

## **Kish, Ernest**

---

### **AGGRAVATION (RCW 51.32.160)**

#### **First terminal date: Order on Agreement of Parties**

Because the parties agreed in an Order on Agreement of Parties that the Department should adjudicate the claim through December 3, 2009, December 3, 2009, became the first terminal date. ...*In re Ernest Kish, BIIA Dec., 12 20993 (2014)* [Editor's Note: The Board's decision was appealed to superior court under Pierce County Cause No. 14-2-10478-8.]

Scroll down for order.

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

1 **IN RE: ERNEST KISH** ) **DOCKET NO. 12 20993**  
2 )  
3 **CLAIM NO. W-435140** ) **DECISION AND ORDER**

4 **APPEARANCES:**

5 Claimant, Ernest Kish, by  
6 Tacoma Injury Law Group, Inc., P.S., per  
7 Tamara S. Clower and Cameron T. Riecan

8 Self-Insured Employer, King County, by  
9 King County Prosecuting Attorney, per  
Tylar A. E. Edwards

10 The claimant, Ernest Kish, filed an appeal with the Board of Industrial Insurance Appeals on  
11 September 13, 2012, from a July 18, 2012 order of the Department of Labor and Industries. In that  
12 order, the Department denied the claimant's application to reopen his claim. The Department order  
13 is **REVERSED AND REMANDED**.

14 style="text-align:center">**PROCEDURAL MATTERS AND OVERVIEW**

15 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
16 review and decision. The claimant filed a timely Petition for Review of a November 1, 2013  
17 Proposed Decision and Order in which the industrial appeals judge affirmed the July 18, 2012  
18 Department order. King County, the self-insured employer, filed a Reply to the Petition for Review  
19 on January 17, 2014.

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

22 The issue on appeal is whether Mr. Kish's neck condition proximately caused by the April 6,  
23 2000 industrial injury objectively worsened between December 3, 2009, and July 18, 2012. We  
24 have granted review for several reasons.

25 As a threshold matter the industrial appeals judge used the wrong first terminal date. The  
26 correct date is December 3, 2009, not May 21, 2010. On the merits, the choice is between the  
27 evidence provided by H. Richard Johnson, M.D., who examined Mr. Kish on October 5, 2009, and  
28 February 29, 2012; and Aleksandar Curcin, M.D., and John S. Wendt, M.D., who examined him on  
29 May 12, 2012. There are also comparative EMGs (January 27, 2006, and May 29, 2012) and  
30 comparative MRIs (January 16, 2008, and June 4, 2012).

1 As a result of the industrial injury, Mr. Kish has undergone three surgeries—a fusion of C5-6  
2 and C6-7 on October 30, 2000; a second fusion of C7-T1 on July 17, 2001; and a third fusion of  
3 C4-5 on October 30, 2005. The claim was closed effective December 3, 2009, with a permanent  
4 partial disability award equal to Category 4 of WAC 296-20-240.

5 Based on a comparison of the January 27, 2006, and May 29, 2012 EMGs, Mr. Kish's  
6 neurological findings were worse as of the second terminal date. The 2012 EMG substantiated an  
7 ulnar nerve problem across the left elbow and pinched nerves at C5-6. Neither finding was present  
8 in 2006. In addition, on October 5, 2009, the left elbow Tinel's sign was negative for ulnar nerve  
9 entrapment while in 2012 both Drs. Johnson and Wendt found a positive Tinel's sign in his left  
10 elbow. Dr. Johnson also observed increased left triceps atrophy in 2012 as compared with his  
11 2009 exam. In addition, the June 4, 2012 MRI showed the progression of degenerative changes at  
12 C3-4, when compared with the 2008 MRI. We therefore conclude that Mr. Kish's neck condition  
13 proximately caused by the April 6, 2000 industrial injury objectively worsened between December 3,  
14 2009, and July 18, 2012. The July 18, 2012 Department order denying Mr. Kish's application to  
15 reopen his claim is reversed.

### 16 **DECISION**

17 **First terminal date:** The Department closed the claim on February 17, 2009, with time-loss  
18 compensation benefits as paid through December 1, 2008, and a permanent partial disability award  
19 equal to Category 3 of WAC 296-20-240. The claimant protested on April 10, 2009, and the  
20 Department affirmed the February 17, 2009 order on June 26, 2009. Mr. Kish appealed on  
21 August 24, 2009, and the Board issued an Order on Agreement of Parties (OAP) on May 13, 2010.  
22 The parties agreed to close the claim effective December 3, 2009 (rather than June 26, 2009), with  
23 a permanent partial disability award equal to Category 4 of WAC 296-20-240 for the neck. In  
24 addition, they agreed that Mr. Kish was entitled to an additional year of time-loss compensation  
25 benefits for the period of December 2, 2008, through December 2, 2009. On May 21, 2010, the  
26 Department issued an order effectuating the OAP.

