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of these Board decisions.

I. INTRODUCTION

Ms. Buchanan worked for a physician for 20 years. On March 14, 2007, he took an extended leave and instructed Ms. Buchanan to collect ten to fifteen thousand dollars of outstanding accounts and deposit the money before his return. After the doctor left, Ms. Buchanan sat on the floor surrounded by paperwork feeling hopeless. The next day, Ms. Buchanan began the process of collecting the accounts; Ms. Buchanan felt overworked and helpless. On March 16, 2007, Ms. Buchanan's husband took her to the emergency room. She was acting very oddly and talking about collecting the doctor's accounts. On March 19, 2007, Ms. Buchanan was diagnosed as suffering from a psychosis by a health care professional at Cascade Mental Health Care. He attributed Ms. Buchanan's condition to the doctor's departure and her increased workload. Other health care professionals have agreed. Ms. Buchanan was hospitalized at the St. Peter's Hospital Psychiatric Unit, in Olympia, Washington.

It is Ms. Buchanan's contention that the doctor placing the collection burden on her suddenly and solely caused her mental breakdown and constitutes an industrial injury under RCW 51.08.100.

If an employer places a burden of responsibility on a worker which causes that worker to feel helpless and develop a diagnosed mental health condition that results in hospitalization within two days, does that constitute an industrial injury within the meaning of RCW 51.08.100 and WAC 296-14-300? (Assignments of Error 1 – 5).

II. ASSIGNMENTS OF ERROR

The Appellant, Nancy Buchanan, hereby makes the following assignments of error with regard to the findings of fact and conclusions of law and judgment entered by the Hon. Nelson E. Hunt of the Lewis County Superior Court on September 17, 2008:

1. The trial court erred by entering Finding of Fact 1.2, adopting Findings of Fact 1 -- 4 in the Decision and Order of the Board of Industrial Insurance Appeals (hereafter, Board) dated March 31, 2008.

2. The trial court erred by entering Conclusion of Law 2.2, adopting the Board's Conclusions of Law 1 – 4 in its Decision and Order dated March 31, 2008.

3. The trial court erred by entering Conclusion of Law 2.3, adopting the Board's Decision and Order dated March 31, 2008.

4. The trial court erred by entering Conclusion of Law 2.4, concluding that the Order of the Washington State Department of Labor and Industries (hereafter, DLI) of April 19, 2007 was correct.

5. The trial court erred by entering judgment in favor of the Respondent, DLI (Paragraphs 3.1 – 3.3 of the Judgment).

6. The trial court erred by not awarding costs and attorney's fees to the Appellant in accordance with RCW 51.52.130.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. On March 14, 2007, Appellant, Nancy Buchanan's, employer left for an extended absence. Her employer left Ms. Buchanan in charge of his office and directed her to collect and deposit sufficient office accounts receivable to pay the office overhead before his return.

On March 14, 2007, Ms. Buchanan had no history of any medical disorder. The next day, March 15, 2007, Ms. Buchanan suffered a severe mental disorder requiring hospitalization. Was the industrial condition an industrial injury as defined by RCW 51.08.100? (Assignments of Error 1, 2, 3, 4, 5, and 6.)

2. Should the claimant have been awarded her costs and attorney's fees pursuant to RCW 51.52.130?

(Assignment of Error 5.)

IV. STATEMENT OF THE CASE

Before March 15, 2007, Nancy Buchanan, was healthy. Ms. Buchanan had not received any medical treatment for any abnormal condition for nearly 20 years. During that span of time, Ms. Buchanan worked for family physician, Simon Elloway, M.D., in Chehalis, Washington. (Certified Appeal Board Record (hereafter, CABR), Nancy Buchanan Test., p. 37 – 38; CABR Joseph Buchanan Test., p. 6.) She had no prior hospitalizations, no surgeries; in fact, she had seen no doctors whatsoever. (CABR, Nancy Buchanan Test., p. 38; CABR, Joseph Buchanan Test., p. 7.)

At the end of the work day on March 14, 2007, Dr. Elloway left for an extended mission to Ecuador. While away, he left Ms. Buchanan in charge of the office. Before departure, Dr. Elloway instructed Ms. Buchanan to collect \$10,000 – \$15,000 of outstanding accounts receivable and get the money deposited before his return. (CABR, Nancy Buchanan Test., p. 39 – 42; CABR, Dr. Elloway Test., p. 83.) After the doctor left, Ms.

Buchanan sat on the office floor surrounded by paperwork and feeling hopeless (CABR, Revay Dep., p 11, 12).

On March 15, 2007, Ms. Buchanan began the process of trying to collect sufficient money to pay the office's overhead. In the course of her work day, Ms. Buchanan became progressively more anxious and concerned about her ability to meet the doctor's directions. She felt helpless, and that she was facing an impossible situation. (CABR, Nancy Buchanan Test., p. 44 – 45; CABR, Revay Dep., p. 8 – 10; CABR, Moore Dep., p. 10.) She later told a mental health professional, Jeanette Revay, ARNP, that she regarded the directive from Dr. Elloway as a threat. (CABR, Revay Dep., p. 8 -- 10.)

Ms. Buchanan testified:

Q. And were you scheduled to work during the time he was gone?

A. Yes.

Q. And why was that?

A. Because I had to get all the billing. I had to get at least 10,000 to 15,000 [dollars] into the bank by the time he returned for the following month.

Q. How did you know that?

A. And it was - - I just had to do it before April 1st for the bills.

Q. Did Dr. Elloway give you any instructions about that before you departed?

A. He expected it to be there when he returned.

Q. He told you that?

A. Yes.

(CABR, Nancy Buchanan Test., p. 39, l. 13 – 26.)

On March 16, 2007, Ms. Buchanan's husband, Joseph, noticed something seriously wrong with his wife, and he took her to the local emergency room. (CABR, Joseph Buchanan Test., p. 12.) Mr. Buchanan testified:

A. ... She's starting to talk about things that didn't make any sense at all.

Q. Such as?

A. Jeez. There was so much stuff going on. Such as work-related. "I can't do this. I can't get this money in." This went on and on and on. It was paperwork, this paperwork, that paperwork, stressful stuff. "I can't get this money. I can't get this done by the time he gets back."

(CABR, Joseph Buchanan Test., p. 14, l. 6 – 13.)

Linda Hughes, Ms. Buchanan's sister-in-law, testified about the unusual behavior in which Ms. Buchanan began engaging in mid-March, 2007. Ms. Buchanan was talking about her

house being evil, drinking water from the cat's bowl, and other things that were not normal. (CABR, Linda Hughes Test., p. 25, 27.) Ms. Hughes had never heard Ms. Buchanan talk or act in such an odd manner before. (CABR, Linda Hughes Test., p. 25; CABR, Walter Hughes Test., p. 32.)

Ms. Hughes and her husband stayed with Ms. Buchanan after she was released from the emergency room and quoted her as saying, "I've got to get back to work." (CABR, Linda Hughes Test., p. 26.) Ms. Hughes said Ms. Buchanan proclaimed, "I have to go back to work and get my deposit out." (CABR, Linda Hughes Test., p. 26.) Ms. Hughes testified that she then accompanied Ms. Buchanan to Dr. Elloway's office while Ms. Buchanan attempted to complete her work in order to deposit the money. (CABR, Linda Hughes Test., p. 25 – 27.)

On March 19, 2007, Ms. Buchanan was evaluated at Cascade Mental Health Care by T.F. Moore, M.A. Mr. Moore spent five and one-half hours with Ms. Buchanan. (CABR, Moore Dep., p. 6.) He diagnosed her as suffering from psychosis. (CABR, Moore Dep., p. 10.) Mr. Moore attributed the condition to Dr. Elloway's departure and Ms. Buchanan's work load during the doctor's absence:

- A. Again, the general impression I had was that because her employer had gone on vacation for a couple weeks and she was solely responsible for the office, that something had happened in the last couple of days that had really – significantly increased her stress levels. And something had really changed in her base line level of functioning.

(CABR, Moore Dep., p. 12, l. 10 – 15.)

Ms. Buchanan entered into treatment with Jeanette Revay, ARNP, specializing in psychiatric nursing. Nurse Practitioner Revay receives referrals from mental health professionals in the Lewis County, Washington area. (CABR, Revay Dep., p. 3, 4.) Ms. Buchanan was referred to Ms. Revay after she was discharged from the St. Peter Hospital Psychiatric Unit, in Olympia, Washington. (CABR, Revay Dep., p. 5.) Nurse Practitioner Revay diagnosed Ms. Buchanan with major depressive disorder with anxiety and post-traumatic stress disorder.

Nurse Practitioner Revay felt that the manner in which Dr. Elloway addressed Ms. Buchanan when he left was, “[L]ike, you better do this, or else. So she felt that her job was in jeopardy. Her livelihood at home was in jeopardy, and facing the impossibility at the same time.” (CABR, Revay Dep., p. 13.) Nurse Practitioner Revay felt this was a singular, precipitating event that caused the

mental health disorders and the need for treatment. (CABR, Revay Dep., p. 15, 16.)

