

Blake, Earl

AGGRAVATION (RCW 51.32.160)

Objective evidence requirement

ER 703 does not eliminate the substantive rule requiring objective medical evidence of worsening.*In re Earl Blake*, BIIA Dec., 51,928 (1980) [Editor's Note: But see *Price v. Department of Labor & Indus.*, 101 Wn.2d 520 (1984).]

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

1 **IN RE: EARL L. BLAKE**) **DOCKET NOS. 51,928 & 51,929**
2)
3 **CLAIM NOS. F-977951 & F-414497**) **DECISION AND ORDER**
4

5 APPEARANCES:

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7 Claimant, Earl L. Blake, by
8 Springer, Norman and Workman, per
9 Richard L. Norman

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11 Employer, Corrosion Controllers, Inc.,
12 None

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14 Employer, The Boeing Company, by
15 Perkins, Coie, Stone, Olsen and Williams, per
16 Calhoun Dickinson

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18 Department of Labor and Industries, by
19 The Attorney General, per
20 John R. Dick, Assistant
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22 Two appeals filed by the claimant on may 17, 1978, from two orders of the Department of
23 Labor and Industries dated March 17, 1978, which denied the claimant's applications for
24 aggravation in two separate injury claims on the ground that there was no adequate objective
25 evidence that the injury had become aggravated. **SUSTAINED**, as to claim No. F-414497, Docket
26 No. 51,929. **REVERSED AND REMANDED**, as to Claim No. F-977951, Docket No. 51,928.
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29 **DECISION**

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31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
32 and decision on timely Petitions for Review filed by the employer, The Boeing Company, and the
33 Department of Labor and Industries to a Proposed Decision and Order issued by a hearing
34 examiner for this Board on October 8, 1979, in which the orders of the Department dated March 17,
35 1978 were reversed, and the claim remanded to the Department of Labor and Industries with
36 direction to enter the claimant upon the pension rolls of this state as a totally disabled worker.
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39 The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no
40 prejudicial error was committed and said rulings are hereby affirmed.
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43 The general nature and background of this appeal are as set forth in the hearing examiner's
44 Proposed Decision and Order and shall not be reiterated herein.
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1 We concur in the hearing examiner's finding that the claimant's low back condition worsened
2 between the terminal dates of January 22, 1974 and March 17, 1978, to the extent that the claimant
3 has been rendered unable to engage in any form of gainful employment. We further concur in the
4 hearing examiner's determination that such worsening was occasioned by the claimant's industrial
5 injury of August 19, 1970, which he sustained during the course of his employment for Corrosion
6 Controllers, Inc.
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10 Of the three medical witnesses who testified herein, Dr. Winfred H. Clark, an orthopedic
11 surgeon, was the most familiar with the claimant's condition. Moreover, he was the only physician
12 testifying who personally examined the claimant reasonably near the aforesaid terminal dates.
13 The doctor's testimony discloses a steady deterioration in the claimant's low back condition
14 following the injury of August 19, 1970, with Corrosion Controllers, Inc.
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18 Although the hearing examiner found that the worsening or aggravation in the claimant's low
19 back condition was caused by the Corrosion Controllers, Inc., injury of August 19, 1970, and
20 concluded therefrom that the Department's order denying aggravation of that injury should be
21 reversed, he further concluded that the Department's order denying aggravation of the claimant's
22 Boeing injury of March 28, 1966, should also be reversed.
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25 The proposed reversal of the Department's order denying aggravation in the Boeing injury
26 claim finds no support as we read the record. While we would agree with the hearing examiner's
27 statement in conclusion No. 3 to the effect that the claimant's Boeing injury was "aggravated" by his
28 injury with Corrosion Controllers, Inc., this fact does not establish "aggravation" of the Boeing injury
29 within the purview of RCW 51.32.160, the statute governing adjustment of compensation for
30 aggravation. To establish aggravation of the Boeing injury, there must be a showing that the
31 worsening in the claimant's low back condition resulted from that injury. As previously noted, the
32 showing in this case is that such worsening resulted from the claimant's injury with Corrosion
33 Controller, Inc., an injury which constitutes an independent, intervening cause.
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39 Before concluding, we deem it necessary to disavow the hearing examiner's discussion
40 concerning the new rules of evidence adopted April 2, 1979, wherein he reaches the conclusion
41 that Rule 703, in legal effect, "repeals" the long-established case law requirement that a claim for
42 aggravation be supported in part by objective medical findings. The genesis of this conclusion
43 stems from the hearing examiner's determination that the case law requirement of objective
44 medical findings is itself a "rule of evidence." Manifestly, we think this is a fallacious premise. The
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1 case law decrees the standard of proof necessary to establish, prima facie, a case of aggravation.
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3 As such, it is a substantive rule of law. To subscribe to the hearing examiner's theory would, in
4 effect, hold that a rule of adjective law has overruled a substantive rule of law. We can find no
5 support in law for that proposition.
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7 **FINDINGS OF FACT**

8 Findings 1 through 10 of the Proposed Decision and Order entered herein are hereby
9 adopted by the Board and incorporated herein by this reference.
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11 **CONCLUSIONS OF LAW**

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13 1. The Board had jurisdiction of the parties and the subject matter of these
14 two appeals.
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16 2. The claimant, Earl L. Blake, is permanently and totally disabled within
17 the meaning of the Industrial Insurance Act.
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19 3. The order of the Department of Labor and Industries dated March 17,
20 1978, in Claim No. F-414497 (Docket No. 51,929) denying the
21 claimant's application to reopen the claim for aggravation is correct
22 and should be sustained.
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24 4. The order of the Department of Labor and Industries dated March 17,
25 1978, in Claim No. F-977951 (Docket No. 51,928) denying the
26 claimant's application to reopen the claim for aggravation is incorrect
27 and should be reversed, and the claim remand to the Department with
28 instructions to reopen the claim and place the claimant on the pension
rolls as a permanently and totally disabled worker.

29 It is so ORDERED.

30 Dated this 19th day of May, 1980.

31 BOARD OF INDUSTRIAL INSURANCE APPEALS

32 /s/
33 MICHAEL L. HALL Chairman

34 /s/
35 SAM KINVILLE Member

36 /s/
37 AUGUST P. MARDESICH Member
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