

Anderson, Lulu

SCOPE OF REVIEW

Aggravation

A worker is only required to prove that some condition proximately caused by the industrial injury worsened between the terminal dates. It is error to find that one condition did not worsen and another condition did. A claim is either open or closed; it cannot be open with respect to some conditions and closed with respect to others.*In re Lulu Anderson, BIA Dec., 09 19941 (2010)*

Scroll down for order.

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

1 **IN RE: LULU M. ANDERSON**) **DOCKET NO. 09 19941**
2 **CLAIM NO. Y-297434**) **DECISION AND ORDER**

3 APPEARANCES:

4
5 Claimant, Lulu M. Anderson, by
6 Stiley & Cikutovich, PLLC, per
7 Patrick K. Stiley

8 Employer, Herman H. Pein,
9 None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Pamela V. Reuland, Assistant

13 The claimant, Lulu M. Anderson, filed an appeal with the Board of Industrial Insurance
14 Appeals on July 24, 2009, from a June 3, 2009 order of the Department of Labor and Industries, in
15 which the Department denied the claimant's application to reopen her claim. The Department order
16 is **REVERSED AND REMANDED**.

DECISION

17 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
18 review and decision. The Department filed a timely Petition for Review of an August 24, 2010
19 Proposed Decision and Order, in which the industrial appeals judge reversed the June 3, 2009
20 Department order and remanded "with direction to reopen the claim for aggravation of condition
21 and take such other and further action as may be indicated by the law and the facts." Conclusion of
22 Law No. 4.

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

25 The issue presented by this appeal and the evidence presented by the parties are
26 adequately set forth in the Proposed Decision and Order. We have granted review to correct a
27 typographical error in Conclusion of Law No. 3, in which the industrial appeals judge incorrectly
28 stated that Ms. Anderson's condition did "not" become aggravated. The Department has also
29 requested that we amend Conclusion of Law No. 4 to clarify that the claim is reopened only for the
30 cervical problem related to the ligament strain at C3-4.

31 Under Finding of Fact No. 3, it is clear the Department is not responsible for pre-existing
32 degenerative changes or bulging discs at C5-6 and C6-7. If the intent of the Department's request

1 was to clarify that fact, there is no need to change Conclusion of Law No. 4 to reflect the content of
2 Finding of Fact No. 3. It goes without saying that, on remand, the Department is only responsible
3 for conditions proximately caused by the industrial injury.

4 However, if the intent of the Department's request was to limit its responsibility on remand to
5 the ligament strain at C3-4, to the exclusion of all other conditions caused by the industrial injury,
6 then we caution that once the claim is reopened, it will be open for all purposes. In Finding of Fact
7 No. 5 the industrial appeals judge may have caused some confusion by saying that Ms. Anderson's
8 cervical strain/C3-4 instability condition has worsened, but her right shoulder condition has not.
9 Ms. Anderson was required only to prove that some condition proximately caused by the industrial
10 injury worsened between the terminal dates, based at least in part on objective evidence. She has
11 done so with respect to her cervical condition.

12 Finding of Fact No. 5 should only have addressed the ultimate issue of whether any
13 condition related to the injury has worsened. To avoid any confusion, we have eliminated the first
14 sentence of Finding of Fact No. 5, which contains superfluous language regarding the right
15 shoulder. The fact that Ms. Anderson failed to prove her right shoulder condition has worsened is
16 irrelevant to the Department's responsibilities on remand. A claim is either open or closed; it cannot
17 be open with respect to some conditions and closed with respect to others. *In re Bette Pike*, BIIA
18 Dec. 88 2266 (1990). There is no hybrid state in which the Department may limit its claims
19 administration to certain conditions related to an industrial injury, and ignore others that are also
20 related to the injury. On remand, the Department will continue to be responsible for any condition
21 proximately caused by the industrial injury, including the right shoulder and dental conditions. The
22 Department's request to limit reopening to the cervical strain at C3-4 is therefore denied.

23 After consideration of the Proposed Decision and Order and the Petition for Review filed
24 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
25 Decision and Order is supported by the preponderance of the evidence and is correct as a matter of
26 law.

