

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: SHERYL SCHROEDER) DOCKET NOS. 13 26468 & 13 26468-A
2)
3 CLAIM NO. SC-54041) PROPOSED DECISION AND ORDER
4

5 INDUSTRIAL APPEALS JUDGE: Steven R. Yeager
6

7 APPEARANCES:
8

9 Claimant, Sheryl M. Schroeder, by
10 Williams, Wyckoff & Ostrander, PLLC, per
11 Wayne L. Williams
12

13 Self-Insured Employer, Providence Health & Services, by
14 Eims Graham, P.S., per
15 Michael P. Graham and Lonnie Ladenburg
16

17 Department of Labor and Industries, by
18 The Office of the Attorney General, per
19 Crystal L. Schlanbusch
20

21 In Docket No. 13 26468, the claimant, Sheryl M. Schroeder, filed an appeal with the Board of
22 Industrial Insurance Appeals on December 17, 2013, from an order of the Department of Labor and
23 Industries dated November 19, 2013. In this order, the Department affirmed its September 20,
24 2013 order that ended time loss compensation as paid through January 5, 2013, and directed the
25 self-insured employer to pay Ms. Schroeder an award for permanent partial disability equivalent to
26 a Category 3 permanent dorso-lumbar and/or lumbosacral impairment. The Department order is
27 **REVERSED AND REMANDED.**
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32 In Docket No. 13 26468-A, the employer, Providence Health & Services, filed an appeal with
33 the Board of Industrial Insurance Appeals on January 17, 2014, from the same order of the
34 Department of Labor and Industries dated November 19, 2013. In this order, the Department
35 affirmed its September 20, 2013 order that ended time loss compensation as paid through January
36 5, 2013, and directed the self-insured employer to pay Ms. Schroeder an award for permanent
37 partial disability equivalent to a Category 3 permanent dorso-lumbar and/or lumbosacral impairment.
38 The Department order is **REVERSED AND REMANDED.**
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42 **PROCEDURAL AND EVIDENTIARY MATTERS**
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44 On March 25, 2014, the parties agreed to include the Jurisdictional History in the Board's
45 record. That history establishes the Board's jurisdiction in this appeal.
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47 Live testimony was presented on September 23, 2014, in Olympia, Washington.

1 The depositions of Brian Anthony Iuliano, M.D., and Christopher Lee Yarter, M.D., taken by
2 the claimant on August 18 and September 11, 2014, respectively; and the depositions of Thomas
3 Griffith, M.D., Theresa McFarland, M.D., and John W. Power, taken by the self-insured employer on
4 October 1, 6, and 15, 2014, respectively, are published pursuant to WAC 263-12-117. Except as
5 noted below, all objections and motions contained therein are overruled and denied.
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8 The objections of page 51 of Dr. McFarland's deposition are sustained. The objections on
9 pages 17, 32, and 34 of Mr. Power's deposition are sustained. The objections on pages 29, 30, 31
10 of Mr. Power's deposition are overruled to the extent the statements are allowed as the basis of his
11 expert opinion but not as substantive expert testimony.
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13 Exhibit Nos. 1 through 5 to Dr. Iuliano's deposition are renumbered Board Exhibit Nos. 1
14 through 5 and are admitted. Exhibit Nos. 1 through 3 to Dr. Yarter's deposition are renumbered
15 Board Exhibits 6, 7, and 8. Exhibits 6 and 7 are admitted. Exhibit No. 8 is rejected as duplicative of
16 Exhibit No. 2, which is admitted.
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18 All parties entered into and submitted a Stipulation of Facts regarding amounts paid towards
19 a previously awarded Category 4 permanent partial disability award.
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23 **ISSUES**
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- 25 1. Is Ms. Schroeder entitled to time loss compensation from January 6,
26 2013, through November 19, 2013?
- 27 2. As of November 19, 2013, was Ms. Schroeder a permanently totally
28 disabled worker?
- 29 3. In the alternative, is she entitled to further medical treatment or an
30 increased award for permanent partial disability?
- 31 4. Is the self insured-employer entitled to an assessment of an
32 overpayment of benefits to Ms. Schroeder?
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34 **EVIDENCE PRESENTED**
35

36 The claimant, Sheryl Schroeder, is 57 years old. She is a high school graduate. Before
37 working for the self-insured employer, she worked in food processing and in markets and
38 delicatessens. For the self-insured employer, Providence Health and Services, she worked as a
39 housekeeper. She injured her back taking the garbage out of the dining room. She explained it
40 usually was not heavy, but the refrigerator had been emptied, and, unknown to her, the garbage
41 bag was full of heavy cans. When she picked up the garbage bag, she "went back down with it."¹
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47 ¹ 9/23/14 Tr. at 8.

