# Jones, Howard

## AGGRAVATION (RCW 51.32.160)

**Proximate cause of worsened condition: new injury vs. aggravation**

An incident at work can be both a new industrial injury and an aggravation of an earlier industrial injury. Because the Department administered the new injury under the earlier claim does not mean that the Department rejected the new claim. ***….In re Howard Jones,* BIIA Dec., 13 20776 (2014)**

## SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY

**New incident aggravating prior injury**

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

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| **IN RE: HOWARD L. JONES** | **)** | **DOCKET NOS. 13 20776 & 13 20777** |
| | **)** | |
| **CLAIM NO. T-284623** | **)** | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Howard L. Jones, Pro Se

Self-Insured Employer, The Boeing Company, by
Pratt Day & Stratton, PLLC, per
Marne J. Horstman

Department of Labor and Industries, by
The Office of the Attorney General, per
Tomas S. Caballero

In Docket No. 13 20776, the self-insured employer, The Boeing Company (Boeing) filed an appeal with the Board of Industrial Insurance Appeals on August 29, 2013, from an order of the Department of Labor and Industries dated July 26, 2013. In this order, the Department affirmed its April 16, 2013 order in which it determined that Mr. Jones is totally and permanently disabled; terminated time-loss compensation benefits as paid through May 15, 2013; and placed him on the pension rolls effective May 16, 2013. The Department order is **REVERSED AND REMANDED**.

In Docket No. 13 20777, the self-insured employer, The Boeing Company, filed an appeal with the Board of Industrial Insurance Appeals on August 29, 2013, from an order of the Department of Labor and Industries dated July 29, 2013. In this order, the Department affirmed its April 17, 2013 order in which it denied Boeing's request for second injury fund relief. The Department order is **REVERSED AND REMANDED**.

## DECISION

### A. Procedural Facts

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The self-insured employer filed a timely Petition for Review of a Proposed Decision and Order issued on August 7, 2014, in which the industrial appeals judge reversed and remanded the Department order dated July 26, 2013, and affirmed the Department order dated July 29, 2013.

The parties agree that Mr. Jones is a totally and permanently disabled worker. The issues contested in these appeals include:

- What is the proper effective date of Mr. Jones's pension?
- Is Boeing entitled to second-injury fund relief?

We accepted review because we conclude that the industrial appeals judge erred in determining the proper effective date of Mr. Jones's pension and in denying Boeing second-injury fund relief.

We fully resolve these appeals by way of Boeing's summary judgment motion. The materials include:

- The Boeing Company's Motion for Summary Judgment, with accompanying Declaration of Marne J. Horstman and attached exhibits; Declaration of John W. Power, C.D.M.S., and attached exhibits (including the Declaration of Jeffrey Christensen, D.P.M.); and Declaration of James R. Schwartz, M.D., and attached exhibits;
- The Department's Response to Employer's Motion for Summary Judgment, with accompanying Declaration of Counsel, and attached exhibits;
- The Boeing Company's Summary Judgment Reply, with accompanying Declaration of Marne J. Horstman to support Employer's Reply and attached exhibits; and Declaration of Erik Samuelsen; and
- The Boeing Company's Supplemental Reply.

The material facts are not disputed, but the parties disagree what conclusions follow from those facts.

**B. <u>Substantive Facts</u>**

The claimant Howard Jones was born July 14, 1957. He spent most of his working life as a painter of commercial airplanes for Boeing, first employed by the company in 1979. He suffered at least four industrial injuries while working for Boeing:

(1) October 4, 1988: Mr. Jones slipped off the engine of an airplane, fell 18 feet, and injured both his left and right ankles. His related claim, Claim No. T-284623, was ultimately closed with a 19 percent permanent impairment of the left lower extremity, and a 6 percent permanent impairment of the right lower extremity. He continued to have problems with his ankles over the years, and his claim was opened and closed at least once more. Mr. Jones has undergone multiple surgeries for his injuries. He was permanently restricted from climbing ladders because of this accident.

