

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

1 **IN RE: ISAAC PICKETT**) **DOCKET NO. 21 11184**
2)
3 **CLAIM NO. BB-54721**) **DECISION AND ORDER**
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5 Isaac Pickett lifted a 50-pound utility box while working as a foreman electrician for Roz
6 Electric. He felt a pop in his neck, had pain, and sought treatment at the emergency room. Mr. Pickett
7 filed a claim and benefits were provided. The Department of Labor and Industries issued an order
8 that determined that as of August 10, 2020, Mr. Pickett did not have the condition of cervical
9 radiculopathy. Mr. Pickett filed an appeal seeking to have the cervical radiculopathy accepted under
10 the claim. Our industrial appeals judge found that Mr. Pickett did not have a cervical radiculopathy
11 condition, and affirmed the Department order segregating the condition. We find that the industrial
12 injury proximately caused or aggravated Mr. Pickett's cervical radiculopathy. The Department order
13 is **REVERSED and REMANDED** with direction to accept the cervical radiculopathy condition.
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DISCUSSION

16 We granted review because we disagree with our industrial appeals judge's determination that
17 Mr. Pickett does not suffer from cervical radiculopathy. We weigh the evidence differently and find
18 that Mr. Pickett has established that he has cervical radiculopathy and that it was either caused or
19 aggravated by his industrial injury. In addition, we take this opportunity to address the scope of review
20 issue presented in this appeal.
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Scope of review

22 Before hearing began, Mr. Pickett filed Claimant's Motion Regarding The Board's Scope of
23 Review, asking for a finding that it was within the Board's scope of review to answer the question of
24 whether Mr. Pickett's diagnosed cervical radiculopathy was proximately caused or aggravated by the
25 industrial injury. The Department opposed the motion, contending that the Board was limited by the
26 order under appeal to a determination as to whether the order was correct when it declared that, as
27 of August 10, 2020, Mr. Pickett did not have the condition of cervical radiculopathy. Our industrial
28 appeals judge issued an order on August 23, 2021, granting Mr. Pickett's motion and declared that
29 the "scope of review in these consolidated appeals includes whether or not conditions were
30 proximately caused or aggravated by the industrial injury." The Department requested interlocutory
31 review, which was declined. *Lenk v Dep't of Labor & Industries*¹ provides guidance on the Board's
32 proper scope of review. In *Lenk* the court of appeals held that that the Board's scope of review is
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47 ¹ *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977 (1970).

