

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]

Scroll down for order.

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

1 **IN RE: GARY L. SUNDBERG**) **DOCKET NO. 62,107**
2)
3 **CLAIM NO. H-669652**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Gary L. Sundberg, by
8 Nathan G. Richardson, Jr. and
9 Gary W. Velie

10
11 Employer, M & L Trucking, Inc.,
12 None

13
14 Department of Labor and Industries, by
15 The Attorney General, per
16 Janet R. Whitney and Nadine Scott, Assistants
17

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

24
25
26
27 **DECISION**

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 Department of Labor and Industries to a
30 proposed Decision and Order issued on February 15, 1983, in which the order of the Department
31 dated March 10, 1982, was reversed, and the claim remanded to the Department with direction to
32 issue an order allowing Gary L. Sundberg's application for benefits for an injury occurring on March
33 18, 1980, and thereafter to take such other and further action as is indicated and in accordance with
34 law.
35

36 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
37 no prejudicial error was committed and said rulings are hereby affirmed.
38

39 In bringing this appeal, the claimant seeks to establish that he sustained an injury during the
40 course of his employment with M & L Trucking, Inc. That nature of the claimant's condition causes
41 this Board to examine whether, in establishing a prima facie case to support his application for
42 benefits, the claimant must prove that his condition developed as a result of unusual exertion.
43
44
45
46
47

1 Mr. Sundberg had been a logger for about ten years working for this employer as a "chaser".
2 To be sure, the work requires heavy manual labor on a continual basis and calls for the claimant to
3 be quick and agile with his arms, hands and legs.
4

5 Although he was unaware of his condition, Mr. Sundberg was working with weakened spots,
6 called blebs, on the walls of his lungs. This condition pre-existed for some time the events of March
7 18, 1980. On that day, he was performing his routine heavy exertional duties as a chaser. While
8 performing these duties, one of the "blebs" ruptured causing his left lung to collapse. This was an
9 emergent medical condition which required immediate attention. No attempt was made by Mr.
10 Sundberg in the course of presenting his evidence to establish that the rupture occurred as a result
11 of anything outside the routine heavy manual labor to which he had grown accustomed.
12

13 The medical testimony is clearly split on the issue of causal relationship of the ruptured bleb
14 to the exertion required in the claimant's employment. The Proposed Decision and Order briefly but
15 adequately discusses the difference in the opinions of Dr. Richard H. Winterbauer, who testified on
16 behalf of the claimant, and Dr. Jonathan H. Ostrow, who testified for the Department. The two
17 physicians essentially agree on diagnosis of the event of March 18, spontaneous pneumothorax.
18 Dr. Ostrow, however, could determine no particular cause for the condition to occur. In so
19 concluding he excludes the likelihood that the exertion required of Mr. Sundberg in the performance
20 of his duties was a significant causal element in the occurrence of the pneumothorax. In supporting
21 his opinion, he noted that in more than half of the instances where pneumothorax occurs the patient
22 is involved incomplete rest or minimal activity.
23

24 Dr. Winterbauer likened the occurrence of the lung blebs to a weakened spot on an inflated
25 rubber innertube. He placed emphasis in his testimony concerning the internal dynamics of
26 hydraulic pressures within the body which occur on exertion and straining. He identified a
27 "Valsalva" maneuver which causes a sudden increase in internal pressure which can supply the
28 needed force to rupture a weakened area of tissue such as is present with blebs on the lungs.
29 Although acknowledging the occurrence of spontaneous pneumothoraxes absent exercise, Dr.
30 Winterbauer's weighed opinion was that the claimant's work activity of March 18, 1980 was a
31 proximate causative element for the condition to occur to Mr. Sundberg.
32

33 The description of the mechanics of injury in this case from Dr. Winterbauer to us is the more
34 persuasive, and we accept his opinion that the claimant's heavy work activity and most strenuous
35 duty in a high production position was a proximate cause of the injury to occur when it did. Our
36
37
38
39
40
41
42
43
44
45
46
47

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

7
8
9
10 The state of Washington is clearly in the minority of jurisdictions which adhere to an unusual
11 exertion requirement in heart and stroke cases. The Department argues that the unusual exertion
12 rule should apply in cases not involving musculoskeletal injuries. Clearly, ordinary routine activity
13 which causes a failure in the musculoskeletal system is sufficient to qualify an injured worker for
14 compensation. Boeing Company v. Fine, 65 Wn. 2d 169 (1964); Longview Fibre v. Weimer, 95 Wn.
15 2d 583 (1981). In fact, a substantial amount of discussion has been devoted to the unusual
16 exertion rule of the state of Washington in Professor Larson's Treatise on the Law of Workmen's
17 Compensation, Vol. 1B, Sec. 38.72.

18
19 We note that in the Windust case the court was careful to limit its application to heart attack
20 cases. Similarly, in Spino the Court of Appeals specifically limited the application of its rule to
21 "cerebral vascular accidents or strokes which the medical testimony...attributed to a progressive
22 deterioration of the cerebral vascular structure".

23
24 We believe the court has attempted to make a clear distinction to limit the application of an
25 unusual exertion test. In the Windust case, the court also placed great emphasis upon the nature
26 of cardiovascular disease as being progressive in nature increasing in incidence and severity with
27 advancing age.

