BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SISTA LEETTA	)	**DOCKET NOS. 15 24959 & 15 24960**
	)	
CLAIM NO. AV-53651	)	**DECISION AND ORDER**

Sista Leetta injured her right shoulder in August 2013, while working as a paratransit driver for Sound Generations Senior Services. She was pushing a woman in a manual wheelchair up an incline when she felt a painful "pop" in her shoulder. Ultimately she required surgical treatment. The Department issued orders terminating Ms. Leetta's time-loss compensation benefits as paid through April 27, 2015, and closing her claim with a permanent partial disability award equal to 12 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder. Ms. Leetta contends that she is entitled to permanent total disability benefits based on the combined effects of conditions caused by this industrial injury and other medical conditions. We conclude that the preponderance of the evidence proves that Ms. Leetta's inability to work is due to the post-injury progression of a preexisting, non-disabling condition that was not aggravated or accelerated by the industrial injury. We conclude that Ms. Leetta's circumstances are factually and legally distinguishable from those addressed in *Shea v. Department of Labor & Indus.*[1] We overrule *In re Carlton Hague*[2] because that decision applied the erroneous legal standard of "significantly contributing cause," rather than "proximate cause," which is the standard of proof of legal causation in the state of Washington. We **AFFIRM** both Department orders.

DISCUSSION

Ms. Leetta appealed two orders; one terminating time-loss compensation benefits, the other a closing order that included an award for permanent partial disability. The doctors who testified agree that the conditions proximately caused by the August 14, 2013 industrial injury reached medical stability. No medical evidence was presented supporting a higher permanent partial disability award. Thus, Ms. Leetta has not presented a prima facie case in support of keeping this claim open or for paying her additional permanent partial disability benefits. This limits the issue under appeal to whether Ms. Leetta is entitled to total disability benefits (time-loss compensation or temporary total disability) from April 28, 2015, through November 3, 2015, and permanent total disability benefits effective November 4, 2015.

[1] 12 Wn. App. 410 (1974), *review denied*, 85 Wn.2d 1009 (1975).
[2] BIIA Dec., 59,331 (1982).

The ultimate total disability determination in these appeals is complicated by the fact that during the total disability period at issue Ms. Leetta also suffered from diffuse right-sided myofascial pain. Leah C. Brown, M.D., an orthopedic surgeon, established that the myofascial pain syndrome had progressed and become disabling after the August 14, 2013 industrial injury but was not proximately caused or aggravated by it. Ms. Leetta had a number of conditions and injuries prior to the August 14, 2013 industrial injury, some of which required medical treatment on an intermittent basis. No testimony, medical or otherwise, suggests that any of those conditions was disabling leading up to the date of injury. None of those conditions prevented her from working or changing jobs.

After the industrial injury, Ms. Leetta was totally disabled for a period of time due to the shoulder conditions from the industrial injury alone. After she underwent shoulder surgery in January 2014, her right shoulder improved to the point that its mobility was no different than that of her left shoulder. After surgery, the residual right shoulder disability alone prevented Ms. Leetta from working at her job of injury, but not at all jobs.

Adam Normoyle, Sr., a vocational rehabilitation counselor, concluded Ms. Leetta could transfer to positions including shuttle driver, cashier, and general clerk. He also concluded she could work as a sales associate and preschool teacher. Janet E. Ploss, M.D., an occupational medicine specialist, treated Ms. Leetta for her shoulder condition beginning two weeks after the industrial injury. She believed that Ms. Leetta could not return to her paratransit driver job of injury, but she could work at the positions suggested by Mr. Normoyle. Their opinions were based on physical restrictions due to the shoulder injury alone and did not consider the myofascial pain syndrome that only became disabling after the industrial injury. Opinions supporting total disability in this record relied on consideration of all physical and mental conditions, including the right-sided myofascial pain syndrome.

If a preexisting condition, disabling or not as of the date of the industrial injury, worsens and becomes (more) disabling afterwards and the industrial injury is not a cause (by direct injury or aggravation) of the worsening, only the disability that existed as of the date of the industrial injury may be considered in determining whether the worker is totally disabled. Any increase in the disability attributed to the preexisting condition may not be considered unless that post-industrial-injury

increase in disability was proximately caused by the injury.[3] The preponderance of the medical and vocational evidence proves that Ms. Leetta was able to obtain and perform some form of gainful employment when only the disabilities caused by the industrial injury are considered. The inability to work arises only if the preexisting diffuse right-sided myofascial pain condition that worsened after the industrial injury is added to the disabilities caused by the industrial injury. Under such a scenario, Ms. Leetta would not be entitled to additional total disability benefits because her inability to work was not proximately caused by the August 14, 2013 industrial injury.

