

Smith, Lyssa

RES JUDICATA

Aggravation

Conditions not explicitly segregated

An unappealed Department order closing the claim with no permanent disability award is only a res judicata determination that there was no disability at that time due to the injury. It does not mean that any condition existing at that time was unrelated to the injury, absent a specific segregation of the condition by the Department. The worker is therefore not barred from later establishing the causal relationship between the injury and a condition which developed either before or after the date of the closing order. Evidence of worsening of the condition is still required, and the worker may not rely on disability existing as of the closing date to prove such worsening. ...*In re Lyssa Smith, BIA Dec., 86 1152 (1988)* [dissent]

Scroll down for order.

1 period has elapsed. Consequently, claimant's objection is overruled. In deciding this appeal we have
2 considered the entire record of proceedings, claimant's Petition for Review and the employer's
3 response thereto.
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5 Lyssa Smith, by this appeal, raises an issue which is simple to state but difficult to resolve. She
6 contends that worsening of her left ankle condition which resulted in fusion surgery was causally
7 related to the injury of March 3, 1980 and covered by this claim. Champion International Corporation,
8 on the other hand, contends that the need for ankle fusion surgery resulted from an injury suffered by
9 Lyssa Smith in an automobile accident on July 13, 1969. Clearly, there have been significant objective
10 changes in Ms. Smith's left ankle and leg condition during the period between November 25, 1980 and
11 March 21, 1986 which resulted in the need for medical treatment and resulted in loss of physical
12 function and increased disability. The question is whether the worsening of the claimant's left ankle
13 condition which occurred during this period was due to the effects of the industrial injury that occurred
14 on March 3, 1980.
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16 Although Lyssa Smith suffered a devastating fracture dislocation injury to her left ankle in an
17 automobile accident on July 13, 1969, she was able to regain a significant amount of function. As the
18 testimony of Dr. Edward H. Mills, who attended her for the automobile injury, reveals, when he last
19 saw her in January of 1971, full motion had been regained in the left ankle. Between her last visit to
20 Dr. Mills in January of 1971 and the March 3, 1980 industrial injury, Ms. Smith was able to engage in a
21 range of physical activities which would be rigorous for someone with a normal ankle and which
22 established that she regained significant physical function in her left ankle. During the period after the
23 automobile accident, Lyssa Smith worked as a sales person at the counter of a candy store and then
24 as a nurse's aide, both jobs requiring her to be on her feet most of the day. Her job as a nurse's aide
25 also required a great deal of lifting. In September of 1974 Ms. Smith entered the U.S. Army and
26 although suffering, on occasion, some soreness, was able to complete the vigorous physical exercise
27 required in basic training. After leaving the Army with an honorable discharge, Ms. Smith worked at
28 several jobs which required her to be on her feet for extended periods of time, before receiving
29 secretarial training which enabled her to secure her job with Champion International Corporation.
30 During this period Ms. Smith swam, hiked, and danced on a regular basis and the only problem
31 attendant to these activities was soreness in the left ankle at the end of the day.
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1 Following the fall and twist injury which occurred at Champion International Corporation on
2 March 3, 1980, the nature of Ms. Smith's left ankle condition changed dramatically. Previously,
3 although she suffered from soreness following extensive or heavy use of her left ankle, she was able
4 to recover following rest, and to continue to engage in substantial physical activities involving the use
5 of the ankle. In May of 1980 Dr. Paul Shelton, an osteopathic physician, referred Ms. Smith to Dr.
6 Frederick Davis, an orthopedic surgeon, to explore the possibility of fusion surgery for the left ankle.
7 Dr. Shelton, a general practitioner, had cared for the claimant since December of 1977 for problems
8 unrelated to the left ankle and was the initial attending physician for the injury of March 3, 1980. Dr.
9 Shelton was of the opinion that the problems that he diagnosed in Ms. Smith's left ankle in May of
10 1980, which led to the need for fusion surgery, were attributable, at least in part, to the injury of March
11 3, 1980.