27 In the current appeal, the industrial appeals judge held a scheduling conference on  
28 February 12, 2013. In the resulting Interlocutory Order Establishing Litigation Schedule, she stated  
29 that the first terminal date was May 21, 2010, but gave the parties permission to argue their  
30 positions regarding that date on the first day of hearings, June 19, 2013. At the beginning of  
31 proceedings on that date, there was an off-the-record discussion by the parties. When the  
32

1 industrial appeals judge came back on the record, she stated that the first terminal date was  
2 May 21, 2010.

3 As a general rule, the date of the Department's ministerial order effectuating the Board's  
4 order is not the first terminal date in an aggravation case. Instead, the appropriate date is the date  
5 through which the Department has adjudicated the claim *In re Donald Workman*, BIIA Dec.,  
6 00 24102 (2001); and *In re Jimmy Storer*, BIIA Dec., 86 4436 (1988). Typically, that date would be  
7 the date of the order under appeal, which in this case was June 26, 2009. But the parties agreed  
8 that on remand the Department should adjudicate the claim through December 3, 2009.  
9 December 3, 2009 is therefore the first terminal date.

10 Because the case was tried using the wrong first terminal date, we have considered whether  
11 the appeal should be remanded to the hearing process for further proceedings using the correct  
12 date. We conclude that remand is unnecessary because the relevant evidence would be the same  
13 either way. The first terminal date findings would still be based on the same clinical exams,  
14 Dr. Johnson's of October 5, 2009, and Dr. Harris's of November 17, 2008, and the same diagnostic  
15 testing, the January 27, 2006 EMG and the January 16, 2008 MRI.

16 **Weighing the Evidence:** Mr. Kish is left-handed. He suffered an industrial injury to his  
17 neck on April 6, 2000, and his symptoms and findings have consistently been left-sided. For  
18 example, he experiences numbness in the left hand; tends to drop things when he uses that hand;  
19 and has visible, longstanding atrophy of the left pectoralis muscle as a result of the injury. Mr. Kish  
20 underwent a fusion of C5-6 and C6-7 on October 30, 2000; a second fusion of C7-T1 on July 17,  
21 2001; and a third fusion of C4-5 on October 30, 2005. He participated in a year-long vocational  
22 retraining program that apparently concluded in December 2008 and was found employable as a  
23 biomechanical technician.

24 On November 17, 2008, Mr. Kish was evaluated by James Harris, M.D., who determined that  
25 he had a permanent impairment equal to Category 3 of WAC 296-20-240. On February 17, 2009,  
26 the claim was closed with a permanent partial disability award based on that rating and with  
27 time-loss compensation benefits as paid through December 1, 2008. That order was affirmed on  
28 June 26, 2009, and Mr. Kish appealed. During the pendency of the appeal, Dr. Johnson examined  
29 him on October 5, 2009. The parties ultimately agreed that the claim should be closed effective  
30 December 3, 2009, with time-loss compensation benefits as paid through December 2, 2009, and a  
31 permanent partial disability award equal to Category 4 of WAC 296-20-240.

1 Mr. Kish returned to work in December 2011, working about one day a week as a photo  
2 booth technician. He also helped his friend out at a restaurant and did some other odd-jobs. His  
3 symptoms increased and he was seen again by Dr. Johnson on February 29, 2012. Dr. Johnson  
4 assisted Mr. Kish in filing an application to reopen his claim on March 2, 2012. The Department  
5 extended the time for making a decision to July 30, 2012. King County requested an independent  
6 medical examination (IME) and Mr. Kish was examined by Drs. Wendt and Curcin on May 12,  
7 2012. They recommended further diagnostic testing. An EMG was obtained on May 29, 2012, and  
8 a cervical MRI on June 4, 2012. The Department denied reopening on July 18, 2012.

