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*, BIIA Dec., 86 1152 (1988)** [dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LYSSA SMITH	)	**DOCKET NO. 86 1152**
	)	
CLAIM NO. S-348882	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Lyssa Smith, by
Schroeter, Goldmark & Bender, per
James D. Hailey and Sidney Stillerman Swan

Employer, Champion International Corporation, by
Eisenhower, Carlson, Newlands, Reha, Henriot & Quinn, per
Richard Jessup

This is an appeal filed by the claimant on April 9, 1986 from an order of the Department of Labor and Industries dated March 21, 1986 which stated that a review of the medical evidence discloses that claimant's condition is unrelated to the injury of March 3, 1980 for which this claim was filed but is causally related to the effects of a non-industrial injury that occurred on July 13, 1969, and which adhered to the provisions of an order dated October 31, 1984, denying the claimant's application to reopen her claim for aggravation of condition. **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 claimant to a Proposed Decision and Order issued on June 5, 1987 in which the order of the Department dated March 21, 1986 was affirmed.

While the deposition of Dr. Paul Shelton III was appropriately published pursuant to a stipulation of the parties, no ruling was made regarding the admission of the exhibits attached to that deposition which were offered by the parties without objection. The application to reopen the claim for aggravation of condition, designated as defendant's Exhibit No. 1, and the self-insurer's medical progress report, designated Exhibit No. 1, are respectively remarked as Exhibits Nos. 2 and 3 and admitted to the record.

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

In addition, claimant has objected to the Board considering the employer's Memorandum in Response to the Petition for Review and in Support of Proposed Decision and Order, arguing that it was untimely filed pursuant to WAC 263-12-145(3). We do not interpret the ten day time limitation contained in that regulation to preclude our consideration of materials submitted after the ten day

period has elapsed. Consequently, claimant's objection is overruled. In deciding this appeal we have considered the entire record of proceedings, claimant's Petition for Review and the employer's response thereto.

Lyssa Smith, by this appeal, raises an issue which is simple to state but difficult to resolve. She contends that worsening of her left ankle condition which resulted in fusion surgery was causally related to the injury of March 3, 1980 and covered by this claim. Champion International Corporation, on the other hand, contends that the need for ankle fusion surgery resulted from an injury suffered by Lyssa Smith in an automobile accident on July 13, 1969. Clearly, there have been significant objective changes in Ms. Smith's left ankle and leg condition during the period between November 25, 1980 and March 21, 1986 which resulted in the need for medical treatment and resulted in loss of physical function and increased disability. The question is whether the worsening of the claimant's left ankle condition which occurred during this period was due to the effects of the industrial injury that occurred on March 3, 1980.

Although Lyssa Smith suffered a devastating fracture dislocation injury to her left ankle in an automobile accident on July 13, 1969, she was able to regain a significant amount of function. As the testimony of Dr. Edward H. Mills, who attended her for the automobile injury, reveals, when he last saw her in January of 1971, full motion had been regained in the left ankle. Between her last visit to Dr. Mills in January of 1971 and the March 3, 1980 industrial injury, Ms. Smith was able to engage in a range of physical activities which would be rigorous for someone with a normal ankle and which established that she regained significant physical function in her left ankle. During the period after the automobile accident, Lyssa Smith worked as a sales person at the counter of a candy store and then 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 also required a great deal of lifting. In September of 1974 Ms. Smith entered the U.S. Army and although suffering, on occasion, some soreness, was able to complete the vigorous physical exercise required in basic training. After leaving the Army with an honorable discharge, Ms. Smith worked at several jobs which required her to be on her feet for extended periods of time, before receiving secretarial training which enabled her to secure her job with Champion International Corporation. During this period Ms. Smith swam, hiked, and danced on a regular basis and the only problem attendant to these activities was soreness in the left ankle at the end of the day.

Following the fall and twist injury which occurred at Champion International Corporation on March 3, 1980, the nature of Ms. Smith's left ankle condition changed dramatically. Previously, although she suffered from soreness following extensive or heavy use of her left ankle, she was able to recover following rest, and to continue to engage in substantial physical activities involving the use of the ankle. In May of 1980 Dr. Paul Shelton, an osteopathic physician, referred Ms. Smith to Dr. Frederick Davis, an orthopedic surgeon, to explore the possibility of fusion surgery for the left ankle. Dr. Shelton, a general practitioner, had cared for the claimant since December of 1977 for problems unrelated to the left ankle and was the initial attending physician for the injury of March 3, 1980. Dr. Shelton was of the opinion that the problems that he diagnosed in Ms. Smith's left ankle in May of 1980, which led to the need for fusion surgery, were attributable, at least in part, to the injury of March 3, 1980.

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

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

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

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

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

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

FINDINGS OF FACT

1. On March 3, 1980 the claimant twisted and turned her left ankle while in the course of her employment for the self-insured employer herein. On March 17, 1980 the claimant filed a report of accident with the Department of Labor and Industries. On November 25, 1980, the Department issued an order allowing the claim for medical treatment only, and closing the claim with no time-loss compensation and no permanent disability award.