12 The only other attending physician to testify in this matter was Dr. Edward H. Mills, an
13 orthopedic surgeon. Dr. Mills provided treatment for Ms. Smith's fracture dislocation of the left ankle
14 from July of 1969 until January of 1971. When he last saw Ms. Smith in January of 1971 her left ankle
15 had a full range of motion but had suffered a significant loss of joint space, demonstrated crepitus on
16 motion, and soreness with use. Dr. Mills was of the opinion that the automobile injury in July of 1969
17 would eventually necessitate left ankle fusion and that the injury of March 3, 1980 did not cause or
18 accelerate the need for this surgery. While normally we would be inclined to rely on the testimony of a
19 specialist in orthopedic surgery such as Dr. Mills, Dr. Shelton, a general practitioner, has had much
20 more significant contact with the claimant during the periods critical to the resolution of this appeal.
21 While Dr. Shelton actively treated the claimant both before and after the 1980 injury at Champion
22 International Corporation, Dr. Mills has not seen the claimant since January of 1971.

23 Because the first ankle fusion surgery occurred in August of 1980, prior to the initial closure of
24 the claim with allowance for medical treatment only on November 25, 1980, the physical impairment or
25 disability attributable to this surgery cannot serve as the basis for establishing worsening or
26 aggravation of condition. The Department order dated November 25, 1980, by closing the claim with
27 no permanent partial disability award, is res judicata to the effect that there was no disability or
28 impairment at that time causally related to the March 3, 1980 industrial injury. Jesse White v.
29 Department of Labor and Industries, 48 Wn.2d 413 (1956). Ms. Smith has, however, provided
30 objective findings of increased disability occurring since November of 1980, causally related to the
31 industrial injury of March 3, 1980, as required by Phillips v. Department of Labor and Industries, 49

1 Wn.2d 195 (1956) and Moses v. Department of Labor and Industries, 44 Wn.2d511 (1954). In
2 addition to the opinion of Dr. Shelton, both Dr. David M. Chaplin, an orthopedic surgeon, and Dr. John
3 R. Mullins, a neurologist, provide objective evidence of the development of a condition subsequent to
4 November 25, 1980 which was causally related to the industrial injury of March 3, 1980 and which was
5 disabling and required further medical treatment. Dr. Mullins, on the basis of an x-ray finding of
6 Sudeck's atrophy, diagnosed a "probable reflex sympathetic dystrophy" in the left lower extremity.
7 Both he and Dr. Chaplin felt that Ms. Smith needed further medical treatment which, in addition to
8 further diagnostic studies, might include surgical decompression of a nerve and attendance at a pain
9 clinic. Both the need for further medical treatment and the condition diagnosed resulted from the
10 effects of the injury of March 3, 1980.

11 While the res judicata effect of the Department order of November 25, 1980 precludes the
12 claimant from relying on disability existing at that time to establish aggravation or worsening of
13 condition thereafter, it does not serve as a determination regarding the causal relationship of
14 conditions existing at that time. Because there was no explicit segregation of any aspect of the left
15 ankle condition in the November 25, 1980 Department order, Ms. Smith may, with appropriate
16 evidence, now establish causal relationship between the industrial injury and conditions which may
17 have developed both before and after the issuance of the initial closing order. King v. Department of
18 Labor and Industries, 12 Wn.App. 1 (1974); See also In re Kerry Kemery, BIIA Dec., 62,634 (1983).
19 By a preponderance of the evidence Ms. Smith has established that left ankle and leg conditions
20 causally related to her industrial injury of March 3, 1980 worsened or became aggravated between
21 November 25, 1980 and March 21, 1986 and that as of the latter date, she required further treatment.

22 Although some contention was made that Ms. Smith sustained a lumbosacral condition as a
23 result of the industrial injury of March 1980, there were no low back complaints made to the initial
24 treating physician, Dr. Shelton. In addition, none of the medical witnesses who examined her
25 subsequently found any objective evidence establishing such a condition. In particular, while Dr.
26 Mullins appeared to causally relate a "lumbosacral strain" to the industrial injury, he found no objective
27 evidence of such a condition and made no treatment or permanent disability recommendations with
28 respect to the low back. We therefore conclude that Ms. Smith has not proved any causal relationship
29 between the industrial injury and any low back condition which she may have, and has not established
30 aggravation of condition on that basis.