28
29 Progressive disease is, of course, not limited to systems apart from the musculoskeletal
30 system of the human body. Certainly degenerative disc disease or osteoarthritis in joints in the
31 extremities would qualify as progressive and deteriorating conditions of the musculoskeletal
32 system. Yet, the court has recognized no rule of law indicating that injuries which occur more
33 readily or more severely because of the presence of such pre-existent conditions disqualify workers
34 from compensation benefits. To the contrary, this state has specifically recognized that the
35 presence of a latent or quiescent disease which is exacerbated by a traumatic event to become
36 symptomatic and disabling qualifies the entire condition in the affected area to be compensable.
37 Miller v. Department of Labor and Industries, 200 Wash. 674 (1939).

1 **DISSENTING OPINION**

2
3 I dissent from the majority opinion on both legal and factual grounds, as follows: (1) the
4 yardstick to be used in satisfying the statutory requirement for an industrial injury, as applied to the
5 facts in this case, should be that of "unusual exertion" and not "ordinary exertion"; and (2) the clear
6 preponderance of the medical evidence lies with the Department and not with the claimant, on the
7 issue of causal relationship between claimant's work activity and the spontaneous pneumothorax.
8

9
10 As conceded in the majority opinion, this state is definitely committed to the requirement of
11 "unusual exertion" as a fundamental pre-requisite to the allowance of a heart attack or a stroke as
12 an industrial injury. Windust and Spino, both cited by the majority.
13

14 Speaking in Boeing v. Fine (cited by the majority), the Supreme Court contrasted heart
15 attacks with back injuries and explained its reasoning at page 171:
16

17
18 "...The fundamental differences between heart attacks and back injuries
19 are such as to render the 'unusual exertion' test irrelevant when
20 transplanted into the area of the law dealing with injuries to the skeletal
21 structure of the body, in particular, the back. A heart attack, under
22 currently persuasive medical theory, is largely related to long-term
23 disease, and may be unrelated to the particular employment hazard to
24 which the work may be subjected. Thus, the thought that a heart attack
25 suffered during accustomed exertion is really happenstance as to time
26 and place is exemplified in the approach of the majority in Windust.
27 Contrast this to injuries of the back. It is quite possible that a slight or
28 usual strain applied at an unusually different angle could, through the
29 forces of levers, etc., overpower and injure a normal back.. Thus, the
30 unusual strain requirement of the Windust case does not apply to
31 injuries to mechanical structures to which the angle of application of the
32 force may be vastly more important than the general level of strain."
33 (Emphasis supplied)

34 And, at page 173, the Supreme Court continued:

35
36 "An unthinking or automatic application of the heart rule to the
37 mechanical structures of the body would be unreasonable, illogical, and
38 unwise. Industry must bear the expense of injuries which are caused by
39 the application of force to a mechanical bodily structure. This is the
40 basic policy of the Workmen's Compensation Act. Restricting the
41 coverage of the Act, which would follow if the argument of the appellant
42 is accepted, should be, and we think is more wisely left for legislative
43 study, evaluation and determination."

44 In Spino, the Court of Appeals explained the requirement of the "unusual
45 exertion" in stroke cases, at page 736:
46
47

1 "...In this case, as in Metcalf and Windust, the workman suffered from a
2 long-term disease, a progressive hardening of the arteries or
3 arteriosclerosis, unrelated to the particular employment hazard to which
4 the workman was subjected. It was necessary to apply the "unusual
5 exertion" rule of Windust to determine whether the stroke suffered
6 during accustomed exertion of employment was more than
7 happenstance as to the time and place..." (Emphasis supplied)
8

9 Both testifying physicians were agreed that the claimant's spontaneous pneumothorax (collapse of
10 the lung by the loss of its air to the surrounding pleural chest enclosure) was due to the rupture of
11 pre-existing weakened spots (blebs) on the external walls of the lung. The causation of these
12 "blebs" on the claimant's lung did not appear to be clearly known to the two medical witnesses.
13

14 Dorland's Medical Dictionary, 25th Edition (1974), at page 1459 defines "spontaneous" as
15 "occurring without external influence". The same authority, at page 1224, defines "spontaneous
16 pneumothorax" as "pneumothorax without known cause". (Emphasis supplied).
17

18 Although each of the referenced cases (Windust and Spino) limited their holdings respectively
19 to "heart attacks" and "strokes", isn't each really discussing the same type of facts found in this
20 appeal? I submit that the only answer must be, yes. The proper test is that of "unusual exertion",
21 and not "ordinary exertion" as applied to the skeletal injury in Fine.
22

23 Furthermore, I submit that, on the factual issue of causal relationship, the majority reaches a
24 conclusion contrary to the weight of the medical evidence. The testimony of Dr. Jonathan H.
25 Ostrow is considerably more persuasive than that of Dr. Richard H. Winterbauer, primarily because
26 the opinion of the former was supported by a recognize medical treatise on the subject, Baum's
27 Textbook of Pulmonary Diseases. It should be noted that Dr. Winterbauer conceded that the
28 foregoing text is a recognized textbook that he would agree with; he did state that he didn't think it
29 was the best textbook, but he supplied no other written authority to buttress his own opinion.
30

31 In Baum's, at page 984, the author discusses the "Etiology of Spontaneous Pneumothorax"
32 as follows:
33

34 "The specific mechanism by which pneumothorax develops in any given
35 person is still open to question. Undue exertion is clearly not a major
36 factor, because meticulous studies of large series of patients
37 demonstrate that more than half of the instances of pneumothorax begin
38 during complete rest or minimal ordinary activity, although they
39 occasionally follow a sneeze or a cough. Rarely do more than a third of
40 patients indicate that severe or moderate exertion was associated with
41 the onset of the symptoms, and the disease is no more common in
42
43
44
45
46
47

