Libby, Aaron

TREATMENT

Aggravation of pre-existing condition

A worker need not prove lighting up of a condition in order to be entitled to treatment. A worker is entitled to treatment if a pre-existing condition was aggravated by the industrial injury or occupational disease. **….*In re Aaron Libby*, BIIA Dec., 04 20487 (2005)**
[*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 05-2-39669-5 SEA.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: AARON S. LIBBY	)	**DOCKET NO. 04 20487**
	)	
CLAIM NO. W-540956	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Aaron S. Libby, by
Small, Snell, Weiss & Comfort, P.S., per
Richard E. Weiss

Self-Insured Employer, City of Seattle, by
Seattle City Attorney, per
Susan J. Holm

Department of Labor and Industries, by
The Office of the Attorney General, per
Andrew J. Simons, Assistant

The self-insured employer, City of Seattle, filed an appeal with the Board of Industrial Insurance Appeals on August 27, 2004, from an order of the Department of Labor and Industries dated August 12, 2004. In this order, the Department reversed a prior order dated July 22, 2004, accepted conditions diagnosed as cervico-thoracic strain and aggravation of pre-existing L5 spondylosis and spondylolisthesis, and directed the self-insured employer to assume responsibility and cover the bills for the L5-S1 arthrodesis on April 10, 2003. The Department order is **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on August 8, 2005, in which the industrial appeals judge reversed and remanded the order of the Department dated August 12, 2004.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

Mr. Libby, a 31-year-old male, was working for the Seattle Police Department when he suffered his industrial injury on August 22, 2001. When the accident occurred, Mr. Libby and his partner were on patrol in an unmarked police vehicle. Mr. Libby stopped the vehicle suddenly to avoid hitting a family of raccoons crossing the street. After his vehicle came to a complete stop, Mr. Libby was rear ended by another vehicle traveling at approximately 35 miles per hour. Upon

impact, Mr. Libby's head snapped backward and forward. He was wearing his lap belt and a shoulder harness. Mr. Libby was taken to Harborview Hospital where he reported neck and back pain. X-rays were taken of his neck and upper back, but not his low back because he reported no tenderness in that area. He was released from the emergency room that evening. The next day, Mr. Libby began experiencing pain in his low back that radiated into his left leg. As Mr. Libby's neck pain decreased, his low back pain increased.

Mr. Libby had no back problems or any other impairment immediately prior to his industrial injury. He worked in residential construction between the ages of 18 and 24. He also worked on a fishing boat, worked as a barista, and as a police officer. Mr. Libby was required to pass a physical test before beginning his work with the police department, which included running two miles, scaling a wall, jumping over a fence, performing push-ups, performing sit-ups, and weightlifting. His duties as a police officer could include fighting with a suspect, running, running stairs, entering his car rapidly, and exiting his car rapidly. In addition to his physically demanding job, Mr. Libby coached soccer, played soccer, skied, and snowboarded. He was able to engage in all housework and yard work.

All of the medical experts agreed that Mr. Libby suffered from a pre-existing spondylosis and spondylolisthesis at the L5-S1 level. Mr. Libby sustained a prior low back injury in 1991, while working on a fishing boat in Alaska. He returned to Seattle and participated in physical therapy for approximately two months. Following Mr. Libby's completed physical therapy, he was deemed to be fully recovered and able to return to fishing. Mr. Libby decided to seek other employment. Mr. Libby also experienced a brief episode of low back pain in 1994 when he "tweaked" his back getting out of the car. He did not seek treatment for his back pain, but missed approximately one week of work. Between 1994 and 2001, Mr. Libby worked continuously as a police officer without any limitations. Mr. Libby did not seek treatment for any low back condition, nor was he taking any prescription or over-the-counter medication to relieve low back symptoms.

Mr. Libby did not work after his industrial injury until February 2002, when he returned to a light-duty desk job. Mr. Libby stopped working in August 2002 because prolonged sitting was aggravating his low back condition, causing him to take a day off work every other day. Mr. Libby remained off work until January 2004. He then returned to a light-duty desk position four hours a day, five days a week. He stopped working again in April 2004. Despite fusion surgery in April 2003 and removal of the hardware in April 2004, Mr. Libby continued to experience severe symptoms. Mr. Libby was sleeping approximately ninety minutes per day. He was not able to

perform yard work or housework. He was not able to play with his daughter. He was not able to sit, stand, lie down, or walk for any extended period of time. He used a cane to compensate for perceived weakness in his leg.

The question posed by this appeal is whether Mr. Libby's industrial injury aggravated a pre-existing condition. Although Mr. Libby suffered some low back symptoms prior to August 22, 2001, he was symptom free and free of any disability for approximately seven years. During that time, he was extremely active, participating in challenging activities at work and in his personal life without restriction. For several years prior to the industrial injury, Mr. Libby's pre-existing spondylosis and spondylolisthesis were inactive and asymptomatic. More importantly, he suffered no disability as a result of those conditions.

Bruce Bradley, M.D., an orthopedic surgeon, conducted an independent medical examination with Jean Millican, M.D., on August 27, 2003, at the request of the self-insured employer. Dr. Bradley originally opined that the industrial injury did not "light up" Mr. Libby's condition, relying upon the medical history dictated by Dr. Millican. After Dr. Bradley reviewed the records himself, he changed his opinion. Both Dr. Bradley and Mark Wagner, M.D., Mr. Libby's attending physician, determined that the industrial injury aggravated Mr. Libby's pre-existing low back condition, on a more-probable-than-not basis. With regard to objective evidence of increased disability, both identified decreased range of motion in the lumbar spine, both before and after the surgical fusion. Mr. Libby also suffered a bilateral disk bulge at the L5-S1 level, as demonstrated on the June 25, 2002, MRI film. While Dr. Bradley stated a possibility that Mr. Libby's lumbar disk bulge was caused by the industrial injury, Dr. Wagner opined, on a more-probable-than-not basis, that the motor vehicle accident caused low back pain, a disk bulge impinging upon the nerve, and the resulting surgery. In addition, on February 7, 2003, Dr. Wagner found that Mr. Libby had pain sensations that conformed to the distribution of the nerve exiting at the L5–S1 level. By October 26, 2004, Mr. Libby had developed decreased sensation in the L4-5 and L5-S1 nerve distributions and trace weakness in his left leg.