1 After consideration of the Proposed Decision and Order, the claimant's Petition for Review filed
2 thereto, the employer's Memorandum in Response to Petition for Review and in Support of Proposed
3 Decision and Order, and a careful review of the entire record before us, we are persuaded that the
4 Department order denying the claimant's application to reopen her claim is incorrect and must be
5 reversed. The claim will be remanded to the Department with direction to reopen the claim and to
6 order the self-insured employer to provide treatment and benefits in accordance with the facts and the
7 law for the period from August 24, 1984 forward. See RCW 51.28.040. We have made no
8 determination with respect to the applicability of RCW 51.32.100 (delay of recovery by preexisting
9 disease) or RCW 51.32.080(3) (segregation of preexisting disability) because those issues are not
10 before us in this appeal. Presumably, on remand, the Department and/or self-insurer will address
11 those questions if appropriate.
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18 **FINDINGS OF FACT**

- 19 1. On March 3, 1980 the claimant twisted and turned her left ankle while in
20 the course of her employment for the self-insured employer herein. On
21 March 17, 1980 the claimant filed a report of accident with the Department
22 of Labor and Industries. On November 25, 1980, the Department issued
23 an order allowing the claim for medical treatment only, and closing the
24 claim with no time-loss compensation and no permanent disability award.
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- 26 2. On October 23, 1984, the claimant filed an application to reopen her claim
27 for aggravation of condition. On October 31, 1984 the Department issued
28 an order denying the application. On December 12, 1984 a protest and
29 request for reconsideration was filed by the claimant. On January 23,
30 1986 the Department held its prior order of October 31, 1984 in abeyance.
31 On March 21, 1986, the Department issued an order adhering to the
32 provisions of its order of October 31, 1984 and stating that the claimant's
33 condition in her left ankle was unrelated to her injury of March 3, 1980 but
34 was, rather, causally related to the non-industrial injury of July 13, 1969.
35 On April 9, 1986, the claimant filed a notice of appeal with the Board of
36 Industrial Insurance Appeals and on April 24, 1986, the Board issued an
37 order granting the appeal, assigning it Docket No. 86 1152, and ordered
38 that hearings be held on the issues raised by the notice of appeal.
- 39 3. On July 13, 1969, as the result of an automobile accident, Ms. Smith
40 suffered a fracture dislocation of her left ankle. In January of 1971,
41 following treatment for the left ankle injury of July 13, 1969, claimant had
42 regained full motion in her left ankle, but still suffered from crepitus, pain,
43 and soreness on use, and had significant loss of joint space.
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- 45 4. On March 3, 1980, during the course of her employment with Champion
46 International Corporation, Lyssa Smith injured her left ankle as the result
47 of a tripping and twisting fall.

- 1 5. Prior to the industrial injury of March 3, 1980, Ms. Smith's conditions
2 causally related to the injury to her left ankle on July 13, 1969, did not
3 prevent her from engaging on a regular and consistent basis in
4 recreational activities such as swimming, hiking, and dancing, and
5 job-related activities such as lifting, walking, bending, stooping, and
6 standing for extended periods of time.
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- 8 6. As the result of the industrial injury of March 3, 1980, claimant, Lyssa
9 Smith, suffered from a left ankle strain which, when superimposed upon
10 her pre-existing left ankle condition caused by the automobile accident of
11 July 13, 1969, rendered necessary the operations to surgically fuse her
12 left ankle, performed in August of 1980 and February of 1981.
- 13 7. Between November 25, 1980 and March 21, 1986, the claimant, Lyssa
14 Smith, developed the condition of reflex sympathetic dystrophy in the left
15 lower extremity which is causally related to the industrial injury of March 3,
16 1980 and which required further medical treatment.
- 17 8. Between November 25, 1980 and March 21, 1986, the claimant's left
18 lower extremity and left ankle conditions attributable to the industrial injury
19 of March 3, 1980 worsened and became aggravated, and as of the latter
20 date, required further medical treatment.
- 21 9. Ms. Smith does not have a low back condition causally related to the
22 industrial injury of March 3, 1980.

