

Defio, Nicholas

OCCUPATIONAL DISEASE (RCW 51.08.140)

Proximate cause of condition(s) in a segregation order

Where the Department issues an order segregating a condition for an allowed occupational disease claim and the worker appeals to the Board, the issue is whether the segregated condition was (1) caused by the same distinctive conditions of employment in the allowed occupational disease claim, or (2) whether the allowed condition in the occupational disease claim caused the segregated condition. The issue on appeal is not whether the segregated condition should be allowed as a new occupational disease.*In re Nicholas Defio, BIIA Dec., 13 13370 (2014)*

Scroll down for order.

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

1 **IN RE: NICHOLAS P. DEFIO**) **DOCKET NOS. 13 13370 & 13 13761**
2)
3 **CLAIM NO. AQ-40527**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Claimant, Nicholas P. Defio, by
8 Allen Law Firm, per
9 Craig K. Allen and Jeffrey Thigpen

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11 Employer, Manuflaxsterit, LLC, by
12 Adelstein, Sharpe & Serka, LLP, per
13 Karen M. Phillips and Jeffrey P. Fairchild

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15 Retrospective Rating Group, PITB Services, Inc., Retro Group No. 10626, by
16 Approach Management Services, per
17 Martha Molina, Lay Representative

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19 Department of Labor and Industries, by
20 The Office of the Attorney General, per
21 Lisa M. Keeler
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23 In Docket No. 13 13370, the claimant, Nicholas P. Defio, filed an appeal with the Board of
24 Industrial Insurance Appeals on March 11, 2013, from an order of the Department of Labor and
25 Industries dated March 8, 2013. In this order, the Department order corrected and superseded its
26 order dated February 20, 2013, and determined that the Department was not responsible for the
27 condition diagnosed as cervical degenerative disc disease with stenosis. The Department order is
28 **AFFIRMED.**

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32 In Docket No. 13 13761, the claimant, Nicholas P. Defio, filed an appeal with the Board of
33 Industrial Insurance Appeals on March 18, 2013, from an order of the Department of Labor and
34 Industries dated March 11, 2013. In this order, the Department corrected and superseded its order
35 dated February 11, 2013; and closed the claim effective March 11, 2013, with no further time-loss
36 compensation benefits; no permanent partial disability award; and no additional medical treatment.
37 The Department order is **AFFIRMED.**

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41 **DECISION**

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43 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
44 review and decision. The employer filed a timely Petition for Review of a Proposed Decision and
45 Order issued on April 14, 2014, in which the industrial appeals judge reversed and remanded
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1 Department orders dated March 8, 2013, and March 11, 2013. On June 19, 2014, the claimant filed
2 a Response to the Petition for Review. The contested issues addressed in this order include
3 whether the Department is responsible for Mr. Defio's preexisting cervical degenerative disc
4 disease with congenital stenosis, and, if so, whether any industrially-related condition(s) were fixed
5 and stable as of March 11, 2013.
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9 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
10 no prejudicial error was committed. The rulings are affirmed.
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12 We have granted review to clarify analysis of the issue in these appeals, which is
13 segregation of a new condition in an existing occupational disease claim. Mr. Defio and our
14 industrial appeals judge framed the issue at hearing as one of allowance of an occupational
15 disease. But what Mr. Defio appeals is a segregation order, not an order denying an occupation
16 disease claim. The issue on appeal is not whether Mr. Defio's cervical degenerative disc disease
17 with congenital stenosis was aggravated by distinctive conditions of his employment. Rather, the
18 issue is whether Mr. Defio's cervical degenerative disc disease with congenital stenosis was
19 proximately caused by his carpal tunnel syndrome condition or by the same distinctive conditions
20 that caused his carpal tunnel syndrome. A preponderance of the evidence does not support a
21 finding that Mr. Defio's preexisting cervical degenerative disc disease with stenosis condition is
22 derivative of his carpal tunnel syndrome as either a residual condition or caused by the same
23 distinctive conditions of employment.
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30 **Facts**

