

Plemmons, Donald

OCCUPATIONAL DISEASE (RCW 51.08.140)

Aggravation of preexisting condition

Aggravation of a pre-existing condition by distinctive conditions of work can be the basis for an occupational disease claim allowance without a showing that the pre-existing condition has objectively worsened. ...*In re Donald Plemmons*, BIIA Dec., 04 12018 (2005)

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: DONALD L. PLEMMONS) DOCKET NO. 04 12018**
2)
3 **CLAIM NO. Y-677854) DECISION AND ORDER**
4 _____)

5 APPEARANCES:

6
7 Claimant, Donald L. Plemmons, by
8 Law Office of Mark C. Wagner, per
9 Mark C. Wagner

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11 Employer, BMC West Corporation,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Lynette Weatherby-Teague, Assistant
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18 The claimant, Donald L. Plemmons, filed an appeal with the Board of Industrial Insurance
19 Appeals on May 4, 2004, from an order of the Department of Labor and Industries dated April 26,
20 2004. In this order, the Department affirmed an April 13, 2004 order in which it rejected the claim.
21 The Department order is **REVERSED AND REMANDED**.
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24 **DECISION**

25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
26 and decision on a timely Petition for Review, filed by the Department, to a Proposed Decision and
27 Order issued on November 9, 2004, in which the industrial appeals judge reversed the April 26,
28 2004 order. Our industrial appeals judge ordered the Department to allow the claim as an
29 occupational disease.
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32 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
33 prejudicial error was committed. These rulings are affirmed.
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36 We granted the Petition for Review to correct findings and conclusions in the Proposed
37 Decision and Order. In the body of the proposed decision, our industrial appeals judge indicated
38 the evidence supported allowing the claim as an aggravation of a pre-existing condition.
39 Nonetheless, the findings and conclusions in the Proposed Decision and Order simply allow the
40 claim as an occupational disease, without that limitation. We have granted review primarily to
41 correct this error.
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44 Mr. Plemmons, a boom truck driver, had an injury at work during October 2001. While
45 unloading his truck in Renton, Washington, a ladder fell out from under him and he caught himself
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1 with his right arm. This injured his right shoulder. However, he did not obtain any medical
2 treatment for his shoulder until November 2002. At that point, he filed an application for benefits
3 with the Department for his October 2001 injury. His claim was rejected as untimely, because it
4 was filed more than a year after his injury.
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7 He obtained treatment from Julian S. Arroyo, M.D., an orthopedic surgeon specializing in
8 shoulder disorders. He was first seen in Dr. Arroyo's office in December 2002. An MRI taken that
9 same month disclosed tendonitis in the right rotator cuff, and a rotator cuff tendon tear. Based on
10 that MRI, a subsequent March 2003 x-ray, and his clinical findings, Dr. Arroyo diagnosed
11 Mr. Plemmons' right shoulder condition as a right rotator cuff tear, with impingement. He
12 recommended surgical intervention. This diagnosis, and the resulting need for treatment, has not
13 been disputed.
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16 The Department maintains that Mr. Plemmons' rotator cuff tear was caused by his
17 October 2001 injury. It maintains there is no objective evidence that his condition has worsened
18 since this injury. It argues this claim should be rejected.
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21 The Department's fundamental premise, that objective proof of worsening is a prerequisite to
22 allowing the claim as an occupational disease, is incorrect. It is undisputed that Mr. Plemmons
23 injured his shoulder in the October 2001 accident. Dr. Arroyo described this fall as the original
24 insult to the right shoulder. However, he stated that Mr. Plemmons' continued job duties as a boom
25 truck driver, since that incident, aggravated his right shoulder condition. Mr. Plemmons' work,
26 described in Exhibit No. 1, involves frequently lifting 35 to 50 pounds above the shoulders and
27 frequently using his arms from waist to above shoulder height. Dr. Arroyo noted that Mr. Plemmons
28 did not seek medical treatment for 13 months after the 2001 incident, and that he continued to work
29 full-time in a strenuous job for two years before filing this claim. He stated that Mr. Plemmons' work
30 as a truck driver following the 2001 injury aggravated his shoulder condition, resulting in a need for
31 treatment. Dr. Arroyo testified that Mr. Plemmons' continuous work duties were the proximate
32 cause of his need for surgery. This is a reasonable conclusion because his work was more
33 strenuous than limitations that the Department's expert witness, Alan G. Brobeck, M.D., thought
34 were appropriate following the October 2001 injury. Dr. Brobeck thought lifting with the right arm
35 should have been limited to 10 to 15 pounds, and repetitive use of the right arm should have been
36 limited since that accident. Mr. Plemmons' job as a boom truck driver required him to regularly
37 exceed these limitations. Our determination that Mr. Plemmons' work duties for two years following
38 his 2001 accident aggravated his shoulder injury is, therefore, quite reasonable.
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1 The medical testimony is legally sufficient to allow this claim as an occupational disease for
2 an aggravation of a pre-existing condition. Since Mr. Plemmons delayed getting treatment after his
3 2001 accident, the exact diagnosis for his pre-existing shoulder condition is unclear. While there
4 are no objective findings indicating his shoulder condition has worsened, such proof is
5 unnecessary. Objective medical findings of worsening are only required to reopen a claim, or to
6 pay a permanent partial disability award to a worker with a pre-existing impairment. Based on a
7 long line of appellate decisions, occupational disease claims can be allowed if medical testimony
8 establishes distinctive work conditions aggravated a worker's pre-existing condition. See *Dennis v.*
9 *Department of Labor & Indus.*, 109 Wn.2d. 467 (1987). If medical testimony establishes a worker's
10 job duties accelerated his need for treatment or aggravated his underlying condition, his claim can
11 be allowed. *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731 (1999). Mr. Plemmons has met
12 this requirement, because he established his work duties after October 2001 aggravated his
13 shoulder condition, resulting in his need for surgery.