1 limited to the issues the Department addressed in its order, either explicitly or by necessary
2 implication. The Department's October 29, 2020 order (which it affirmed in its November 17, 2020
3 order) makes clear that Mr. Pickett asked the Department to accept responsibility for the cervical
4 radiculopathy condition, placing the issue of proximate cause squarely before the Department. When
5 the Department determined that he did not have the condition, it implicitly and necessarily determined
6 that the condition was not proximately caused or aggravated by the industrial injury. Moreover, if we
7 declined to address proximate cause at this juncture, we would unnecessarily delay and add to the
8 expense of the parties' resolution of the issue, against the interests of judicial economy. We conclude
9 that our scope of review includes determining whether Mr. Pickett's cervical radiculopathy condition
10 was proximately caused or aggravated by the industrial injury.
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16 **Claim-related cervical radiculopathy preponderates**
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18 On August 14, 2016, Mr. Pickett lifted a 50-pound utility box while working as a foreman
19 electrician for Roz Electric. He felt a pop in his neck and had pain. He went to the emergency room.
20 He filed a claim and benefits were provided. Mr. Pickett testified to having ongoing neck pain, pain
21 radiating down into his arm, and loss of strength since his work accident.
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23 In support of his appeal, Mr. Pickett presented the expert medical testimony of
24 R. Trent McKay, M.D., an orthopedic surgeon, and Douglas W. Taylor M.D., an interventional pain
25 management physician. Dr. McKay determined, based on his examination and on x-rays, an MRI,
26 and a CT scan, that Mr. Pickett's pain was not due to a shoulder condition. Instead, Dr. McKay felt
27 that the pain was related to the cervical spine, so he ordered cervical spine and scapular MRIs.
28 Mr. Pickett's June 7, 2017 MRI showed a small right paracentral disc protrusion at the C5-6 level,
29 and minimal narrowing of the neural foramina bilaterally and moderate left and right foraminal
30 stenosis of the C6-7 level. Dr. McKay felt that the cervical MRI identified a possible source and
31 explanation for Mr. Pickett's pain. Mr. Pickett also had an oncology review that ruled out a tumor,
32 and was seen by a neurosurgeon who did not feel surgery was warranted.
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34 Because Dr. McKay primarily treats shoulder issues, he referred Mr. Pickett to Dr. Taylor, who
35 first saw Mr. Pickett in September of 2018. Mr. Pickett had normal upper extremity strength,
36 decreased cervical spine range of motion, a positive Spurling sign, some tenderness with palpation
37 in the muscles in and around the neck, and a normal neurological exam. Dr. Taylor noted that
38 Mr. Pickett's MRI showed a C5-6 disc herniation and some stenosis at the C6-7 level. He believed
39 that Mr. Pickett was having nerve pain from the neck radiating in the shoulder region and
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1 recommended an injection. Between February 2019 and July 2020, Dr. Taylor performed three
2 diagnostic and therapeutic epidural steroid injections. The first was at the C5-6 level. Mr. Pickett did
3 not have the anticipated relief of symptoms from the first injection. The second injection was targeted
4 at the C6-7 level right-sided nerve. Mr. Pickett reported 25-30 percent pain improvement. The third
5 injection, on July 22, 2020, was another right-sided transforaminal epidural steroid injection at the
6 C5-6 level. Mr. Pickett reported that the third injection provided significant durable symptom-relief for
7 several weeks. Following the third injection, Mr. Pickett continued to present to Dr. Taylor with severe
8 neck pain along with radicular pain into the right shoulder and upper extremity. Dr. Taylor felt that
9 Mr. Pickett's symptoms were mainly coming from neuroforaminal stenosis at the C5-6 and C6-7
10 levels. During the course of his treatment, Dr. Taylor became Mr. Pickett's attending provider for his
11 industrial insurance claim. Throughout the treatment, from 2019 through 2021, Dr. Taylor's cervical
12 radiculopathy diagnosis remained consistent, and he related the cervical radiculopathy diagnosis to
13 the industrial injury.
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16 In defense of its order, the Department presented the expert medical testimony of
17 Jon C. Kooiker, M.D., a neurologist, and David M. Karp, M.D., an orthopedic surgeon. Drs. Kooiker
18 and Karp evaluated Mr. Pickett one time, jointly, on August 10, 2020. Mr. Pickett presented with
19 right-sided neck pain, pain in the anterior aspect of his right arm and the scapula region, right arm
20 tingling, trouble coordinating right arm movements, and right arm weakness. However, on
21 examination, Dr. Kooiker found no evidence of reflex or sensory abnormalities, and no weakness that
22 suggested a nerve root abnormality. Dr. Kooiker concluded that Mr. Pickett's industrial injury resulted
23 in a cervical strain without any nerve root or spinal cord involvement, and thus without cervical
24 radiculopathy. Dr. Karp saw no acute findings on Mr. Pickett's 2019 MRI, but did note degenerative
25 changes. Dr. Karp agreed that Mr. Pickett's range of motion was reduced, but he had a negative
26 Spurling's maneuver and no atrophy. Mr. Pickett had cervical pain with self-performed axial
27 compression. Dr. Karp thought that Mr. Pickett had obtained no significant relief from the July 22,
28 2020 injection, and thought that was the only injection that Dr. Taylor had performed. Like
29 Dr. Kooiker, Dr. Karp did not believe that Mr. Pickett's industrial injury had caused any cervical
30 radiculopathy.
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33 For several reasons, we believe the weight of the evidence shows that Mr. Pickett developed
34 cervical radiculopathy that was either proximately caused or aggravated by his 2016 industrial injury.
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1 Dr. Taylor, Mr. Pickett's attending physician, saw his patient over the span of two-and-a-half
2 to three years and consistently diagnosed claim-related cervical radiculopathy. His opinions have
3 stronger foundations than those offered by the opposing doctors. Dr. Taylor saw Mr. Pickett multiple
4 times and documented his symptoms for a longer time period than any other medical witness. He
5 clearly expressed his opinion that his patient's cervical radiculopathy symptoms correlated with the
6 medical imaging and were explained by the industrial injury. Dr. Taylor also relied on the diagnostic
7 and therapeutic benefits Mr. Pickett obtained from three cervical injections. And while Mr. Pickett did
8 not have a positive EMG, Dr. Taylor explained that the absence of a positive EMG does not rule out
9 radiculopathy.
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11 Stating the foundational strengths underlying Dr. Taylor's opinions impliedly highlights some
12 of the weaknesses underlying the opinions of Drs. Kooiker and Karp. These latter two doctors saw
13 Mr. Pickett only once, and did not have an opportunity to make findings about his condition over time.
14 Moreover, Mr. Pickett received his third and most effective epidural steroid injection just 19 days
15 before Drs. Kooiker and Karp evaluated him. This circumstance may go far to explain the limited
16 findings they observed in their one examination.
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18 Finally, there is nothing in the record suggesting that Mr. Pickett was symptomatic before the
19 industrial injury, or which otherwise explains his symptoms. We have no reason to doubt Mr. Pickett's
20 testimony about his ongoing symptoms.
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22 **DECISION**

23 In Docket No. 21 11184, the claimant, Isaac Pickett, filed an appeal with the Board of Industrial
24 Insurance Appeals on January 8, 2021, from an order of the Department of Labor and Industries
25 dated November 17, 2020. In this order, the Department affirmed the terms of an October 29, 2020
26 order determining that as of August 10, 2020, the worker did not have cervical radiculopathy. This
27 order is incorrect and is reversed and remanded.
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29 **FINDINGS OF FACT**

- 30 1. On April 20, 2021, an industrial appeals judge certified that the parties
31 agreed to include the Jurisdictional History in the Board record solely for
32 jurisdictional purposes.
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- 34 2. Isaac Pickett sustained an industrial injury on August 4, 2016, when he
35 was lifting an electrical box and felt pain in his neck and shoulder area,
36 and sustained a cervical strain, right shoulder strain, and cervical
37 radiculopathy.
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3. Isaac Pickett's cervical radiculopathy condition was proximately caused or aggravated by his industrial injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. The Department order dated November 17, 2020, is incorrect and is reversed and remanded to the Department with direction to issue an order accepting the cervical radiculopathy condition, and to take other such action as is consistent with the law and the facts.

Dated: March 3, 2022.

BOARD OF INDUSTRIAL INSURANCE APPEALS



MARK JAFFE, Acting Chairperson



ISABEL A. M. COLE, Member

**Addendum to Decision and Order
In re Isaac Pickett
Docket No. 21 11184
Claim No. BB-54721**

Appearances

Claimant, Isaac Pickett, by Reck Law, PLLC, per Tara J Reck and Charity L. Ramsey
Employer, Roz Electric, LLC (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Ryan A. Houser

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 December 2, 2021, in which the industrial appeals judge affirmed the Department order dated November 17, 2020.

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.