Sundberg, Gary

INJURY (RCW 51.08.100)

Unusual exertion not required

The aggravation of preexisting lung blebs (weakened spots) ruptured by routine on-the-job exertion is compensable as an "injury." It is not necessary to show unusual exertion as in cases of cardiovascular incidents. **….*In re Gary Sundberg*, BIIA Dec., 62,107 (1983)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GARY L. SUNDBERG	**)**	**DOCKET NO. 62,107**
	)	
CLAIM NO. H-669652	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Gary L. Sundberg, by
Nathan G. Richardson, Jr. and
Gary W. Velie

Employer, M & L Trucking, Inc.,
None

Department of Labor and Industries, by
The Attorney General, per
Janet R. Whitney and Nadine Scott, Assistants

This is an appeal filed by the claimant on May 6, 1982, from an order of the Department of Labor and Industries dated March 10, 1982, adhering to the provisions of a prior order which rejected the claim for the reasons (1) that there was no proof of a specific injury at a definite time and place in the course of employment; (2) that the claimant's condition was not the result of an industrial injury as defined by the industrial insurance laws; and (3) that the claimant's condition was not an occupational disease. **REVERSED AND REMANDED**.

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 Department of Labor and Industries to a proposed Decision and Order issued on February 15, 1983, in which the order of the Department dated March 10, 1982, was reversed, and the claim remanded to the Department with direction to issue an order allowing Gary L. Sundberg's application for benefits for an injury occurring on March 18, 1980, and thereafter to take such other and further action as is indicated and in accordance with law.

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

In bringing this appeal, the claimant seeks to establish that he sustained an injury during the course of his employment with M & L Trucking, Inc. That nature of the claimant's condition causes this Board to examine whether, in establishing a prima facie case to support his application for benefits, the claimant must prove that his condition developed as a result of unusual exertion.

Mr. Sundberg had been a logger for about ten years working for this employer as a "chaser". To be sure, the work requires heavy manual labor on a continual basis and calls for the claimant to be quick and agile with his arms, hands and legs.

Although he was unaware of his condition, Mr. Sundberg was working with weakened spots, called blebs, on the walls of his lungs. This condition pre-existed for some time the events of March 18, 1980. On that day, he was performing his routine heavy exertional duties as a chaser. While performing these duties, one of the "blebs" ruptured causing his left lung to collapse. This was an emergent medical condition which required immediate attention. No attempt was made by Mr. Sundberg in the course of presenting his evidence to establish that the rupture occurred as a result of anything outside the routine heavy manual labor to which he had grown accustomed.

The medical testimony is clearly split on the issue of causal relationship of the ruptured bleb to the exertion required in the claimant's employment. The Proposed Decision and Order briefly but adequately discusses the difference in the opinions of Dr. Richard H. Winterbauer, who testified on behalf of the claimant, and Dr. Jonathan H. Ostrow, who testified for the Department. The two physicians essentially agree on diagnosis of the event of March 18, spontaneous pneumothorax. Dr. Ostrow, however, could determine no particular cause for the condition to occur. In so concluding he excludes the likelihood that the exertion required of Mr. Sundberg in the performance of his duties was a significant causal element in the occurrence of the pneumothorax. In supporting his opinion, he noted that in more than half of the instances where pneumothorax occurs the patient is involved incomplete rest or minimal activity.

Dr. Winterbauer likened the occurrence of the lung blebs to a weakened spot on an inflated rubber innertube. He placed emphasis in his testimony concerning the internal dynamics of hydraulic pressures within the body which occur on exertion and straining. He identified a "valsalva" maneuver which causes a sudden increase in internal pressure which can supply the needed force to rupture a weakened area of tissue such as is present with blebs on the lungs. Although acknowledging the occurrence of spontaneous pneumothoraxes absent exercise, Dr. Winterbauer's weighed opinion was that the claimant's work activity of March 18, 1980 was a proximate causative element for the condition to occur to Mr. Sundberg.

The description of the mechanics of injury in this case from Dr. Winterbauer to us is the more persuasive, and we accept his opinion that the claimant's heavy work activity and most strenuous duty in a high production position was a proximate cause of the injury to occur when it did. Our

acceptance of this opinion, however, does not yet resolve the legal issue presented. For even assuming the requisite causal connection between the claimant's work activity and the condition diagnosed, the claimant is only entitled to benefits so long as the extraordinary exertion rule as applied in heart cases and cerebral vascular accidents does not apply to the present case. Windust v. Department of Labor and Industries, 52 Wn. 2d 33 (1958), Spino v. Department of Labor and Industries, 1 Wn. App. 730 (1969).