2. On October 23, 1984, the claimant filed an application to reopen her claim for aggravation of condition. On October 31, 1984 the Department issued an order denying the application. On December 12, 1984 a protest and request for reconsideration was filed by the claimant. On January 23, 1986 the Department held its prior order of October 31, 1984 in abeyance. On March 21, 1986, the Department issued an order adhering to the provisions of its order of October 31, 1984 and stating that the claimant's condition in her left ankle was unrelated to her injury of March 3, 1980 but was, rather, causally related to the non-industrial injury of July 13, 1969. On April 9, 1986, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals and on April 24, 1986, the Board issued an order granting the appeal, assigning it Docket No. 86 1152, and ordered that hearings be held on the issues raised by the notice of appeal.

3. On July 13, 1969, as the result of an automobile accident, Ms. Smith suffered a fracture dislocation of her left ankle. In January of 1971, following treatment for the left ankle injury of July 13, 1969, claimant had regained full motion in her left ankle, but still suffered from crepitus, pain, and soreness on use, and had significant loss of joint space.

4. On March 3, 1980, during the course of her employment with Champion International Corporation, Lyssa Smith injured her left ankle as the result of a tripping and twisting fall.

5. Prior to the industrial injury of March 3, 1980, Ms. Smith's conditions causally related to the injury to her left ankle on July 13, 1969, did not prevent her from engaging on a regular and consistent basis in recreational activities such as swimming, hiking, and dancing, and job-related activities such as lifting, walking, bending, stooping, and standing for extended periods of time.

6. As the result of the industrial injury of March 3, 1980, claimant, Lyssa Smith, suffered from a left ankle strain which, when superimposed upon her pre-existing left ankle condition caused by the automobile accident of July 13, 1969, rendered necessary the operations to surgically fuse her left ankle, performed in August of 1980 and February of 1981.

7. Between November 25, 1980 and March 21, 1986, the claimant, Lyssa Smith, developed the condition of reflex sympathetic dystrophy in the left lower extremity which is causally related to the industrial injury of March 3, 1980 and which required further medical treatment.

8. Between November 25, 1980 and March 21, 1986, the claimant's left lower extremity and left ankle conditions attributable to the industrial injury of March 3, 1980 worsened and became aggravated, and as of the latter date, required further medical treatment.

9. Ms. Smith does not have a low back condition causally related to the industrial injury of March 3, 1980.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and subject matter of this appeal.

2. Claimant's conditions described as surgical fusion of the left ankle and reflex sympathetic dystrophy in the left lower extremity are causally related to the industrial injury of March 3, 1980, within the meaning of the Washington Industrial Insurance Act.

3. Between November 25, 1980 and March 21, 1986, claimant's conditions causally related to her industrial injury of March 3, 1980, worsened and became aggravated within the meaning of RCW 51.32.160.

4. The order of the Department of Labor and Industries dated March 21, 1986 which stated that a review of the medical evidence discloses that claimant's condition is unrelated to the injury of March 3, 1980 for which this claim was filed but is causally related to the effects of a non-industrial injury that occurred on July 13, 1969, and which adhered to the provisions of an order dated October 31, 1984, denying the claimant's application to reopen her claim for aggravation of condition, is incorrect and must be reversed and the claim remanded to the Department with direction to reopen the claim and order the self-insured employer to deny responsibility for any low back condition which claimant may have, and provide treatment and benefits for Lyssa Smith's left ankle and left lower

extremity conditions, on and subsequent to, August 24, 1984 in the amount and for the duration justified by the law and facts.

It is so ORDERED.

Dated this 19th day of January, 1988.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/______________________________________
SARA T. HARMON Chairperson

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

DISSENTING OPINION

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

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

Our Industrial Appeals Judge has analyzed this entire case quite well in his Proposed Decision and Order, and I quote some particular portions of his discussion, as follows:

> "It is conceivable that there may have been some affect by the injury upon the deteriorating condition in the claimant's left ankle in 1980 but this was a process of deterioration that had already been going on in the claimant's ankle since 1969. There is no medical evidence of an objective nature to show that the events of March 1980 when the claimant twisted her ankle had any significant accelerating affect on her deteriorating ankle joint. There is no objective medical evidence by which it can now be established that the need for fusion surgery was accelerated by the industrial injury of March 3, 1980. Indeed, the evidence most strongly supports the contention that that fusion surgery was purely the result of her prior non-industrial auto accident of 1969 and the subsequent and insidious joint surface erosion that took place since.
>
> ....
>
> The criteria for a conclusion that a condition has become aggravated between two dates include medically objective findings of increased disability which are causally related to the industrial injury, as opposed to be related to some other traumatic event."

I would adopt the findings, conclusion, and order of the Proposed Decision and Order, and thereby fully affirm the terms of the Department's order of March 21, 1986.

Dated this 19th day of January, 1988.

/s/____
PHILLIP T. BORK Member