Swindell, Alfred

AGGRAVATION (RCW 51.32.160)

Proximate cause of worsened condition: new injury vs. aggravation

*McDougle* (64 Wn.2d 640) does not hold that a new accident identifiable in time and place, adversely affecting an area of the body previously injured in an industrial injury, should be considered an aggravation of that previous injury. The aggravation of the worker's condition is the result of the new and independent traumatic occurrence, not the industrial injury. *...In re Alfred Swindell, BIIA Dec., 53,792 (1980)* [Editor's Note: Consider continued application in light of *In re Robert Tracy*, BIIA Dec., 88 1695 (1990).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ALFRED SWINDELL                                      ) DOCKET NOS. 53,792 and 54,864
CLAIM NOS. S-282858 and S-241523                              ) DECISION AND ORDER

APPEARANCES:

Claimant, Alfred Swindell, by
Springer, Norman and Workman, per
Richard Norman and Leonard Workman

Employer, Boise Cascade Corporation, by
Souther, Spaulding, Kinsey, Williamson and Schwabe, per
James Huegli

These are appeals filed by the claimant, (1) on February 14, 1979 in claim No. S-282858, from an order of the Department of Labor and Industries dated January 26, 1979, adhering to the provisions of a prior order rejecting the claim against Boise Cascade Corporation, a self-insured employer under the Industrial Insurance Act (Docket No. 53,792), and (2) on July 11, 1979 in claim No. S-241523 from an order of the Department of Labor and Industries dated July 5, 1979, terminating compensation as paid to June 25, 1978, denying responsibility for an injury of October 15, 1978, and closing the claim with no award for permanent partial disability (Docket No. 54,864). AFFIRMED as to both appeals.

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 employer to a Proposed Decision and Order issued by a hearing examiner for this Board on February 8, 1980, in which the order of the Department dated January 26, 1979 in Claim No. S-282858 was dismissed, and the order of the Department dated July 5, 1979 in claim No. S-241523 was reversed, and the claim remanded to the Department and the self-insured employer with direction to accept responsibility for the treatment of the claimant’s back condition subsequent to the aggravation of October 15, 1978, and for such other relief as may be indicated or required by law.

There are two appeals before us. One involves Claim No. S-241523 and concerns an industrial injury sustained by this claimant while he was in the course of employment with Boise Cascade Corporation on October 28, 1977. That claim was filed for a low back injury and closed by an order of the Department dated June 25, 1978, with no permanent partial disability award. On October 15, 1978, the claimant suffered further injury to his low back, while on a hunting expedition,
and mistakenly filed a new claim form with the self-insured employer, which was assigned Claim No. S-282858. On January 26, 1978, the Department entered an order adhering to a prior order rejecting the claim for the reason that the claimant was not an employee of the Boise Cascade Corporation at the time of the October 15, 1978 accident. The claimant appealed from that order (Docket No. 53,792). The claimant acknowledges his mistake in filing a separate claim for the hunting injury and wishes the report of accident filed in that claim to be considered an application to reopen claim No. S-241523 for aggravation of condition and that the two claims be consolidated.

Upon considering the October 15, 1978 accident's effect upon the October 28, 1977 accepted injury, the Department issued an order on July 5, 1979, effectively denying responsibility for the effects of the episode while hunting. The claimant has appealed to us from that order (Docket No. 54,864).

The issue before us ultimately concerns whether the claimant sustained an aggravation of a condition causally related to the October 28, 1977 industrial injury at the time of the events of October 15, 1978.

Dr. Charles Dresher, an orthopedic surgeon, testified on behalf of the claimant, and Dr. James Owen, a general surgeon, testified on behalf of the employer. They were in substantial agreement concerning the claimant's condition.

The claimant sustained injuries to his low back on October 28, 1977, and by March 1978 a herniated disc at the L4-L5 level was diagnosed by Dr. Dresher, with a mild radiculitis. By April of 1978, the conditions were fixed, and the doctor did not think that there was any further treatment indicated. This claim was closed in June 1978, with no permanent partial disability award. Dr. Dresher was also of the opinion that the condition would improve with the passage of time and had a very reasonable prospect (70-80 percent) to completely resolve to be asymptomatic. In June 1978, the claimant went back to work at moderate to hard physical labor, which included lifting heavy objects on occasions. He did not lose any work thereafter up to October 15, 1978, and did not require any further treatment for his back. He stated that he still felt pain in his low back on occasions but that he was able to keep it under control with rest. On October 15, 1978, the claimant was walking on a rotted log while hunting and it crumbled under his feet and he fell perhaps a distance of 18 inches, landing on his heels. The jar caused his herniated disc condition to worsen and shortly thereafter he required surgery. Dr. Dresher stated that the October 15, 1978 injury precipitated a major rupture in his lumbar spine which ultimately necessitated surgery. It was
also Dr. Dresher's opinion that if the claimant had not suffered the 1977 industrial injury, the trauma of the hunting accident would not have resulted in surgery. For that reason, he referred to the incident on October 15, 1978, as causing an aggravation of the underlying low back condition the claimant sustained as the result of the 1977 industrial injury.