9 **Dr. Johnson:** Of particular note for comparison purposes, Dr. Johnson's February 29, 2012  
10 findings included the following: Mr. Kish had atrophy at all three heads of the left triceps, with  
11 weakness; the triceps strength on the left was minus 4 over 5; and the Tinel's sign at the left elbow  
12 was mildly positive. When asked if there was a difference between his 2009 and 2012 clinical  
13 exams, Dr. Johnson responded:

14 Well, there certainly was difference in that the patient now was showing  
15 evidence of the atrophy had progressed in the left triceps to where it was  
16 significant in all three heads of the triceps versus the fact that it was  
17 significant in my initial examination on October 5, 2009 just in the lateral  
18 head with mild—correction, with less atrophy in the other two heads.

19 The Tinel's sign at the elbow on the left was negative on my initial  
20 examination and it was positive on the follow-up examination, consistent  
21 with progression of the ulnar nerve involvement to now being shown  
22 evidence of ulnar entrapment. This ulnar entrapment was also in  
23 evidence when the patient underwent more recent electrodiagnostic  
24 studies on May 29, 2012, showing evidence of moderate left ulnar  
25 neuropathy across the elbow, consistent with the physical findings. And  
26 those findings were negative in the electrodiagnostic studies [prior] to  
27 closure of his claim.<sup>1</sup>

28 Dr. Johnson also said that the 2006 EMG had shown a problem at C7 and C8, whereas the  
29 2012 EMG showed an additional area of involvement at C5 and C6.

30 When Dr. Johnson compared the January 16, 2008 MRI findings with the June 4, 2012 MRI  
31 findings, he noted that the latter showed the degenerative changes at C3-4 had progressed. In his  
32 opinion, Mr. Kish's condition related to the April 6, 2000 industrial injury had objectively worsened  
between May 21, 2010, and July 18, 2012, based on cervical range of motion; the positive Tinel's

---

<sup>1</sup> 6/19/13 Tr. at 49-50.

1 sign at the left elbow; the ongoing evidence of nerve irritation substantiated by physical findings and  
2 electrodiagnostic studies; and the progression of degenerative changes on MRI.

3 **Dr. Wendt and Dr. Curcin:** Drs. Wendt's and Curcin's testimony was not quite as detailed  
4 as Dr. Johnson's testimony with respect to their examination findings, but the findings they  
5 described on May 12, 2012, were consistent with what Dr. Johnson had found a few months earlier.  
6 In addition, Mr. Kish's presentation during both examinations was straightforward with no evidence  
7 of pain behavior. All five Waddell's signs were negative during Dr. Johnson's examination. Axial  
8 loading was positive during Dr. Curcin's examination but he said this was not a concern and the  
9 rest of the Waddell's signs were negative.

10 Dr. Wendt, a neurologist, said he "saw no convincing evidence" <sup>2</sup> that Mr. Kish's cervical  
11 condition had worsened between May 21, 2010, and July 18, 2012. Likewise, Dr. Curcin, an  
12 orthopedic surgeon, said there was no evidence of objective worsening between those dates.

13 **Neurological aspect of Mr. Kish's condition:** Like Dr. Johnson, Dr. Wendt found triceps  
14 weakness; an absent left triceps reflex; and sensory loss, particularly in the fourth and fifth digits,  
15 which is over the ulnar nerve distribution. Like Dr. Johnson, he found a positive Tinel's sign at the  
16 elbow, which was also substantiated by the May 29, 2012 EMG. Dr. Wendt did not know if Mr. Kish  
17 had a positive Tinel's sign before claim closure but he said that the finding was not related to the  
18 neck injury because it had "to do with pinching of a peripheral nerve after it has come out of the  
19 spine" and was in a "totally separate anatomic area."<sup>3</sup>

20 In contrast, Dr. Johnson said the ulnar nerve problem at the elbow was related to the neck  
21 condition because:

22 Ulnar entrapment occurs as a result of an increased sensitization of the  
23 C7 and C8 nerves, and that the entrapment occurs at the elbow in the  
24 area where it's commonly referred to as the funny bone, the nerve is quite  
25 close to the surface in the ulnar nerve at the elbow as it passes around  
26 the posterior medial aspect of the elbow. The nerve with the  
27 sensitization and the normal pressure there then begins to show[s]  
28 dysfunction. . . .[T]he physical examination in terms of Tinel's sign, shows  
29 that there's definitely now evidence of increased irritation and therefore  
30 entrapment of the ulnar nerve.<sup>4</sup>

31 <sup>2</sup> Wendt Dep. at 22.

32 <sup>3</sup> Wendt Dep. at 28-29.

<sup>4</sup> 6/19/13 Tr. at 52.

