Wardlaw, Mary

SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY

New incident aggravating prior injury

In determining whether a new incident is the cause of a worker's further disability it is appropriate to apply the analysis used in new injury or aggravation cases. However, whether the incident was a new injury or an aggravation of the preexisting industrial condition is not determinative, as the two notions are not mutually exclusive. The issue is whether the incident constitutes a supervening, independent cause. Where trauma of the further incident is no greater than that suffered as a result of the incidents of normal daily living and but for the original injury the further disability would not have occurred, the new incident is not a supervening cause of the subsequent disability. **….*In re Mary Wardlaw*, BIIA Dec., 88 2105 (1990)** [dissent, on ground new incident constituted supervening independent cause]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARY L. WARDLAW	**)**	**DOCKET NO. 88 2105**
	)	
CLAIM NO. T-084891	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mary L. Wardlaw by
Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz, per
William D. Hochberg

Self-Insured Employer,
Sisters of Providence of Washington by
Hall & Keehn, per
Linda Bauer, Legal Assistant and
Gary D. Keehn

This is an appeal filed by the claimant, Mary L. Wardlaw, on July 25, 1988 from an order of the Department of Labor and Industries dated July 20, 1988. The order affirmed a Department order dated June 10, 1988 which directed the self-insured employer, Sisters of Providence of Washington, to deny responsibility for the condition resulting from the July 5, 1987 injury, which condition was determined to have been caused by an altercation with a police officer on July 5, 1987 and was not an incident of ordinary daily living. **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 claimant to a Proposed Decision and Order issued on October 11, 1989 in which the order of the Department dated July 20, 1988 was affirmed.

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

Resolution of this appeal depends upon the determination of causal relationship between the industrial injury of December 2, 1986 and Mrs. Wardlaw's need for a surgical hernia repair on August 12, 1987. After a careful review of the record, we are of the opinion that the surgery in August of 1987 occurred as a direct consequence of the industrial injury and the hernia surgeries previously performed. While the incident with the police which occurred on July 5, 1987 might invite comparison to televised police dramas, the actual trauma suffered by Mrs. Wardlaw was no greater than that suffered as a result of the incidents of normal daily living.

Prior to the industrial injury which resulted in this claim, Mrs. Wardlaw had had three abdominal surgeries and in each case, the incision was made in the same site. The first surgery, in March of 1981, consisted of removal of the gall bladder, which was followed by two hernia repairs performed in 1983 and in 1984 or 1985.

On December 2, 1986, while engaged in the course of her employment at Providence Hospital, Mrs. Wardlaw felt a "pull" in her abdomen. This incident, which is the subject of this claim, resulted in a third surgery for hernia repair, which was performed on December 10, 1986. As Mrs. Wardlaw continued to have problems with the sutures that were placed during her third hernia repair, a fourth hernia surgery was performed on April 24, 1987. Following slow gradual improvement in her condition, Mrs. Wardlaw returned to work at Providence Hospital in a light duty position in May or June of 1987. From late May until early July of 1987, claimant's family physician, Dr. William dePender recorded no complaints and provided no treatment for the incisional hernia.

On July 5, 1987, police officers came to Mrs. Wardlaw's home and bumped her or "roughed her up" after responding to a false report of a stolen automobile made by her son. While there may be dispute about several aspects of this incident, there is no question but that Mrs. Wardlaw did suffer some trauma and she was highly distraught and emotionally upset as a result of the trauma. The extent of Mrs. Wardlaw's disturbance over the incident is revealed by the history that she gave to Dr. Fernando Vega and his nurse on July 6, 1987, when she first sought treatment following the incident of July 5, 1987. The history related to Dr. Vega and his nurse revealed that the police had pushed open a door and in doing so, had pushed Mrs. Wardlaw against the wall. Dr. Vega, who examined the claimant on July 6, 1987, made findings which revealed a problem in the thoracic and lumbar spine, and provided treatment in the form of medication. Although Dr. Vega has treated Mrs. Wardlaw since December 29, 1983, Dr. dePender had provided most of her care since December of 1986. Dr. Vega specifically stated that he would defer to Dr. dePender regarding the cause of the hernia surgery performed on August 12, 1987.

Dr. dePender, who has been Mrs. Wardlaw's attending physician since December of 1986, first saw her following the July 5th incident on July 8, 1987. At that visit he received a history of the claimant being pushed backwards by a police officer causing her to lose her balance; when she tried to catch herself, she strained her abdomen. As a result of straining while trying to regain her balance, Mrs. Wardlaw felt an immediate burning sensation in her abdomen in the area of the hernia incision. As a result of his findings on examination, Dr. dePender formed the opinion that the incident with the

police had resulted in the appearance of a new midline incisional hernia. However, following the surgery performed on August 12, 1987, he expressed the opinion that the sutures used in the previous surgery had broken, resulting in the need for additional surgery.

