Tracy, Robert

AGGRAVATION (RCW 51.32.160)

Proximate cause of worsened condition: new injury vs. aggravation

SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY

New incident aggravating prior injury

> The occurrence of a new injury and an aggravation of a preexisting condition are not mutually exclusive. Whether a worker's worsened condition is a result of a new incident or constitutes an aggravation of the original injury depends upon whether the new incident is a supervening cause, independent of the original injury. The real question is one of proximate cause, *i.e.*, whether "but for" the original injury the worker would not have sustained the subsequent condition. **….*In re Robert Tracy*, BIIA Dec., 88 1695 (1990)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBERT D. TRACY	**)**	**DOCKET NO. 88 1695**
	)	
CLAIM NO. J-492420	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Robert D. Tracy, by
Michael A. Clarke

Employer, Cliff Duncan-Action Electric, by
None

Department of Labor and Industries, by
The Attorney General, per
Venita M. Lang, Assistant, and
Laurel Anderson and Gary McGuire, Paralegals

This is an appeal filed by the claimant on April 20, 1988 from an order of the Department of Labor and Industries dated February 23, 1988. That order adhered to provisions of a Department order dated September 3, 1986 which denied the application to reopen for aggravation of condition and held the claim closed pursuant to the Department order dated July 8, 1985 which closed the claim with no award for permanent partial disability. **AFFIRMED**.

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 July 7, 1989 in which the order of the Department dated February 23, 1988 was affirmed.

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

The claimant, Robert D. Tracy, suffered an industrial injury on October 14, 1984, while in the course of his employment with Action Electric. Mr. Tracy was hooking up a furnace when he leaned over and heard/felt a "snap" and "crunch" in his back. Because of the pain, Mr. Tracy could not straighten his neck or back and had to be driven home.

The next day Mr. Tracy consulted his chiropractor, Michael L. Clark, D.C. On examination, Dr. Clark found muscle spasm in the claimant's shoulder, low back and legs. He noted limitation in Mr. Tracy's range of motion and x-rays revealed disalignment of C7, T9 and L5. The claimant also had a positive foraminal compression test. Dr. Clark began treating the claimant with chiropractic

manipulations of his neck, back and hip. Mr. Tracy was referred to a physical therapist who treated his right shoulder.

On January 26, 1985, Dr. Clark performed a final examination of Mr. Tracy. While he still had a positive foraminal compression test, Dr. Clark concluded that Mr. Tracy's condition was fixed, stable and much improved from when he originally saw him. On July 8, 1985, Mr. Tracy's claim was closed with no award for permanent partial disability. Nonetheless, Mr. Tracy testified he still had pain and other symptoms from the industrial injury. He attempted to return to work part time as an electrician, but was unable to handle the physical requirements of the job.

In February, 1986, Mr. Tracy was washing and waxing his van when he felt his neck, back and shoulder "cramp up". About a week later, on February 14, 1986, Mr. Tracy returned to Dr. Clark for treatment. At that time, Dr. Clark observed many of the same findings that had been present at the time of his initial examination. Once again, the claimant had a positive foraminal compression test, positive right shoulder depression test, positive straight leg raising test, spasm in his low back and cervical spine. The x-rays were unchanged. Dr. Clark said Mr. Tracy showed more objective findings than were present at his January 2, 1985 (sic, presumably he meant his January 26, 1985) examination.

Dr. Clark began treating the claimant with chiropractic manipulation. He continued to treat Mr. Tracy until June 3, 1987, when he concluded the claimant was fixed and stable once again and the aggravation of his condition had been successfully treated. On February 23, 1988, the Department ultimately denied the claimant's application to reopen for aggravation of condition.

On August 28, 1988, Mr. Tracy was examined by William E. Hummel, M.D., an orthopedic surgeon. Dr. Hummel noted the claimant had a limited range of motion and loss of grip on the right, as well as a decrease in his right forearm and brachial radius reflexes. Based on his clinical findings, Dr. Hummel diagnosed right shoulder and cervical spine strains and frozen shoulder. Dr. Hummel recommended treatment for these conditions, or, in the alternative, concluded the claimant had an impairment best described by Category 3 of WAC 296-20-240 for the neck condition and equal to 36% of the amputation value for the shoulder. It was his opinion these conditions were causally related to the industrial injury and were an aggravation of that injury caused by the van washing incident.

A different conclusion was reached by Stanley J. Bigos, M.D., an orthopedic surgeon, who examined Mr. Tracy on June 12, 1986, some four months after the van-washing incident. At that time, the claimant exhibited "diffuse giving away of 4/5 in the right upper extremity, which means in a

non-anatomic pattern. . . ." Bigos Dep. at 11. Mr. Tracy also "met three of five Waddell criteria for tendencies toward displaying pain behavior." Bigos Dep. at 12-13. Further, Dr. Bigos found no shoulder atrophy from disuse nor did he diagnose frozen shoulder. It was his opinion that the claimant had not aggravated his industrial injury. Instead, Dr. Bigos found a sedentary man engaged in sudden physical activity with resulting physical discomfort. Dr. Bigos concluded such discomfort did not constitute a new injury or an aggravation of Mr. Tracy's prior injury.