1 Ms. Schroeder said she had two surgeries on her back, physical therapy, injections, and
2 work conditioning. She said that since January 6, 2013, she has been limited in what she can do
3 around the house. She said she does not bake pies anymore because rolling the dough does her
4 in. Folding laundry is rough. She has to sit on a stool to cook. She does not believe she could
5 have worked since January 2013.
6

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8 Christopher Lee Yarter, M.D., is a family practitioner. He has been Ms. Schroeder's primary
9 care physician since 1999. He has been following her care and treating the residuals of her
10 industrial injury since 2007. He said he would treat her from time to time for flare-ups of pain and
11 strains.
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13
14 He did not feel she was fixed and stable in August 2012.² In March 2013, he felt
15 Ms. Schroeder should be considered a Category 4 impairment. He did not believe she would be
16 able to return to her job of injury, and would need assistance in her return to work. He deferred to
17 Dr. Iuliano's restrictions.³
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19
20 Brian Anthony Iuliano, M.D., is a neurosurgeon. He treated Ms. Schroeder from 2008
21 through 2013 for her industrial injury, performing two surgeries; decompression at L4-5 and L5-S1
22 on March 17, 2009, and fusion of the same levels on January 8, 2010. Ms. Schroeder was seen in
23 his office approximately 20 times.⁴
24

25
26 Dr. Iuliano testified that while in August 2012 he indicated to the self-insured employer he
27 agreed Ms. Schroeder's claim should be closed as a Category 3, and she could work as a
28 sandwich maker, he saw her after that and changed his mind because she was reporting worsening
29 symptoms. He saw her in October 2012 and ordered a repeat MRI. He recalculated her
30 permanent impairment to be a Category 4, and prescribed further physical therapy.
31

32
33 Dr. Iuliano testified Ms. Schroeder is restricted in her ability to bend, lift, stand, and sit. She
34 should not lift more than 20 pounds or sit or stand more than 10 or 15 minutes without changing
35 positions. He said these restrictions are caused by her work injury which resulted in her lumbar
36 disc herniation and resultant scoliosis and disc space deformity. Ultimately, he is of the opinion she
37 would not be able to tolerate a job as a sandwich maker.
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45 ² Exhibit 6

46 ³ Exhibit 7

47 ⁴ McFarland Dep. at 43.

1 Karin Larson is a vocational rehabilitation counselor. She reviewed Ms. Schroeder's medical
2 and vocation records and interviewed Ms. Schroeder at her attorney's request on September 9,
3 2014.
4

5 Ms. Larson testified that relying of Dr. Iuliano's limitations of March 28, 2013, Ms. Schroeder
6 can only occasionally sit or stand/walk,⁵ and is not capable of working as a sandwich maker.
7 Occasionally is only up to 3 hours per day.
8
9

10 Ms. Larson questioned the accuracy of the Job Analysis used for the Sandwich maker
11 position.
12

13 Theresa McFarland, M.D., is an orthopedic surgeon. She reviewed records and examined
14 Ms. Schroeder at the self-insured employer's request on December 5, 2012. Based upon her
15 review of records and examination, Dr. McFarland diagnosed a lumbar strain and an
16 administratively allowed claim of permanent aggravation of her preexisting degenerative
17 spondylosis.
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19

20 She thought Ms. Schroeder had reached maximum medical improvement and was best
21 described as having a Category 3 level of permanent low back impairment. Dr. McFarland testified
22 there was no objective basis to restrict Ms. Schroeder from working as a cafeteria attendant,
23 housekeeper, cashier 2, or sandwich maker, based on her exam, radiologic findings, and a work
24 hardening discharge summary from August 25, 2010⁶. Her opinion remains the same as of
25 November 19, 2013.
26
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29 Thomas Griffith, M.D., is an orthopedic surgeon. He specialized in hand and plastic surgery,
30 and is now on the teaching staff at Madigan army Medical Center in Tacoma. He examined Ms.
31 Schroeder at the self-insured employer's request on February 8, 2011
32
33