The state of Washington is clearly in the minority of jurisdictions which adhere to an unusual exertion requirement in heart and stroke cases. The Department argues that the unusual exertion rule should apply in cases not involving musculoskeletal injuries. Clearly, ordinary routine activity which causes a failure in the musculoskeletal system is sufficient to qualify an injured worker for compensation. Boeing Company v. Fine, 65 Wn. 2d 169 (1964); Longview Fibre v. Weimer, 95 Wn. 2d 583 (1981). In fact, a substantial amount of discussion has been devoted to the unusual exertion rule of the state of Washington in Professor Larson's Treatise on the Law of Workmen's Compensation, Vol. 1B, Sec. 38.72.

We note that in the Windust case the court was careful to limit its application to heart attack cases. Similarly, in Spino the Court of Appeals specifically limited the application of its rule to "cerebral vascular accidents or strokes which the medical testimony...attributed to a progressive deterioration of the cerebral vascular structure".

We believe the court has attempted to make a clear distinction to limit the application of an unusual exertion test. In the Windust case, the court also placed great emphasis upon the nature of cardiovascular disease as being progressive in nature increasing in incidence and severity with advancing age.

Progressive disease is, of course, not limited to systems apart from the musculoskeletal system of the human body. Certainly degenerative disc disease or osteoarthritis in joints in the extremities would qualify as progressive and deteriorating conditions of the musculoskeletal system. Yet, the court has recognized no rule of law indicating that injuries which occur more readily or more severely because of the presence of such pre-existent conditions disqualify workers from compensation benefits. To the contrary, this state has specifically recognized that the presence of a latent or quiescent disease which is exacerbated by a traumatic event to become symptomatic and disabling qualifies the entire condition in the affected area to be compensable. Miller v. Department of Labor and Industries, 200 Wash. 674 (1939).

Consequently, it appears from the reported cases that our courts are attempting to restrict a rule of unusual exertion to non-musculoskeletal conditions. Certainly, a pneumothorax occurring as a result of a ruptured lung bleb qualifies as a non-musculoskeletal injury. However, the courts have been careful to restrict the unusual exertion rule not only to non-musculoskeletal events but to those in which the medical testimony described a progressive deterioration in the organic tissue structure due to longstanding disease.

It is unclear whether the claimant's pre-existent condition of lung blebs, making him susceptible to spontaneous pneumothorax, was a result of progressive deterioration of the lung tissue. The testimony does not sufficiently describe that the pre-existent condition was a result of a longstanding disease causing progressive deterioration. Given the state of the record before us, we must conclude that the unusual exertion rule should not be extended to cases where clear heavy exertion, albeit routine, has precipitated the rupture of a lung bleb and resulted in a pneumothorax.

Proposed findings 1-3 are hereby adopted by the Board. In addition, the following findings are entered in lieu of finding 4 in the Proposed Decision and Order.

4. Prior to the event of March 18, 1980, the claimant had a pre-existent condition of weakened spots on his lungs which were not attributable to any progressive deterioration of underlying disease.

5. As a result of routine heavy exertion in his work on March 18, 1980, the claimant sustained a rupture in one of the weakened spots of his lungs causing a condition of pneumothorax. The condition required medical care and treatment.

The conclusions and order of the Proposed Decision and Order are hereby adopted as the Board's conclusions and order and are incorporated herein by this reference.

It is so ORDERED.

Dated this 29th day of June, 1983.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/_____
MICHAEL L. HALL Chairman

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

DISSENTING OPINION

I dissent from the majority opinion on both legal and factual grounds, as follows: (1) the yardstick to be used in satisfying the statutory requirement for an industrial injury, as applied to the facts in this case, should be that of "unusual exertion" and not "ordinary exertion"; and (2) the clear preponderance of the medical evidence lies with the Department and not with the claimant, on the issue of causal relationship between claimant's work activity and the spontaneous pneumothorax.

As conceded in the majority opinion, this state is definitely committed to the requirement of "unusual exertion" as a fundamental pre-requisite to the allowance of a heart attack or a stroke as an industrial injury. Windust and Spino, both cited by the majority.

