# Lively, Cathy

## SCOPE OF REVIEW

### Occupational disease and industrial injury as alternative theories

Although the Department order on appeal rejected the claim for the sole reason that the worker's condition was not the result of an industrial injury and the notice of appeal did not allege an occupational disease theory, the Board may nevertheless consider the issue of whether the worker's condition constitutes an occupational disease where the parties, by tacit agreement, tried the case under alternative theories. ***….In re Cathy Lively*, BIIA Dec., 62,097 (1983)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 83-2-00722-2.]

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

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| **IN RE: CATHY E. LIVELY** | ) | **DOCKET NO. 62,097** |
| | ) | |
| **CLAIM NO. S-433355** | ) | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Cathy E. Lively, by
Schroeter, Goldmark and Bender, per
James D. Hailey

Employer, The Boeing Company, by
Perkins, Coie, Stone, Olsen and Williams, per
Debra F. Cheatum

This is an appeal filed by the claimant on May 5, 1982 against The Boeing Company, a self-insured employer under the Act, from an order of the Department of Labor and Industries dated April 29, 1982, which rejected the claim for the reasons that there was no proof of a specific injury at a definite time and place in the course of employment, and that claimant's condition was not the result of an industrial injury as defined by the Industrial Insurance Laws. **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 employer to a Proposed Decision and Order issued on October 28, 1982, in which the order of the Department dated April 29, 1982, was reversed, and the claim remanded to the Department with direction to issue an order requiring the self-insured employer to allow the claimant's application for benefits.

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

The issue in this appeal concerns whether the claim was rightfully rejected by the Department of Labor and Industries. Much of the evidence presented by the parties was adequately discussed in the Proposed Decision and Order, but the conclusions of law, held that the claimant had simultaneously sustained in industrial injury and contracted an occupational disease. Our understanding of the state of Washington law is that these classifications are mutually exclusive. As we understand it a condition alleged to have resulted from an employee's performance of work cannot, at one and the same time, be held to constitute both an industrial injury and an occupational disease.

To date it is settled law in this state that repetitive trauma does not constitute an industrial injury. Haerling v. Department of Labor and Industries, 49 Wn. 2d 403, 405 (1956); and Cooper v. Department of Labor and Industries, 49 Wn. 2d 826, 828 (1957). Lehtinen v. Weyerhaeuser Company, 63 Wn. 2d 456, 458 (1963) has often been cited as authority for the allowance of repetitive trauma as an industrial injury in the state of Washington. We note that the holding in Lehtinen was to affirm the granting of a summary judgment by the Grays Harbor County Superior Court. The opinion was written by a pro tempore justice, citing five foreign cases as precedent for the acceptance in Washington of repetitive trauma as the basis for the allowance of an industrial injury. In citing the five non-Washington cases, the justice made no attempt to compare the statutory definition, as it exists in Washington and each of the foreign jurisdictions, of industrial injury. The references made in Lehtinen concerning the repetitive nature of the forces involved are clearly dicta and should not be relied upon as the law of the state.

Furthermore, the occurrence of an industrial injury must be fixed at one identifiable point in time. Spino v. Department of Labor and Industries, 1 Wn. App. 730, 733 (1969); and Higgins v. Department of Labor and Industries, 27 Wn. 2d 816, 819 (1947). Relative to sustaining an industrial injury, in essence the claimant here had alleged the occurrence of a sudden and tangible happening, of a traumatic nature, producing an immediate and prompt result, ... to have transpired on any one of four Saturdays in December of 1981. We conclude that Ms. Lively has failed to prove that she sustained an industrial injury.

Inasmuch as the claimant did not specifically allege the development of an occupational disease in her pro se notice of appeal and the Department's order on appeal did not specifically rule on that question, we must determine whether this Board's jurisdiction extends to that issue.

To initiate a claim RCW 51.28.020 requires the filing with the Department of an application for benefits. The court in Georgia-Pacific Plywood Company v. Department of Labor and Industries, et al, 47 Wn. 2d 893, 896 (1955) stated that it was never intended, when a worker's right to the benefits of the Act on one basis or another is clear, that he should have to make a binding election between the possible causes of his condition.

At the conference held June 8, 1982, the pro se claimant was encouraged by the industrial appeals judge to seek legal counsel. She did so. At the first hearing, held August 2, 1982, claimant's counsel did not mention occupational disease, nor did he move to amend claimant's notice of appeal. However, this excerpt is taken from his pre-hearing statement:

> "There appears, from my discussions with her, there appear to be two questions in terms of origination from work. One is a long-standing development of a problem which is not related to a specific injury, and the other is a specific injury which occurred in December of 1981."

Thereafter, counsel for claimant presented the testimony of claimant's witnesses, without objection from the Employer, in the context both of an industrial injury and an occupational disease. We conclude that the two parties tried this appeal in tacit agreement as to the claimant's two alternatives for relief. See also, Lenk v. Department of Labor and Industries, 3 Wn. App. 977 (1970) and Beels v. Department of Labor and Industries, 178 Wash. 301 (1934).

Turning to the facts in this case, the testimony of claimant does not reveal any previous problems with her low back. She did have a prior condition with her mid-back, and with her coccyx (which is near the low back). However, the coccyx problem disappeared while she was in junior high school.

The gist of claimant's testimony shows the gradual buildup of a low back condition on a cumulative basis over at least a two year period.