Ms. Buchanan also treated with psychiatrist, Richard A. Crabbe, M.D., who concurred with the diagnoses of Nurse Practitioner Revay and opined that the work conditions existing on March 15, 2007 were traumatic and caused the mental health condition. (CABR, Dr. Crabbe Dep., p. 18.)

Ms. Buchanan's husband and friends all saw bizarre, unexplained behavior that they had never seen before March 15, 2007. (CABR, Linda Hughes Test., p. 28 – 29; CABR, Walter Hughes Test., p. 32 – 33.) Ms. Buchanan's focus on the need to obtain Dr. Elloway's money and make the deposit was overheard and observed by witnesses. All witnesses point to a single date of initiation of Ms. Buchanan's mental health disorder: Dr. Elloway's departure on March 14, 2007. The overwhelming and unrebutted evidence is that Ms. Buchanan suffered a mental health disorder on the next day. (CABR, Linda Hughes Test., p. 28; CABR, Joseph Buchanan Test., p. 14.)

DLI's sole medical witness was Stephen Lykins, M.D., of St. Peter's Hospital. He testified Ms. Buchanan's major depression and anxiety were not related to work. (CABR, Dr.

Lykins Dep., p. 26 – 28.) His opinion was based on a history that included no knowledge of Dr. Elloway’s absence from the office. (CABR, Dr. Lykins Dep., p. 33 – 34.) Dr. Lykins also had no information about Ms. Buchanan’s focus on collecting a certain amount of money by the time Dr. Elloway returned. (CABR, Dr. Lykins Dep., p. 34.) This inaccurate and incomplete history left Dr. Lykins puzzled. He had no idea what the triggering event of Ms. Buchanan’s breakdown was. He testified, “It remained a puzzle to me.” (CABR, Dr. Lykins Dep., p. 36.)

DLI chose not to share with Dr. Lykins the more complete histories taken and testified to by Dr. Crabbe, Nurse Practitioner Revay, and Mr. Moore. (CABR, Dr. Lykins Dep., p. 31 – 32.)

V. ARGUMENT

A. Standard of Review. The factual findings of the Board are presumed correct on appeal. However, the presumption is rebuttable if the finder of fact determines that the Board’s findings are incorrect by a simple preponderance of evidence, even if there is substantial evidence to support the Board’s decision. Allison v. Department of Labor and Industries, 66 Wn.2d 263, 401 P.2d 982 (1965).

There exists no genuine factual dispute in the case. The matter was presented to the trial court primarily as a question of law. RP 17.

B. Ms. Buchanan Suffered an Industrial Injury on March 15, 2007. The trial court upheld the decision of the Board, saying:

A more reasonable view (and the one apparently taken by the judge below) is that Dr. Elloway's remark was the straw that broke the camel's back.

CP 20.

In 1988, the Washington State Legislature adopted RCW 51.08.142. It directed the Department to adopt a rule providing that claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an "occupational disease" contained in RCW 51.08.140, which provides:

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective provisions of this title.

In June, 1988, the Department promulgated WAC 296-14-300. The Department lists a number of examples of causes of psychological conditions or disabilities which do not fall within the

definition of an occupational disease. However, Subsection 2 of the regulation states:

Stress resulting from exposure to a single traumatic event will be adjudicated with reference to RCW 51.08.100.

RCW 51.08.100 provides, as follows:

“Injury” means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

The question in this case is: Was Dr. Elloway’s departure and direction to Ms. Buchanan on March 14, 2007 a traumatic event constituting an “injury,” or an “occupational disease” barred by RCW 51.08.142?

Since the adoption of the statute and administrative regulation, a series of Board cases have addressed this issue. In re: David T. D. Erickson, BIIA Dec., Docket No. 65 990 (1985)¹, the Board stated:

There is no question but what unusual mental stress and strain falls within the purview of the phrase “sudden and tangible happening” as used in the definition of the term “injury.” ... Under the law, the trauma, be it emotional or physical, which is relied upon as a “sudden tangible happening” must be

¹ RCW 51.52.160 requires the Board to publish and index its significant decisions. Copies of all cited Board decisions are appended to the Appellant’s brief.

something "of some notoriety, fixed as to time and susceptible of investigation".

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the condition complained of and without which such condition would not have happened. There may be one or more proximate causes of a condition. (WPI 15.01 and comment.) For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must be a proximate cause of the alleged condition for which benefits are sought. The law does not require that the industrial injury be the sole proximate cause of such condition. McDonald v. Department of Labor and Industries, 104 Wn. App. 617, 17 P.3d 1195 (2001).

The Board has ruled:

It is axiomatic that a claimant is entitled to have his or her application for benefits analyzed as to whether it is compensable as an industrial injury or an occupational disease. ... Indeed, some conditions, under certain circumstances, may well qualify as both an industrial injury and an occupational disease.

In re: Santos E. Saucedo, BIIA Dec., Docket No. 99 18557 (2001).

An example of a case where an injured worker could have both an injury and an occupational disease is In re: Sharon

Baxter, BIIA Dec., Docket No. 92 5897 (1994). Ms. Baxter worked as a medical assistant in an oral surgeon's office for two and one-half years, ending in 1982. During that time, she received multiple needle sticks involving contamination from multiple, unidentified sources. Her initial exposure occurred before the test for hepatitis C was known. She had abnormal liver symptoms as early as 1984. The condition was diagnosed in 1990, after the test became available. The Board held:

Based on the uncontroverted medical evidence contained in the record we believe that Ms. Baxter has a valid claim for an occupational disease. While it is doubtlessly true that the incidents which resulted in her contracting hepatitis C could also have formed the basis for an injury claim, separate claims are not mutually exclusive. Just as one incident can result in aggravation of a condition caused by a previous injury and also be the basis for a new claim, one incident can serve as the basis for both an injury and for an occupational disease claim.

In this case, the evidence might establish a *prima facie* case for an occupational disease. That does not mean Ms. Buchanan did not have an "injury" as defined by RCW 51.08.100.

Ms. Buchanan worked for Simon Elloway, M.D., for nearly 23 years. (CABR, Nancy Buchanan Test., p. 34.) Dr. Elloway routinely went on medical missions to other countries, which would typically last two weeks. (CABR, Nancy Buchanan

Test., p. 37.) There is no evidence Dr. Elloway had previously demanded Ms. Buchanan collect and deposit ten to fifteen thousand dollars while he was gone. There was significant testimony involving the single precipitating stressful event.

In industrial insurance cases, “[T]he ‘multiple proximate cause’ theory is but another way of stating the fundamental principle that, for disability assessment purposes, a workman is to be taken as he is, with all preexisting frailties and bodily infirmities.” City of Bremerton v. Shreeve, 55 Wn. App. 334, 340, 777 P.2d 568 (1989). Even if Ms. Buchanan had pre-existing, stressful exposure or “stressors,” those would constitute pre-existing conditions which could constitute one of the proximate causes of her industrial injury.

The trial court’s reference to the employer’s directive, being the “straw that broke the camel’s back,” actually strengthens Ms. Buchanan’s case. There are numerous industrial insurance decisions in which the camel’s weak back figures:

The conclusion we draw is that the industrial injury was the proverbial “straw that broke the camel’s back.” It was the causative event that began the symptomatic progression of the low back arthritis, as well as the acceleration of the underlying condition revealed by the serial MRIs. In short, the industrial injury was the proximate cause of the disability that

originated when the previously asymptomatic and nondisabling low back arthritic condition became active and symptomatic. Miller v. Department of Labor & Industries, 200 Wash. 674 (1939).
In re: Suzanne E. Dyer, BIIA Dec., Docket Nos. 03 15747, 03 15748, 03 16355 (2005).

Miller is the seminal case on proximate causation involving industrial injuries. When an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not the pre-existing physical condition. Miller, at 682.

If Ms. Buchanan had absolutely no pre-existing stress or if she had a lifetime of stress, she is still entitled to claim that an industrial injury occurred on March 15, 2007.

The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature, and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. Dennis v. Department of Labor and Industries, 109 Wn. 2d 467, 470, 745 P.2d 1295 (1987).

The Legislature did not bar all claims based upon mental conditions or mental disabilities caused by stress. Imagine an ironworker who lifts rebar each and every day of his occupation. On one occasion, while lifting a piece of rebar, he feels a sudden happening of a traumatic nature to his low back. Under DLI's theory proposed here, his claim would have to be adjudicated as an occupational disease, even if there was no evidence that prior lifting proximately caused the low back condition. Clearly, that is not the law in the State of Washington. Even if the ironworker had pre-existing conditions, the lifting incident alone would constitute an injury, as defined by RCW 51.08.100.

