seldom basis as reasonable. Assuming the commute to and from a job as
29 electronic/production assembler was approximately one hour, Dr. Allen felt that Mr. Skewis may be
30 able to tolerate the drive, based on his reported abilities.

31 Dr. Allen testified that based on the job analysis, the history provided by Mr. Skewis and
32 Dr. Harper, and Dr. Allen's exam, Mr. Skewis would not be able to perform the jobs of shipping and

1 receiving clerk due to the requirement of frequent standing or walking. He could not perform the
2 general floor clerk job due to frequent standing, walking, lifting; and carrying up to 50 pounds. He
3 was unable to perform the job of assembly because of the constant repetitive standing and walking.
4 He could not perform the job of electronics technician/assembler because of the constant standing.
5 Mr. Skewis's condition remained the same as of March 18, 2011.

6 George R. Harper, M.D., a certified orthopedic surgeon, evaluated Mr. Skewis on June 29,
7 2010. He reviewed various medical records, including the surgical notes and a physical capacities
8 evaluation done on March 9 and 11, 2010. At the time of the exam, Mr. Skewis complained of
9 some aching pain in the midline lumbosacral area (where he had undergone surgery); and some
10 feeling of numbness and aching in the posterior aspect of his right lower extremity, including his
11 thigh, calf, and foot. Following the work hardening, Mr. Skewis said he felt 60 to 70 percent
12 improved. Dr. Harper felt that Mr. Skewis's symptoms had plateaued. Dr. Harper testified that
13 Mr. Skewis's reports of subjective symptoms were credible.

14 Dr. Harper diagnosed lumbar strain, subsequently diagnosed as a ruptured disk at the
15 lumbosacral level on the right side, which led to a laminotomy and disc removal. Mr. Skewis's
16 permanent partial disability was a Category 3. Dr. Harper provided the following Doctor's Estimated
17 Physical Capacities: He could sit and stand for one-half hour at a time, and walk for an hour at a
18 time in the course of a complete day. He could sit for three hours, stand for three hours, and walk
19 for five hours total. Dr. Harper restricted lifting to seldom carrying 35 pounds, occasionally carrying
20 21 to 25 pounds, and frequently carrying 11 to 20 pounds. He could use both hands for repetitive
21 tasks and do simple grasping with each hand at work during an eight-hour day, and could do
22 pushing and pulling using both right and left hands within the previously stated weight limits.
23 Mr. Skewis could do fine manipulation. Bending, squatting, kneeling, crawling, and climbing were
24 limited to seldom. He had almost no reaching limitations. There were no limitations on driving
25 automotive equipment. Dr. Harper felt that driving the estimated 1 ½- to 2-hour round-trip commute
26 from Rochester, Washington to the Kent area would not preclude Mr. Skewis from working in that
27 location. Although it exceeded the doctor's estimated physical capacities limitation for sitting,
28 Dr. Harper took into account that driving allows a person to change positions, get out of their car,
29 and walk around as needed. For that reason, he did not think the travel duration would preclude
30 Mr. Skewis from taking the job.

31 The Department solely presented the testimony of vocational witness Jennifer Farland,
32 VRC. She was referred by the Department on October 11, 2010, to perform an ability-to-work

1 assessment. Ms. Farland reviewed information from the Department claim file, including
2 Mr. Skewis's work history, a job analysis, a surgery report, a prior vocational assessment, a work
3 hardening program evaluation and progress reports, an independent medical examination, labor
4 market information, work and medical history, and a physical capacities evaluation. The job of
5 shipping and receiving clerk had been explored. An ability-to-work assessment report of July 14,
6 2010 recommended that he was able to work at that occupation. However, Ms. Farland's research
7 indicated that it was not a viable occupation for Mr. Skewis due to the physical requirements.
8 Based on his reported work history, she determined that the occupations of production assembly
9 and electronics assembly were a good fit for him. Ms. Farland reviewed the labor market for these
10 occupations starting with Olympia and Longview, based on claimant's residency in Rochester,
11 Washington. The labor market in Olympia was not a viable labor market for the assembler job.

12 Ms. Farland then met with a Department vocational services specialist who asked that
13 Ms. Farland explore the Kent, Washington area, where Mr. Skewis had been working at the time of
14 injury; and the Shoreline, Washington area, where the employer of injury was based. In Kent, she
15 found some employer contacts. Based on those contacts, she recommended that Mr. Skewis could
16 work as an assembler. Her decision was based on his prior work experience using his hands, his
17 ability to read and understand blueprints and projects, to assemble products with his hands and
18 fingers, utilizing tools, and his understanding of the mechanics of building a product. The physical
19 demands appeared aligned with the medical information on file, and there was a labor market for
20 this occupation in the Kent area. The physician's assistant for attending physician Dr. Yamamoto
21 approved job analyses for electronics technician assembler, production line assembler, and
22 assembler on November 5, 2010. Additional information relied on by Ms. Farland was a physical
23 capacities evaluation performed in March 2010.