Her attending physician, Dr. Michael K. Eshleman, was the only doctor of medicine to testify. He first examined the claimant on February 10, 1982, diagnosing her problem as a low back muscle strain; directly related to her work. The following questions and answers are taken from Dr. Eshleman's testimony:

> "Q. Were you able to come to any conclusions or reach a diagnosis as to her low back condition at that time?
>
> A Well, I felt that she had strain of the muscles in the low back and I thought that, from what I could gather in talking to her, that it was directly related to the things that she did at work.
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> * * *
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> A . . .The way that she was doing things at work, specifically holding these parts out in front of her, puts a terrible strain on the muscles in the low back, and I would bet almost if anybody had to do that continuously, they would start having back pain. That's totally opposite of how we try to teach people to lift things, and that's to hold it as close to your body as possible because that minimizes the strain on those muscles in the low back. The further away you get it from your body, the more that those muscles are put under stress and have to work harder. Anybody can do that themselves by just experimenting. Holding weights close to you and start moving it away and you find that you start feeling more and more tension, stress in your low back by doing that.

Q Doctor, specifically in Mrs. Lively's case, do you have an opinion as to whether or not this type of activity at work caused her to develop (sic) the low back problem which you diagnosed on February 10?

A Well, there's little question in my mind that that and the fact that she lifted and demonstrated to me that she was not doing it in what we would say, with proper body mechanics, was the cause of her symptoms. If she had been doing this for four, five years, however long she had been working there, there's virtually no question in my mind that that's where her symptoms came from.

Q Is there -- is this -- does this type of poor body mechanics or poor lifting, is that likely to progress or stay the same over time, or what's the course of a lifting injury in this case?

A Well, as long as she continued to do that she's going to have pain and the likely thing is that it would get more severe if she continues to do it in those ways. The body, to repair itself, needs rest, and when you hurt bad enough then you won't do that anymore and that's eventually what most people come to when they have back problems." (Emphasis supplied)

Having carefully read the entire record, we conclude that the nature of the claimant's daily work, and the way she performed it, constituted a continued straining exposure, resulting in an occupational disease of "low back muscle strain".

We are aware that nowhere did Dr. Eshleman actually use the words, "occupational disease." However, the content of his testimony spells out "occupational disease" with more clarity than the words themselves. He does use the phrase "chronic use syndrome", which certainly tends to support the theory of occupational disease as applied to these facts.

While holding persons who claim rights under the Industrial Insurance Act of this state to strict proof of their right to receive benefits, it is clearly the laws of this state that the Act is to be liberally construed in favor of the injured worker. Olympia Brewing Company v. Department of Labor and Industries, 34 Wn. 2d 498 (1949). Applied to this case, we feel that the statutory definition of occupational disease should be construed to encompass a cumulative, repetitive muscle strain of the low back caused by the straining nature of the claimant's job requirements.

The proposed findings, conclusions and order are hereby stricken and replaced by this Board's findings, conclusions and order.

## FINDINGS OF FACT

1. On February 22, 1982, the claimant, Cathy E. Lively, filed an accident report with the Department of Labor and Industries alleging that on January 28, 1982, she had sustained a disability in the course of her employment with The Boeing Company, a self-insured employer under the Act. On April 29, 1982, the Department of Labor and Industries issued its order rejecting the claim on the grounds that there was no proof of a specific injury at a definite time and place in the course of employment, and that claimant's condition was not the result of an industrial injury as defined by the industrial insurance laws. On May 5, 1982, acting on her own behalf, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On May 21, 1982, this Board issued its order granting the appeal and directed that proceedings be held on the issues raised by the appeal.

2. Beginning on November 2, 1977, Cathy E. Lively worked over three years at The Boeing Company, initially as a painter's helper and later as a painter. Throughout that period of time, she regularly lifted, on four-foot sticks, parts which weighed as much as 20 pounds, and occasionally up to 60 to 70 pounds. The parts were carried in the center of the sticks her arms were fully extended in front of her, and sometimes her back was bent while carrying the sticks. She also regularly lifted, dumped, cleaned and refilled cast-iron pots which she moved with substantial difficulty. She often moved 24-pound cases of paint. She often held a six-pound spray gun, connected to two hoses, extended in front of her. She occasionally used the spray gun for three or four hours at a time. She occasionally moved heavy airplane parts.

3. On and before January 28, 1982, Cathy E. Lively had gradually developed a condition diagnosed as low back muscle strain as a natural direct, proximate and cumulative result of her daily exposure to the lifting and carrying of weights at awkward angles while at work for The Boeing Company during a period of time in excess of two years. The condition required medical treatment.

4. On or about January 28, 1982 the claimant was not, at a single specific and identifiable point in time, subjected to a sudden and traumatic happening, of a traumatic nature, producing an immediate result, and occurring from without, while in the course of her employment with The Boeing Company.

## CONCLUSIONS OF LAW

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

2. As defined by RCW 51.08.100, the claimant did not sustain an industrial injury on or about January 28, 1982 while in the course of her employment with the self-insured employer.

3. As defined by RCW 51.08.140, Cathy E. Lively developed an occupational disease during the course of her employment with The Boeing Company.

4. The order of the Department of Labor and Industries issued April 29, 1982, which rejected the claimant's application for benefits is incorrect and should be reversed and the claim remanded to the Department with direction to issue its order requiring the self-insured employer, The Boeing Company, to allow Cathy E. Lively's application for benefits based on an occupational disease, and thereafter to take such other and further action as is indicated and in accordance with law.

It is so ORDERED.

Dated this 25th day of January, 1983.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

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