The evidence is overwhelming that Ms. Buchanan did not have any diagnosed, treated, or identifiable mental health disorder before March 15, 2007. It is also undisputed that when Dr. Elloway left, Ms. Buchanan was charged with collecting sufficient funds to pay the bills within two weeks. She felt this was impossible. This precipitating event was identifiable as a tangible happening of a traumatic nature. The events described by all the witnesses who were observing Ms. Buchanan fixed this event in time. It was capable of being investigated, and in fact it was.

The suggestion by the Board that the only stress-related injury that could be established is if a single physical event causes an immediate psychiatric reaction (such as erasing computer data) ignores the underlying definition of an injury contained in RCW 51.08.100. The facts of this case clearly establish that a stressful work environment can be tolerated until a sudden and tangible happening of a notorious nature, fixed as to the time, and susceptible to an investigation, takes place. This meets the industrial injury statutory definition.

The Department's interpretation of the industrial insurance law would result in all mental health disorders related to work being barred. This would ignore WAC 296-14-300(2). In fact, the DLI April 3, 2007 Order states:

Claims based on mental conditions or mental disabilities caused by stress are specifically excluded from coverage by law. Finding of Fact No. 1.

CABR, p. 30.

The above is an incorrect statement of the law.

Applying the proper legal standard to this case, it is clear that Ms. Buchanan suffered an identifiable mental health condition, with at least two diagnoses. There was a specific traumatic incident at the end of the day on March 15, 2007. A

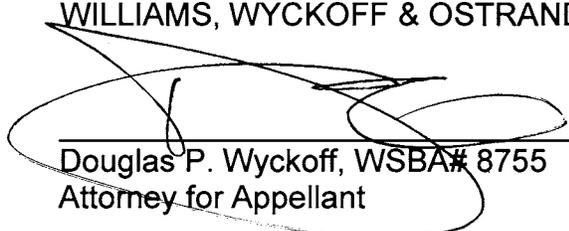
preponderance of medical opinions attributed the proximate cause of Ms. Buchanan's condition to the single, traumatic event. Within the day, the condition caused by the injury was in full flower. Ms. Buchanan meets all the tests necessary to establish her condition as an industrial injury, as defined by RCW 51.08.100.

VI. CONCLUSION

Based upon the foregoing argument of authority, Appellant, Nancy Buchanan, hereby requests this court to reverse the Superior Court Decision and to hold that DLI must allow her industrial insurance claim as an industrial injury. The Appellant also requests that the Court award attorney's fees and costs in accordance with RCW 51.52.130.

DATED this 28th day of January, 2009.

WILLIAMS, WYCKOFF & OSTRANDER, PLLC



Douglas P. Wyckoff, WSBA# 8755
Attorney for Appellant

DECLARATION OF MAILING

I, Anne Heins, hereby declare, under the penalties of perjury of the State of Washington, that a true and correct copy of this Brief of Appellant was mailed on this 28th day of January, 2009, to each of the following:

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Anne Heins

Anne Heins

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No. 38374-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Nancy Buchanan, Appellant

v.

Department of Labor and Industries, Respondent

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STATE OF WASHINGTON
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APPENDIX TO
AMENDED BRIEF OF APPELLANT

Other Authorities: Decisions of the Board of
Industrial Insurance Appeals, State of Washington

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*57345 Board of Industrial Insurance Appeals
State of Washington

IN RE DAVID T.D. ERICKSON, DEC'D

DOCKET NO. 65,990

CLAIM NO. J-298603

July 15, 1985

SIGNIFICANT DECISION

APPEARANCES:

Widow-petitioner, Andrea Erickson

by Sackman Law Office, per Steven H. Sackman

Employer, Columbia Basin Health Association,
None

Department of Labor and Industries

by The Attorney General, per Marcy L. Edwards
and Gregory M. Kane, Assistants

DECISION AND ORDER

This is an appeal filed by Andrea T. Erickson, the widow of the deceased worker, David Erickson, on October 10, 1983 from an order of the Department of Labor and Industries dated August 10, 1983 which rejected the petitioner's claim for widow's benefits on the ground that the decedent's death resulted from his deliberate intent to take his own life. Reversed and remanded.

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 widow-petitioner to a Proposed Decision and Order issued on December 14, 1984 in which the order of the Department dated August 10, 1983 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, with the exception of a ruling infra, as to certain testimony of Nancy Blaisdell.

The general nature and background of this appeal are as set forth in the Proposed Decision and Order and our discussion of the case merely builds thereon.

We would begin by noting that the conclusion of industrial causation in this case, a case of death by suicide, is unavoidable. The depth and magnitude of the mental stress and harassment to which the decedent was constantly subjected over a period of three weeks from a mentally deranged co-worker defies practical description. The degree of this stress cannot be fully appreciated or comprehended without an actual reading of this record. A small sense of this appreciation can perhaps be imparted through the statement of Dr. Ralph W. Bolton, the decedent's preceptor who witnessed much of the harassment, to wit:

"... I have been around for, I have been practicing for thirty-three years and I have never seen anything like it before."

Even more telling was Dr. Bolton's response when asked if it "were not true" that the harassing co-worker was mentally unstable, to wit:

"A. And after that three weeks I was beginning to be."

Further, the description of Nancy Blaisdell, a registered nurse and one of the decedent's co-workers, fully documents the extraordinary nature of the work situation under which the decedent was placed:

"Q: From January 6 when you first began working up there, up until the time of his death, was his condition much the same or better or worse, or what was the progression?"

A. It became progressively worse. I think we were all more progressively more stressed. By the 27th we were all ready to hang it. I, myself, was pushed to the ultimate. Dave and I both had a long week-end and we both couldn't get out of there fast enough. I have never been put under such stress, and I have worked at the Sacred Heart Hospital in the neurosurgical unit where you are under a great deal of stress with critical patients and a lot going on, and never, never have I taken harassment that we took out there."

**2 The widow-petitioner presented six witnesses in this matter, five of whom worked closely with the decedent at the clinic, and witnessed directly much of the harassment in this matter, and its toll upon the decedent. They testified as to how the accusations against the decedent (which had been thoroughly investigated and shown to be groundless) accelerated and intensified. It became magnified to the point that the accusations began to be echoed throughout the general community with the result that the clinic began receiving threatening telephone calls from members of the public at large. The instigating co-worker had been relieved of her duties and placed on sick leave shortly after her first accusations against the decedent. This action, however, apparently, simply gave her more time to devote to her campaign of harassment which came to include incessant phone calls at all hours to the decedent, as well as other members of the clinic staff. Dr. Bolton testified that he received "15, 20 or more" such calls at his home at night. The petitioner testified that things reached the point where the decedent would finally take the home phone off the hook at night.

The record in this matter is replete with eye-witness testimony describing the utter mental unravelling of the decedent as the accusations against him continued unabated over a three-week period of time. To understand his torment requires some understanding of the decedent himself.

To begin with, Mr. Erickson, the decedent, was no stranger to stress. He served two tours of combat duty, each of nine months' duration, as a medic in Vietnam. He volunteered for the second tour. He was the recipient of various letters of commendation for his conduct in battle, and was awarded the Purple Heart and the Bronze Star. Although he sustained multiple wounds from shrapnel, and a ruptured eardrum from a hand grenade, he fully recovered from these injuries and was left with no physical impairment therefrom. From a mental or emotional standpoint, there is no indication that he ever had any problems as a result of his combat experience.

At the time of his death, the Ericksons had been married about ten years and were without children. Mrs. Erickson described her husband as being the strong one in their relationship--the one who always handled any stressful matters that arose--and as always being very protective of her. From all that

appears, they had a loving and stable marriage. However, each had their own interests in life and pursued these interests separately. The decedent was not one to verbalize his emotions or feelings; thus their emotional communication or attachment was not particularly close.

For the decedent, his life revolved greatly around his job. The record shows he greatly enjoyed his work and was immensely proud to be a physician's assistant. He took great pride in his professional competence--evidently, with good reason. Dr. Bolton testified that in his job performance rating of the decedent, he had rated him so high that the clinic management made him lower the rating somewhat. Although the decedent loved the field of medicine, he had no aspirations of becoming a medical doctor. He had found his niche in the profession as a physician's assistant, and he wanted nothing more than to be the best in that role as he possibly could. In sum, from the testimony of the various witnesses in this matter who knew and worked with David Erickson, his attitude and devotion to his work may be fairly stated to be the center of gravity of his life.

**3 With this profile of the decedent as a backdrop, the effect of the false accusations against the decedent can best be weighed. That effect was described by Dr. Paul Hofheins, a fellow-employee of the clinic:

"Q. How did David react to the charges that were made upon him in that month of January?

A. The charges devastated him. As I said before, David was in his niche and he took great pride in his position and his professionalism, and charges like this can be devastating to a P.A.'s career, probably even more so than a physician, because a physician's assistant just sits in his, is vulnerable, and is not in the type of authority position that a doctor is. Accusations of this nature, whether or not they are true, can destroy a person's career, and David's career was extremely important to him."