31 Mr. Defio is a 65 year old man. He worked for Manuflaxsterit, LLC, a manufacturer of
32 organic flaxseed oils, fish oils and miscellaneous products, for about nine years. From the time he
33 started in 2003 until 2009, his duties at Manuflaxsterit included pressure washing plastic barrels
34 and metal tanks, and filling and stacking sacks of flour. After hernia surgery in 2009, and until
35 October 2012, he worked light-duty work cleaning pumps.
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38 Mr. Defio testified that the plastic barrels he cleaned weighed 24 pounds each and stood
39 three feet high and two feet wide. On days he cleaned plastic barrels, Mr. Defio estimated that he
40 cleaned 50-100 a day, with each barrel taking 6 to 10 minutes to clean. Cleaning required that he
41 place the barrel on a wash rack where the barrel sat at a tilt between knee and chest height. No
42 overhead lifting was required for this task. After barrels were cleaned and dried, they were stacked
43 two high. Occasionally, Mr. Defio and another worker put some of the barrels in a loft about
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1 one-half story up from the floor where the barrel washing was done. Sometimes Mr. Defio was the
2 one lifting the barrels, other times he was in the loft grabbing and stowing them. Metal tanks were
3 moved with a forklift to the cleaning area and then tilted and rolled as needed to accomplish
4 cleaning. Mr. Defio cleaned two to three metal tanks a day.
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7 When Mr. Defio was not cleaning plastic barrels or metal tanks, he filled sacks with
8 50 pounds of flour, stacking filled sacks on a pallet. A fully loaded pallet contained 40 sacks and
9 reached a height Mr. Defio said was about to his nose. Mr. Defio is 5 feet 11½ inches tall.
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11 After hernia surgery in 2009, Manuflaxsterit reassigned Mr. Defio to the light-duty job of
12 cleaning pumps and augers used in its manufacturing processes. The large pumps that Mr. Defio
13 cleaned were on wheels and hand pushed. Lifting was involved with cleaning smaller pumps, with
14 the heaviest lifting being around 25 pounds. To clean the small pumps, Mr. Defio hung pump parts
15 on rack hooks. The hooks were at waist and eye level. To clean augers, Mr. Defio described
16 having to remove a 50 pound lid above shoulder height before vacuuming out the auger.
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20 Mark Lemma was called by Manuflaxsterit. Mr. Lemma was the maintenance manager and
21 Mr. Defio's supervisor until October 2011, when he became the manager of new equipment design.
22 His physical description was similar to Mr. Defio's regarding the plastic barrels and metal tanks; the
23 washing and drying process; the time it took per barrel to wash; and the work's knee-to-chest height
24 nature. The only notable difference was that Mr. Lemma's estimate of the volume of barrels
25 cleaned in a day was about half of the number Mr. Defio identified. On the matter of stacking
26 barrels, Mr. Lemma described the loft as a long-term storage area where barrels were moved about
27 once a month. The loft's size allowed only 45 to 50 barrel to be put there, and the seven foot
28 ceiling height preventing stacking over two high. Mr. Lemma testified that a forklift was sometimes
29 used to move the barrels to the loft, and that handing them up was done when a forklift could not be
30 found or workers did not want to look for one.
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37 Mr. Lemma described Manuflaxsterit's flour bag filling equipment as requiring Mr. Defio to
38 slide a bag into place. When in place, the top of the bag was at waist height. After the bag was
39 filled, it had to be slid off the machine; the top glued shut; and the bag placed onto a pallet. Placing
40 a bag on the pallet required Mr. Defio to squat; lift the bag; turn to the pallet; and set it on the pallet.
41 Mr. Lemma, who stands six feet tall (one-half inch taller than Mr. Defio), described a filled pallet as
42 reaching about to his shoulders. Mr. Lemma also explained that not all auger lids were at shoulder
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1 height; some were lower. For the auger lids at shoulder height, they were two-part lids for safety
2 reasons, each half weighing 25 pounds.
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4 Mr. Defio presented the testimony of two medical experts, Eric Smith, M.D., an occupational
5 medicine physician, and Tung Mai Ha, D.O., a neurosurgeon.
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7 Mr. Defio first saw Dr. Smith on October 10, 2012, on referral from Matt Oswin, M.D., the
8 doctor who performed Mr. Defio's carpal tunnel release surgeries. When asked about his
9 understanding of Mr. Defio's work conditions, Dr. Smith referred to a November 30, 2012 statement
10 in his file signed by Mr. Defio. In that statement, Mr. Defio described his work as requiring "highly
11 repetitive lifting and overhead activity."¹ Mr. Defio's statement also said he had had no neck
12 problems before he went to work for Manuflaxsterit. Dr. Smith's opinion was that the lifting and
13 repetitive overhead reaching and lifting work Mr. Defio did, as described in the November 30, 2012
14 statement, lit up Mr. Defio's preexisting cervical degenerative disc with congenital stenosis
15 condition.
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21 Dr. Ha first saw Mr. Defio in July 2012, also on referral from Dr. Oswin. The work history he
22 obtained from Mr. Defio was that he "did a lot of heavy lifting above his head."² The cervical MRI
23 Dr. Ha reviewed, which had been ordered by Dr. Oswin, showed multiple levels of severe
24 degenerative changes in the discs and this was superimposed on Mr. Defio's congenital cervical
25 spinal canal stenosis. Dr. Ha diagnosed severe multilevel spinal cord compression. He said the
26 heavy overhead lifting Mr. Defio did in his work accelerated his preexisting degenerative condition.
27 Among Dr. Ha's records was a copy of Mr. Defio's November 30, 2012 signed statement.
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31 The Department presented the testimony St. Elmo Newton, III, M.D. an orthopedic surgeon.
32 Dr. Newton examined Mr. Defio on October 11, 2012. Based on his review of claim-related medical
33 records that included the same cervical MRI that Dr. Ha reviewed and his physical examination of
34 Mr. Defio, Dr. Newton diagnosed Mr. Defio with bilateral carpal tunnel syndrome. He felt that the
35 condition was not related to his work, but noted that it had been administratively accepted.
36 Dr. Newton also diagnosed cervical degenerative disc disease with stenosis. He felt this condition
37 was not related to Mr. Defio's work for several reasons. First, Dr. Newton noted that the stenosis
38 was congenital. Next, he noted that the degenerative condition was multi-level and age-related.
39 Finally, Dr. Newton explained that he understood that Mr. Defio's work did not involve repetitive
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46 ¹ Smith Dep. at 14.