Allen v. Department of Labor & Indus.[4] is an application of this rule. In *Allen* the worker sustained two industrial injuries and the claims for both had been closed. Afterward, the disability covered by the first claim worsened and the claim was reopened. The worker was found to have a permanent total disability proximately caused by the worsening of the first claim. A finding of permanent total disability based on the initial claim was consistent with *Erickson* since the legal cause, the later disability, was work related due to the aggravation of disabilities attributable to the initial industrial injury. In Ms. Leetta's case, however, the diffuse right-sided myofascial pain was not causally connected to an earlier industrial injury nor was it aggravated by the August 14, 2013 industrial injury. Thus, the proximate cause of Ms. Leetta's inability to work was the post-injury worsening of the preexisting diffuse right-sided myofascial pain. The residual right shoulder disability from the August 14, 2013 industrial injury was merely a condition on which the cause operated and not itself a proximate cause of total disability under the Industrial Insurance Act.

In her Petition for Review, Ms. Leetta quotes language from *Shea v. Department of Labor & Indus.*,[5] as well as one of our significant decisions, *In re Carlton Hague,*[6] to argue the appropriate legal standard of proof should be "significantly contributing cause" rather than "proximate cause" when determining whether the required causal connection exists between the industrial injury and her inability to work.[7]

The Proposed Decision and Order[8] also quoted the language from *Shea* that appears to apply "significantly contributing cause" rather than proximate cause as the standard to be proven by a

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[3] *Erickson v. Department of Labor & Indus.,* 48 Wn.2d 458 (1956); *In re V. Pearl Howes,* BIIA Dec., 58,356 (1982); *In re Coral Kaufman,* BIIA Dec., 59,962 (1982).
[4] 30 Wn. App 693 (1981).
[5] 12 Wn. App. 410 (1974), *review denied*, 85 Wn.2d 1009 (1975).
[6] BIIA Dec., 59,331 (1982).
[7] Petition for Review, at 4 & 10.
[8] Proposed Decision and Order, p. 9.

worker to support an entitlement to total disability benefits. We disagree with this argument: the appropriate legal standard to apply in total disability cases is that of "proximate cause," not "significantly contributing cause."

Throughout the history of the Industrial Insurance Act, the "proximate cause" standard has been the legal standard of proof of causation when determining entitlement to benefits. The preference for the proximate cause test in statutory workers' compensation cases mirrors the same preference in common law negligent tort cases.[9] In virtually all workers' compensation cases, including those in which entitlement to total disability benefits was at issue, "proximate cause" has been the legal standard of proof.[10] A proximate cause is a cause that in a direct sequence unbroken by any superseding cause produces the disability complained of and without which such a disability would not have occurred.[11] Proximate cause is legal cause and is not always as broad as cause in fact ("but for" causation).[12] Thus, a prior disability is not a proximate or legal cause but only a condition on which the subsequent legal cause operates.[13]

The factual and legal circumstances in *Shea* are materially different than in this case. In *Shea* the worker sustained an industrial injury to his right shoulder and neck. Prior to that injury, however, he had a significant progressive vascular condition unrelated to his employment. The vascular condition progressed independently and rendered him unable to work. His claim was closed with a permanent partial disability award, but when the neck and shoulder conditions worsened the claim was reopened. When the claim was reclosed, the worker appealed arguing that he was permanently and totally disabled due to the worsened disabilities from conditions accepted under the claim. The court of appeals held that when a worker suffered from two disabling conditions, only one of which was proximately caused by an industrial injury, and the progressive worsening of each when considered independently was sufficient to cause the permanent incapacity to perform any gainful employment, the worker is entitled to permanent total disability benefits even when he first became totally disabled by reason of the unrelated disabling condition.

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[9] See, for example, *Eckerson v. Ford's Prairie School Dist. No. 11*, 3 Wn.2d 475 (1940) and *Blasick v. City of Yakima*, 45 Wn.2d 309 (1954).
[10] See, for example, *Hurwitz v. Department of Labor & Indus.*, 38 Wn.2d 332 (1951); *Kallos v. Department of Labor & Indus*., 46 Wn.2d 26 (1955); and *Erickson v. Department of Labor & Indus.*, 48 Wn.2d 458 (1956).
[11] See WPI 15.01.
[12] *Erickson*.
[13] *Miller v. Department of Labor & Indus.*, 200 Wash. 674 (1939); *Erickson*; *In re Walter Larson*, BIIA Dec. 21,004 (1966).