Also, Dr. Bolton elaborated on his view of the decedent's mental reaction:

"Q. And as far as this mental condition that arose, again not from the performance of his job duties, which, I take it, he did very well, but from

the accusation and the emotional effect that had on him by a mentally incompetent co-worker, is that correct?

A. That is not true.

Q. Okay, explain?

A. Explain, okay. It was very much related to work because he, being the kind of person he was, being a perfectionist, he has wanted very much to do everything right, and he is a highly intelligent man, and when somebody starts questioning, the nurse that works with him, and the people that work with him start saying you did something wrong, you did this wrong, he begins to question himself, therefore, when somebody does those things, that is a severe blow to his, not only his emotions, but to his ego, to his sense of that he is an important person, and it destroys some of that, and I think that is where the problem came from."

Finally, we admit as evidence a further excerpt from the testimony of Nancy Blaisdell, previously placed in the record as colloquy, but which we hereby place in evidence:

"He was extremely depressed. I think his self-image was totally destroyed, something that meant everything to him had been sabotaged and destroyed. He had put his whole being, his whole life into being the best physician's assistant he could possibly be. Her verbalized that he felt like he had been, you know, completely just sabotaged, his career, his career that meant so much to him had been destroyed, and no matter what he said to anybody, it wasn't going to make any difference."

In sum, suffice it to say that it is clear from the record as a whole that the false accusations against the decedent which continued unabated, day after day, and with no end in sight, caused the decedent to become totally defeated mentally. Despite repeated assurances from his co-workers and superiors that his job was secure, the decedent's mental state became such that he perceived his career to have ended, which, in turn, prompted him to end his life as well.

**4. Given the foregoing factual background, the initial legal question with which we are confronted

is whether the mental condition which led the decedent to take his own life, albeit industrially caused, qualifies as an injury or an occupational disease under the Act. Prior to *Department of Labor and Industries v. Kinville*, 35 Wash.App. 80 (1983), we would have no problem in finding that the decedent's condition constituted an occupational disease. However, *Kinville* introduced a requirement in occupational disease cases that the job requirements of the particular occupation must expose the worker to a greater risk of contracting the disease in issue than would other types of employment or non-employment life. That test cannot be met in the case at hand. The risk of being subjected to harassment by a mentally deranged co-worker is no greater in the decedent's particular line of work than in any other--a point which was readily conceded by each witness who was specifically queried thereon.

We have, however, come to the determination that the decedent's mental condition qualifies as an injury under the Act. There is no question but what unusual mental stress and strain falls within the purview of the phrase "sudden and tangible happening" as used in the definition of the term "injury". *Sutherland v. Department of Labor and Industries*, 4 Wn.App. 333 (1971). Nor does the fact that the resulting condition is mental, as opposed to physical, bar a finding of "injury". *Peterson v. Department of Labor and Industries*, 178 Wash. 15 (1934). Under the law, the trauma, be it emotional or physical, which is relied upon as a "sudden and tangible happening" must be something "of some notoriety, fixed as to time and susceptible of investigation". *Lehtinen v. Weyerhaeuser Co.*, 63 Wn.2d. 456 (1964). In this case, the trauma was certainly a matter of "some notoriety"; it was certainly "fixed as to time"--from January 6 to January 31, 1982, and, not only was it "susceptible to investigation", but in fact it was investigated--very thoroughly. The trauma here involved was not ill-defined in nature or sustained over an "indefinite" period of time [Compare *Cooper v. Department of Labor and Industries*, 49 Wn.2d. 826 (1957)]. Rather, it was very well-defined and sustained over a specific three-week period of time. Under these circumstances, we hold that the emotional trauma sustained by the decedent qualifies as "a sudden and tangible happening" within the purview of RCW 51.08.100, and that his resulting mental condition constituted an "injury" under the Act.

There remains the question of whether the petitioner's claim for benefits is barred by RCW 51.32.020, which bars self-inflicted injuries. As noted in the Proposed Decision and Order, this state's landmark case construing that statute is Schwab v. Department of Labor and Industries, 76 Wn.2d, 784 (1969), wherein the court reviewed its prior suicide holdings and then summarized its current view as follows:

**5 "This review of our prior decisions on the questions at hand indicates that while we started with and adhere to the requirement of a direct causal relationship between a workman's industrial injury, insanity, and resultant self-destruction, we have tended to lean away from characterizing, in the traditional tort sense, volitional or conscious suicidal acts as an independent intervening cause precluding compensation. Rather, it appears that we have inclined more toward looking upon RCW 51.32.020 as erecting a statutory bar between cause and a proximately related result. Likewise, it would appear that we have broadened, somewhat, the concept, found in *In re Sponatski*, 220 Mass. 526, 108 N.E. 466 (1915), that an injury occasioned suicidal death to be compensable must occur from an uncontrollable impulse or in a delirium of frenzy without conscious volition to produce death, by extending it to include irresistible impulse, delirium caused by injury related drugs, pain, and suffering and/or other forms of acute dementia, any of which render the injured workman incapable, at the pertinent time, of forming a volitional and deliberate intent to commit suicide." (Emphasis supplied.)

It is of some interest to note that Prof. Arthur Larson, the leading text book authority on workers' compensation, discusses the Schwab case at some length. After setting out the above quotation from Schwab, he asks, rhetorically, "Where does this leave the rule in Washington?" In answer thereto, Larson suggests that our court, by its decision in Schwab, has, without expressly saying so, in fact aligned itself with the majority rule in suicide cases--the chain-of-causation rule--which holds a suicidal death compensable if the injury caused the mental condition which in turn caused the suicide. See Larson, *Workmen's Compensation Law*, Volume 1A, Section 36.22.

Under the chain-of-causation rule, we would have no problem in finding that the suicide in this case

was compensable. Unlike Larson, however, we are not prepared to suggest that this is now the rule in Washington. As we read Schwab, a suicide, even though it be the result of a deliberate and conscious act (which admittedly was the case here), must also be "volitional" if it is to bar compensation. The word "volitional" implies the free exercise of choice. Dr. Philip G. Bernard, a clinical psychologist, performed what is termed a psychological autopsy of the decedent's death. Of the two mental experts to testify herein, we attach the greater weight to that of Dr. Bernard. His knowledge and study of the decedent's background and the events leading up to the death, was superior in our view to that of Dr. James Kilgore, a psychiatrist who testified on behalf of the Department. When questioned as to the decedent's mental state at the time of death, Dr. Bernard stated that the decedent was suffering from a major depressive episode to the extent that he "had no other choice" but suicide. He testified that the repeated accusations against the decedent built up, like brick upon brick, until the decedent was faced with a "wall without any openings" and he had "no other alternative" but suicide.

**6 In sum, we hold that the decedent's suicide was not a "volitional" act on his part. His industrially-induced mental condition caused him to believe he had no choice other than to take his own life. Faced with no choice, one can hardly be said to have acted volitionally.

FINDINGS OF FACT

Findings 1 and 2 of the Proposed Decision and Order entered in this matter on December 14, 1984 are hereby adopted by the Board and incorporated herein by this reference as the Board's Findings 1 and 2. In addition, the Board finds:

3. During the month of January, 1982, beginning on or about the 6th thereof, a series of accusations were made against Mr. Erickson by Jean Sheahan, a registered nurse who worked closely with Mr. Erickson at the Columbia Basin Health Association. Specifically, the major accusations against Mr. Erickson were to the effect that he had bungled the treatment of a gunshot wound victim, thereby causing the victim's death; that he had taken indecent sexual liberties with young females during the course of sports physicals; and that he had tried to poison

her, Jean Sheahan, by putting poison in a drink he had given her. These charges or accusations were fully investigated and found to be groundless. Mrs. Sheahan was found to be mentally ill and in need of psychiatric treatment. It was later found that she had a long history of drug and alcohol abuse. Shortly after she began making the accusations against Mr. Erickson, Ms. Sheahan was relieved of her work duties and placed on sick leave. This, however, did not stop the accusations, but rather they accelerated to the point that Ms. Sheahan was spreading them throughout the community and harassing Mr. Erickson both at work and at home through telephone calls made to him and his co-workers at all times of the day and night. It was not long before Ms. Sheahan's accusations were being echoed by the public and the clinic began receiving numerous phone calls of a threatening nature from members of the public at large.

4. The accusations against Mr. Erickson continued virtually unabated from January 6, 1982 to January 31, 1982, on which latter date Mr. Erickson took his life by means of a self-inflicted gunshot wound. At the time of his death, Mr. Erickson was suffering from a mental condition diagnosed as a major depressive episode. The decedent's mental condition developed as a direct result of the repeated accusations and harassment to which he had been subjected almost continually over a period of three weeks.

5. At the time of the decedent's death on January 31, 1982, his mental condition was such that he believed that his job and career as a physician's assistant had ended as a result of the accusations against him, despite the fact that he had been told on a number of occasions by his superiors that his job was secure.

6. At the time of his death on January 31, 1982, the decedent's mental condition was induced by the false accusations that had been directed against him over a three-week period of time.

