

## Thrush, Richard

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### INTERVENTION

#### Medical providers

A hospital which has provided medical services for which the Department has denied payment has an interest in an appeal concerning the worker's entitlement to such services and may properly intervene. ....*In re Richard Thrush, BIA Dec., 30,899 (1969)*

Scroll down for order.

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

1 **IN RE: RICHARD W. THRUSH** ) **DOCKET NO. 30,899**  
2 )  
3 **CLAIM NO. F-525552** ) **DECISION AND ORDER**  
4 \_\_\_\_\_ )

5 APPEARANCES:

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7 Claimant, Richard W. Thrush, by  
8 Clarence H. Fidler, and  
9 Jager, Austin & Culver, per  
10 William J. Van Natter, Associate Counsel

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12 Employer, M. R. Smith Shingle Company  
13 (In attendance: William A. Hartley, Authorized Representative)

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15 Intervener, The Swedish Hospital, by  
16 Jackson, Ulvestad & Goodwin, per  
17 Roy E. Jackson and James A. Grutz

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19 Department of Labor and Industries, by  
20 The Attorney General, per  
21 Edward G. Gough and Dinah Campbell, Assistants

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23 This is an appeal filed by the claimant on June 5, 1968, from an order of the Department of  
24 Labor and Industries dated May 6, 1968, which closed the claim with time-loss compensation as  
25 paid through June 29, 1967, with no award for permanent partial disability. The Department has  
26 also disallowed the payment of medical expenses. **SUSTAINED IN PART** and **REVERSED AND**  
27 **REMANDED IN PART.**  
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30 **DECISION**

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32 This matter is before the Board for review and decision on a timely Statement of Exceptions  
33 filed by the Department of Labor and Industries to a Proposed Decision and Order issued by a  
34 hearing examiner for this Board on March 20, 1969, in which the order of the Department dated  
35 May 6, 1968, was reversed and the matter remanded to the Department to assume responsibility  
36 for the aggravation of a pre-existing condition of tuberculosis of the greater trochanter and to pay  
37 the claimant a permanent partial disability award.

