AGGRAVATION (RCW 51.32.160)

Proximate cause of worsened condition: pre-existing condition

In order to be entitled to benefits on reopening of the claim it is necessary to show aggravation of the condition that was caused by the industrial injury; it is insufficient to show only a worsening of a pre-existing condition that was temporarily lit up by the industrial injury.In re Arlen Long, BIIA Dec., 94 2539 (1996) [Editor's Note: The Board's decision was appealed to superior court under Okanogan County Cause No. 96-2-00033-9.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

)

IN RE: ARLEN L. LONG

DOCKET NO. 94 2539

CLAIM NO. T-129502

DECISION AND ORDER

APPEARANCES:

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Claimant, Arlen L. Long, by Delay, Curran, Thompson & Pontarolo, P.S., per Michael J. Walker

Self-Insured Employer, Cavenham Forest Industries, by Roberts, Reinisch, MacKenzie, Healey & Wilson, P.C., per Stephen L. Pfeifer and Craig A. Staples

The claimant, Arlen L. Long, filed an appeal with the Board of Industrial Insurance Appeals on April 18, 1994, from an order of the Department of Labor and Industries dated April 6, 1994. The order indicated the Department had been requested to enter a determinative order and held the self-insured employer is not responsible for medical treatment received due to the April 24, 1992 exacerbation when the claimant lifted a boat. **AFFIRMED.**

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the worker and the self-insured employer to a Proposed Decision and Order issued on July 25, 1995, in which the order of the Department dated April 6, 1994, was reversed and remanded to the Department with direction to hold the self-insured employer responsible for the claimant's treatment received due to the April 24, 1992 exacerbation, including further treatment identified as an L5-S1 fusion. In the Proposed Decision and Order the claimant was also denied time loss compensation for the period May 18, 1992 through April 6, 1994.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that,
except as reflected in our discussion which follows, no prejudicial error was committed and the
rulings are affirmed.

DECISION

The issue in this case is whether Arlen L. Long's 1986 industrially related injury to his low back has worsened and is in need of treatment, and whether he is entitled to temporary total disability benefits since mid-1992. We find that the 1986 industrial injury is not a cause of Mr. Long's current need for treatment, nor is he entitled to temporary total disability benefits.

It is undisputed that Mr. Long had a preexisting spondylolisthesis condition (slippage of the L5 vertebra over S1). This was probably a congenital condition which has made him more susceptible to back injuries as well as prone to develop spontaneous back pain. Mr. Long did, in fact, experience a 1984 low back straining injury which apparently resolved.

This appeal arises out of an industrial injury to Mr. Long's low back in 1986. After the industrial injury, Mr. Long obtained treatment and continued working. The Department closed the claim by order dated September 25, 1987, with direction to the self-insured employer to provide an award for permanent partial disability consistent with Category 2 of WAC 296-20-280, the categories of permanent dorso-lumbar and lumbosacral impairments. Mr. Long testified that after the claim was closed he continued to have episodes of back pain related to activity and that he occasionally sought medical assistance for that pain. He continued working, but at times restricted his physical activity to accommodate his back condition.

On April 24, 1992, Mr. Long experienced an acute episode of back pain when he was lifting, without assistance, one end of a 14-foot aluminum boat, in order to pivot the boat to align it for placement on its trailer. Mr. Long now reports dramatically increased, persistent low back symptoms even though x-rays and CT scans do not show any new injury. Mr. Long now feels he is in need of further treatment in the form of surgery to improve his condition. He also views himself as considerably restricted in his ability to perform strenuous work. As indicated, the ultimate issue

in this appeal is whether this need for treatment and corresponding temporary total disability is causally related to Mr. Long's 1986 industrial low back strain.

Mr. Long filed an application to reopen his industrial insurance claim on June 15, 1992. The Department did not timely respond to this application and Mr. Long eventually appealed to this Board. On July 2, 1993, we issued an Order Granting Relief on the Record, Dckt. No. 93 2456, in which we held the claim was reopened by operation of RCW 51.32.160 when the Department failed to act upon the application within 90 days as required. The self-insured employer, Cavenham Forest Industries, appealed our order to the Okanogan County Superior Court. The court dismissed the self-insured employer's appeal of our order in its January 24, 1994 Order of Remand, Cause No. 93-2-00310-4.

While the resolution of this appeal is fairly straightforward, there are several preliminary issues raised in the Proposed Decision and Order and by the parties which must be addressed. One of these issues is whether the boat lifting incident constitutes an independent supervening cause of Mr. Long's current low back condition. While, we agree with our industrial appeals judge that the activity of lifting a boat on April 24, 1992, was not unreasonable in the sense contemplated in <u>McDougle v. Department of Labor & Indus.</u>, 64 Wn.2d 640 (1964) this issue is not the correct focus of the appeal.