47 ² Ha Dep. at 11. See also at 31.

1 overhead lifting, and that even if it did, there was no impact to his neck from such lifting because it
2 would not involve the use of his neck.
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4 **Discussion**

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6 Resolution of these appeals does not turn on whether frequent overhead lifting was a
7 distinctive condition of Mr. Defio's employment that aggravated his preexisting cervical
8 degenerative disc condition. The real question is whether Mr. Defio's preexisting cervical condition
9 was aggravated by either the treatment of his carpal tunnel condition or caused by the same
10 distinctive conditions of employment underlying the accepted carpal tunnel condition. This
11 distinction is important and not unlike the distinction we have drawn in cases where we have
12 decided whether a new condition was an aggravation of condition caused by an industrial injury or
13 whether a condition was due to a new injury.
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18 A dichotomy occasionally arises between a new occupational disease and one derivative of
19 an allowed condition. That is the circumstance we have here. In the context of new injury versus
20 aggravation, we adopted in *In re Robert Tracy* an analytical framework for resolving this dichotomy
21 by way of a shorthand question.³ Rephrased for application in occupational disease cases, the
22 analytical framework, and the real questions in this appeal, are whether but for the accepted
23 occupational disease condition, would Mr. Defio have suffered the subsequent condition, or did a
24 separate cause, independent of distinctive conditions underlying the accepted occupational disease
25 condition, cause the newly claimed condition? The real question is one of proximate cause, that is,
26 whether but for the original allowed occupational disease condition and the distinctive conditions
27 that caused that condition, would the worker suffer from this additional condition.⁴
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33 The evidence to support Mr. Defio's appeal focused on work activities, or distinctive
34 conditions of his employment that he believed aggravated his cervical degenerative disc condition.
35 He pointed to frequent overhead lifting. Mr. Defio's medical expert's opinions were based on their
36 understanding that his work required frequent repetitive overhead lifting of significant weights. At
37 one point, Mr. Defio testified that he thought he did 50 to 90 percent of his work overhead.
38 However, when he factually described his work activities and the relative heights at which most of it
39 was conducted, it showed that his work involved little overhead lifting. Mr. Defio's testimony, like
40 Mr. Lemma's (who is only one-half inch taller than Mr. Defio), described work that was
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46 ³ BIIA Dec., 88 1695 (1990).

47 ⁴ *In re Robert Tracy*, BIIA Dec., 88 1695 (1990).

1 predominately executed between knee and shoulder heights. Both described barrel cleaning as
2 involving work activities mostly done between knee and chest height. Lifting for this work
3 comprised placing 24-pound plastic barrels onto the wash rack and, once dry, stacking them one on
4 top of the other. Filling and stacking of sacks of flour involved activity that was predominately
5 performed at knee to chest height. Although Mr. Defio described the pump rack as above his head,
6 that was not the level at which his work activities occurred. Mr. Defio testified that he placed pump
7 parts on hooks at waist and eye level.
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11 Nothing in the record indicates whether or how frequent overhead lifting was a cause of
12 Mr. Defio's carpal tunnel condition. Neither of his medical experts testified that that activity was
13 causally related to the accepted carpal tunnel condition, or that any other aspect of his barrel
14 cleaning, pump part cleaning, or flour sack filing, acted upon his preexisting cervical condition. We
15 also carefully review the record for medical testimony that traced Mr. Defio's cervical condition to
16 any treatment he received for his carpal tunnel condition. We found none. Beyond this, both
17 Mr. Defio's doctors related his cervical condition to his work because of their understanding that
18 Mr. Defio's work required a lot of overhead heavy lifting. That understanding is inaccurate based
19 on Mr. Defio's and Mr. Lemma's fact-based descriptions of the work Mr. Defio did. The evidence
20 shows that overhead work was required only occasionally, at most.
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23 The evidence fails to show that but for Mr. Defio's carpal tunnel syndrome condition, his
24 preexisting cervical degenerative disc disease with congenital stenosis would have been
25 aggravated nor does the evidence show that the distinctive conditions of employment that caused
26 the carpal tunnel syndrome also aggravated his preexisting cervical condition. We therefore affirm
27 the Department's segregation order.
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34 **FINDINGS OF FACT**

- 35 1. On May 20, 2013, an industrial appeals judge certified that the parties
36 agreed to include the Jurisdictional History, as amended, in the Board
37 record solely for jurisdictional purposes.
- 38 2. Nicholas P. Defio worked as a pressure washer for Manuflaxsterit, LLC,
39 from 2003 to 2012. His duties from 2003 until 2009, included washing
40 plastic barrels and metal tanks used in manufacturing organic oils, and
41 filling sacks with 50 pounds of flour. From 2009 to 2012, Mr. Defio
42 cleaned pump parts and vacuumed augers used in manufacturing
43 organic oils.
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