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39 Hearing Examiner Wallace Bartholomew, who issued the Proposed Decision and Order of  
40 March 20, 1969, had adequately stated the sequence of events necessary to an understanding of  
41 the issues on this appeal on pages 1, 2 and 3 of his proposed Decision and Order, and since all  
42 parties have been furnished the Proposed Decision and Order we will not repeat the historical data.  
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1 We believe Mr. Bartholomew to be in error, however, in his determination that the Swedish Hospital  
2 could not intervene in the case, since we determine that RCW 4.08.190 and RCW 51.52.060 are  
3 broad enough to permit intervention by any individual or entity which may be affected by a decision  
4 of the Department of Labor and Industries. (See State v. Inland Empire Refineries, Inc., 3 Wn. 2d  
5 651, 668 [1940], where our Supreme Court permitted a railroad to intervene in a tax action.) We  
6 also do not agree with our hearing examiner's determination regarding permanent disability.  
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10 Prior to his industrial injury of February 13, 1967, the claimant had a condition of tuberculosis  
11 involving the greater trochanter of the left hip. In essence, this is tuberculosis of a bone. This came  
12 to the attention of the claimant's doctors while the claimant was undergoing treatment for a blow he  
13 had received to his left hip during his employment. The claimant was sent to Swedish Hospital, in  
14 Seattle, where he received two operative procedures on his left hip which were directed to the  
15 elimination of the tubercular condition. These operations were apparently successful.  
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19 The claimant contends on this appeal that the blow to his left hip during the course of his  
20 employment was an industrial injury which caused an aggravation of his otherwise quiescent  
21 tubercular condition in his hip, and the blow thereby made necessary the operative procedures  
22 sooner in time than would have been the case had there been no industrial injury. He further  
23 contends that he is deserving of an award for permanent partial disability based upon disability  
24 suffered as a result of those operative procedures.  
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28 The Department, on the other hand, contends that the operative procedures on the  
29 claimant's hip were not causally related to his industrial injury, but, rather, were the natural result of  
30 the diagnosis of tuberculosis in the greater trochanter. Further, the Department argues that any  
31 permanent disability suffered by the claimant as a result of the operative procedures on his hip are  
32 not compensable since they fall within the provisions of RCW 51.32.100, which provides:  
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35 "If it is determined by the department that an injured workman had, at  
36 the time of his injury, a pre-existing disease and that such disease  
37 delays or prevents complete recovery from such injury, the said  
38 department shall ascertain, as nearly as possible, the period over which  
39 the injury would have caused disability were it not for the diseased  
40 condition and the extent of permanent partial disability which the injury  
41 would have caused were it not for the disease, and award compensation  
42 only therefor."  
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1 The Department also argues that its order dated July 19, 1967, from which no appeal was ever  
2 taken, effectively segregated the pre-existing condition of tuberculosis. The operative language to  
3 which it alludes is as follows:  
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5 "WHEREAS, medical evidence discloses pre-existing condition  
6 described as: 'asseoris tuberculosis involving the greater trochanter':  
7 The Department hereby denies responsibility for this pre-existing  
8 condition as unrelated to the injury for which the claim was filed;...."  
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10 The issues before the Board on this appeal are: (1) did the order of the Department of Labor and  
11 Industries dated July 19, 1967, establish as a matter of law that the Department has no  
12 responsibility for the care and treatment for the claimant's tubercular condition in the greater  
13 trochanter of the left hip? (2) did the claimant have a permanent disability resulting from the  
14 industrial injury of February 13, 1967, or the treatment therefor, when his claim was closed on May  
15 6, 1968, and, if so, the extent thereof?  
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19 Having reviewed this record with great care, we have concluded that the claimant did indeed  
20 have a pre-existing tuberculosis in the greater trochanter of his left hip which, more probably than  
21 not, was temporarily aggravated and made manifest by his industrial injury of February 13, 1967.  
22 We also conclude that had it not been for the industrial injury of February 13, 1967, and the  
23 temporary aggravation caused thereby, he may not have required surgical treatment. Because the  
24 industrial injury temporarily aggravated his pre-existing condition to require its treatment earlier than  
25 otherwise would have been necessary, the medical bills incurred in the pursuit of that treatment and  
26 the portion of time-loss compensation attributable thereto are properly the responsibility of the  
27 Department of Labor and Industries.  
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33 In our view, the order of the Department of Labor and Industries dated July 19, 1967, by its  
34 terms, did not purport to or succeed in segregating aggravation of the claimant's pre-existing  
35 condition which occurred as a result of his industrial injury. The order of July 19, 1967, only denied  
36 responsibility for the pre-existing condition itself. The order was not sufficient to invoke the  
37 provisions of RCW 51.32.100. LeBire v. Department of Labor and Industries, 14 Wn. 2d 407, relied  
38 upon by Department's counsel, is not in point.  
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42 There is no evidence before us that the Department ever invoked the provisions of RCW  
43 51.32.100 by the entry of an appropriate appealable order. The statute is not self-executing.  
44 Therefore, the Department's reliance on the provisions of RCW 51.32.100 must fail.  
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1 On the matter of whether or not the blow to the claimant's hip on February 13, 1967 required  
2 the surgeries, the testimony of Dr. Robert W. Simpson, an internal medicine specialist who  
3 examined for the Department, is persuasive:  
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5 "Q (EXAMINER) He is climbing up a ladder working, and he falls backward  
6 several feet - say 3 or 4 feet - on to a hard surface - on his hip.  
7 Wouldn't this aggravate the pre-existing problem or inflammation -  
8 wouldn't it upset the situation there?  
9

10 A Yes - because you can assume he bruised the area, and had a little  
11 bruise - then he got bleeding and swelling in this area, and it swelled up,  
12 and the tissue was tight, and it was painful. I don't think it caused the  
13 infection though; I think the infection was smoldering.  
14