7. The decedent's act of suicide on January 31, 1982 was not a volitional act on his part in that his industrially-induced mental condition caused him to believe that he had no choice other than to take his own life.

CONCLUSIONS OF LAW

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

2. The mental condition, diagnosed as a major depressive episode, developed by the decedent as a direct result of the accusations leveled against him and harassment he endured over a three-week period of time constitutes an industrial injury within the meaning of RCW 51.08.100.

3. The decedent's act of suicide on January 31, 1982 is not barred by the provisions of RCW 51.32.020.

4. The order of the Department of Labor and Industries dated August 10, 1983, rejecting the widow-petitioner's claim for benefits pursuant to RCW 51.32.020 on the grounds that the decedent's death was the result of a self-inflicted gunshot wound, and was not related to an industrial injury or an occupational disease, is incorrect, should be reversed, and this claim remanded to the Department with direction to grant the petitioner's claim for widow's benefits.

It is so ORDERED.

Dated this fifteenth day of July, 1985.

MICHAEL L. HALL

Chairman

FRANK E. FENNERTY, JR.

Member

#292990 Board of Industrial Insurance Appeals
State of Washington

IN RE: SANTOS E. SAUCEDA

Docket No. 99 18557

Claim No. P-870939

January 25, 2001

Appearances:

Claimant, Santos E. Saucedo,

by Law Offices of Earl W. Bladow, per Earl W. Bladow

Employer, Artificial Ice & Fuel Company,

by Roger Pearson, President/CEO, and Cathy Pennington, Manager

Department of Labor and Industries,

by The Office of the Attorney General, per Timothy S. Hamill, Assistant

DECISION AND ORDER

The claimant, Santos E. Saucedo, filed an appeal with the Board of Industrial Insurance Appeals on August 9, 1999, from an order of the Department of Labor and Industries dated June 7, 1999. The order affirmed a prior order dated February 23, 1999, which rejected the claim. REVERSED AND REMANDED.

PROCEDURAL MATTERS

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 October 20, 2000, in which the order of the Department dated June 7, 1999, was affirmed.

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

The issue presented by this appeal and the evidence

presented by the parties are adequately set forth in the Proposed Decision and Order. We have set forth only the evidence necessary to explain our decision.

DECISION

Santos E. Saucedo began employment with Artificial Ice and Fuel on June 29, 1998. Although Mr. Saucedo's recollection is that he began work there in June of 1997, this is clearly in error since employment records reflect that he came to work for Artificial Ice and Fuel on June 29, 1998. His job at Artificial Ice and Fuel was to shovel ice into bags in a room kept at approximately 20 degrees Fahrenheit. About two and one half months after Mr. Saucedo began work in the cold room, he began to experience shortness of breath and coughing. This was severe enough that he had to go to the emergency room at a local hospital to obtain treatment for his breathing difficulties. Ultimately, Mr. Saucedo had to be assigned to another job outside of the cold room.

Mr. Saucedo testified that prior to beginning work at Artificial Ice and Fuel, he worked in the cold all his life and had never had breathing problems before. He also testified that he had never been diagnosed as having asthma before beginning work at Artificial Ice and Fuel.

John Lyzanchuk, D.O., is a family physician who has treated Mr. Saucedo since at least February 1997, at which time Mr. Saucedo presented at Dr. Lyzanchuk's office complaining of breathing problems. Although Dr. Lyzanchuk did not at that time make an actual diagnosis of asthma, he prescribed asthma medications to treat Mr. Saucedo's condition. Dr. Lyzanchuk also treated Mr. Saucedo for breathing difficulties on March 31, 1998 and on April 10, 1998. In September 1998, Mr. Saucedo saw Dr. Lyzanchuk with complaints of shortness of breath and of wheezing.

**2 Richard Plunkett, M.D., is a physician certified as a specialist in emergency medicine. He first provided treatment to Mr. Saucedo on June 24, 1998, when Mr. Saucedo came to the Emergency Room at Providence Hospital in Yakima, Washington, in acute respiratory distress. At that time, Mr. Saucedo gave a history of chronic obstructive pulmonary disease for the last year, which had been treated with inhalers. Since the

June 24, 1998 episode. Mr. Saucedo has obtained treatment from Dr. Plunkett in the emergency room at Providence Hospital for breathing complaints on at least two other occasions.

Dr. Plunkett has since reviewed medical records, and believes that Mr. Saucedo has a history consistent with asthma, a history that began prior to his employment with Artificial Ice and Fuel. However, cold can trigger asthma to flare-up, and based on the history in this situation, the cold in the ice room probably triggered Mr. Saucedo's asthma to flare-up.

J. Scott Hepler, M.D., is a physician certified as a specialist in pulmonary and critical care medicine. He first saw Mr. Saucedo on May 18, 1999, and has seen him five times since then. He has diagnosed Mr. Saucedo as having asthma. Dr. Hepler explained that in general, asthma is a sensitivity for which there is a genetic predisposition. Indeed, Dr. Hepler does not believe that working for Artificial Ice and Fuel induced Mr. Saucedo's sensitivity. As a general rule, there must be a trigger to cause a flare-up of the condition. In Mr. Saucedo's case, the cold air in the freezer is just such a trigger; when Mr. Saucedo is exposed to cold air in the cold room, he coughs and becomes short of breath. To this extent, then, in Dr. Hepler's opinion the cold air at Artificial Ice and Fuel did not cause the sensitivity, but it did cause the flare-ups.

Our analysis of this matter turns on the characteristics specific to the condition of asthma. As Dr. Plunkett testified, asthma is best understood as a sensitivity. Persons with asthma are asymptomatic much of the time, until a trigger causes the coughing and difficulty in breathing that is characteristic of asthma. Thus, this application for benefits must be analyzed both as to whether Mr. Saucedo's employment caused the underlying condition, and/or whether some aspect of his employment caused the underlying condition to become symptomatic.

It is axiomatic that a claimant is entitled to have his or her application for benefits analyzed as to whether it is compensable as an industrial injury or an occupational disease. In *re Joe Callendar, Sr.*, BIIA Dec., 89 0823 (1990). Indeed, some conditions, under certain circumstances, may well qualify as both an industrial injury and an

occupational disease. In this particular situation, we believe that Mr. Saucedo's application for benefits is best analyzed as an occupational disease.

RCW 51.08.140 defines an occupational disease as such disease or infection as arises naturally and proximately out of employment. The analysis of whether a condition is compensable as an occupational disease consists of a two prong test, the first prong being whether the condition arises out of distinctive conditions of employment, and the second prong being whether there is competent medical evidence to establish that "but for" the exposure to the distinctive conditions of employment, the disease or infection would not have occurred.

**3 We agree with our industrial appeals judge's analysis of whether Mr. Saucedo's cold exposure at Artificial Ice and Fuel constituted distinctive conditions of employment. The constant 20-degree Fahrenheit temperature in the ice room is certainly distinctive. While individuals may well come into contact with cold temperatures in everyday life, this does not ordinarily involve exposure to 20 degree Fahrenheit environments over the course of a full day of work. We believe that Mr. Saucedo has thus satisfied the "naturally" prong of the occupational disease statute.

Turning, then, to whether Mr. Saucedo has satisfied the causation prong of the statute, we are persuaded that Mr. Saucedo's exposure to cold temperatures did not cause his underlying asthma condition. In this regard, the evidence clearly establishes that Mr. Saucedo complained of asthma before he ever began work at Artificial Ice and Fuel. Indeed, his own physician, Dr. Lyzanchuk testified that he had been treating Mr. Saucedo for asthma for the year before Mr. Saucedo began work at Artificial Ice and Fuel. Thus, Mr. Saucedo has not proved that his exposure to cold temperatures at Artificial Ice and Fuel caused his underlying asthma.

However, as our industrial appeals judge appropriately observed, a worker is entitled to benefits if the employment aggravates a pre-existing unrelated disease, whether symptomatic or not. See *Dennis v. Department of Labor & Indus.*, 109 Wn.2d. 467 (1987). In this matter, Mr. Saucedo has a history of asthma, which remained largely asymptomatic until he was exposed to a trigger of some sort. The trigger would cause his asthma to

flare-up and become symptomatic. The flare-up would then subside, either with or without treatment, and Mr. Saucedo would then be asymptomatic until he experienced another trigger.

There is also ample evidence in this record to establish that the cold temperatures to which Mr. Saucedo was exposed in the cold room at Artificial Ice and Fuel triggered flare-ups of asthma. Indeed, there is no medical evidence in this record to dispute that Mr. Saucedo's work in 20 degree Fahrenheit temperatures in the cold room caused the flare-ups of asthma. Clearly, the distinctive conditions of employment exacerbated Mr. Saucedo's pre-existing unrelated condition.

Our industrial appeals judge, however, affirmed the Department order rejecting this claim based on his analysis of *Ruse v. Department of Labor & Indus.*, 138 Wn.2d 1 (1999). In *Ruse*, the court held:

In an aggravation case, the employment does not cause the disease, but it causes the disability because the employment conditions accelerate the preexisting disease to result in the disability. In this sense, it is proper to speak of the disability being caused by the employment in an aggravation case.

