

Swindell, Alfred

[AGGRAVATION \(RCW 51.32.160\)](#)

Proximate cause of worsened condition: new injury vs. aggravation

McDougle (64 Wn.2d 640) does not hold that a new accident identifiable in time and place, adversely affecting an area of the body previously injured in an industrial injury, should be considered an aggravation of that previous injury. The aggravation of the worker's condition is the result of the new and independent traumatic occurrence, not the industrial injury.***In re Alfred Swindell, BIIA Dec., 53,792 (1980)*** [*Editor's Note: Consider continued application in light of *In re Robert Tracy*, BIIA Dec., 88 1695 (1990).*]

Scroll down for order.

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

1 **IN RE: ALFRED SWINDELL**)
2)
3 **CLAIM NOS. S-282858 and S-241523**)
4) **DOCKET NOS. 53,792 and 54,864**
 DECISION AND ORDER

5 APPEARANCES:

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7 Claimant, Alfred Swindell, by
8 Springer, Norman and Workman, per
9 Richard Norman and Leonard Workman
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11 Employer, Boise Cascade Corporation, by
12 Souther, Spaulding, Kinsey, Williamson and Schwabe, per
13 James Huegli
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15 These are appeals filed by the claimant, (1) on February 14, 1979 in claim No. S-282858,
16 from an order of the Department of Labor and Industries dated January 26, 1979, adhering to the
17 provisions of a prior order rejecting the claim against Boise Cascade Corporation, a self-insured
18 employer under the Industrial Insurance Act (Docket No. 53,792), and (2) on July 11, 1979 in claim
19 No. s-241523 from an order of the Department of Labor and Industries dated July 5, 1979,
20 terminating compensation as paid to June 25, 1978, denying responsibility for an injury of October
21 15, 1978, and closing the claim with no award for permanent partial disability (Docket No. 54,864).
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23 **AFFIRMED** as to both appeals.

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26 **DECISION**
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28 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
29 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and
30 Order issued by a hearing examiner for this Board on February 8, 1980, in which the order of the
31 Department dated January 26, 1979 in Claim No. S-282858 was dismissed, and the order of the
32 Department dated July 5, 1979 in claim No. S-241523 was reversed, and the claim remanded to the
33 Department and the self-insured employer with direction to accept responsibility for the treatment of
34 the claimant's back condition subsequent to the aggravation of October 15, 1978, and for such
35 other relief as may be indicated or required by law.
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38 There are two appeals before us. One involves Claim No. S-241523 and concerns an
39 industrial injury sustained by this claimant while he was in the course of employment with Boise
40 Cascade Corporation on October 28, 1977. That claim was filed for a low back injury and closed by
41 an order of the Department dated June 25, 1978, with no permanent partial disability award. On
42 October 15, 1978, the claimant suffered further injury to his low back, while on a hunting expedition,
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1 and mistakenly filed a new claim form with the self-insured employer, which was assigned Claim
2 No. S-282858. On January 26, 1978, the Department entered an order adhering to a prior order
3 rejecting the claim for the reason that the claimant was not an employee of the Boise Cascade
4 Corporation at the time of the October 15, 1978 accident. The claimant appealed from that order
5 (Docket No. 53,792). The claimant acknowledges his mistake in filing a separate claim for the
6 hunting injury and wishes the report of accident filed in that claim to be considered an application to
7 reopen claim No. S-241523 for aggravation of condition and that the two claims be consolidated.
8 Upon considering the October 15, 1978 accident's effect upon the October 28, 1977 accepted
9 injury, the Department issued an order on July 5, 1979, effectively denying responsibility for the
10 effects of the episode while hunting. The claimant has appealed to us from that order (Docket No.
11 54,864).

12 The issue before us ultimately concerns whether the claimant sustained an aggravation of a
13 condition causally related to the October 28, 1977 industrial injury at the time of the events of
14 October 15, 1978.

15 Dr. Charles Dresher, an orthopedic surgeon, testified on behalf of the claimant, and Dr.
16 James Owen, a general surgeon, testified on behalf of the employer. They were in substantial
17 agreement concerning the claimant's condition.