More on point is the question of whether the "deemed granted" provisions of RCW 51.32.160 relieves an injured worker of proving a causal relationship between a work related condition and the need for further treatment and benefits for temporary total disability. The industrial appeals judge held the Department lacked authority to issue its order of April 6, 1994, which provided that the self-insured employer is not responsible for the medical treatment related to the April 24, 1992 boat lifting incident. The industrial appeals judge reasoned that, since aggravation application had been granted by operation of law, "by its essential nature, [the

1	Department order of April 6, 1994] has to contravene RCW 51.32.160." Proposed Decision and
2 3 4	Order, at 8. In other words, the "deemed granted" language automatically resolves the causation
4 5 6	question so that evidence involving the actual proof of aggravation by medical findings was
7 8	unnecessary.
9 10	This reasoning is incorrect. In our prior July 3, 1993 Order Granting Relief on the Record,
11 12	we clearly stated we did not foreclose the Department from adjudicating whether the claimant was
13 14	entitled to any benefits. Specifically, we made:
15 16 17	no determination by this order concerning the nature and extent of benefits, if any, to which the claimant may be entitled by virtue of the aggravation application having been deemed granted.
18 19 20	In its Order of Remand, the Okanogan Superior Court, quoting in part from our order, remanded
21 22	the matter to the Department:
23 24 25	to conduct proper proceedings to determine '[T]he nature and extent of benefits, if any, to which the claimant may be entitled.'
26 27	These rulings are consistent with our interpretation of the effect of "deemed granted" reopening
28 29	under RCW 51.32.160. In re Margaret Casey, BIIA Dec., 90 5286 (1992). Contrary to the holding
30 31	in the Proposed Decision and Order, the Department had authority, and here was expected by the
32 33	Superior Court, to determine whether Mr. Long was entitled to any particular benefits. The
34 35	industrial appeals judge erred in holding that such a determination "has to contravene RCW
36 37	51.32.160." As we said in <u>Casey</u> , "deemed granted" would normally allow the Department to
38 39	"make further investigations and conduct further evaluations as necessary to properly administer
40 41	the claim." <u>Casey</u> , at 4. Essentially, "deemed granted" only forces the Department to deal with the
42 43	application to reopen and to prevent the injured worker from suffering from possible administrative
44 45	inefficiencies that would delay a proper consideration of the claim.
46 47	Turning to the main probative issue in this appeal, we now consider the evidence on the
	actual medical causation. Dr. Linder expressed his opinion that the problems Mr. Long

experienced after the April 24, 1992 incident were related only to that incident and the effects of the preexisting spondylolisthesis. Dr. Linder does not believe Mr. Long's current problems are related to the industrial injury. Dr. Linder did assume that the award for permanent partial disability made when Mr. Long's claim was closed in 1987 was premised upon the idea that the industrial injury had acted upon the preexisting spondylolisthesis so as to cause continued impairment. However, Dr. Linder believes that, in fact, the effects of the industrial injury eventually resolved and that the effects of the 1986 industrial injury did not play any role in contributing to Mr. Long's condition relating to the April 24, 1992 incident.

Dr. Linder's medical opinion was rejected on legal grounds. This was due to the erroneous application of the "deemed granted" language in RCW 51.32.160. We have already disposed of that misconception. Dr. Linder's opinion was also rejected as contrary to law on the basis that Mr. Long had received an award for permanent partial disability, Mr. Long's condition "did not return to a quiescent, pre-injury state as a matter of law." Proposed Decision and Order, at 10. We disagree. For example, this does not take into account that the condition for which a disability is awarded might actually improve over time.

We reject the ruling that Dr. Linder's opinion also contradicts legal holdings related to lighting up of preexisting but quiescent infirmities in <u>Miller v. Department of Labor & Indus.</u>, 200 Wash. 674 (1939), and <u>Fochtman v. Department of Labor & Indus.</u>, 7 Wn. App. 286 (1972). Citing these cases, the industrial appeals judge held, "[s]ince the granting of Mr. Long's application to reopen determined such an initial relationship to exist, Dr. Linder's theory is untenable." Proposed Decision and Order, at 10. First, we again note that the "deemed granted" reopening of Mr. Long's claim was based solely upon the provisions of RCW 51.32.160 given the failure of the Department to act upon the application within 90 days. Neither this Board nor the Okanogan Superior Court made any determination related to the factual basis of disability or causation issues.