(2) August 9, 1993: Mr. Jones injured his left shoulder, apparently leading to rotator cuff surgery. His related claim was ultimately closed with a 10 percent left upper extremity permanent impairment. He was permanently restricted from climbing ladders; no pushing, pulling, or carrying over 30 pounds; and allowed only occasional walking and frequent reaching above shoulder level.

(3) July 26, 2004: While squatting on his left leg and kneeling on his right knee; Mr. Jones injured his left ankle again. He again injured his left subtalar joint and suffered significant traumatic arthritis in the joint. He filed a Self-Insured Accident Report over the event, Claim No. W-812820. The Department determined the "injury is an aggravation of the injury covered by claim number T-284623," consolidated the claims, and reopened the T-claim for authorized treatment and action as warranted. Boeing paid Mr. Jones time-loss compensation benefits on the claim based on his hourly wage on July 26, 2004. His treating doctor, Dr. Christensen, restricted him permanently from crawling, squatting, and overhead work, and limited his standing, walking, stair-climbing, bending, and kneeling. He also precluded his patient from returning to his job of injury because of this second ankle injury. Mr. Jones has not worked since.

(4) July 26, 2004 (date of last injurious exposure): Mr. Jones made an accepted claim for bilateral carpal tunnel syndrome. He received surgical releases of both carpal, and his claim was closed with no permanent impairment. Because of these injuries, sedentary work involving repetitive forceful hand and wrist movements would not be appropriate for Mr. Jones.

Mr. Jones has a long-standing, preexisting, significant learning disability. A mental health professional has opined that it is doubtful that Mr. Jones could succeed in any retraining plan either in classroom training or in a sedentary to light-duty job that involves exchange of information by verbal, conceptual, or written means.

Orthopedic surgeon, James R. Schwartz, M.D., performed an independent medical examination (IME) of Mr. Jones on April 16, 2012. He concluded that Mr. Jones was not precluded from performing full-time sedentary work. Six months later, on October 11, 2012, Dr. Schwartz issued an addendum to his April 16, 2012 IME after he reviewed numerous additional records relating to Mr. Jones. He explained:

> Although it was my initial feeling that Mr. Jones would [*sic*] work at a sedentary [job] per my April 16, 2012 report, based on my review of these additional records, it is my opinion that as a result of the effects of only the October 1988 foot injuries, Mr. Jones would have likely continued to work in his position at The Boeing Company and in a sedentary capacity at a minimum. Similarly, but for the effects of

> Mr. Jones's October 1988 injury, the July 26, 2004 injury event/aggravation, would not have been totally and permanently disabling. Rather, the July 26, 2004 injury aggravated the effects of the 1988 injury to such an extent that the combined effects of those injuries along with his bilateral upper extremity conditions and learning disability have caused him to be medically incapable of reasonably continuous gainful employment, with or without retraining.[1]

Dr. Schwartz stated that Mr. Jones has been medically fixed and stable since April 10, 2009.

Based on Dr. Schwartz's addendum and numerous other records, Vocational Rehabilitation Consultant John W. Power issued a closing report dated October 29, 2012, completed "after review and additional research," concluding that "the combined effects of the pre-existing learning disability and physical restrictions attributed to the October 4, 1988 injury combined with the residual effects of the July 26, 2004 injury prevent the claimant from benefiting from vocational services." On July 3, 2013, treating physician Jeffrey Christensen, D.P.M., concurred that due to the combined effects of Mr. Jones's multiple conditions, including his July 26, 2004 industrial injury, Mr. Jones is totally and permanently disabled. Dr. Christensen was of the opinion that Mr. Jones has held that status since April 10, 2009.

### C. Proper Effective Date of Mr. Jones's Pension

We have explained:

> A permanent total disability determination is a combination of medical and vocational fixity, and should turn on the facts then in existence. **A retroactive determination should be based on the date medical and vocational experts arrived at the determination that the worker was permanently totally disabled.[2]**

(Emphasis added.)