1 For comparison purposes, Dr. Johnson used the November 17, 2008 independent medical  
2 examination (IME) performed by Dr. James Harris, an orthopedist. Dr. Wendt did not describe  
3 Dr. Harris's findings. According to Dr. Johnson:

4 Dr. Harris performed an IME on 11-17-08 and his physical examination  
5 did reveal evidence of limited neck motion, the decreased sensation in  
6 the left upper extremity over the area of the left ulnar nerve involvement.  
7 There was also weakness in the left triceps and decreased left grip  
8 strength. The findings there were similar to the findings that I recorded in  
my evaluation of October 5, 2009, with regards to the limitation of motion  
and strength testing, as well as sensory deficits.<sup>5</sup>

9 Dr. Wendt said his May 12, 2012 examination was "comparable"<sup>6</sup> to Dr. Harris's 2008 examination  
10 but that he had found "increased weakness of left upper extremity since last claim closure."<sup>7</sup> He  
11 was not sure whether this was due to variability between examiners, which was why he  
12 recommended additional testing.

13 According to Dr. Wendt, the May 29, 2012 EMG substantiated a longstanding problem with  
14 the ulnar nerve across the elbow and showed "evidence of chronic, that means long-standing,  
15 multi-level, that means multiple levels, of pinched nerves in the neck, mild at C5-6, more significant  
16 C7. And mild at C8."<sup>8</sup> He stressed that the changes were longstanding, not acute or active. Unlike  
17 Dr. Johnson, he did not compare the May 29, 2012 EMG with the January 27, 2006 EMG. His  
18 focus instead was on whether Mr. Kish "had active injury to the nerve roots or whether he just had  
19 some chronic long-standing changes that would be considered less significant."<sup>9</sup>

20 King County's other medical expert, Dr. Curcin, testified that according to what Dr. Wendt  
21 wrote in the IME report, the first EMG showed a problem at C7-8, whereas the second one showed  
22 a problem at that level and at C5-6. He said that because Dr. Wendt was a neurologist, he would  
23 defer to him with respect to whether the electrodiagnostic testing showed any objective worsening.

24 We conclude that Mr. Kish has shown an objective worsening of his neurological findings  
25 related to the April 6, 2000 industrial injury. In his testimony, Dr. Wendt failed to do the necessary  
26 comparison of the January 27, 2006, and May 29, 2012 EMGs. But his description of the two  
27 EMGs in his IME report is consistent with and supports Dr. Johnson's conclusion that as of the  
28 second terminal date there was a worsening at C5-6. In terms of clinical findings, Dr. Wendt

---

29 <sup>5</sup> 6/19/13 Tr. at 54.

30 <sup>6</sup> Wendt Dep. at 12.

31 <sup>7</sup> Wendt Dep. at 16.

32 <sup>8</sup> Wendt Dep. at 18.

<sup>9</sup> Wendt Dep. at 12.

1 conceded that his examination showed increased left arm weakness compared with Dr. Harris's,  
2 and Dr. Johnson found increased atrophy of the triceps in 2012.

3 In addition, Dr. Johnson testified that the ulnar nerve problem at the elbow was not evident  
4 during his October 5, 2009 examination or revealed by the January 27, 2006 EMG. By comparison,  
5 the May 29, 2012 EMG substantiated ulnar nerve entrapment at the left elbow, which was clinically  
6 confirmed by both Drs. Johnson and Wendt in 2012. That is another objective change supporting  
7 reopening of the claim, with the remaining question being causation.

8 Dr. Wendt summarily asserted that the ulnar nerve entrapment was unrelated to the neck  
9 problem because it was at the elbow. Dr. Johnson gave a more detailed explanation for relating the  
10 entrapment at the elbow to the cervical condition. His theory was that the irritation of the C7 and  
11 C8 nerve roots at the neck sensitized the nerves so that with normal pressure at the elbow they  
12 were entrapped. Dr. Wendt was not asked his views regarding Dr. Johnson's theory.

13 Dr. Wendt is a neurologist and Dr. Johnson is an orthopedic surgeon. At the same time,  
14 Dr. Wendt's opinions are undermined by his failure to satisfy the most basic requirement in an  
15 aggravation case—he failed to compare the EMG findings. He was unable to say whether the  
16 positive Tinel's sign in 2012 coupled with the supporting EMG evidence constituted a new or an old  
17 finding. We find Dr. Johnson's testimony more persuasive and accept his rationale for relating the  
18 2012 ulnar nerve findings to the neck injury.