Second, we are aware that both Drs. Linder and Broberg speculated at hearing that the prior award for permanent partial disability might have been premised upon a theory that Mr. Long's industrial injury had lighted up or made active his preexisting congenital spondylolisthesis. However, even if we were to assume Mr. Long's prior award for permanent partial disability was in fact premised upon a lighting up theory, it does not necessarily follow that later need for treatment or subsequently arising disability affecting the same area of the body should automatically be considered causally related to Mr. Long's industrial injury.

The relevant legal holdings in Miller and Fochtman clarify that the workers' compensation insurer is responsible for disability caused by an industrial injury even if the disability is the product of the industrial injury acting upon a preexisting infirmity. In other words, the insurer is responsible for the **lighting up** of a preexisting condition caused by the industrial injury. However, we are not aware of any law which requires the insurer to assume responsibility for the preexisting condition in and of itself. The spondylolisthesis was a preexisting physical condition. Such a preexisting condition may be made symptomatic by subsequent work conditions or injury, but a work related injury may only have a limited or finite effect on the preexisting condition. The effects of a work related injury may not contribute to a further deterioration of the part of body involved. The workers' compensation insurer, here the self-insured employer, is responsible only for the effects of the industrial injury. Factually, it is proper to inquire whether the industrial injury continues to be a cause of a future need for treatment or a cause of further disability. Neither the holdings in Miller or Fochtman, or any other law of which we are aware, would hold the self-insured employer forever responsible for Mr. Long's preexisting spondylolisthesis simply because Mr. Long's entitlement to particular benefits was once premised upon a lighting up theory.

Mr. Long's attending physician, Dr. Broberg, expressed an opinion that Mr. Long's need for treatment and disability from work is causally related to Mr. Long's industrial injury of 1986.

However, we understand Dr. Broberg to also explain his opinion in this regard as premised upon the legal assumption that the prior award for permanent partial disability required him to assume Mr. Long's spondylolisthesis is now legally considered causally related to the industrial injury. In the deposition of Dr. Broberg at 34, he stated: And I can't put my finger on any one incident that caused that problem. In the way the law works, the way I understand it, is that if there's a preexisting condition that has been exacerbated by a particular injury, no matter how severe that injury is or what the preexisting condition is, then it is that injury that is responsible for his disability or his impairment. And apparently the department has accepted the injury of 1986 as the basis for his impairment to Category II rating. And given that fact, I think it's all related to that initial injury. In summary, Dr. Broberg's opinion is contaminated with the same legal misconceptions we have just discussed. His medical factual opinion regarding causation is inconclusive and does not even make a prima facie case when he states: "[w]hether that [his present need for treatment is related to the 1986 injury] is true in the big picture or not I have no idea." Broberg Dep. at 34. In summary, only Dr. Linder expressed a reliable medical opinion on the critical issue of causation in this case. Dr. Linder believes Mr. Long's 1986 industrial injury is not in fact a cause of Mr. Long's current need for treatment and work related restrictions arising since April 1992. Dr. Linder believes these are best understood as the consequences of an independent exacerbation of Mr. Long's spondylolisthesis, not related to his 1986 industrial injury. We are mindful of Mr. Long's testimony that he continued to have some back pain and limitations after his claim was closed in 1987. However, Dr. Linder was apprised of this contention and had reviewed Mr. Long's medical history. This included the preexisting spondylolisthesis predisposing Mr. Long to back problems, a prior back sprain in 1984 which resolved, the 1986 industrial injury which was treated conservatively and after which Mr. Long returned to work, as well as the April 1992 incident after which Mr. Long experienced an acute episode of back pain. Dr. Linder also examined Mr. Long in

September 1992. Mr. Long's own attending physician, Dr. Broberg, did not express any medical

opinion contrary to that of Dr. Linder.

We, therefore, affirm the Department order. In so doing, we make the following Findings of

Fact and Conclusions of Law:

FINDINGS OF FACT

1. On November 13, 1986, the claimant, Arlen L. Long, filed an application for benefits with the Department of Labor and Industries alleging he sustained an industrial injury on October 15, 1986, in the course of his employment with Cavenham Forest Industries, a self-insured employer. The Department allowed the claim and directed the self-insured employer to provide benefits as required by law. On September 25, 1987, the Department issued an order which directed the self-insured employer to provide an award for permanent partial disability equal to five percent of the maximum allowed for unspecified disabilities, paid at 75 percent of monetary value, and which thereupon closed the claim. On June 15, 1992, Mr. Long filed an application to reopen his claim. The Department did not issue an order denying this application until September 15, 1992. Mr. Long protested the September 15, 1992 order on October 1, 1992, and the Department affirmed the September 15, 1992 order by order dated December 21, 1992. On February 10, 1993, Mr. Long filed an appeal of the December 21, 1992 order with the Board of Industrial Insurance Appeals. The Board returned the matter to the Department after which the Department issued an order on February 19, 1993, holding the December 21, 1992 order in abeyance.