CONCLUSIONS OF LAW

- 24 1. The Board has jurisdiction of the parties and subject matter of this appeal.
- 25 2. Claimant's conditions described as surgical fusion of the left ankle and
26 reflex sympathetic dystrophy in the left lower extremity are causally related
27 to the industrial injury of March 3, 1980, within the meaning of the
28 Washington Industrial Insurance Act.
- 29 3. Between November 25, 1980 and March 21, 1986, claimant's conditions
30 causally related to her industrial injury of March 3, 1980, worsened and
31 became aggravated within the meaning of RCW 51.32.160.
- 32 4. The order of the Department of Labor and Industries dated March 21,
33 1986 which stated that a review of the medical evidence discloses that
34 claimant's condition is unrelated to the injury of March 3, 1980 for which
35 this claim was filed but is causally related to the effects of a non-industrial
36 injury that occurred on July 13, 1969, and which adhered to the provisions
37 of an order dated October 31, 1984, denying the claimant's application to
38 reopen her claim for aggravation of condition, is incorrect and must be
39 reversed and the claim remanded to the Department with direction to
40 reopen the claim and order the self-insured employer to deny
41 responsibility for any low back condition which claimant may have, and
42 provide treatment and benefits for Lyssa Smith's left ankle and left lower
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1 extremity conditions, on and subsequent to, August 24, 1984 in the
2 amount and for the duration justified by the law and facts.

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4 It is so ORDERED.

5 Dated this 19th day of January, 1988.

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7 BOARD OF INDUSTRIAL INSURANCE APPEALS

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11 /s/
12 SARA T. HARMON Chairperson

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15 /s/
16 FRANK E. FENNERTY, JR. Member

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18 **DISSENTING OPINION**

19 As the Board majority points out, there have been objective changes for the worse in the
20 claimant's left ankle and leg condition during the aggravation period here in issue (November 25, 1980
21 to March 21, 1986) which resulted in some loss of physical function and increased disability. The
22 crucial question, as the majority admits, is whether or not such worsening was due to the effects of the
23 industrial injury of March 3, 1980. This in turn depends on whether or not the ankle fusion surgery in
24 August 1980 and the re-fusion surgery in 1981 (and whatever may have been the subsequent effects
25 of such surgeries), were necessitated by the March 3, 1980 industrial injury. The majority answers this
26 question in the affirmative. I do not.

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31 I am convinced that the need for the surgeries was simply the natural and inevitable
32 deterioration of claimant's left ankle joint resulting from the much more serious fracture dislocation in
33 the 1969 auto accident; not the minor ankle-turning incident of March 3, 1980, which, according to the
34 attending physician at that time, Dr. Shelton, was just a ligamentous strain not affecting the bones in
35 the ankle joint itself. I am not persuaded, as the majority seems to be, that there was a "dramatic"
36 change in claimant's left ankle condition resulting from the March 1980 industrial injury -- nor, for that
37 matter, were the claimant or Dr. Shelton of such a mind at that time. They acquiesced in claim closure
38 in November of 1980, after payment solely for the doctor's treatment of the ligamentous strain, even
39 though claimant was then still under treatment following the ankle fusion surgery. It was not until four
40 years later that they appeared to develop some different thoughts on the severity of the ankle-twisting
41 incident and applied to reopen the claim for alleged aggravation caused thereby.

1 Our Industrial Appeals Judge has analyzed this entire case quite well in his Proposed Decision
2 and Order, and I quote some particular portions of his discussion, as follows:
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4 "It is conceivable that there may have been some affect by the injury upon
5 the deteriorating condition in the claimant's left ankle in 1980 but this was
6 a process of deterioration that had already been going on in the claimant's
7 ankle since 1969. There is no medical evidence of an objective nature to
8 show that the events of March 1980 when the claimant twisted her ankle
9 had any significant accelerating affect on her deteriorating ankle joint.
10 There is no objective medical evidence by which it can now be established
11 that the need for fusion surgery was accelerated by the industrial injury of
12 March 3, 1980. Indeed, the evidence most strongly supports the
13 contention that that fusion surgery was purely the result of her prior
14 non-industrial auto accident of 1969 and the subsequent and insidious
15 joint surface erosion that took place since.
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18 The criteria for a conclusion that a condition has become aggravated
19 between two dates include medically objective findings of increased
20 disability which are causally related to the industrial injury, as opposed to
21 be related to some other traumatic event."
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23 I would adopt the findings, conclusion, and order of the Proposed Decision and Order, and thereby
24 fully affirm the terms of the Department's order of March 21, 1986.
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26 Dated this 19th day of January, 1988.
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29 /s/
30 PHILLIP T. BORK Member
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