19 **Comparison of the MRIs:** Without giving specifics, Dr. Wendt said the June 4, 2012 MRI  
20 scan was "similar to what was found in MRI scans performed previously."<sup>10</sup> He said there was no  
21 evidence of an acute disc herniation or new or accelerated spinal cord compression or damage.  
22 Like Dr. Johnson, Dr. Curcin is an orthopedic surgeon. He testified

23 The findings documented the previous surgical changes from C4-5 to T1.  
24 There was mild cord compression at C3-4, but that was unchanged.  
25 Basically compared to the 2008 study, there wasn't any significant  
26 objective change other than the postsurgical changes and multiple levels  
of arthritic disease.<sup>11</sup>

27 When he was asked to further explain and was provided with copies of the two reports, he said:

28 So first of all, these are C spine MRI reports, January 16, '08, and June 4,  
29 2012. Both of those were read by the same radiologist. And the 2008  
30 study, there are degenerative changes at C3-4. There's some question

---

31 <sup>10</sup> Wendt Dep. at 19.

32 <sup>11</sup> Curcin Dep. at 16.



1 of a signal abnormality in the cord at that level. Dr. Kell talks about  
2 discogenic end-plate edema present at that level.

3 And the two (sic) 2012 study, there's no signs of cord edema or  
4 myelomalacia, no mention of the (sic) any end-plate edema at this point.  
5 Dr. Kell's impression is some progression of disc-space loss at C3-4, but  
6 he compared, at the time of his reading, the 2012 study to the 2008 study  
and felt that there was no change, and if anything, improvement in those  
signal abnormalities in the cord.<sup>12</sup>

7 In sum, Dr. Curcin acknowledged there was increased narrowing at the C3-4 level but stressed the  
8 radiologist's conclusion of no change or maybe improvement with respect to cord compression.

9 Dr. Johnson also noted the changes at the C3-4 level in 2012 as compared with 2008. He  
10 testified that the June 4, 2012 MRI:

11 [S]howed that clearly there what's referred to as a transfer lesions at  
12 C3-C4. There had been previous degenerative changes noted in the MRI  
13 prior to patient's claim closure; namely, that of January 16, 2008 that did  
14 reveal evidence of degenerative changes; however, the degenerative  
15 changes noted on the more recent study of June 4, 2012, clearly reveal  
progression of the degenerative changes in that transfer lesions at  
C3-C4.<sup>13</sup>

16 According to Dr. Johnson: "The patient's previous MRI studies had demonstrated prior to closure of  
17 his claim that he had a transfer lesion in terms of progression of degenerative changes C2-3 and  
18 C3-4"<sup>14</sup> but the 2012 MRI showed that "the degenerative changes in that transfer lesion had  
19 progressed."<sup>15</sup>

20 Dr. Curcin agreed that the June 4, 2012 MRI showed "some progression of disc-space loss  
21 at C3-4."<sup>16</sup> We conclude that Mr. Kish has shown that the degenerative changes have progressed  
22 at the C3-4 level, which is one level above his fusion site. Dr. Johnson related the progression of  
23 the changes at C3-4 to the industrial injury. This is another objective finding in support of reopening  
24 the claim.

25 To summarize, Mr. Kish has proved that his neck condition proximately caused by the  
26 April 6, 2000 industrial injury worsened between December 3, 2009, and July 18, 2012, based on  
27 objective findings, including: The May 29, 2012 EMG showed involvement at the C5 and C6 levels,  
28 which were not affected in the past, and substantiated an ulnar nerve problem across the left elbow

29 

---

<sup>12</sup> Curcin Dep. at 17.

30 <sup>13</sup> 6/19/13 Tr. at 58.

31 <sup>14</sup> 6/19/13 Tr. at 68.

32 <sup>15</sup> 6/19/13 Tr. at 69.

<sup>16</sup> Curcin Dep. at 17.

1 that was not evident on the prior EMG. Drs. Johnson and Wendt both documented a positive  
2 Tinel's sign at the left elbow in 2012 compared with Dr. Johnson's negative finding in 2009.  
3 Dr. Johnson observed increased left triceps atrophy in 2012 as compared with his 2009 exam. And  
4 the June 4, 2012 MRI showed the progression of degenerative changes at C3-4 when compared to  
5 the 2008 MRI.