The employer first argues that the hearing examiner was incorrect in holding that the rule in the McDougle v. Department of Labor and Industries, 64 Wn. 2d 640, was controlling in this case. McDougle had sustained a low back condition that was accepted by the Department of Labor and Industries as industrially related, and for which he had been granted a permanent partial disability award. During the time when his claim was closed, he attempted to assist a relative in moving heavy grain sacks and while lifting or sliding one of them aggravated his old back condition. The court held that the Board and trial court were incorrect in holding that any condition caused by lifting the feed sacks was not compensable and found that the principles of aggravation were applicable:

"Aggravation of the claimant's condition caused by the ordinary incidents of living -- by work he could be expected to do; by sports or activities by which he could be expected to participate -- is compensable because it is attributable to the condition caused by the original injury."

The claimant attempted to lay a foundation for the application of the McDougle rule by asking Dr. Dresher if hunting was a reasonable activity for this claimant in view of the disability that he had sustained as the result of the industrial injury. Dr. Dresher stated that it was. The Board accepts that statement by the doctor. The claimant was back working full time, which included lifting heavy objects on occasion and was able to live a normal life without too much difficulty. Hunting, which we assume would normally consist of walking while carrying a gun was not an unreasonable activity for this claimant under the circumstances. However, the aggravation of the claimant's condition following the October 15, 1978 incident was not the direct result of the hunting "activity", but rather an accident while hunting. It was the result of a new and independent traumatic occurrence, an accident of falling through a rotted log which acted upon his previously weakened condition to create a disabling new dimension to the claimant's low back problems.

The circumstances of onset for this new condition do not fall within the refined aggravation concept carved out by the McDougle decision. It must be remembered that the claimant in McDougle noticed an exacerbation of a previously injured back condition the day after he had helped his brother-in-law unload some sacks of feed from a truck. No specific incident or accident was identified as being the exacerbating or aggravating factor. The totality of the activity which in
itself was seen by the court as reasonable for a person with McDougle’s impairment was the cause of the exacerbation. We do not understand the court to hold or imply in McDougle that a specific accident identifiable in time and place adversely affecting an area of the body which was previously an area of an industrial injury should be considered an aggravation of that previous injury. Employers in this state should expect to underwrite certain risks inherent in the exercise of reasonable physical activity by persons with limiting impairments, but should not be expected to be responsible for the effects of all accidents which occur during those activities.

For these reasons, we feel the Department acted properly in rejecting the claim as a new injury and also in denying responsibility for the injury of October 15, 1978, as an aggravation of his prior (October 28, 1977) industrial injury. Both orders of the Department appealed to this Board will be affirmed.

FINDINGS OF FACT

After a careful review of the record, the Board finds as follows:

1. On October 15, 1978, the claimant sustained an injury while hunting and filed a claim within two months thereafter with Boise Cascade Corporation, a self-insured employer under the Industrial Insurance Act, which was assigned No. S-282858. On December 13, 1978, the Department entered an order rejecting the claim for the reason that the claimant was not an employee of the Boise Cascade Corporation at the time of the October 15, 1978 accident. The claimant timely protested this order, and on January 26, 1979, the Department issued an order adhering to the provisions of the December 13, 1978 order rejecting the claim and the claimant appealed from that order to the Board on February 14, 1979. The appeal was granted under Docket No. 53,792.

2. On October 28, 1977, the claimant sustained a low back injury while employed by Boise Cascade Corporation. On November 8, 1977, the claimant filed a report of accident and the claim was assigned S-241523. The claim was thereafter allowed and on June 25, 1978, the Department entered an order closing the claim with no permanent partial disability award. On July 15, 1979, the Department entered an order denying responsibility for the accident of October 15, 1978, as being unrelated to the injury of October 28, 1977. On July 11, 1979, the claimant appealed to this Board and on July 23, 1979, the Board issued an order granting the appeal under Docket No. 54,864.

3. As the result of the October 28, 1977 industrial injury (Claim No. S-241523), the claimant suffered a herniation of the disc between the fourth lumbar vertebra and the fifth lumbar vertebra with mild radiculitis. Claimant’s condition as the result of the industrial injury improved during 1978, and by June the claimant was able to return to work at moderate
to hard physical labor which included lifting weights of one hundred pounds on occasion. Between the time he started work in June, 1978 until October 15, 1978, the claimant's low back condition did not bother him except infrequently, and he lost no time from work on account of his low back condition. During September and early October, 1978, claimant did not require treatment for his low back condition.

4. On October 15, 1978, the claimant fell a distance of 18 inches from a rotted log while hunting and landed on his heels, causing and precipitating a major rupture of the disc at the interspace between the fourth and fifth lumbar vertebrae. In early November 1978, surgery was required for the claimant's low back condition.


6. At the time that the claimant was injured on October 15, 1978 while hunting, he was not performing any services on behalf of the employer, it did not occur during a working day, and he was not on company property.

**CONCLUSIONS OF LAW**

Based on the foregoing findings of fact, the Board concludes as follows:

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

2. In Claim No. S-282858, the order of the Department dated January 26, 1979 adhering to the provisions of a prior order rejecting the claim was essentially correct and should be affirmed.

3. In Claim No. S-251423, the order of the Department of Labor and Industries dated July 5, 1979, reciting therein that the accident of October 15, 1978 is unrelated to the injury of October 28, 1977, is correct and should be affirmed.

It is so ORDERED.

Dated this 8th day of May, 1980.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ ______________________________
MICHAEL L. HALL Chairman

/s/ ______________________________
AUGUST P. MARDESICH Member