If Ms. Leetta is totally disabled, it is only due to a combination of the disabilities due to the industrial injury along with the subsequent disabilities from the unrelated diffuse right-sided myofascial pain condition. Total disability in this case is not proven when considering either of the two conditions independently of the other. The ruling in *Shea* does not apply in this case.

In explanation of its ruling, the court in *Shea* wrote:

> When a **significantly contributing cause** of that inability [to perform reasonably obtainable work] is an industrial injury or disease, the workman is entitled to receive total disability benefits under the workmen's compensation act, regardless of the fact that other circumstances and conditions may also be considered contributing causes of that inability.
>
> When the disabling condition **proximately caused** by an injury is no longer remedial and its character has expectedly an unchangeable existence, the resultant disability is said to be permanent. When the totality and permanency coalesce, the individual is said to be totally and permanently disabled, and when those qualities coalesce and an industrial injury is a **significantly contributing cause** of the resultant inability to perform reasonably obtainable work suitable to his qualifications and training, regardless of the other causes, the workman is entitled to pension benefits under the workmen's compensation act. [14]

(Citation omitted. Emphasis ours.)

Division 2 of the court of appeals explained the language quoted above in *Wendt v. Department of Labor & Indus.*[15] In that case, the trial court denied an injured worker's requested jury instruction that "simply lifts language from the *Shea* opinion . . . ."[16] The court of appeals agreed with the trial court, noting that the use of that phrase in the manner requested by the worker would confuse the jury in regard to both terms. The potential for that problem had been recognized earlier by the supreme court in *Ward v. Ticknor*, where the court noted that the indiscriminate use of these terms can only lead to confusion of the jury.[17] The *Wendt* court went on to apply the standard of "proximate cause" rather than the one referred to in *Shea*, which the court referred to as explanatory only, not for use in instructions. The court further noted that more appropriate description of the principle was as a "multiple proximate cause" theory.[18] We agree with the court in *Wendt* that in cases involving multiple conditions and disabilities, some related to a workplace injury and some not, a more accurate

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[14] *Shea*, at 415-6.
[15] 18 Wn. App. 674 (1977).
[16] *Wendt,* at 682.
[17] *Ward v. Ticknor,* 49 Wn.2d 493, 497 (1956).
[18] *Wendt*, at 682.

designation for the standard is "multiple proximate cause." That is the gist of multiple court and Board decisions that note that an industrial injury need only be **a** proximate cause of an injury or a disability rather than **the** proximate cause.[19]

We applied the significantly contributing cause standard on one occasion, *In re Carlton Hague*.[20] Before Mr. Hague sustained his industrial injury he suffered a heart attack and a stroke affecting his speech as well as undergoing groin arterial bypass surgery because of poor leg circulation. After the industrial injury, Mr. Hague suffered another stroke and was found to have diabetes that required medical treatment. We relied on *Shea* and *Allen* in applying the significant contributing cause standard when determining the worker was entitled to total disability benefits. Our application of *Allen* was unnecessary because, as we explained earlier, in the *Allen* case **all** conditions and disabilities were industrially caused. Since that time, we have almost exclusively[21] relied on *Wendt* and the myriad of other court cases that apply the proximate cause standard in these situations. In one of our significant decisions, *In re Coral Kaufman,*[22] we described the language in *Shea* on which *Hague* is based as dictum. This is a fair characterization considering there was no need for the *Shea* court to consider the standard of proof in a multiple disability since it had already determined that the industrial injury alone had proximately caused the worker's total disability. We have cited *Hague*, in a number of our decisions without mentioning the standard we were applying,[23] or erroneously attributing the proximate cause standard to it.[24] It appears that the *Wendt* court's fear that attempting to juggle multiple standards would result in confusion has occurred. Therefore, because the correct legal standard of proof of entitlement to total disability benefits is proximate cause, or in appropriate cases, "multiple" proximate causes, we overrule *Hague* to the extent it relied on a significantly contributing cause.

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[19] *Wendt*, at 683; *In re Shauna Guyman,* BIIA Dec., 05 13662 (2006).
[20] BIIA Dec., 59,331 (1982)
[21] The sole exception is *In re Rebecca Wyatt*, Dckt No. 02 11961 (August 14, 2003), in which we cited *Hague* and applied the significant contributing cause language without explanation.
[22] BIIA Dec., 59,962 (1982).
[23] For example, *In re Richard Underwood*, Dckt. No. 00 17035 (November 29, 2001) and *In re Maria Valverde, Dec'd*, Dckt. No. 13 12531 (March 25, 2014).
[24] For example *In re Kevin Dawson*, Dckt. No. 12 15792 (December 17, 2013).