14 We have, therefore, corrected Findings of Fact Nos. 3 through 5, and Conclusions of Law
15 Nos. 2 and 3 in the Proposed Decision and Order, to make them consistent with this decision.

16 **FINDINGS OF FACT**

- 17 1. On November 21, 2003, the claimant, Donald L. Plemmons, filed an
18 application for benefits with the Department of Labor and Industries,
19 alleging that he sustained an occupational disease on or about
20 November 17, 2003, while in the course of his employment with
21 BMC West Corporation.

22 On April 13, 2004, the Department issued an order in which it rejected
23 the claim for benefits for the following reasons: there was no proof of a
24 specific injury at a definite time and place in the course of employment;
25 the claimant's condition was not the result of an industrial injury; and the
26 claimant's condition was not an occupational disease.

27 On April 22, 2004, the claimant filed a protest to the Department's
28 April 13, 2004 order. On April 26, 2004, the Department issued an order
29 in which it affirmed its April 13, 2004 order.

30 On May 4, 2004, the claimant filed a Notice of Appeal with the Board of
31 Industrial Appeals from the Department's April 26, 2004 order. On
32 May 25, 2004, the Board issued an order in which it granted the appeal
33 under Docket No. 04 12018.

- 34 2. Between 1985 and April 26, 2004, the claimant worked as a boom truck
35 driver, delivering trusses and other materials to construction sites. In
36 addition to other heavy work duties, his conditions of employment

1 included repetitive lifting to varying degrees: floor to waist, 35 to
2 50 pounds frequently; waist to shoulder, 35 to 50 pounds frequently; and
3 shoulder and above, 35 to 50 pounds frequently. His job duties required
4 frequent reaching while securing loads and throwing straps over trusses.
5 Those conditions are unique to his employment, and are not merely
6 coincidentally occurring in his workplace.
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- 8 3. Mr. Plemmons had a work-related right shoulder injury in 1989, but he
9 fully recovered following this accident. He reinjured his right shoulder
10 again in October 2001, while unloading his truck in Renton. A ladder fell
11 out from under him, and he caught himself with his right arm. He did not
12 seek treatment for his right shoulder until November 2002.
13
- 14 4. Mr. Plemmons filed an application for benefits with the Department for
15 his October 2001 injury in November 2002. This claim was denied on
16 the grounds his application for benefits was filed more than one year
17 after his injury, and was, therefore, untimely.
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- 19 5. Following the October 2001 right shoulder injury, and despite associated
20 pain, the claimant continued to perform his heavy repetitive job duties,
21 preventing the right shoulder from healing. In December 2002, an MRI
22 revealed a right rotator cuff tear. A March 2003 x-ray revealed a right
23 shoulder bone spur. As of April 26, 2004, Mr. Plemmons' right shoulder
24 condition is best described as a rotator cuff tear with impingement.
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- 26 6. There is no specific diagnosis for the right shoulder condition
27 proximately caused by Mr. Plemmons' October 2001 injury. As of
28 April 26, 2004, Mr. Plemmons' right rotator cuff tear with impingement
29 was either the natural and proximate result of distinctive conditions of
30 his employment with BMC West Corporation following his October 2001
31 injury, or was an aggravation of a condition caused by his October 2001
32 injury.
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CONCLUSIONS OF LAW

- 35 1. The Board of Industrial Insurance Appeals has jurisdiction over the
36 parties to and the subject matter of this appeal.
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- 38 2. As of April 26, 2004, the claimant had developed an occupational
39 disease within the meaning of RCW 51.08.140.
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- 41 3. The order of the Department of Labor and Industries dated April 26,
42 2004, is incorrect and is reversed. This matter is remanded to the
43 Department with instructions to issue an order in which it allowed this
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1 claim as an occupational disease for an aggravation of his pre-existing
2 right shoulder condition and to take such further action as required by
3 the law and the facts.

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5 It is so **ORDERED**.

6 Dated this 7th day of February, 2005.

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8 BOARD OF INDUSTRIAL INSURANCE APPEALS

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12 /s/ _____
13 THOMAS E. EGAN Chairperson

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

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22 /s/ _____
23 CALHOUN DICKINSON Member

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