James Champoux, M.D., agreed that Mr. Libby suffered injury to his low back as a result of the industrial injury and that the bilateral disk bulge could be the cause of Mr. Libby's left buttock pain. He disagreed that the industrial injury proximately caused the disk bulge. Dr. Champoux had no other explanation for Mr. Libby's low back pain, but his testimony suggested that if Mr. Libby's spodylolisthesis was not symptomatic prior to the industrial injury, then the industrial accident caused the condition to become symptomatic.

The other physicians presented by the self-insured employer, Dr. Millican, and David Zucker, M.D., both felt that, because Mr. Libby did not experience immediate low back pain after the industrial accident, it was not possible that the accident could have caused Mr. Libby's low back disk bulge or aggravated his pre-existing conditions. Dr. Zucker focused on the lack of objective findings of a low back condition when the emergency room physician examined Mr. Libby. Dr. Zucker opined that the disk bulge pre-existed the industrial injury, but had not viewed the MRI films and could not state with certainty when the disk bulge occurred. Dr. Zucker's explanation for Mr. Libby's onset of symptoms was deconditioning. He did not explain how Mr. Libby became so out of shape between August 22, 2001 and August 31, 2001, the first day Mr. Libby complained of low back pain, as to cause low back symptoms.

Much of the record was developed to determine whether the industrial injury "lighted up" Mr. Libby's pre-existing conditions. A "lighting up" analysis is not required in order to direct the self-insured employer to accept responsibility for providing treatment for these conditions. "Lighting-up" analysis as developed in *Miller v. Department of Labor & Indus*., 200 Wash 674 (1939) is appropriate when determining whether permanent disability can be attributed to a pre-existing condition. It is premature in this claim to determine permanent disability and, accordingly, is premature to determine whether the industrial injury lighted up Mr. Libby's pre-existing L5 spondlylosis and spondylolisthesis. We need only determine whether the industrial injury aggravated the pre-existing conditions.

The preponderance of the evidence established that the effects of the industrial accident aggravated Mr. Libby's pre-existing spondylosis and spondylolisthesis. Specifically, the industrial injury caused his L5-S1 disk bulge, decreased range of motion, decreased sensation, and pain symptoms. Those symptoms prevented Mr. Libby from performing his regular police officer duties and from engaging in other activities he enjoyed prior to the industrial injury. The Department correctly ordered the self-insured employer to accept responsibility for Mr. Libby's spondylosis and spondylolisthesis conditions, and the bills resulting from the lumbar arthrodesis.

FINDINGS OF FACT

1. On September 10, 2001, Aaron S. Libby, the claimant, filed an Application for Benefits with the Department of Labor and Industries, in which it alleged that he sustained an industrial injury to his neck and back on August 22, 2001, while in the course of his employment with the City of Seattle.

The claim was allowed and benefits provided.

On August 27, 2004, the self-insured employer filed a Notice of Appeal from the August 12, 2004, Department order, which reversed a prior July 22, 2004, order, accepted the claim for cervico-thoracic strain and aggravation to the pre-existing L5 spondylosis and spondylolisthesis, and directed the self-insured employer to assume responsibility and cover the bills pertaining to the L5-S1 arthrodesis from April 10, 2003.

On September 27, 2004, the Board issued an order that granted the appeal, assigned Docket No. 04 20487, and directed that further proceedings be held on the issues raised therein.

2. On August 22, 2001, Aaron S. Libby sustained injuries to his neck and low back in the course of his employment as a police officer for the City of Seattle. The accident occurred when Mr. Libby's unmarked police car was rear-ended by another vehicle, which was estimated to be traveling 35 miles per hour. At the time of the accident. Mr. Libby had stopped his vehicle to permit a family of raccoons to cross the road. Mr. Libby recalled the forward and backward motion of his upper body. He saw the ceiling of the vehicle as his head was thrown backward, despite his use of lap and shoulder harnesses. When Mr. Libby was transported to Harborview Hospital after the accident he complained of both neck and back pain. At that time, he experienced the most significant pain in his neck.

3. Prior to August 22, 2001, Mr. Libby was a 31-year-old police officer. He had asymptomatic L5 spondylosis and spondylolisthesis. He performed the full range of duties as a police officer without limitation. He coached soccer, played soccer, skied, and snowboarded. In addition, he played with his daughter and was able to perform a full range of household chores, including yard work.

4. Mr. Libby's August 22, 2001, industrial injury proximately caused a cervico-thoracic strain/sprain and disk bulge at L5-S1. The bulging disk, proximately caused by the industrial injury aggravated Mr. Libby's pre-existing L5 spondylolisthesis and spondylosis. As a result, he suffered loss of range of motion, loss of sensation, left leg weakness, low back pain, and left leg pain.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and subject matter of this appeal.

2. Mr. Libby's August 22, 2001, industrial injury aggravated his pre-existing spondylolisthesis and spondylosis.

3. The Department's order dated August 12, 2004, is correct and is affirmed.

It is so **ORDERED**.

Dated this 29th day of November, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
CALHOUN DICKINSON Member