Ruse, at 7. We do not, however, construe the above verbiage as a requirement that in an occupational disease claim involving aggravation of a pre-existing unrelated condition, a claimant must show that the distinctive conditions of employment caused functional limitations. Such a showing has never been required for claim compensability. In this regard, we are mindful of the mandate of RCW 51.32.180, which provides, in pertinent part:

**4 Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title ... shall receive the same compensation benefits and medical, surgical and hospital care and treatment as would be paid and provided for a worker injured or killed in employment under this title,

A person who suffers an industrial injury need only show that he sustained an injury in the course of his employment, and that the resulting condition required some form of treatment. It is not required that the claimant establish functional limitations for

compensability. In this regard, the requisite showing is the same for an occupational disease.

In conclusion, we determine that the evidence establishes that the claimant's underlying asthma condition pre-existed and is unrelated to his employment. However, we further determine that the distinctive conditions of the claimant's employment proximately caused his asthma to flare-up. We, therefore, reverse the Department order of June 7, 1999, and remand this matter to the Department with direction to allow this claim as exacerbation(s) of the claimant's pre-existing, unrelated condition of asthma, and to direct provision of benefits as may be authorized by law.

FINDINGS OF FACT

1. On February 12, 1999, the claimant, Santos E. Saucedo, filed an application for benefits with the Department of Labor and Industries, alleging he had sustained an industrial injury to his airways on August 3, 1998, while in the course of employment with Artificial Ice & Fuel Company. On February 23, 1999, the Department issued an order rejecting the claim for asthma, determining that the condition was not the result of an industrial injury or exposure, to have pre-existed the alleged injury, and was not related to the alleged injury.

On April 14, 1999, the claimant timely protested the Department order of February 23, 1999. On June 7, 1999, the Department issued an order affirming its prior order of February 23, 1999.

On August 9, 1999, the claimant filed an appeal of the Department's order of June 7, 1999. On August 25, 1999, this Board granted the appeal, assigned it Docket No. 99 18557, and directed that further proceedings be held.

2. Prior to June 29, 1998, the claimant, Santos E. Saucedo, had a history of receiving treatment for asthma-related symptoms beginning in February 1997.

3. On June 29, 1998, Artificial Ice & Fuel Company hired Mr. Saucedo as an ice bagger, a job that required working in a room kept at a 20-degree Fahrenheit temperature. Exposure to this cold temperature was a distinctive condition of

Mr. Saucedá's employment.

4. Prior to June 29, 1998, Mr. Saucedá suffered from asthma, which remained largely asymptomatic until he was exposed to a trigger of some sort. The trigger would cause his asthma to flare-up and become symptomatic. The flare-up would then subside, either with or without treatment, and Mr. Saucedá would then be asymptomatic until he experienced another trigger.

5. The cold temperatures to which Mr. Saucedá was exposed as an ice bagger acted as a trigger, and proximately caused Mr. Saucedá's pre-existing unrelated asthma condition to flare-up on more than one occasion.

CONCLUSIONS OF LAW

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

2. The claimant, Santos E. Saucedá, sustained an occupational disease within the meaning of RCW 51.08.140, in that his exposure to cold

temperatures during the course of his employment at Artificial Ice and Fuel caused his underlying, pre-existing condition of asthma to become symptomatic.

3. The order of the Department of Labor and Industries dated June 7, 1999, is reversed. This matter is remanded to the Department with direction to issue a further order allowing this claim for exacerbation(s) of the claimant's pre-existing asthma condition, and to take such further action as is appropriate under the law and the facts.

It is so ORDERED.

Dated this 25th day of January, 2001.

Thomas E. Egan

Chairperson

Frank E. Fennerty, Jr.

Member

876747 Board of Industrial Insurance Appeals
State of Washington

IN RE: SHARON BAXTER

CLAIM NO. N-390479

DOCKET NO. 92 5897

January 7, 1994

SIGNIFICANT DECISION

APPEARANCES:

Claimant, Sharon Baxter

by Rolland, O'Malley, Williams & Wyckoff,
P.S., per Douglas P. Wyckoff, Attorney

Employer, Dolgash & Haines

by Candy Snyder, Business Manager

Department of Labor and Industries

by The Office of the Attorney General, per
Thomas Adkins, Assistant, and Whitney Cochran,
Paralegal

DECISION AND ORDER

This is an appeal filed by the claimant, Sharon Baxter, on November 30, 1992 from an order of the Department of Labor and Industries dated November 10, 1992 which corrected and superseded an order dated May 26, 1992, and which rejected the claim for the reason no claim has been filed by said worker within one year after the day upon which the alleged injury occurred, and that claimant's condition is not an occupational disease, and bills regarding this claim are rejected except those which are authorized for diagnosis. Reversed and remanded.

EVIDENTIARY AND PROCEDURAL MATTERS

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, Sharon Baxter, to a Proposed Decision and Order issued on September 24, 1993 in which the order of the Department dated November 10,

1992, rejecting the claim, 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.

DECISION

Based on the uncontroverted medical evidence contained in the record we believe that Ms. Baxter has a valid claim for an occupational disease. While it is doubtlessly true that the incidents which resulted in her contracting hepatitis C could also have formed the basis for an injury claim, separate claims are not mutually exclusive. Just as one incident can result in aggravation of a condition caused by a previous injury and also be the basis for a new claim, one incident can serve as the basis for both an injury ([FN1]) and for an occupational disease ([FN2]) claim. The record supports Ms. Baxter's contention that she contracted an occupational disease as a result of exposure during the course of employment and filed an application for benefits in a timely manner. She is entitled to have her claim allowed.

The only medical evidence presented was the testimony of two physicians who had treated Ms. Baxter. Both Dr. James F. Kruidenier, a specialist in gastroenterology and hepatology, and Dr. Michael R. Boyd, a family practitioner, were of the opinion that she had contracted hepatitis C as a result of exposure to contaminated blood and tissue during the course of her employment as a dental assistant. Ms. Baxter's only exposure occurred while she was working for Dr. Dolgash and Dr. Haines, oral surgeons, during a two and one-half year period ending in June of 1982. Following termination of employment she was seen by Dr. Boyd for vague and non-specific complaints which were ultimately attributed to some form of hepatitis. As medical science had not identified hepatitis C at that time her condition was described as non-A/non-B hepatitis. Even this rather vague and preliminary diagnosis was not made until December of 1984, when Dr. Boyd discussed the issue of causation with Ms. Baxter for the first time. Ms. Baxter's condition was not definitively diagnosed until some time in 1990 when she saw a physician in Las Vegas, Nevada. Following termination of her employment with Dr.'s Dolgash and Haines, she was able to work on a fairly regular and continuous

basis and was not impaired or disabled as a result of her hepatitis. She received no treatment for hepatitis C until April of 1992 when as the result of reading a magazine article she sought and was provided interferon by Dr. Kruidenier.

**2 It is clear that Ms. Baxter suffers from a job-related condition which would entitle her to benefits if she filed an application for benefits within the period provided in the statute. If this condition is considered to have arisen out of a "sudden and tangible happening" and to constitute an industrial injury, the period for filing an application for benefits would be one year following the incident as provided in RCW 51.28.050. In light of the uncontroverted medical testimony presented this is not the conclusion we reach. While the "needle stick" incidents satisfy the definition of an injury contained in RCW 51.08.100 and could have served as the basis for separate claims, no claims for these incidents were filed within the one year period set forth in the RCW 51.28.050.

While the condition for which this claim was filed occurred as a result of on-the-job exposure and the likeliest source of this exposure were "needle sticks", there was, nevertheless nothing "immediate or prompt" about the onset of the physical conditions resulting therefrom. In light of the testimony of Dr. Kruidenier, the attending specialist, it is unlikely that the particular "needle stick" which initiated the disease process can be identified. In particular, he thought it unlikely that the disease was contracted from a hepatitis carrier identified in the early 1980's, as there was no test to identify hepatitis C until the 1990's. During the period within which Ms. Baxter could have filed an injury claim the disease had not developed to the extent that it was diagnosable and, had it developed, the medical community had no test to identify the condition.

Ms. Baxter's condition did not develop to the extent that it was disabling or required treatment until 1992. Both the manner in which the condition developed and the definition of an occupational disease convinces us that this is a condition or ailment which should be evaluated under the provisions of RCW 51.08.140. Consideration of the decisions in *Nygaard v. Department of Labor & Indus.*, 51 Wn.2d 659 (1958) and *Williams v. Department of Labor & Indus.*, 45 Wn.2d 574 (1954), supports our conclusion that this is precisely

the type of condition which should be covered as an occupational disease. In light of the lengthy period that elapsed before the disease developed, was diagnosed, or required treatment, it would be unreasonable to require that a claim be filed within the period provided for a claim arising out of a " . . . sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result . . . ". RCW 51.08.100. (Emphasis added).