24 In approving the job, Ms. Farland did not take into account the fact that Mr. Skewis would
25 need to drive to the job in Kent from his home in Rochester, Washington. She did not consider this
26 important because he had previously been traveling to that locale for work at the time of injury.
27 Based on the work-hardening discharge report, it appeared to her that he could make the commute.
28 She acknowledged, however, that she did not know how many miles Mr. Skewis would need to
29 drive to commute from Rochester to Kent, Washington. She was also unaware of whether jobs
30 existed that limited lifting to 20 pounds, maximum.

31 As provided by WAC 296-19A-010(4), "[g]enerally, the worker's relevant labor market is the
32 geographic area where the worker was last gainfully employed. The labor market must be within a

1 reasonable commuting distance and be consistent with the industrially injured or ill worker's
2 physical and mental capacities." Although there are exceptions to the rule applicable to workers
3 who relocate after sustaining an industrial injury, none applies to the facts here. Based on this rule,
4 we find the commuting distance required of Mr. Skewis was not reasonable subsequent to his
5 industrial injury.

6 Vocational expert Ms. Farland assumed that Mr. Skewis could continue driving to Kent from
7 his home in Rochester, Washington as he had done in the past. We note that although the
8 commute was "reasonable" for Mr. Skewis prior to the injury, the residuals of the injury shifted the
9 balance considerably. Mr. Skewis testified that driving post-injury caused his right leg and foot to
10 go numb. He was forthcoming in acknowledging that he felt he could drive for an hour before
11 having to shift his weight, or stop, get out of the car, and move around. Dr. Allen's testimony was
12 that Mr. Skewis might be able to tolerate the drive. According to Dr. Harper, Mr. Skewis could sit
13 and stand for one-half hour at a time, requiring that he pull over halfway through the commute.

14 As provided by CR 201, it is appropriate to take judicial notice of the adjudicative fact that
15 the round-trip mileage from Rochester, Washington to Kent, Washington is approximately
16 134 miles. The one-way drive of approximately 67 highway miles would likely require that
17 Mr. Skewis pull over at least once to get out of the car and move around to avoid leg numbness.

18 We find these facts indistinguishable from those in *In re Richard M. Gramelt*, Dckt.
19 No. 09 21629 (July 14, 2011). In *Gramelt*, the claimant was found employable based on an
20 available job where the round-trip commute was 136 miles. Mr. Gramelt testified that he would
21 have to pull to the side of the road several times. We looked to the dictionary definition of
22 "reasonable." "Governed by or in accordance with reason or sound thinking. . . . Within the bounds
23 of common sense. . . . Not extreme or excessive." Webster's II New Riverside University Dictionary
24 980 (1994). Based on that definition, we held, "Under the circumstances, the commute was not
25 reasonable because in view of Mr. Gramelt's work-related physical limitations, it was beyond the
26 bounds of common sense, and was extreme and excessive." *Gramelt* at 10.

27 The facts in Mr. Skewis's appeal are indistinguishable from those in *Gramelt* regarding his
28 ability to handle the commute expected of him by the Department. A commute that is reasonable
29 for one with a healthy back can easily become unreasonable post-injury. Although the job was
30 approved by the physician's assistant who worked with Dr. Yamamoto, there is no indication that he
31 was aware of the distance Mr. Skewis would need to drive to the assembler job. Dr. Allen was also
32 doubtful that Mr. Skewis could perform the assembler job due to the standing requirement. He felt

1 that Mr. Skewis could possibly tolerate the drive. Dr. Harper, who also examined the claimant, felt
2 he could sit and stand only 30 minutes at a time, and that Mr. Skewis would need to pull over and
3 walk around in the course of his commute. We conclude that Mr. Skewis has proven by a
4 preponderance of the evidence that he is incapable of obtaining, performing, and maintaining
5 reasonably continuous gainful employment. He is entitled to time-loss compensation benefits from
6 March 18, 2011, through April 21, 2011, and was permanently totally disabled as of April 22, 2011.