John T. Chapman, M.D., a neurologist, examined the claimant on December 18, 1987, just two months before the second terminal date. He, too, found positive Waddell signs and stocking paresthesia. He found no objective abnormal findings, no frozen shoulder and non-anatomic sensory loss. He also concluded the claimant had no residual impairment, nor aggravation of his prior injury.

With respect to the events of February, 1986, the industrial appeals judge determined that:

> The existence of both a specific incident and a sudden and immediate onset of pain in Mr. Tracy's case proves that a new injury occurred, not merely an aggravation of the old injury. McDougle [McDougle v. Dep't of Labor & Indus., 64 Wn.2d 640, 393 P.2d 631 (1964)] does not suggest that a specific incident, identifiable in time and place, which exacerbates conditions caused by a prior industrial injury should be considered as an aggravation of that earlier injury. This conclusion is in accord with Alfred Swindell, BIIA Dec., 53,792 and 54,864 (1980), and William R. Dowd, BIIA Dec., 61,310 (1983), both significant orders of the Board of Industrial Insurance Appeals.

PDO, at 8. The industrial appeals judge further stated that: "The facts of this case materially differ from those in McDougle, supra." PDO, at 8.

The Court in McDougle, quoted Mr. McDougle's description of the activity which he engaged in on November 12, 1958 as follows:

> I wouldn't say, it wasn't very long. It was a few minutes. I happened to be visiting and talking with him and him and the hired man was unloading some ground feed, and he was loading it out of the van truck onto one of those cars and he was taking them to the grainary and visiting there with him, I got a load and helped and the next day I had to go in for treatments.

McDougle, at 641. Mr. Tracy described what happened when he was washing and waxing his van in February, 1986 as follows:

> I'd just finished several jobs and weekend came up. I was fairly stiff and sore. I wanted to go out somewhere for the weekend and I was out waxing my van and just cramped up. I can't tell you what movements hurt

> or what made it the worst but it was bad. Bang. I had to go see Dr. Clark again. I couldn't put it off.

4/7/89 Tr. at 14. When asked what he was doing when he felt pain, Mr. Tracy responded:

> I was stretching up overhead making a big swirl, you know, wiping. I'd just wiped some wax off started to take it off and as I rubbed I just. (sic)

4/7/89 Tr. at 35.

From these descriptions, we can see little difference between the type of activity engaged in by Mr. McDougle in November, 1958 and the type of activity engaged in by Mr. Tracy in February, 1986. As our industrial appeals judge correctly noted:

> There is no doubt that Mr. Tracy's activity of washing and waxing his van is an "ordinary incident of living." Drs. Clark, Hummel and Bigos all agreed to that. Common sense would tell you that washing and waxing a van is well within the capacities of a man with back pain but without a permanent disability in his spine.

PDO, at 8.

However, we disagree with the distinction which the industrial appeals judge makes between a new injury and an aggravation. Based on the description given by Mr. McDougle, we would be hard pressed to state that Mr. McDougle did not suffer an injury as well as an aggravation of his preexisting industrially-related condition on November 12, 1958. A new injury and an aggravation of a preexisting condition are not necessarily mutually exclusive. We certainly do not read the Court's decision in McDougle as making any hard and fast distinction between the two.

The resolution of this appeal should not turn upon whether the claimant here sustained a new injury in February, 1986. The real question is whether the events of February, 1986 constituted a supervening cause, independent of the claimant's industrial injury of October 14, 1984.

Frequently a dichotomy is established between a new injury and an aggravation for purposes of providing a framework for analyzing cases like Mr. McDougle's and like the appeal before us. But this is merely a shorthand way of determining the real questions -- but for the original industrial injury, would the worker have sustained the subsequent condition? Or, in the alternative, did some subsequent event or events constitute a supervening cause, independent of his industrial injury? In this case, the evidence supports the latter conclusion.

On February 14, 1986, about a week after the van washing incident, the claimant consulted his chiropractor. The chiropractor's findings were consistent with a 46 year old inactive man, who

engaged in unaccustomed physical activity resulting in soreness from overuse. This is consistent with the opinion expressed by Dr. Bigos, who said "inactivity alone is a great culprit." Bigos Dep. at 28.

Further, any findings and conclusions made by the chiropractor with respect to Mr. Tracy's shoulder are of no consequence. WAC 296-20-01002 defines a chiropractor as a doctor or practitioner but not a physician. WAC 296-20-015 provides that a practitioner may provide treatment only within the scope and field of the practitioner's license. A chiropractor is not qualified to render opinions beyond the area of his expertise. Dobbins v. Commonwealth Aluminum, 54 Wn.App. 788, 776 P.2d 139 (1989). Mr. Tracy's shoulder problems are beyond Dr. Clark's area of expertise. For those reasons, Dr. Clark's findings and opinions regarding Mr. Tracy's shoulder are of no probative value.