15 Q Okay. Suppose it is smoldering, wouldn't this then be the finale that  
16 would make it blow-up and spread?  
17

18 A That is right.  
19

20 Q I am not.  
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22 A I think very possibly it flared the area of inflammation to the point where  
23 the man became symptomatic and needed surgery; and then, because  
24 the surgery was done and the tuberculosis was not found in the first  
25 tissue biopsy, the drainage continued, and the second surgery then  
26 showed the tuberculosis which had been there all along.  
27

28 Q Well, now----(interrupted)  
29

30 A (Continuing) Tuberculosis is an odd disease. It will smoulder in some  
31 people 30 or 40 years. We used to see this. And in other people, they  
32 will get the tuberculosis and be dead in a month or two from it going  
33 through the blood stream; so I think each patient's resistance is a little  
34 different, and this boy's resistance to tuberculosis was enough to hold it  
35 partially in check until something interfered with his body's defense  
36 mechanism.  
37

38 Q (EXAMINER) Now, the second point - you testified there was no  
39 disability. The boy testified that ever since this time, he can't walk as far  
40 as he did; he had to find lighter work because he can't stand as long on  
41 this hip and it hurts him to do so. Is this consistent with the after-effects  
42 of this treatment?  
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44 A This is consistent with the after-effects of tuberculosis.  
45

46 Q Not the treatment?  
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48 A Not the treatment.  
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50 Q So, we can say, Doctor, that the injury probably made the need for  
51 treatment imperative?  
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53 A Yes.  
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1 Q But we could not say there would be any disability as a result of that  
2 treatment -- but if there were disability, it would be as a result of the  
3 underlying tuberculosis condition?  
4

5 A Yes.

6 **CROSS EXAMINATION**

7 BY MR. GRUTZ:  
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9 Q In answer to the Examiner, you said the fall caused the tuberculosis to  
10 flare up?

11 A The area of inflammation to flare up.

12 Q And this necessitated the first surgery, is that correct?

13 A Yes.

14 Q Given your opinion that this fall caused a flare-up and this necessitated  
15 the first surgical operation, wouldn't it be fair to say, Doctor, that the  
16 failure of this wound to heal necessitated the second surgical operation?  
17

18 A Oh, yes."  
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21 On the question of the claimant's permanent disability, what is before us is the effect his industrial  
22 injury had upon his pre-existing condition. The preponderance of medical testimony does not  
23 support the claimant's contention that he has permanent disability in his hip residual to his hip  
24 operations related to the industrial injury. The more persuasive medical evidence is that it was not  
25 the aggravation of the claimant's pre-existing condition which resulted in any permanent disability,  
26 but if there is permanent disability, it is the result of the tuberculosis of the greater trochanter.  
27 There is a difference in medical opinion on whether or not the claimant's left hip surgeries resulted  
28 in a permanent partial disability. Clearly the evaluation testimony of Dr. Arthur R. Black must be  
29 disregarded because he obviously does not understand the rating system of the Washington  
30 Industrial Insurance Act.  
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32 In determining whether or not there is a resultant permanent disability, we have carefully  
33 considered the evaluations given by Dr. Peter Fisher and Dr. Robert W. Simpson, internal medicine  
34 specialists, and Dr. Edwin E. Sprecher, an orthopedic surgeon. None of the parties presented the  
35 testimony of Dr. Ernest Burgess, so we do not have before us an evaluation of the attending  
36 orthopedic surgeon.  
37