The proper effective date of a pension is often the date that a vocational expert concludes that the claimant is totally and permanently disabled based on the medical evidence.[3]

Boeing argues that the proper effective date of Mr. Jones's pension should be April 10, 2009, because he was medically fixed and stable by that date, and no vocational activity of significance occurred after that date. The Department offers little of value in the analysis, arguing we should not apply *Neuman* and *Cuendet* where the employer is self-insured, and we should instead use the date of legal fixity as the effective date of the pension. Here, that date was July 26, 2013.

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[1] 10/11/12 Addendum to IME report at page 4.
[2] *In re Roger Neuman*, BIIA Dec., 97 7648 (1999), at 12.
[3] *In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001); *In re Debbi J. Lawton*, Dckt. No. 09 13660 (September 30, 2010).

Under *Neuman* and *Cuendet*, medical fixity is not enough; the medical experts must opine that the claimant is permanently and totally disabled. Here, as late as April 16, 2012, independent medical examiner Dr. Schwartz opined that Mr. Jones could perform full-time sedentary work. He did not reverse his position until October 11, 2012. Relying on Dr. Schwartz's changed position and after conducting additional research, V.R.C. Power issued his report concluding that Mr. Jones is vocationally permanently and totally disabled as of October 29, 2012.

October 29, 2012, is therefore the proper effective date of Mr. Jones's pension.

**D. Applicability of Second-Injury Fund Relief for Boeing**

Second-injury fund relief is provided in RCW 51.16.120. The statute provides:

> (1) Whenever a worker has a **previous bodily disability from any previous injury or disease**, whether known or unknown to the employer, and shall suffer **a further disability from injury or occupational disease** in employment covered by this title and become totally and permanently disabled from the combined effects thereof or die when death was substantially accelerated by the combined effects thereof, then the experience record of an employer insured with the state fund at the time of the further injury or disease shall be charged and a self-insured employer shall pay directly into the reserve fund only the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to such employer at the time of the further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund.

(Emphasis added.)

An incident at work can be **both** a new industrial injury and an aggravation of an earlier industrial injury.[4] That the Department consolidates a new claimed industrial injury with an earlier industrial injury, determines the new incident is an aggravation of the earlier injury, and then administers the two incidents under only the earlier claim number does **not** mean that the Department rejected the new claim as an industrial injury.[5]

Boeing argues it is entitled to second-injury fund relief based on the undisputed evidence. The Department disagrees, arguing that Mr. Jones's July 26, 2004 work event that rendered him permanently and totally disabled was not a new injury but an aggravation of his original 1988 injury,

[4] *In re Robert Tracy*, BIIA Dec., 88 1695 (1990).
[5] *In re Daniel A. Gilbertson*, Dckt. No. 89 2865 (November 7, 1990).

and second-injury fund relief is not applicable in that circumstance. The Department contends specifically that: (1) the Department's order consolidating the 2004 event with the 1988 industrial injury and deeming it an aggravation means that the 2004 event was rejected as an industrial injury, and (2) Boeing did not prove Mr. Jones suffered a medical condition because of the 2004 incident.

The Department administered Mr. Jones's claim for the July 26, 2004 incident as an aggravation of his October 4, 1988 industrial injury, and our *Gilbertson* decision clarifies that that circumstance does not mean the Department rejected the July 26, 2004 event as an industrial injury. An industrial injury means "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom."[6] The undisputed evidence indicates that on July 26, 2004, while working, Mr. Jones suffered a sudden and tangible re-injury to his left ankle at the subtalar joint while kneeling on his right knee, suffering significant traumatic arthritis in the joint. The evidence indicates that Mr. Jones sustained an industrial injury on July 26, 2004, and that event also was an aggravation of his October 4, 1988 industrial injury.

Combined with his prior disabilities, including those based on his 1988 industrial injury, Mr. Jones's July 26, 2004 industrial injury rendered him totally and permanently disabled. Boeing is entitled to second-injury fund relief.

## FINDINGS OF FACT

1. On October 24, 2013, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History for these two appeals in the Board's record solely for jurisdictional purposes.