7 FINDINGS OF FACT

- 8 1. In Docket No. 11 12825, on May 17, 2011, an industrial appeals judge
9 certified that the parties agreed to include the Jurisdictional History in
10 the Board record solely for jurisdictional purposes.
- 11 2. In Docket No. 11 15221, on June 14, 2011, an industrial appeals judge
12 certified that the parties agreed to include the Jurisdictional History in
13 the Board record solely for jurisdictional purposes.
- 14 3. Donald R. Skewis sustained an industrial injury on September 30, 2009,
15 when he bent over to pick up an item and stood up into a floor truss.
- 16 4. Mr. Skewis was born on October 16, 1959. He graduated from high
17 school and attended one quarter of college. He worked in shipping,
18 processed chemicals, and was employed as a carpenter. He also briefly
19 owned and operated a construction company.
- 20 5. Mr. Skewis's physical capacities were limited to seldom lifting and
21 carrying greater than 35 pounds; and sitting and standing a maximum of
22 30 minutes at a time. He would have difficulty tolerating a one-hour
23 drive without stopping periodically to get out of his vehicle and move
24 around.
- 25 6. Mr. Skewis was unable to perform and obtain gainful employment on a
26 reasonably continuous basis from March 18, 2011, through April 21,
27 2011, due to the residuals of the industrial injury and taking into account
28 the claimant's age, education, work history, and pre-existing conditions.
- 29 7. As of April 22, 2011, Mr. Skewis was permanently unable to perform and
30 obtain gainful employment on a reasonably continuous basis.

31 CONCLUSIONS OF LAW

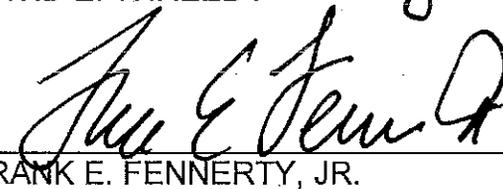
- 32 1. Based on the record, the Board of Industrial Insurance Appeals has
jurisdiction over the parties to and the subject matter of these appeals.
2. Donald Skewis was a temporarily totally disabled worker within the
meaning of RCW 51.32.090 from March 18, 2011 through April 21,
2011.
3. Donald Skewis was a permanently totally disabled worker within the
meaning of RCW 51.08.160, as of April 22, 2011.
4. The Department orders dated March 18, 2011, and April 28, 2011, are
incorrect and are reversed. This matter is remanded to the Department

1 to pay time-loss compensation benefits from March 18, 2011, through
2 April 21, 2011, and to find Mr. Skewis permanently totally disabled as of
3 April 22, 2011.

4 Dated: August 23, 2012.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS

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8 DAVID E. THREEEDY Chairperson

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11 FRANK E. FENNERTY, JR. Member

12 **DISSENT**

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14 I respectfully dissent. The uncontroverted vocational evidence demonstrates
15 electronics/production assemblers are not required to lift over 20 pounds, and there was a Kent
16 labor market for this occupation. Mr. Skewis would often only need to lift 10 pounds and may sit or
17 stand, at his option. The medical evidence shows Mr. Skewis could lift and carry from
18 11 to 20 pounds frequently, 21 to 25 pounds occasionally, and up to 35 pounds on a seldom basis.

19 The majority does not dispute that Mr. Skewis is capable of obtaining and performing
20 reasonably continuous gainful employment as an electronics/production assembler. The crucial
21 question then is whether a 134-mile round-trip commute is reasonable.

22 Dr. Allen limits any single continuous sitting, standing, or walking to one hour with periodic
23 changes in position. Assuming the commute was approximately one hour each way, Dr. Allen felt
24 that Mr. Skewis would be able to drive the commute, based on Mr. Skewis's self-reported abilities.

25 Dr. Harper imposed no limits on Mr. Skewis's driving automotive equipment. Dr. Harper
26 limits sitting and standing to one-half of an hour and then states that Mr. Skewis could sit for three
27 hours. Dr. Harper's opinion was confusing because the range between one-half hour and three
28 hours is so great.

29 Considering the entire record, Mr. Skewis's capacity to sit at one time was at least one hour,
30 not one-half hour at a time. The majority's reliance on one-half hour as the sitting capacity was
31 misplaced because even Mr. Skewis admitted that he could drive for an hour before having to shift
32 his weight, stop, get out of the car, or move around. 10/26/11 Tr. at 13.

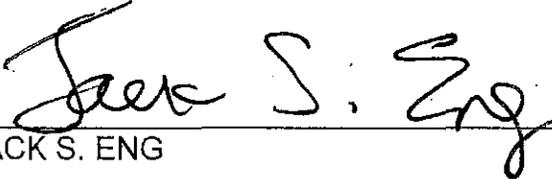
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The evidence supports the conclusion that this commute is reasonable. Contrary to the majority's conclusion, I do not believe having to possibly stop, shift his weight, or move around once during the one-way commute to be extreme, excessive, or beyond the bounds of common sense.

As the preponderance of the evidence proves that Mr. Skewis is capable of obtaining, performing, and maintaining reasonably continuous gainful employment as an electronics/production assembler and that the 134-mile round-trip commute is reasonable, I would affirm the Department's orders dated March 18, 2011, and April 28, 2011.

Dated: August 23, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS



JACK S. ENG Member