38 We note that the descriptions of pain and limitation of motion as found by the doctors on their  
39 examinations describe a minimal, if any, loss of function and disability. We are persuaded that the  
40 doctor best qualified to give a disability rating opinion in this case was not presented by any of the  
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1 parties. In the absence of the opinion of the attending orthopedic surgeon, we accept the opinion of  
2 Drs. Robert W. Simpson and Edwin E. Sprecher that the claimant suffered no permanent partial  
3 disability attributable to the industrial injury of February 13, 1967, or the surgeries required  
4 thereafter.  
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7 It is our conclusion, therefore, that the treatment, including the two surgeries for the  
8 claimant's left hip trochanteric tuberculosis, and time-loss compensation allowable during said  
9 period are properly the responsibility of the Department and, that on May 6, 1968, the claimant had  
10 no measurable degree of permanent disability attributable to his industrial injury of February 13,  
11 1967.  
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14 At a hearing held in this matter on December 16, 1968, Swedish Hospital appeared by its  
15 attorney, Roy M. Jackson, and moved it be allowed to intervene in this matter. Its claimed interest  
16 in the matter was unpaid hospital bills for an operation on the claimant and certain other medical  
17 expenses. Although our disposition of the present appeal favors the hospital's underlying  
18 contention that the operative procedures were made necessary by the industrial injury, it behooves  
19 us to clarify the legal question of their right to intervene. As already mentioned earlier in our  
20 decision, The Swedish Hospital has an interest in the litigation and in the success of one of the  
21 parties and may become a party to the proceeding under the terms of RCW 4.08.190 and RCW  
22 51.52.060, and our order will grant the motion to intervene.  
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### 28 **FINDINGS OF FACT**

29 Based on the record made at the hearing held in this matter, this Board finds:  
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- 31 1. The claimant, Richard W. Thrush, was injured by a blow to the left hip  
32 on February 13, 1967, during the course of his employment at M. R.  
33 Smith Shingle Company in Beaver, Clallam County, Washington. He  
34 filed a report of accident with the Department of Labor and Industries on  
35 March 16, 1967. On April 27, 1967, the Department entered an order  
36 allowing the claim and granting time-loss compensation payments. On  
37 July 19, 1967, the Department entered an order segregating a pre-  
38 existing condition described as "asseoris tuberculosis, involving the  
39 greater trochanter," and denying responsibility for this as unrelated to  
40 the injury. On May 6, 1968, the Department issued an order closing the  
41 claim and terminating time-loss, without any award for permanent partial  
42 disability. Claimant gave notice of appeal on June 5, 1968. By order  
43 dated June 28, 1968, the Board of Industrial Insurance Appeals granted  
44 the appeal.  
45
- 46 2. Appellate proceedings were conducted before the Board of Industrial  
47 Insurance Appeals and on March 20, 1969, a hearing examiner for this

1 Board entered a Proposed Decision and Order in connection with this  
2 appeal. Thereafter, within the period of time provided by law,  
3 exceptions were filed and the case referred to the Board for review as  
4 provided by RCW 51.52.106.

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6 3. On July 19, 1967, the Department had issued an order reciting:

7 "**WHEREAS**, medical evidence discloses pre-existing condition  
8 described as: 'asseoris tuberculosis involving the greater trochanter':  
9 The Department hereby denies responsibility for this pre-existing  
10 condition as unrelated to the injury for which the claim was filed;...."

11  
12 4. The injury to the claimant's left hip on February 13, 1967, aggravated a  
13 pre-existing condition of tuberculosis in his left greater trochanter. The  
14 claimant was operated at The Swedish Hospital in Seattle, Washington,  
15 on two occasions, March 27, 1967, and May 31, 1967, for alleviation of  
16 the infectious condition of tuberculosis of his greater trochanter as  
17 diagnosed. These operations were required sooner than they otherwise  
18 would have been necessary due to the effects of the February 13, 1967  
19 industrial injury.

20 5. On or about May 6, 1968, when his claim was closed by the Department  
21 of Labor and Industries, the claimant had a complete range of motion in  
22 all directions of his arms and legs. The left hip showed some pain at the  
23 extreme of internal rotation and external rotation of the hip. The calf  
24 measurements were equal bilaterally and the thigh measurements were  
25 approximately equal bilaterally.

