

Anderson, John

AGGRAVATION (RCW 51.32.160)

Objective evidence requirement

A worker's subjective description of increased pain is not sufficient to establish that the condition causally related to the industrial injury worsened or became aggravated between the relevant terminal dates since there must be some objective findings to support the complaints of increased pain and loss of function.*In re John Anderson*, **BIIA Dec., 91 6315 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 93-2-00001-3.]

Scroll down for order.

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

1 **IN RE: JOHN F. ANDERSON**)
2)
3 **CLAIM NO. G-739449**)
4)
 DOCKET NO. 91 6315
 DECISION AND ORDER

5 APPEARANCES:

6
7 Claimant, John F. Anderson, by
8 Prediletto, Halpin, Scharnikow, Bothwell & Smart, P.S., per
9 Darrell K. Smart, Attorney, and Cindy Ward, Paralegal

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11 Employer, Charley Storms
12 None

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14 Department of Labor and Industries, by
15 Office of the Attorney General, per
16 Robert S. Young, III, and David Trick, Assistants

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18 This is an appeal filed by the claimant on November 21, 1991 from an order of the Department
19 of Labor and Industries dated October 30, 1991 which affirmed a Department order dated June 3,
20 1991. The June 3, 1991 order determined that treatment was no longer necessary and closed the
21 claim with time loss compensation as paid through April 19, 1990 and with no additional permanent
22 partial disability award. **AFFIRMED.**

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25 **DECISION**

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27 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
28 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
29 Proposed Decision and Order issued on June 29, 1992 in which the order of the Department dated
30 October 30, 1991 was reversed and the matter remanded to the Department with instructions to pay
31 additional time-loss compensation for the period April 19, 1990 to October 30, 1991, and to declare the
32 claimant permanently totally disabled as of October 30, 1991 and to provide him with all benefits
33 attendant to that status.

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

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38 The Proposed Decision and Order found that there was a worsening of Mr. Anderson's
39 condition related to his April 25, 1975 left foot industrial injury, between the terminal dates of February
40 6, 1981 and October 30, 1991, and that as of the latter date he was permanently totally disabled as a
41 result of the industrial injury. On the other hand, it also found that there was no greater permanent
42 partial disability in Mr. Anderson's lower left leg on October 30, 1991, than that which existed on
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1 February 6, 1981. We have granted review because we disagree with the analysis set forth in the
2 Proposed Decision and Order regarding the aggravation of the condition associated with the industrial
3 injury. We believe Mr. Anderson has failed to establish objective evidence of permanent worsening of
4 his condition related to that injury.
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7 Mr. Anderson had a serious crushing injury to his left foot in 1975. As a result, he underwent a
8 number of surgeries to fuse all of the bones in the left foot. He has no movement in the foot, although
9 he has complete use of his ankle. Following the first closure of the claim in February 1981, he
10 returned to gainful employment driving a school bus and performing other physical labor associated
11 with his farm. In December 1989 he stepped down from a hay bale and hyperextended his left ankle,
12 temporarily aggravating the left foot condition. His claim was reopened, at the discretion of the
13 Director, by order dated March 29, 1990, effective as of December 11, 1989.
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18 The initial medical evaluation of Mr. Anderson's left foot after the December 1989 incident
19 indicated a possible failure of the fused joints. However, x-rays confirmed that there was no failure of
20 the original fusion. Mr. Anderson continues to complain of severe pain in the foot following the incident
21 involving stepping down from the bale of hay. He testified that he currently uses a crutch between 80
22 and 90 percent of the time.
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25 We agree with the industrial appeals judge that there are no objective findings on clinical
26 examination to support Mr. Anderson's complaints of increased pain and loss of function. The
27 Proposed Decision and Order relies on Wilber v. Dep't of Labor & Indus., 61 Wn.2d 439 (1963) to
28 conclude that objective worsening is established if the worker's subjective complaints have objective
29 support on clinical examination. While we agree that this is an accurate summation of the analysis
30 used in Wilber, we do not believe the medical evidence in this case is sufficient to objectively support
31 Mr. Anderson's subjective increased complaints.
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35 In Wilber, the worker complained of pain which was confirmed on clinical examination. Mr.
36 Wilber had a ruptured spinal disc. His complaints of pain and disability were supported by the
37 "symptoms disclosed by the physicians on clinical examination," including a "lessening of the achilles
38 reflex in the left foot" which is a "classic symptom of a ruptured disc." "In fact, the complaints were the
39 classical manifestations uniformly found in cases of unrepaired ruptured intervertebral discs". Wilber,
40 at 446 and 449. On those facts, the court in Wilber found objective worsening of Mr. Wilber's
41 condition. But the court stressed that it is the "peculiar facts" of each case which must be considered.
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1 We do not believe Wilber stands for the proposition that increased permanent disability is
2 necessarily established, in all cases, where the worker complains of worsened pain and function and
3 the examining physicians agree that the worker is less capable because of the worsened pain and
4 function claimed by the worker, absent some objective confirmation of those complaints.
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7 We believe that when the rationale of Wilber is applied to the facts involving Mr. Anderson, the
8 correct question we must answer is, "What increased complaints by Mr. Anderson were objectively
9 verified by symptoms disclosed by the physician's clinical examination?" However, the Proposed
10 Decision and Order takes a different approach. The Proposed Decision and Order asks, "Does the
11 worker have increased subjective complaints?" If the answer is yes, then the next question was,
12 "Does the doctor agree that the worker has increased subjective complaints?" If the answer is yes to
13 the second question, then, according to the rationale set forth in the Proposed Decision and Order,
14 there is objective worsening. We do not believe that this is the correct interpretation of Wilber.
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17 Mr. Anderson complains of increased pain and loss of function associated with the left foot.
18 Both physicians who testified, Dr. Jack C. Irwin and Dr. A. J. Myers, believe that Mr. Anderson has
19 increased pain and loss of function, as subjectively described by Mr. Anderson. But nothing in their
20 clinical examinations verify the complaints of increased pain or loss of function. The objective
21 conditions associated with Mr. Anderson's left foot impairment as of the time of re-closure of the claim
22 in October 1991 are the same as when this claim was originally closed in 1981. It is true that there
23 was one objective increased finding shortly after the December 1989 aggravating incident, namely,
24 some swelling in Mr. Anderson's left foot. This finding, along with suspicion of failure of the fusion of
25 the foot joints, no doubt justified the reopening of the claim for treatment and evaluation of the status of
26 the fusion, and payment of temporary disability compensation for about four months. However, the
27 swelling was clearly temporary, the foot fusion was still solid, and thereafter through closure of the
28 claim in 1991, there were no objective findings supporting increased permanent disability. Mr.
29 Anderson has failed to establish any objectively verifiable changes in his disability so as to show
30 entitlement to increased permanent disability benefits. Dinnis v. Dep't of Labor & Indus., 67 Wn.2d
31 654 (1965).
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35 After consideration of the Proposed Decision and Order and the Petition for Review filed
36 thereto, the Claimant's Response to Petition for Review, and a careful review of the entire record
37 before us, we are persuaded that the Department order of October 30, 1991, which affirmed a
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1 Department order dated June 3, 1991 which closed the claim with no additional permanent partial
2 disability, is correct and should be affirmed.
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4 **FINDINGS OF FACT**