27 **FINDINGS OF FACT**

- 28 1. On July 28, 2003, the claimant, Lulu M. Anderson, filed an Application for
29 Benefits with the Department of Labor and Industries, in which she alleged
30 she sustained an injury on July 17, 2003, in the course of her employment
31 with Herman H. Pein. On August 13, 2003, the Department allowed the
32 claim. On June 8, 2005, the Department determined it was responsible for
the condition diagnosed as cervical strain. On June 30, 2005, the
Department denied responsibility for the condition diagnosed as reversible
pulpitis and chronic nocturnal bruxism. On July 1, 2005, the Department

1 closed the claim with awards for permanent partial disability consistent
2 with Category 2 of the categories of permanent cervical and cervico-dorsal
3 impairments, and 10 percent of the amputation value of the right arm at or
4 above the deltoid insertion or by disarticulation at the shoulder. The order
provided that the impairment to the right arm at the shoulder was for distal
clavicle excision.

5 On March 25, 2009, the Department received an application to reopen the
6 claim for aggravation of condition. On May 27, 2009, the Department
7 extended the time for acting on the application to August 22, 2009. On
8 June 3, 2009, the Department denied the application to reopen the claim
9 for the reason the medical record shows the conditions caused by the
injury did not worsen following the final claim closure.

10 On July 24, 2009, the Board of Industrial Insurance Appeals received a
11 Notice of Appeal filed on Ms. Anderson's behalf from the June 3, 2009
12 Department order. On August 26, 2009, the Board granted the appeal
under Docket No. 09 19941, and agreed to hear the appeal.

- 13 2. Lulu M. Anderson sustained an injury on July 17, 2003, in the course of
14 her employment milking cows for Herman H. Pein. The injury occurred
15 when she attempted to leap over a cow coming toward her in an alley to
16 the milking parlor, but was instead dragged by the cow into a support
17 beam. As a result of this incident, Ms. Anderson sustained bruises to her
18 face, right shoulder, hips and leg; a right shoulder strain with
acromioclavicular joint disruption; three cracked teeth (numbers 18, 19,
and 30); and, a cervical ligament strain with resulting hypermobility
(instability) at C3-4, with anterolisthesis of C3 over C4.
- 19 3. Prior to the July 17, 2003 injury, Ms. Anderson had the following
20 conditions: degenerative changes at C5-6 and C6-7; and a broken left
21 ankle (1989) surgically repaired with pins. These conditions were not
22 proximately caused or aggravated by the July 17, 2003 injury. Ms.
23 Anderson also has MRI evidence of bulging discs at C5-6 and C6-7. More
likely than not, these conditions were also not proximately caused or
aggravated by the July 17, 2003 injury.
- 24 4. As of July 1, 2005, the conditions proximately caused by Ms. Anderson's
25 July 17, 2003 injury were medically fixed and stable. As of July 1, 2005,
26 Ms. Anderson had permanent impairment of her right arm, proximately
27 caused by the July 17, 2003 injury, equal to 10 percent of the amputation
28 value of the right arm at or above the deltoid insertion or by disarticulation
29 at the shoulder, due to distal clavicle excision. As of July 1, 2005, Ms.
30 Anderson had permanent cervical impairment, proximately caused by the
July 17, 2003 injury, best described by Category 2 of the categories of
permanent cervical and cervico-dorsal impairments, due to instability
(anterolisthesis) at C3-4.
- 31 5. During the period July 1, 2005, through June 3, 2009, Ms. Anderson's
32 cervical strain/C3-4 instability condition proximately caused by the July 17,
2003 injury, objectively worsened and became aggravated, as evidenced

1 by increased cervical paraspinal muscle spasm detected by Thomas J.
2 Boone, M.D., on March 19, 2009.

3 **CONCLUSIONS OF LAW**

- 4 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
to and the subject matter of this appeal.
- 5 2. The claimant, Lulu M. Anderson, presented medical and other evidence,
6 which, if believed, would make a prima facie case of aggravation under
7 RCW 51.32.160, occurring during the period July 1, 2005, and June 3,
8 2009. The Department's motion to dismiss the claimant's appeal for
failure to make a legally sufficient case for the relief sought is denied.
9 RCW 51.52.050(2)(a); CR 41(b)(3).
- 10 3. During the period July 1, 2005, and June 3, 2009, a condition of the
11 claimant, Lulu M. Anderson, proximately caused by her July 17, 2003
injury, became aggravated within the meaning of RCW 51.32.160.
- 12 4. The June 3, 2009 Department order is incorrect and is reversed. This
13 claim is remanded to the Department with direction to reopen the claim for
14 aggravation of condition, and take such other and further action as may be
indicated by the law and the facts.

15 DATED: November 5, 2010.

16 BOARD OF INDUSTRIAL INSURANCE APPEALS

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18 /s/ _____
DAVID E. THREEEDY Chairperson

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

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24 /s/ _____
LARRY DITTMAN Member