Speaking in Boeing v. Fine (cited by the majority), the Supreme Court contrasted heart attacks with back injuries and explained its reasoning at page 171:

> "...The fundamental differences between heart attacks and back injuries are such as to render the 'unusual exertion' test irrelevant when transplanted into the area of the law dealing with injuries to the skeletal structure of the body, in particular, the back. A heart attack, under currently persuasive medical theory, is largely related to long-term disease, and may be unrelated to the particular employment hazard to which the work may be subjected. Thus, the thought that a heart attack suffered during accustomed exertion is really happenstance as to time and place is exemplified in the approach of the majority in Windust. Contrast this to injuries of the back. It is quite possible that a slight or usual strain applied at an unusually different angle could, through the forces of levers, etc., overpower and injure a normal back.. Thus, the unusual strain requirement of the Windust case does not apply to injuries to mechanical structures to which the angle of application of the force may be vastly more important than the general level of strain." (Emphasis supplied)
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> And, at page 173, the Supreme Court continued:
>
> "An unthinking or automatic application of the heart rule to the mechanical structures of the body would be unreasonable, illogical, and unwise. Industry must bear the expense of injuries which are caused by the application of force to a mechanical bodily structure. This is the basic policy of the Workmen's Compensation Act. Restricting the coverage of the Act, which would follow if the argument of the appellant is accepted, should be, and we think is more wisely left for legislative study, evaluation and determination."
>
> In Spino, the Court of Appeals explained the requirement of the "unusual exertion" in stroke cases, at page 736:

> "...In this case, as in Metcalf and Windust, the workman suffered from a long-term disease, a progressive hardening of the arteries or arteriosclerosis, unrelated to the particular employment hazard to which the workman was subjected. It was necessary to apply the "unusual exertion" rule of Windust to determine whether the stroke suffered during accustomed exertion of employment was more than happenstance as to the time and place..." (Emphasis supplied)

Both testifying physicians were agreed that the claimant's spontaneous pneumothorax (collapse of the lung by the loss of its air to the surrounding pleural chest enclosure) was due to the rupture of pre-existing weakened spots (blebs) on the external walls of the lung. The causation of these "blebs" on the claimant's lung did not appear to be clearly known to the two medical witnesses.

Dorland's Medical Dictionary, 25th Edition (1974), at page 1459 defines "spontaneous" as "occurring without external influence". The same authority, at page 1224, defines "spontaneous pneumothorax" as "pneumothorax without known cause". (Emphasis supplied).

Although each of the referenced cases (Windust and Spino) limited their holdings respectively to "heart attacks" and "strokes", isn't each really discussing the same type of facts found in this appeal? I submit that the only answer must be, yes. The proper test is that of "unusual exertion", and not "ordinary exertion" as applied to the skeletal injury in Fine.

Furthermore, I submit that, on the factual issue of causal relationship, the majority reaches a conclusion contrary to the weight of the medical evidence. The testimony of Dr. Jonathan H. Ostrow is considerably more persuasive than that of Dr. Richard H. Winterbauer, primarily because the opinion of the former was supported by a recognize medical treatise on the subject, Baum's Textbook of Pulmonary Diseases. It should be noted that Dr. Winterbauer conceded that the foregoing text is a recognized textbook that he would agree with; he did state that he didn't think it was the best textbook, but he supplied no other written authority to buttress his own opinion.

In Baum's, at page 984, the author discusses the "Etiology of Spontaneous Pneumothorax" as follows:

> "The specific mechanism by which pneumothorax develops in any given person is still open to question. Undue exertion is clearly not a major factor, because meticulous studies of large series of patients demonstrate that more than half of the instances of pneumothorax begin during complete rest or minimal ordinary activity, although they occasionally follow a sneeze or a cough. Rarely do more than a third of patients indicate that severe or moderate exertion was associated with the onset of the symptoms, and the disease is no more common in

those at heavy labor than in persons with other occupations." (Emphasis supplied)

In light of these medical facts, it is clear to me that a spontaneous pneumothorax during accustomed exertion, just like a heart attack or a stroke during accustomed exertion, is, in the words of the Court in Windust and Spino, no more than "happenstance as to the time and place."

In conclusion, I maintain that the wrong "exertion" test was used by the majority; and that the testimony of Dr. Ostrow clearly carries much more weight than that of Dr. Winterbauer. I would affirm the Department's order of March 10, 1982, rejecting this claim.

Dated this 29th day of June, 1983.

/s/
PHILLIP T. BORK Member