34 Based on his review of medical records and examination, he diagnosed preexisting
35 degenerative joint disease in the lumbar spine that was permanently aggravated the October 8,
36 2007 industrial injury. He thought she was fixed and stable and rated her permanent partial
37 disability as best described by category 4 for low back impairments.
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40 He testified that based upon a performance based work capacity evaluation of August 25,
41 2010, he felt she could work so long as she did not have to lift more than 20 pounds and carry it
42 more than 20 feet.
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46 ⁵ Exhibit No. 2

47 ⁶ McFarland Dep. at 59.

1 John Power is a vocational consultant. He was asked in June 2014 to do a forensic
2 vocational review of this claim by the self-insured employer. He testified he reviewed "previous
3 independent medical examinations, physical capacities evaluations, as well as labor markets and
4 conclusions in regards to vocational assessment made by previous counselors."⁷
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6

7 Mr. Power testified that Dr. Iuliano's July 26, 2012 letter to the vocational counselor at the
8 time, Ms. Parker, indicated lifting restrictions of 10 to 20 pounds with no bending, stooping, or
9 crawling, a need to change positions every 30 minutes. He said Dr. Iuliano approved the job with
10 the restrictions that Ms. Schroeder be able to change her position every 20 to 30 minutes. This
11 approval by Dr. Iuliano was made on June 29, 2012.
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14 Upon this approval, Ms. Parker, the vocational counselor assigned to the claim, wrote a
15 closing report.
16

17 Mr. Power testified that he conducted a labor market survey of sandwich maker jobs himself
18 in August 2014, and that indeed the standing was broken up with walking from time to time to stand
19 in another position to make sandwiches or do other tasks. Lifting requirements were 10 pounds
20 frequently, 20 pounds occasionally. Jobs as sandwich makers were available. He concluded
21 Ms. Schroeder is capable of working as a sandwich maker
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25 DISCUSSION

26 There is no opinion put forth that Ms. Schroeder is in need of further medical treatment as of
27 November 19, 2013.
28

29 Neither is there any argument made that her limitations are not proximately caused by the
30 industrial injury.
31

32 The threshold issue, then, because there is no evidence of significant change in her
33 condition afterwards, is whether Ms. Schroeder has been able to work as a sandwich maker since
34 January 6, 2013.
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37 Dr. Iuliano had approved the job in July 2012. The self-insured employer challenges the fact
38 that he changed his position in March 2013 and the basis for that change. Ultimately, I am more
39 persuaded by Dr. Iuliano's changed opinion and the reason for the change, than I am by the
40 opinions of the self-insured employer's witnesses that Ms. Schroeder is capable of reasonable
41 continuous gainful employment as a sandwich maker.
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47 ⁷ Power Dep. at 11.

1 Dr. Iuliano was Ms. Schroeder's treating surgeon. As such, he or his physician assistant saw
2 her approximately twenty times from 2008 through 2013. He testified that when he saw her in
3 October 2012,
4

5 she was having pain radiating into both legs, and some of the clinical
6 exam findings had changed as well. She had weakness, as mentioned
7 before, in the dorsiflexion and knee extension, but I think the foot
8 dorsiflexion and weakness was on the right side, and the knee extension
9 weakness was on the left side. Actually, that may have been a later
10 exam, but either way the pain going down both legs was new.⁸
11

12 He said this pain and weakness, while not severe, was new.⁹

13 The issues regarding Ms. Schroeder's ability to work are for the period January 6, 2013
14 through November 19, 2014, for time loss compensation, and as of November 19, 2013, for
15 permanent total disability. Consequently, the reliance of Dr. McFarland and Dr. Griffith on an
16 August 2010 physical capacities evaluation is not persuasive. As I am persuaded by Dr. Iuliano's
17 reasons for his change in position regarding her ability to work as a sandwich maker, neither do I
18 find their reliance on his earlier approval of the job convincing evidence that she is capable of doing
19 it.
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24 Neither Dr. McFarland nor Dr. Griffith provide what they believe Ms. Schroeder's restrictions
25 realistically should be, though Dr. Griffith does allude to appropriate modifications. Regarding what
26 limitations, if any, she would have imposed on Ms. Schroeder when she saw her in December
27 2012, Dr. McFarland said
28