Even under the most literal and restrictive interpretation of RCW 51.28.055, as it existed prior to the 1984 amendment, the events which would initiate the period for filing a claim did not occur until December of 1984. Even then there was no positive diagnosis of the condition, as no test existed to provide this diagnosis, and the condition had not progressed to the extent that it was disabling or in need of treatment. As the 1984 amendments to RCW 51.28.055 became effective prior to that date and are clearly remedial in nature, they must be used in determining the timeliness of Ms. Baxter's application for benefits. Sharon Baxter filed an application for benefits within two years of the date on which she was notified in writing by a physician of the nature of her occupational disease.

**3 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto on behalf of the claimant, and a careful review of the entire record before us, we are persuaded that the Department order dated November 10, 1992 is incorrect and must be reversed and the claim remanded for allowance of the condition hepatitis C as an occupational disease.

FINDINGS OF FACT

1. On May 18, 1992, claimant, Sharon Baxter, filed an application for benefits alleging that she contracted hepatitis C as a result of exposure to contaminated blood and tissue during the course of her employment by Dr.'s Dolgash & Haines. The claim was assigned Claim No. N-390479.

The Department of Labor and Industries issued an order dated November 10, 1992, which corrected and superseded an order dated May 26, 1992, and which rejected the claim because

no claim has been filed by said worker within one year after the day upon which the alleged injury occurred. That the claimant's condition is

not an occupational disease as contemplated by Section 51.08.140 RCW. Any and all bills for services or treatment concerning this claim are rejected, except those which are authorized by the Department for diagnosis.

Claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals on November 30, 1992 from the Department order dated November 10, 1992. On December 21, 1992 the Board issued its order granting the appeal, and directing that further proceedings be held on the issues raised by the notice of appeal.

2. During the two and one-half years she was employed as a dental assistant by Dolgash & Haines, claimant, Sharon Baxter, was exposed on a number of occasions to contaminated blood and tissue.

3. As a direct and proximate result of her occupational exposure, claimant's developed the condition of chronic hepatitis C, and status-post interferon treatment therefore.

4. No earlier than December 1984, claimant was told by her physician that she suffered from hepatitis non-A/non-B as a result of her occupational exposure to contaminated blood and tissue.

5. Claimant's condition of hepatitis C was not definitively diagnosed until 1990 and she was not impaired or disabled by this condition until May of 1992 when she received treatment, which treatment had not previously been available or required.

6. Claimant first received written notice of her condition and its cause from her physician in February 1992.

CONCLUSIONS OF LAW

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

2. As a result of exposure during the course of her employment, claimant, Sharon Baxter, contracted an occupational disease within the

meaning of RCW 51.08.140, when she was exposed to contaminated blood and tissue.

3. Claimant, Sharon Baxter, filed an application for benefits within the time limits set forth in RCW 51.28.055.

5. The order of the Department of Labor and Industries dated November 10, 1992, which corrected and superseded an order dated May 26, 1992 and which rejected the claim for the reasons that:

**4. no claim has been filed by said worker within one year after the day upon which the alleged injury occurred, and the claimant's condition is not an occupational disease as contemplated by Section 51.08.140 RCW.

is incorrect, and is reversed, and the claim is remanded with directions to allow the claim for the occupational disease of hepatitis C, and to take such further action as may be authorized or indicated by law.

It is so ORDERED.

Dated this 7th day of January, 1994.

S. FREDERICK FELLER

Chairperson

FRANK E. FENNERTY, JR.

Member

ROBERT L. McCALLISTER

Member

(FN1). RCW 51.08.100 "Injury." "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate prompt result, and occurring from without, and such physical conditions as result therefrom.

(FN2). RCW 51.08.140 "Occupational Disease." "Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

#1658404 Board of Industrial Insurance Appeals
State of Washington

IN RE: SUZANNE E. DYER

Docket Nos. 03 15747, 03 15748, & 03 16355

Claim No. W-707348

March 1, 2005

Appearances:

Claimant, Suzanne E. Dyer,

by Smart Law Offices, P.S., per Darrell K. Smart

Self-Insured Employer, Yakima County,

by Wallace, Klor & Mann, P.C., per Schuyler T. Wallace, Jr.

Department of Labor and Industries, by The Office of the Attorney General, per James A. Yockey, Assistant

DECISION AND ORDER

In Docket No. 03 15747, the self-insured employer, Yakima County, filed an appeal with the Board of Industrial Insurance Appeals on August 18, 2003, from an order of the Department of Labor and Industries dated July 18, 2003. In this order, the Department directed the self-insured employer to authorize a hemi-laminectomy with discectomy at the L4-5 level of the lumbar spine. The Department order is AFFIRMED.

In Docket No. 03 15748, the self-insured employer, Yakima County, filed an appeal with the Board of Industrial Insurance Appeals on August 18, 2003, from an order of the Department of Labor and Industries dated July 23, 2003. In this order, the Department directed the self-insured employer to pay time-loss compensation from February 18, 2003 through May 12, 2003. The Department order is AFFIRMED.

In Docket No. 03 16355 the self-insured employer, Yakima County, filed an appeal with the Board of Industrial Insurance Appeals on September 8, 2003, from an order of the Department of Labor and Industries dated August 26, 2003. In this

order, the Department directed the self-insured employer to pay an additional amount in benefits to the claimant for unreasonably delaying the payment of time-loss compensation for the period February 18, 2003 through April 28, 2003. The Department order is REVERSED AND REMANDED.

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 September 20, 2004, in which the industrial appeals judge reversed and remanded the orders of the Department dated July 18, 2003, July 23, 2003 and August 26, 2003. We have granted review in order to affirm the Department orders requiring the self-insured employer to authorize the hemi-laminectomy with discectomy at the L4-5 level of the lumbar spine and pay time-loss compensation from February 18, 2003 through May 12, 2003. However, like our industrial appeals judge, we conclude that the self-insured employer did not unreasonably delay payment of time-loss compensation and therefore the August 26, 2003 order should be reversed.

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

Causation of Low Back Conditions and Surgical Authorization:
Dckt No. 03 15747

As of December 3, 2001, Ms. Dyer was a 52-year-old woman who had never experienced back or leg symptoms or disabilities and had never sought treatment for back or leg conditions. She worked two jobs: a full-time job as a dispatcher for the Yakima County Sheriff's Office and assisting her husband in running the small family orchard (which required considerable labor on her part). On December 3, 2001 Ms. Dyer slipped on water on the floor in the Yakima County Courthouse. She ended up doing the splits, twisting her entire back in the process, but she did not fall. She experienced immediate pain in her neck, low back, and left hip, for which she sought treatment in an emergency room that day and then from Theodore Palmatier, M.D., her family doctor, two days later. Ms. Dyer

did not describe leg pain to the emergency room doctor, nor did she describe it to Dr. Palmatier on December 5, 2001. Dr. Palmatier diagnosed lumbosacral and trapezius strains, took her off work for four days due to pain and spasms, and prescribed physical therapy. The claimant only went to a couple of the therapy sessions because they conflicted with her work schedule at the sheriff's office. Her neck condition rapidly improved, but her back condition did not and the pain began to spread down her left leg.

**2 X-rays taken at the emergency room on December 3, 2001, revealed facet problems at the base of Ms. Dyer's spine. On January 14, 2002, a lumbar MRI revealed moderate disc degeneration at L3-4 and 4-5 with a moderate disc bulge at L3-4 and a large central disc bulge at L4-5, but without stenosis or foraminal encroachment. In February 2002, Ms. Dyer underwent a lumbar CT scan that revealed no spinal instability, but included positive findings of facet disease resulting in moderate narrowing of the central canal and encroachment on the lateral recesses from L3 through S1.

Because of continuing back and leg symptoms and the positive imaging studies, Dr. Palmatier referred Ms. Dyer to Dr. Kjerulf, a neurosurgeon, in March 2002. Dr. Kjerulf recorded a positive straight leg raising test on the right and recommended epidural injections. On June 5, 2002, the claimant received a selective nerve block on the left L-5 nerve, which resulted in significant pain relief for three hours. Michael A. Thomas, D.O., the neurosurgeon who took over Dr. Kjerulf's practice after he retired, testified that the nerve block was diagnostic of the source of Ms. Dyer's pain. Dr. Kjerulf recommended low back surgery, but that did not occur.

Ms. Dyer underwent independent medical examinations (IMEs) on July 29, 2002 and October 30, 2002, conducted respectively by William J. Stump, M.D., a neurologist, and Leslie R. Bornfleth, M.D., a neurosurgeon. Both doctors concluded that the industrial injury caused a lumbar strain and rendered the pre-existing degenerative disc disease temporarily symptomatic. Both doctors believed that Ms. Dyer's conditions were fixed and stable and rated her low back impairment as a pre-existing Category 2, which was not increased by the industrial injury. They testified that the claimant's ongoing symptoms were related only to the natural

progression of the pre-existing condition.