Even if we were to conclude that Mr. Tracy had a frozen right shoulder based on Dr. Hummel's diagnosis, his conclusion that the condition was related to Mr. Tracy's industrial injury of October 14, 1984 was based on findings made six months after the second terminal date of February 3, 1988. Considering the lack of objective findings made by Dr. Bigos and Dr. Chapman when they examined claimant on June 12, 1986 and December 18, 1987, this conclusion is difficult to fathom. The more reasoned position was expressed by Dr. Bigos, who said "I have a very hard time relating anything that happened after June 12, 1986 [when he examined claimant] to anything that happened October 14, 1986, [sic - 1984] considering that period of time, considering his particular makeup at the time of that examination." Bigos Dep. at 40-41.

In In re William R. Dowd, BIIA Dec., 61,310, (1983), we analyzed a similar fact situation as follows:

> In short, the claimant's worsened low back condition resulted from a new and independent injury sustained by the claimant on November 11, 1980. The injury of January 12, 1978 to the claimant's low back in no way contributed to the development of symptoms which Mr. Dowd experienced on November 11, 1980. The `reasonableness' test of McDougle v. Department of Labor and Insustries, 64 Wn. 2d (1964), used to determine compensability in aggravation cases, has no application where the accepted industrial injury was not a contributory element, i.e., proximate cause of later-occurring symptoms. In this case, a new traumatic event was wholly and independently responsible for the production of symptoms.

Dowd, at 3-4. Our decision in that case was reversed by Division I of the Court of Appeals on September 28, 1987 by unpublished opinion. However, in its decision, the Court still required the

claimant to prove by a preponderance of evidence that a proximate causal relationship existed between his industrial injury and the subsequent disability which resulted from the new event.

Mr. Tracy did not show that but for the October 14, 1984 industrial injury he would not have experienced discomfort after washing and waxing his van in February, 1986. Nor did he prove that an actual condition resulted from that incident. For those reasons, the Department order denying his application to reopen for aggravation of condition is correct and should be sustained.

FINDINGS OF FACT

1. On October 18, 1984, the claimant, Robert D. Tracey, filed an accident report with the Department of Labor and Industries, alleging the occurrence of an industurial injury on October14, 1984 while in the course of his employment with Cliff Duncan-Action Electric. Benefits, including time loss compensation, were provided. On July 8, 1985, the Department issued an order closing the claim with time loss compensation as paid to April 7, 1985, inclusive, and without an award for permanent partial disability.

   On March 4, 1986, the claimant filed an application to reopen his claim with the Department of Labor and Industries. On September 3, 1986, the Department issued an order denying the claimant's application to reopen his claim. On October 23, 1986, the claimant filed a protest and request for reconsideration with the Department. On October 29, 1986, the Department issued an order placing the September 3, 1986 order in abeyance. On February 23, 1988, the Department issued an order adhering to the provisions of the September 3, 1986 Department order. On April 20, 1988, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On May 9, 1988, this Board issued an order granting the claimant's appeal, assigning it Docket No. 88 1695 and directing that further proceedings be held.

2. On October 14, 1984, while in the course of his employment as a journeyman electrician for Cliff Duncan-Action Electric, the claimant pulled on a furnace fitting while in an awkward position and felt a snap and crunch in his back which resulted in immediate back and neck stiffness and right shoulder, neck and left hip pain which necessitated chiropractic treatment and physical therapy.

3. As a result of the October 14, 1984 industrial injury, the claimant sustained a sprain of his right shoulder and the cervico-thoracic and thoraco-lumbar spine which, as of July 8, 1985, caused him right shoulder, neck and back pain and headaches, but had not resulted in any permanent partial impairment.

4. In February, 1986, while washing and waxing a van at home, the claimant stretched and reached overhead in order to wipe wax off the van, when he

felt a sudden onset of right shoulder, neck and back pain for which he sought chiropractic treatment about a week later.

5. The February, 1986 incident caused the claimant to become sore and feel discomfort. It was the result of physical activity after being inactive.

6. Any worsening of the claimant's right shoulder, neck and back conditions between July 8, 1985 and February 23, 1988 is attributable to the supervening February, 1986 incident, and is independent of and not causually related to, the October 14, 1984 industrial injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and parties to this appeal.

2. Between July 8, 1985 and February 23, 1988, claimant sustained no aggravation of disability within the meaning of RCW 51.32.160, that was causally related to the October 14, 1984 industrial injury.

3. The order of the Department of Labor and Industries dated February 23, 1988 which adhered to the provisions of a September 3, 1986 Department order which denied the claimant's application to reopen his claim, is correct and is affirmed.

It is so ORDERED.

Dated this 2nd day of February, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
PHILLIP T. BORK Member