2. Prior to July 26, 2004, the claimant, Howard Jones, suffered at least three industrial injuries or occupational diseases while working as a painter of commercial airplanes for The Boeing Company:

   (a) On October 4, 1988, Mr. Jones slipped off the engine of an airplane, fell 18 feet, and injured both his left and right ankles. His related claim, Claim No. T-284623, was ultimately closed with a 19 percent permanent impairment of the left lower extremity, and with a 6 percent permanent impairment of the right lower extremity. He continued to have problems with his ankles over the years, and his claim was opened and closed at least once more. He has undergone multiple surgeries for his injuries. He was permanently restricted from climbing ladders because of the accident.

[6] RCW 51.08.100.

(b) On August 9, 1993, Mr. Jones injured his left shoulder, apparently leading to rotator cuff surgery. His claim was ultimately closed with a 10 percent left upper extremity permanent impairment. He was permanently restricted from climbing ladders; no pushing, pulling, or carrying over 30 pounds; and allowed only occasional walking and frequent reaching above shoulder level.

(c) Mr. Jones made an accepted occupational disease claim for bilateral carpal tunnel syndrome. His last date of injurious exposure was July 26, 2004. He received surgical releases of both carpal, and his claim was closed with no permanent impairment. Because of these injuries, sedentary work involving repetitive, forceful hand and wrist movements would not be appropriate for Mr. Jones.

3. On July 26, 2004, Mr. Jones sustained another industrial injury in the course of his employment with Boeing. While squatting on his left leg and kneeling on his right knee, he injured his left ankle. Specifically, he injured the left subtalar joint and suffered significant traumatic arthritis in the joint.

4. Based on the July 26, 2004 work accident, Mr. Jones filed a Self-Insured Accident Report, Claim No. W-812820. The Department determined that the injury was an aggravation of the injury covered by Claim No. T-284623, consolidated the claims, and reopened the T-claim for authorized treatment and action as warranted. Boeing paid Mr. Jones time-loss compensation benefits on the claim based on his hourly wage on July 26, 2004. Mr. Jones's treating physician restricted him permanently from crawling, squatting, and overhead work, and limited his standing, walking, stair-climbing, bending and kneeling. The doctor also precluded Mr. Jones from returning to his job at Boeing because of this second ankle injury. Mr. Jones has not worked since the July 26, 2004 incident.

5. Mr. Jones has a long-standing, significant learning disability that preexisted his employment at Boeing. Because of the learning disability, it is doubtful he could succeed in any job retraining plan, either in classroom training or in a sedentary to light-duty job that involves exchange of information by verbal-conceptual or written means.

6. Combined with his prior disabilities, including those based on his October 4, 1988 industrial injury, Mr. Jones's July 26, 2004 industrial injury rendered him totally and permanently unable to perform gainful employment on a reasonably continuous basis considering his age, education, work history, and preexisting conditions.

7. On April 16, 2012, an independent medical doctor who had examined Mr. Jones opined that Mr. Jones could perform full-time sedentary work. The doctor reversed his position on October 11, 2012, after reviewing additional information about Mr. Jones. Relying on the doctor's changed

position and after conducting his own additional research, a vocational rehabilitation consultant issued a report on October 29, 2012, concluding that Mr. Jones is vocationally permanently and totally disabled from gainful employment.

## CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. No material facts are in dispute and these appeals may be resolved on summary judgment. CR 56.

3. On July 26, 2004, Mr. Jones sustained an industrial injury within the meaning of RCW 51.08.100.

4. The Department did not reject Mr. Jones's July 26, 2004 incident as an industrial injury by administering it as an aggravation of his October 4, 1988 industrial injury. *In re Daniel A. Gilbertson*, Dckt. No. 89 2865 (November 7, 1990).

5. The proper effective date of Mr. Jones's pension is October 29, 2012. *In re Roger Neuman*, BIIA Dec., 97 7648 (1999); *In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001).

6. Boeing is entitled to second-injury fund relief under RCW 51.16.120(1).

7. The Department orders dated July 26, 2013, and July 29, 2013, are reversed and remanded to the Department with directions to determine that the proper effective date of Mr. Jones's pension is October 29, 2012; grant Boeing second-injury fund relief; and take further action consistent with the facts and the law.

Dated: December 8, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

/s/_____
JACK S. ENG Member