29 I found no limitations with regards to-- and really it only makes sense to
30 talk about limitations with regards to jobs. I found no limitations with
31 regards to the four job analyses that I received, and these are based on,
32 again, the work hardening discharge summary which showed what limits
33 she had and if they could be accommodated within those job analyses,
34 as well as my physical exam findings and my knowledge of her
35 surgery.¹⁰
36

37 The fact that most of the vocational testimony is taken up with the detail of the job analysis
38 for the sandwich maker position and whether it is accurate obscures the two most pertinent facts.
39 First, Dr. Iuliano limited Ms. Schroeder to stand/walk occasionally, 1 to 3 hours per day.¹¹ Second,
40 the job of sandwich maker requires frequent standing, 2.5 to 5.5 hours per day, and frequent
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44 ⁸ Iuliano Dep. at 31-32.

45 ⁹ Iuliano Dep. at 34.

46 ¹⁰ McFarland Dep. at 57.

47 ¹¹ Exhibit 2.

1 walking, 2.5 to 5.5 hours per day.¹² This is why Ms. Larson testified Ms. Schroeder was not
2 capable of gainful employment as a sandwich maker.
3

4 Ms. Schroeder has proved by a preponderance of the evidence she has not been capable of
5 working as a sandwich maker since January 6, 2013.
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7 Because I have concluded Ms. Schroeder is entitled to time loss compensation from
8 January 6, 2013, through November 18, 2013, and a pension as of November 19, 2013, I need not
9 address extent of permanent partial disability or the issue of an overpayment.
10

11 FINDINGS OF FACT

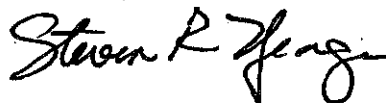
- 12 1. On March 25, 2014, an industrial appeals judge certified that the parties
13 agreed to include the Jurisdictional History in the Board record solely for
14 jurisdictional purposes.
15
- 16 2. Ms Schroeder sustained an industrial injury on October 8, 2007, when
17 she lifted a bag of garbage that was much heavier than expected. The
18 injury proximately caused a lumbar strain and aggravated her
19 preexisting low back condition and resulted in two low back surgeries at
20 L4-5 and L5-S1.
21
- 22 3. Ms. Schroeder is 57 years old. She is a high school graduate. She has
23 worked in food processing, in markets and delicatessens, and
24 housekeeping.
25
- 26 4. Because of conditions proximately caused by the October 8, 2007
27 industrial injury, Ms. Schroeder is limited to sitting occasionally 1 to 3
28 hours per day, and standing/walking occasionally, 1 to 3 hours per day,
29 lifting no more than 20 pounds, and no bending or stooping.
30
- 31 5. Ms. Schroeder was unable to perform or obtain gainful employment on a
32 reasonably continuous basis from January 6, 2013, through
33 November 18, 2013, due to the residuals of the industrial injury, taking
34 into account the her age, education, work history, and preexisting
35 conditions.
36
- 37 6. As of November 19, 2013, Ms. Schroeder's conditions proximately
38 caused by the industrial injury were fixed and stable.
39
- 40 7. Ms. Schroeder was unable to perform or obtain gainful employment on a
41 reasonably continuous basis as of November 19, 2013, due to the
42 residuals of the industrial injury, taking into account the her age,
43 education, work history, and preexisting conditions.
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47 ¹² Exhibit No. 1.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of these appeals.
2. Ms. Schroeder was a temporarily totally disabled worker within the meaning of RCW 51.32.090 from January 6, 2013, through November 18, 2013.
3. Ms. Schroeder was a permanently totally disabled worker within the meaning of RCW 51.08.160, as of November 19, 2013.
4. The Department order dated November 19, 2013, is incorrect and is reversed. This matter is remanded to the Department to order the self insured employer to pay time-loss compensation benefits from January 6, 2013, through November 18, 2013, to take into account amounts paid by the self-insured employer towards a prior Category 4 permanent partial disability award, and to find Ms. Schroeder permanently totally disabled as of November 19, 2013.

DATED: JAN 05 2015



Steven R. Yeager
Industrial Appeals Judge
Board of Industrial Insurance Appeals

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