18 The claimant sustained injuries to his low back on October 28, 1977, and by March 1978 a
19 herniated disc at the L4-L5 level was diagnosed by Dr. Dresher, with a mild radiculitis. By April of
20 1978, the conditions were fixed, and the doctor did not think that there was any further treatment
21 indicated. This claim was closed in June 1978, with no permanent partial disability award. Dr.
22 Dresher was also of the opinion that the condition would improve with the passage of time and had
23 a very reasonable prospect (70-80 percent) to completely resolve to be asymptomatic. In June
24 1978, the claimant went back to work at moderate to hard physical labor, which included lifting
25 heavy objects on occasions. He did not lose any work thereafter up to October 15, 1978, and did
26 not require any further treatment for his back. He stated that he still felt pain in his low back on
27 occasions but that he was able to keep it under control with rest. On October 15, 1978, the
28 claimant was walking on a rotted log while hunting and it crumbled under his feet and he fell
29 perhaps a distance of 18 inches, landing on his heels. The jar caused his herniated disc condition
30 to worsen and shortly thereafter he required surgery. Dr. Dresher stated that the October 15, 1978
31 injury precipitated a major rupture in his lumbar spine which ultimately necessitated surgery. It was
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1 also Dr. Dresher's opinion that if the claimant had not suffered the 1977 industrial injury, the trauma
2 of the hunting accident would not have resulted in surgery. For that reason, he referred to the
3 incident on October 15, 1978, as causing an aggravation of the underlying low back condition the
4 claimant sustained as the result of the 1977 industrial injury.
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7 The employer first argues that the hearing examiner was incorrect in holding that the rule in
8 the McDougle v. Department of Labor and Industries, 64 Wn. 2d 640, was controlling in this case.
9 McDougle had sustained a low back condition that was accepted by the Department of Labor and
10 Industries as industrially related, and for which he had been granted a permanent partial disability
11 award. During the time when his claim was closed, he attempted to assist a relative in moving
12 heavy grain sacks and while lifting or sliding one of them aggravated his old back condition. The
13 court held that the Board and trial court were incorrect in holding that any condition caused by lifting
14 the feed sacks was not compensable and found that the principles of aggravation were applicable:
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19 "Aggravation of the claimant's condition caused by the ordinary incidents
20 of living -- by work he could be expected to do; by sports or activities by
21 which he could be expected to participate -- is compensable because it
22 is attributable to the condition caused by the original injury."
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24 The claimant attempted to lay a foundation for the application of the McDougle rule by asking Dr.
25 Dresher if hunting was a reasonable activity for this claimant in view of the disability that he had
26 sustained as the result of the industrial injury. Dr. Dresher stated that it was. The Board accepts
27 that statement by the doctor. The claimant was back working full time, which included lifting heavy
28 objects on occasion and was able to live a normal life without too much difficulty. Hunting, which
29 we assume would normally consist of walking while carrying a gun was not an unreasonable activity
30 for this claimant under the circumstances. However, the aggravation of the claimant's condition
31 following the October 15, 1978 incident was not the direct result of the hunting "activity", but rather
32 an accident while hunting. It was the result of a new and independent traumatic occurrence, an
33 accident of falling through a rotted log which acted upon his previously weakened condition to
34 create a disabling new dimension to the claimant's low back problems.
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40 The circumstances of onset for this new condition do not fall within the refined aggravation
41 concept carved out by the McDougle decision. It must be remembered that the claimant in
42 McDougle noticed an exacerbation of a previously injured back condition the day after he had
43 helped his brother-in-law unload some sacks of feed from a truck. No specific incident or accident
44 was identified as being the exacerbating or aggravating factor. The totality of the activity which in
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1 itself was seen by the court as reasonable for a person with McDougle's impairment was the cause
2 of the exacerbation. We do not understand the court to hold or imply in McDougle that a specific
3 accident identifiable in time and place adversely affecting an area of the body which was previously
4 an area of an industrial injury should be considered an aggravation of that previous injury.
5 Employers in this state should expect to underwrite certain risks inherent in the exercise of
6 reasonable physical activity by persons with limiting impairments, but should not be expected to be
7 responsible for the effects of all accidents which occur during those activities.
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11 For these reasons, we feel the Department acted properly in rejecting the claim as a new
12 injury and also in denying responsibility for the injury of October 15, 1978, as an aggravation of his
13 prior (October 28, 1977) industrial injury. Both orders of the Department appealed to this Board will
14 be affirmed.
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18 **FINDINGS OF FACT**