26 There was a healed scar 6½ inches long lateral to the left trochanter, the  
27 center portion of which is retracted over a 1-inch distance extending  
28 down to the trochanter. The surgical scar was depressed with slight  
29 tenderness in the depressed area. The claimant's back motions were  
30 normal and various stress tests given by medical experts to the  
31 claimant's legs indicated normal function, the tones of the gluteal  
32 muscles were normal, and the claimant walked without a limp. The  
33 claimant walked normally on his heels and toes and could squat  
34 normally. The medical findings and tests indicated no evidence of  
35 permanent disability existed in the claimant's left hip, leg, or back when  
36 his claim was closed.

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38 6. On May 6, 1968, the claimant's condition resulting from his industrial  
39 injury of February 13, 1967, was fixed and the claimant suffered no  
40 limitation of function or permanent disability as a result of said injury or  
41 the surgeries to his left hip.

42 7. The Swedish Hospital, through counsel, moved to intervene in the  
43 appeal as an interested party in view of unpaid medical bills.

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45 8. There is no evidence that the Department issued an appropriate  
46 appealable order to invoke the provisions of RCW 51.32.100.  
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**CONCLUSIONS OF LAW**

Based on the foregoing findings of fact, this Board concludes:

1. This Board has jurisdiction of the parties and subject matter of this appeal.
2. The order of the Department dated July 19, 1967, did not establish, as a matter of law, that the aggravation of the claimant's pre-existing tuberculosis of the greater trochanter by his industrial injury of February 13, 1967, was not causally related to said injury.
3. No appropriate appealable order was entered by the Department to invoke the provisions of RCW 51.32.100 and said statute is not self-executing.
4. The treatment received by the claimant at The Swedish Hospital in Seattle, Washington, on March 27, 1967, and May 31, 1967, and the related treatment procedures precedent and antecedent thereto were necessitated by his industrial injury of February 13, 1967, and causally related thereto, and is properly the responsibility of the Department of Labor and Industries within the meaning of the Washington Industrial Insurance Act.
5. The Swedish Hospital is an interested party within the meaning of RCW 4.08.190 and RCW 51.52.060, and its motion to intervene should be granted.
6. On May 6, 1968, the claimant did not suffer any permanent disability as a result of his industrial injury of February 13, 1967, within the meaning of the Washington Industrial Insurance Act.
7. The order of the Department of Labor and Industries issued herein on May 6, 1968, should be reversed and this matter remanded to the Department with instruction to accept responsibility for the claimant's hospitalization and treatment at The Swedish Hospital, including the operative procedures performed on the claimant on March 27, 1967, and May 31, 1967, and the necessary medical procedures associated therewith, and furthermore to pay any time-loss compensation not already paid to the claimant for periods of temporary total disability occasioned by said treatment, and thereupon to close the claim.

It is so ORDERED.

Dated this 14th day of October, 1969.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/

ROBERT C. WETHERHOLT                      Chairperson

/s/

R.H. POWELL                                      Member

/s/

R.M. GILMORE                                    Member

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3 Revised Code of Washington, Section 51.52.120(2) provides:  
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5 "If, on appeal to the board, the order, decision or award of the department is reversed or  
6 modified and additional relief is granted to a workman or beneficiary, or in cases where a party  
7 other than the workman or beneficiary is the appealing party and the workman's or beneficiary's  
8 right to relief is sustained by the board, the board shall fix a reasonable fee for the services of this  
9 attorney in proceedings before the board if written application therefor is made by the attorney,  
10 workman or beneficiary. In fixing the amount of such attorney's fee, the board shall take into  
11 consideration the fee allowed, if any, by the director, for services before the department, and the  
12 board may review the fee fixed by said director. Any attorney's fee set by the department or the  
13 board may be reviewed by the superior court upon application of such attorney. Where the board,  
14 pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or  
15 receive any fee for services before the board in excess of that fee fixed by the board. Any person  
16 who violates any provision of this section shall be guilty of a misdemeanor."  
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