On June 3, 1993, the Department issued an order affirming its December 21, 1992 order. On June 10, 1993, Mr. Long filed an appeal of the June 3, 1993 order with the Board. The Board assigned the appeal Docket No. 93 2546 and, on July 2, 1993, the Board issued an Order Granting Relief on the Record in which the Board held that the application to reopen the claim was deemed granted by operation of law in that the Department did not timely deny the application, and in which the Board reversed the Department order dated June 3, 1993, and remanded the matter to the Department with directions to reopen the claim, and to take such further action as indicated by the facts and the law. On July 28, 1993, the Department issued an order canceling its June 3, 1993 order and reopening the claim effective May 18, 1992. On August 6, 1993, the employer filed an appeal of the Board's July 2, 1993 order in Okanogan Superior Court, assigned Cause No. 93-2-00310-4. On January 24, 1994, the Okanogan County Superior Court issued an Order of Remand which dismissed the self-insured employer's appeal and which directed the Department to conduct proper

proceedings to determine the nature and extent of benefits, if any, to which the claimant may be entitled.

On April 6, 1994, the Department issued an order which indicated the Department had been requested to issue a determinative order and which determined that the self-insured employer is not responsible for medical treatment received due to the April 24, 1992 exacerbation when the claimant lifted a boat. On April 18, 1994, the claimant filed an appeal of the April 6, 1994 order with the Board. The Board assigned the appeal Docket No. 94 2539, and on May 11, 1994, the Board issued an Order Granting Appeal which directed that further proceedings be held on the appeal. At conferences held on July 8, 1994, July 11, 1994, and September 19, 1994, the parties agreed to bring the issues of the claimant's entitlement to treatment and time loss compensation before the Board and, subsequently, the parties presented evidence concerning these issues.

- 2. On October 15, 1986, the claimant, Arlen L. Long, sustained an industrial injury, diagnosed as a low back strain, in the course of his employment with Cavenham Forest Industries. Prior to this industrial injury, Mr. Long had a congenital condition of L5-S1 spondylolisthesis, that is, slippage of the L5 vertebra over the S1 vertebra. This preexisting condition made Mr. Long more susceptible to back injury and spontaneous back pain. Mr. Long had a prior low back strain in 1984 which resolved.
- 3. Prior to April 24, 1992, the effects of Mr. Long's October 15, 1986 industrial injury had resolved. On April 24, 1992, Arlen L. Long lifted only one end of a small aluminum fishing boat in order to pivot the boat for alignment on a trailer. This activity was not clearly unreasonable in light of medical advice provided Mr. Long related to his October 15, 1986 industrial injury. Due to this lifting activity, Mr. Long experienced an episode of back pain which led to medical treatment and further recommendation for fusion surgery and restriction in physical activity.
- 4. The episode of back pain (and resultant treatment and surgical recommendation, and recommendation to restrict activity) which Mr. Long experienced after the April 24, 1992 activity was caused by the April 24, 1992 activity acting upon Mr. Long's preexisting spondylolisthesis, independent of the industrial injury of October 15, 1986. The October 15, 1986 industrial injury, or any condition resulting therefrom, was not a cause of Mr. Long's need for treatment or disability after the April 24, 1992 boat lifting incident.
- 5. The industrial injury of October 15, 1986, did not cause Mr. Long any physical restriction or disability from work for any period of time between April 24, 1992 and April 6, 1994.

CONCLUSIONS OF LAW

- 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
- 2. Claimant Arlen L. Long was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 at any time during the period April 24, 1992 through April 6, 1994.
- 3. Within the meaning of RCW 51.36.010, Arlen L. Long was not an injured worker entitled to the medical aid recommended after the April 24, 1992 boat lifting incident.
- 4. The order of the Department of Labor and Industries dated April 6, 1994, which indicated the Department had been requested to issue a determinative order, and which indicated the self-insured employer is not responsible for medical treatment received due to the April 24, 1992 exacerbation when claimant lifted a boat, is correct, and is affirmed.

It is so ORDERED.

Dated this 17th day of January, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____S. FREDERICK FELLER Chairperson

/s/_____ ROBERT L. McCALLISTER

Member