19 After a careful review of the record, the Board finds as follows:

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21 1. On October 15, 1978, the claimant sustained an injury while hunting and
22 filed a claim within two months thereafter with Boise Cascade
23 Corporation, a self-insured employer under the Industrial Insurance Act,
24 which was assigned No. S-282858. On December 13, 1978, the
25 Department entered an order rejecting the claim for the reason that the
26 claimant was not an employee of the Boise Cascade Corporation at the
27 time of the October 15, 1978 accident. The claimant timely protested
28 this order, and on January 26, 1979, the Department issued an order
29 adhering to the provisions of the December 13, 1978 order rejecting the
30 claim and the claimant appealed from that order to the Board on
31 February 14, 1979. The appeal was granted under Docket No. 53,792.
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33 2. On October 28, 1977, the claimant sustained a low back injury while
34 employed by Boise Cascade Corporation. On November 8, 1977, the
35 claimant filed a report of accident and the claim was assigned S-
36 241523. The claim was thereafter allowed and on June 25, 1978, the
37 Department entered an order closing the claim with no permanent partial
38 disability award. On July 15, 1979, the Department entered an order
39 denying responsibility for the accident of October 15, 1978, as being
40 unrelated to the injury of October 28, 1977. On July 11, 1979, the
41 claimant appealed to this Board and on July 23, 1979, the Board issued
42 an order granting the appeal under Docket No. 54,864.
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44 3. As the result of the October 28, 1977 industrial injury (Claim No. S-
45 241523), the claimant suffered a herniation of the disc between the
46 fourth lumbar vertebra and the fifth lumbar vertebra with mild radiculitis.
47 Claimant's condition as the result of the industrial injury improved during
1978, and by June the claimant was able to return to work at moderate

1 to hard physical labor which included lifting weights of one hundred
2 pounds on occasion. Between the time he started work in June, 1978
3 until October 15, 1978, the claimant's low back condition did not bother
4 him except infrequently, and he lost no time from work on account of his
5 low back condition. During September and early October, 1978,
6 claimant did not require treatment for his low back condition.
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- 8 4. On October 15, 1978, the claimant fell a distance of 18 inches from a
9 rotted log while hunting and landed on his heels, causing and
10 precipitating a major rupture of the disc at the interspace between the
11 fourth and fifth lumbar vertebrae. In early November 1978, surgery was
12 required for the claimant's low back condition.
- 13 5. The claimant's condition causally related to the October 28, 1977
14 industrial injury did not worsen, nor did his disability increase between
15 June 25, 1978 and July 5, 1979.
- 16 6. At the time that the claimant was injured on October 15, 1978 while
17 hunting, he was not performing any services on behalf of the employer,
18 it did not occur during a working day, and he was not on company
19 property.
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21 **CONCLUSIONS OF LAW**

22 Based on the foregoing findings of fact, the Board concludes as follows:

- 23 1. The Board has jurisdiction of the parties and subject matter of this
24 appeal.
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- 26 2. In Claim No. S-282858, the order of the Department dated January 26,
27 1979 adhering to the provisions of a prior order rejecting the claim was
28 essentially correct and should be affirmed.
- 29 3. In Claim No. S-251423, the order of the Department of Labor and
30 Industries dated July 5, 1979, reciting therein that the accident of
31 October 15, 1978 is unrelated to the injury of October 28, 1977, is
32 correct and should be affirmed.
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34 It is so ORDERED.

35 Dated this 8th day of May, 1980.

36 BOARD OF INDUSTRIAL INSURANCE APPEALS

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38 /s/
39 MICHAEL L. HALL Chairman

40 /s/
41 AUGUST P. MARDESICH Member
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