DECISION

In Docket No. 15 24959, the claimant, Sista Leetta, filed an appeal with the Board of Industrial Insurance Appeals on December 22, 2015, from an order of the Department of Labor and Industries dated November 2, 2015. In this order, the Department terminated time-loss compensation benefits effective April 27, 2015. This order is correct and is affirmed.

In Docket No. 15 24960, the claimant, Sista Leetta, filed an appeal with the Board of Industrial Insurance Appeals on December 22, 2015, from an order of the Department of Labor and Industries dated November 4, 2015. In this order, the Department closed the claim with a permanent partial disability award equal to 12 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder. This order is correct and is affirmed

FINDINGS OF FACT

1. On January 26, 2016, and February 8, 2016, an industrial appeals judge certified that the parties agreed to include the Jurisdictional Histories in the Board record solely for jurisdictional purposes.

2. Sista Leetta sustained an industrial injury on August 14, 2013, while working for Sound Generations Senior Services as a paratransit driver. While attempting to push a large passenger in a manual wheelchair up an incline, Ms. Leetta felt a painful "pop" in her right shoulder. As a proximate result of the industrial injury Ms. Leetta suffered a right shoulder sprain/strain with shoulder impingement syndrome and a rotator cuff tear, requiring surgery.

3. As of November 4, 2015, Sista Leetta was 63 years old. She had earned a high school diploma and certificates as a child care specialist, dialysis technician, and a family support specialist following training and course work at technical schools and a community college. Ms. Leetta's work history included working as a director/teacher at a child care facility; a sales associate and/or manager at various retailers; a dialysis technician; a behavioral rehabilitation specialist; and a paratransit driver.

4. Before August 14, 2013, Sista Leetta had a history of back injuries, wrist injuries, carpal tunnel syndrome, and chronic, diffuse, right-sided myofascial pain, for which she sought treatment on an intermittent basis. None of these conditions hindered or prevented her from working or were otherwise disabling to her. These conditions were not aggravated, accelerated, or made disabling by the August 14, 2013 industrial injury.

5. Sista Leetta's preexisting chronic, diffuse right-sided myofascial pain began to worsen around March 2014, leading to weakness of the right side of her body. These symptomatic changes and the worsening of this condition caused restrictions to her physical capacities and ability to work.

These symptomatic changes and the worsening of this condition were not causally connected to the August 14, 2013 industrial injury.

6. As a proximate result of conditions caused by the industrial injury alone, Sista Leetta was permanently restricted from working as a paratransit driver for Sound Generations Senior Services due to excessive lifting requirements.

7. From April 28, 2015, through November 3, 2015, and as of November 4, 2015, as a proximate result of conditions caused by the industrial injury alone, Sista Leetta was able to work as a cashier, with no lifting more than 5 pounds above shoulder height; a shuttle driver, with no lifting more than 5 pounds above shoulder height; a sales attendant, with no lifting more than 5 pounds above shoulder height; and no lifting more than 20 pounds as a general clerk. There was a positive current labor market for sales attendant positions.

8. As a proximate result of conditions caused by the industrial injury alone Sista Leetta was able to perform and obtain gainful employment on a reasonably continuous basis from April 28, 2015, through November 3, 2015, and as of November 4, 2015.

9. As of November 4, 2015, Sista Leetta's conditions proximately caused by the industrial injury were medically fixed and stable.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. Sista Leetta was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from April 28, 2015, through November 3, 2015.

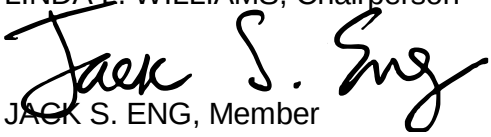
3. Sista Leetta was not a permanently totally disabled worker within the meaning of RCW 51.08.160, as of November 4, 2015.

4. The Department orders dated November 2, 2015, and November 4, 2015, are correct and are affirmed.

Dated: May 1, 2017.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson



JACK S. ENG, Member

Addendum to Decision and Order
In re Sista Leetta
Docket Nos. 15 24959 & 15 24960
Claim No. AV-53651

Appearances

Claimant, Sista Leetta, by Law Office of Robert M Keefe, per Robert M. Keefe

Employer, Sound Generations Senior Services, by Integrated Claims Management, per April Dini, Account Manager

Retrospective Rating Group, 501 (C) Agencies Trust #00185, None

Department of Labor and Industries, by Office of the Attorney General, per William F. Henry

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on November 17, 2016, in which the industrial appeals judge affirmed the orders of the Department dated November 2, 2015, and November 4, 2015.

Evidentiary Rulings

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