6 There is one final matter we wish to address. There appears to be an undercurrent in this  
7 case about the fact that Mr. Kish has gone back to work and the effect that may have had on his  
8 symptoms. Mr. Kish was straightforward regarding the work he began performing in  
9 December 2011. His symptoms worsened thereafter and he filed the application to reopen his  
10 claim in March 2012. "Aggravation of the claimant's condition caused by the ordinary incidents of  
11 living—by work which he could be expected to do; by sports or activities in which he could be  
12 expected to participate—is compensable because it is attributable to the condition caused by the  
13 original injury." *McDougle v. Department of Labor & Indus.*, 64 Wn.2d 640 (1964). There is no  
14 suggestion in this record that Mr. Kish exceeded his restrictions or acted unreasonably. The fact  
15 that his symptoms increased as a result of the ordinary incidents of living, including work, is not a  
16 barrier to the reopening of his claim. It is the essence of an aggravation case.

### 17 **FINDINGS OF FACT**

- 18 1. On June 19, 2013, an industrial appeals judge certified that the parties  
19 agreed to include the Jurisdictional History in the Board record solely for  
20 jurisdictional purposes.
- 21 2. Ernest Kish sustained an industrial injury on April 6, 2000, when he was  
22 pulling on a large pipe wrench while trying to take apart a pipe joint.  
23 Mr. Kish suddenly fell backwards; twisted; tried to catch himself with his  
24 left hand; and injured his left upper extremity and neck. As a proximate  
25 result of the industrial injury, Mr. Kish underwent three surgeries—a  
26 fusion of C5-6 and C6-7 on October 30, 2000; a second fusion of C7-T1  
27 on July 17, 2001; and a third fusion of C4-5 on October 30, 2005.
- 28 3. On December 3, 2009, Mr. Kish experienced numbness in his left hand,  
29 and dropped items held in his left hand as a proximate result of the  
30 April 6, 2000 industrial injury. His objective findings proximately caused  
31 by the industrial injury included the following: A January 27, 2006 EMG  
32 showed evidence of cervical radiculopathy involving C7-8, but no  
evidence of ulnar nerve entrapment at the left elbow. The left elbow  
Tinel's sign was negative. Mr. Kish had some triceps atrophy in the  
lateral triceps head with less atrophy in the other two heads. A  
January 16, 2008 cervical MRI revealed degenerative changes at C3-4  
and end plate edema. Mr. Kish had a permanent cervical and

1 cervico-dorsal impairment equal to Category 4 of WAC 296-20-240  
2 which includes: moderate cervico-dorsal impairment with objective  
3 clinical findings of such impairment with neck rigidity substantiated by  
4 x-ray findings of loss of anterior curve; narrowed intervertebral disc  
5 spaces and/or osteoarthritic lipping of vertebral margins with objective  
6 findings of moderate nerve root involvement with weakness and  
7 numbness in one or both upper extremities.

- 8 4. On July 18, 2012, Mr. Kish experienced numbness in his left hand and  
9 dropped items held in his left hand as a proximate result of the April 6,  
10 2000 industrial injury. His objective findings proximately caused by the  
11 industrial injury included: a May 29, 2012 EMG showed ulnar nerve  
12 entrapment and involvement at the additional levels of C5 and C6 when  
13 compared with the January 27, 2006 EMG. The left elbow Tinel's sign  
14 was mildly positive. Mr. Kish had atrophy at all three heads of the left  
15 triceps, with weakness. His triceps strength on the left was minus  
16 4 over 5. His left triceps atrophy had progressed to where it was  
17 significant in all three heads of the triceps as compared with the atrophy  
18 that was present in 2009. A June 4, 2012 cervical MRI revealed  
19 degenerative changes at C3-4 and no end plate edema, but it also  
20 showed increased narrowing and progression of the degenerative  
21 changes at C3-4 as compared with the January 16, 2008 MRI.
- 22 5. Mr. Kish's condition proximately caused by the April 6, 2000 industrial  
23 injury objectively worsened between December 3, 2009, and July 18,  
24 2012.

25 **CONCLUSIONS OF LAW**

- 26 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
27 parties and subject matter in this appeal.
- 28 2. Between December 3, 2009, and July 18, 2012, Mr. Kish's condition  
29 proximately caused by the April 6, 2000 industrial injury objectively  
30 worsened within the meaning of RCW 51.32.160.
- 31 3. The July 18, 2012 Department order is incorrect and is reversed. This  
32 matter is remanded to the Department to reopen the claim and take  
further action as indicated.

DATED: February 26, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ \_\_\_\_\_  
DAVID E. THREEDY Chairperson

/s/ \_\_\_\_\_  
FRANK E. FENNERTY, JR. Member