While it is true that Mrs. Wardlaw did suffer some trauma during the course of the incident occurring on July 5, 1987, it does not appear that that trauma was any more significant than the normal trauma that many people are subjected to during the course of their day-to-day life. The physical insult suffered by claimant as a result of this incident was nothing more than the type of trauma she would have suffered had she been bumped into by a family member, slipped on a newly waxed floor, or jostled in a shopping mall. Whether she was pushed against the wall by a door opened by a police officer, or she strained her abdomen when she lost her balance after being pushed by a police officer, does not alter the fact that these are not such significantly traumatic events as to constitute a new and intervening cause. Had the previous hernia surgeries healed in an appropriate manner, the stresses caused by the incident with the police on July 5, 1987 would have had no effect on the condition which is the subject of this claim. In response to a question asking his opinion regarding the type of stress which would have caused the problems found on surgery, Dr. dePender stated:

> That kind of stress that people receive in the course of normal living should not cause a surgical wound to breakdown at ten weeks. The kinds of stresses that should be tolerable at ten weeks would be lifting heavy objects, coughing, sneezing, catching one's self from a fall, or minor kinds of blunt trauma.
>
> The wound at that point should have been strong enough to withstand any of the kinds of stresses that we all encounter.

dePender Dep. at 15. Dr. dePender went on to express his opinion regarding the cause of the hernia, stating:

> I would say that there was inadequate healing in the previous surgical area, and that had healing been as we normally expected, the incision couldn't have torn at ten weeks.

dePender Dep. at 16. Clearly, Dr. dePender, as the physician who has followed Mrs. Wardlaw's care after the three surgeries which have occurred subsequent to the industrial injury, is in the best position to express an opinion regarding causal relationship between the industrial injury and the last hernia surgery. We agree with his opinion that the need for further surgery on August 12, 1987 would not have occurred but for inadequate healing occurring at the site of the previous hernia surgery. The

need for surgery in August was not occasioned solely by the incident of July 5, 1987, but also occurred as a natural consequence of the surgeries performed in treatment of the industrial injury. Put another way, if claimant had not sustained the industrial injury of December 2, 1986 and had not undergone the resulting surgeries of December 10, 1986 and April 24, 1987, she would not have required surgery on August 12, 1987.

The Proposed Decision and Order correctly states that, while Ms. Wardlaw's claim was still open at the time of the July 5, 1987 incident, an analysis analogous to that typically employed in a new injury/aggravation case is appropriate. However, claimant is also entirely correct in her assertion that this is not an either/or proposition. Ms. Wardlaw sustained both a new injury and an aggravation of her pre-existing industrially-related surgical site during the incident with the police on July 5, 1987. As we have said before, the two notions are not mutually exclusive. In re Robert Tracy, Dckt. No. 88 1695 (February 2, 1990). The critical question is not whether Ms. Wardlaw sustained a new injury or an aggravation of her pre-existing industrially-related condition. The real question is whether the incident of July 5, 1987 constituted a supervening cause, independent of the claimant's industrial injury of December 2, 1986.

But for the industrial injury of December 2, 1986, and the inadequate healing of the surgical site, claimant would not have required surgery on August 12, 1987 to repair the damage done during the July 5, 1987 incident. Therefore, the July 5, 1987 incident was not an entirely independent, supervening cause. Both the July 5, 1987 incident and the December 2, 1986 industrial injury were essential ingredients. Together they caused the need for treatment in August, 1987. The claim will, therefore, be remanded to the Department to enter an order directing the self-insured employer to accept responsibility for the surgery performed on August 12, 1987 and for such further action as may be authorized or indicated by law.

Proposed Findings of Fact Nos. 1, 2, 3 and 4 and proposed Conclusion of Law No. 1 are hereby adopted as this Board's final findings and conclusions. In addition, the Board enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

5. Following the July 5, 1987 incident, claimant experienced varying amounts of pain in her abdomen and as a result, further surgery was performed on August 12, 1987 to investigate and repair the site of the previous surgeries.

6. The trauma suffered by Mrs. Wardlaw as a result of the incident occurring on July 5, 1987 was no greater than the trauma suffered as the result of the incidents of ordinary daily living.

7. But for the December 2, 1986 industrial injury and the resulting surgeries of December 10, 1986 and April 24, 1987, claimant would not have required the further surgery of August 12, 1987.

CONCLUSIONS OF LAW

2. The industrial injury of December 2, 1986 and the surgical treatment provided for that injury were a proximate cause of the surgery performed on August 12, 1987, and that surgery is the responsibility of the self-insured employer within the meaning of the Industrial Insurance Act.

3. The Department order dated July 20, 1988 which affirmed an order dated June 10,1988 and ordered the self-insured employer, Sisters of Providence of Washington, to deny responsibility for conditions resulting from the July 5,1987 injury which was determined to have been caused by an altercation with a police officer on July 5,1987 and not resulting from an incident of ordinary daily living, is incorrect, and is reversed and the claim remanded to the Department with directions to order the self-insured employer to accept responsibility for the surgery performed on August 12, 1987, and to take such other and further action as may be authorized or indicated by law.

It is so ORDERED.

Dated this 25th day of May, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

DISSENT

The Board majority has, in my opinion, greatly minimized the traumatic effect of claimant's altercation with police officers at her home on July 5, 1987, by determining that that altercation "was not an entirely independent, supervening cause" of the need for the subsequent surgery on August 12, 1987. The majority's significant finding (No. 6) determines that the trauma of the police incident was "no greater than the trauma suffered as the result of the incidents of ordinary daily living."

My view of the evidence does not accord with that finding. I believe the police altercation was a quite major traumatic event; was not a trauma expected to be encountered in ordinary daily living; and was indeed an independent supervening cause of the subsequent surgery. Finding No. 6 in our industrial appeals judge's Proposed Decision and Order is, in my opinion, entirely accurate, and I would adopt it:

> The claimant's need for the August 12, 1987 surgery was proximately caused by the altercation with police on July 5, 1987, not the incidents of ordinary daily living. (Emphasis mine)

I would affirm the Department's order dated July 20, 1988, thereby affirming all provisions of its order dated June 10, 1988.

Dated this 25th day of May, 1990.

/s/
PHILLIP T. BORK Member