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6 1. John F. Anderson, claimant, filed an application for benefits on June 2,
7 1975, alleging that he injured his left foot on April 25, 1975, during the
8 course of his employment with Charley Storms. The claim was allowed
9 and assigned number G-739449.

10 On February 6, 1981, the Department of Labor and Industries closed the
11 claim with an award for permanent partial disability for 88% of the
12 amputation value of the left leg below the knee joint.

13 Claimant filed an application to reopen the claim because of aggravation
14 of condition on January 24, 1990. On March 29, 1990, the Director
15 waived the statute of limitations, and the Department reopened the claim
16 effective December 11, 1989, for medical benefits. Time loss
17 compensation was paid for the period December 11, 1989 through April
18 19, 1990. The Department closed the claim, by order dated June 3, 1991,
19 without additional award for permanent partial disability. Following timely
20 protest, the Department affirmed this order by order dated October 30,
21 1991.
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23 On November 21, 1991 the claimant filed a notice of appeal with the
24 Board of Industrial Insurance Appeals. The Board issued an order
25 granting the appeal on December 23, 1991.

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27 2. On April 25, 1975, during the course of his employment with Charley
28 Storms, John F. Anderson injured his left foot when it was run over by a
29 spray trailer. Mr. Anderson suffered bone fractures in his left foot,
30 resulting in a fusion of the bones of the left foot.
- 31 3. As of February 6, 1981, Mr. Anderson's condition causally related to the
32 industrial injury of April 25, 1975 was status-post triple arthrodesis, was
33 fixed and stable and his permanent partial disability was equal to 88% of
34 amputation value of the left leg below the knee joint.
- 35 4. On December 10, 1989, while stepping down from a hay bale, claimant
36 hyperextended his left ankle, temporarily aggravating the conditions with
37 his left foot, and requiring treatment and necessary medical evaluation.
38 Such temporary worsening subsided within several months thereafter.
- 39 5. Between February 6, 1981 and October 30, 1991, Mr. Anderson's left foot
40 condition did not worsen or become aggravated on a permanent basis.
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42 6. As of October 30, 1991, Mr. Anderson was not in need of further medical
43 treatment, and his condition of the left foot causally related to the industrial
44 injury of April 25, 1975 was again fixed and stable and best described as
45 equal to 88% of the amputation value of the left leg below the knee joint.
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- 1 7. As of October 30, 1991, claimant, John F. Anderson, was 51 years old, six
2 feet tall, weighed 175 pounds, and was a high school graduate. His work
3 history consists of unskilled and semi-skilled labor, including orchard work,
4 farming his own hay farm, carpentry and house remodeling, truck driving,
5 warehouse foreman, and school bus driving.
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7 8. As of October 30, 1991, as a result of the residuals of his industrial injury,
8 and in consideration of his age, training, experience, education, and other
9 relevant factors, Mr. Anderson was capable of reasonably continuous
10 gainful employment.

11 **CONCLUSIONS OF LAW**

- 12 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
13 and the subject matter to this appeal.
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15 2. Claimant's condition causally related to the industrial injury of April 25,
16 1975 did not worsen or become aggravated on a permanent basis within
17 the meaning of RCW 51.32.160 between February 6, 1981 and October
18 30, 1991.
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20 3. As of October 30, 1991, the claimant was not permanently and totally
21 disabled within the meaning of RCW 51.08.160.
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23 4. The order of the Department of Labor and Industries dated October 30,
24 1991, which affirmed its order dated June 3, 1991, which closed the claim
25 which had been reopened effective December 11, 1989, without time-loss
26 compensation after April 19, 1990 and without further award for
27 permanent partial disability, is correct and is affirmed.

28 It is so **ORDERED**.

29 Dated this 18th day of December, 1992.

30 BOARD OF INDUSTRIAL INSURANCE APPEALS

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33 /s/
34 S. FREDERICK FELLER Chairperson

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37 /s/
38 PHILLIP T. BORK Member