Ms. Dyer continued on time-loss compensation until December 17, 2002, when Dr. Palmatier released her to return to her dispatcher job, initially at four hours per day. In January 2003, the claimant increased her hours to six hours per day, but was missing time from work due to pain and the powerful painkilling medications she was taking, which she testified hampered the alertness she needed for her job. Ms. Dyer never was able to return to a full eight-hour day. On February 4, 2003, a second low back MRI was performed. It revealed a much larger paracentral disc protrusion at L4-5, which was a worsening of the condition at that level. On February 17, 2003, Dr. Palmatier removed the claimant from work and recommended she obtain surgical treatment.

On September 18, 2003, Ms. Dyer underwent a third low back MRI. Dr. Bornfleth read this MRI to show some improvement based on a decrease in the size of the L4-5 disc. However, Dr. Thomas noted that the MRI report indicated that the L4-5 disc was of similar appearance with perhaps minimal improvement, but also that it slightly displaced the L-5 nerve root in the lateral recess and there was foraminal encroachment on the left side. On November 3, 2003, Dr. Thomas surgically removed the degenerative L4-5 disc and also performed a hemi-laminectomy. Dr. Palmatier concluded that the worsening of the disc seen on the February 2003 and October 2003 MRIs was a worsening of condition that represented a gradual progression of the pre-existing condition begun by the industrial injury. Dr. Thomas stated that the mechanics of the claimant's industrial injury were not inconsistent with the progression of her symptoms and the subsequent herniation of the disc.

**3 The doctors all agree that Ms. Dyer had significant pre-existing low back degenerative disc disease and arthritis that was not symptomatic at the time the industrial injury occurred. With the exception of Dr. Fuller, who conducted a record review on behalf of the self-insured employer, all agree that the industrial injury caused an aggravation of that pre-existing condition, at least to the extent that the degenerative condition became symptomatic. Dr. Fuller notes that the timing of the onset of the pain does not necessarily correlate with the industrial injury; however, the preponderance of the medical testimony contradicts

na position. No other believable explanation was provided as to why the claimant's symptoms started at the time they did.

Drs. Stump and Bornfleth testified that the symptomatic aggravation of the pre-existing condition was only temporary. They believe that the effects of Ms. Dyer's lumbar strain were gone after a few weeks or a month at the most. However, neither doctor ever adequately explained the basis for this conclusion, which is inconsistent with the unchallenged history of the claimant's constant low back problems that began when the industrial injury occurred. We find Ms. Dyer to be a reliable witness and historian. There is no evidence whatsoever of symptom magnification on her part. The examinations reported in the record do not include functional findings such as positive Waddell's tests. The various imaging studies provide ample objective proof of the problems she has. In fact, those imaging findings show why testimony regarding the typical period of symptoms for a low back strain is not dispositive in Ms. Dyer's case: she does not have a normal back; her degenerative findings are moderate and involve impingement and encroachment on a nerve root. The conclusion we draw is that the industrial injury was the proverbial "straw that broke the camel's back." It was the causative event that began the symptomatic progression of the low back arthritis, as well as the acceleration of the underlying condition revealed by the serial MRIs. In short, the industrial injury was the proximate cause of the disability that originated when the previously asymptomatic and nondisabling low back arthritic condition became active and symptomatic. *Miller v. Department of Labor & Indus.*, 200 Wash. 674 (1939).

Since the low back surgery was intended to be curative treatment for a condition that was proximately caused (aggravated and accelerated) by the industrial injury, the question now becomes whether that surgical treatment constituted "proper and necessary ... surgical services" within the meaning of RCW 51.36.010. The self-insured employer contends that even if the surgery was for a low back condition proximately caused by the December 3, 2001 industrial injury, it should not have been authorized because it was not proper and necessary treatment. Drs. Bornfleth and Stump stated that the low back surgery was not indicated in Ms. Dyer's case. Dr. Stump testified that a medical

study had shown that under circumstances similar to this case less than one-third of these surgeries provided significant improvement. In contrast to this conclusion, Ms. Dyer testified that the surgery helped her. She said that her low back and leg pain improved significantly, although both symptoms are still present. She noted that she no longer needs prescription pain medications; she can handle the pain by using over-the-counter medication. Dr. Thomas testified that the claimant obtained a good result from the surgery, albeit she would still have limitations on mobility and the length of time she could remain in one position.

**4 We conclude that the record supports Dr. Thomas's decision to go forward with the surgery. The serial MRIs presented evidence of the progressive degeneration at L-5 that correlates with Ms. Dyer's increasing symptoms. The L5 nerve block proved that the source of most of the claimant's disabling symptoms was at that level. The last MRI was the first to show some actual encroachment on the left L-5 nerve root. Obviously the need for surgery would be more clearly shown had these findings from the imaging tests translated into consistent objective clinical findings. However, with the record before us we cannot disagree with the medical judgment of the attending doctors that surgical treatment was indicated.

Last, but not least, using 20-20 hindsight, it is evident that the surgery was successful in relieving much of Ms. Dyer's symptoms and decreasing her reliance on narcotic painkillers. This surgical result provides strong evidence that it was proper and necessary medical treatment in this case. In re Susan Pleas, BIIA Dec., 96 7931 (1998). Dr. Fuller's belief that the surgery would worsen the claimant's condition was incorrect. If one believes the study cited by Dr. Stump, Ms. Dyer was one of only one-third of the population of patients whose surgery was successful in the absence of certain pre-surgery indications. Predicting the success of surgery with any accuracy can be difficult at times. Nonetheless, we know of no law or regulation that requires a surgeon to certify before the fact that the recommended surgical procedure will more likely than not improve or cure his or her patient.

Entitlement to Time-loss Compensation: Dckt. No. 03 15748

The self-insured employer's primary basis for

disputing Ms. Dyer's entitlement to time-loss compensation from February 18, 2003 through May 12, 2003, is that the low back condition that rendered her temporarily and totally disabled was unrelated to the December 3, 2001 industrial injury. We have rejected that argument for the reasons stated above. Dr. Bornfleth's opinion that Ms. Dyer was able to work was based on clinical findings he observed during the October 30, 2002 IME, which occurred prior to her protracted attempt to return to work and the subsequent exacerbation of her low back condition. Thus, his conclusion is not probative in regard to the time-loss compensation period that is at issue in this appeal. We believe that Ms. Dyer's entitlement to time-loss compensation was well supported by the certification from Dr. Palmatier and the need for surgery to treat a condition caused by this industrial injury.

The Penalty Order: Dckt No. '03 16355

The penalty period at issue runs from February 18, 2003 through April 28, 2003, a different ending date than that in which the Department directed payment of the time-loss compensation. According to Ms. Housain, the workers' compensation adjudicator within the Department's self-insured section and the person who issued the penalty order under appeal, the reason that a penalty was not assessed against the self-insured employer for the entire time-loss compensation period at issue was due to her application of an unwritten Department "standard" that a delay in payment of up to twenty days is not considered unreasonable. Ms. Housain acknowledged that this standard is not in a statute, regulation, or written Department policy.

**5 In reviewing the penalty decision of the Department, the Board uses a preponderance of the evidence standard. The test, as stated by In re Frank Madrid, BIIA Dec., 86 0224-A (1987), is whether the employer had a genuine doubt from a medical or legal standpoint as to the liability for benefits. Ms. Housain defined medical doubt as a conflict of information that is not clear and convincing as to whether time-loss compensation is payable as a result of the injury. Legal doubt occurs when a Department order is issued and is still in dispute. A penalty can be ordered even though the Department has not issued an order requiring the payment of time-loss compensation. Taylor v. Nalley's Fine Foods, 119 Wn. App. 919

(2004).

The penalty order under appeal here was issued on August 26, 2003, (in which the Department affirmed an earlier penalty order). At that time, the Department's records included the certification of time-loss compensation from Dr. Palmatier that had been faxed to the employer on February 18, 2003, and was contrary to the Department's vocational determination issued on January 23, 2003, that Ms. Dyer was employable. In March 2003, the employer's attorney disputed the causation of the condition for which Dr. Palmatier certified time-loss compensation. This was followed on April 14, 2003, by a letter outlining that position, which was signed by Dr. Bornfleth, one of the IME doctors who saw the claimant in 2002. Because of the worsening of Ms. Dyer's low back condition by early 2003, the opinion of Dr. Bornfleth was no longer relevant to the Department's determination whether a penalty should be assessed to the extent that the opinion in question only addressed her ability to work based on the examination findings in 2002. However, the opinion of Dr. Bornfleth was still probative regarding the issue of whether any proximate causal connection existed between Ms. Dyer's December 3, 2001 industrial injury and her inability to work in 2003. Therefore, it is clear from information the Department possessed at the time the penalty order was issued that the self-insured employer had a "genuine doubt from a medical standpoint" as to its responsibility to provide time-loss compensation to the claimant because of the ongoing controversy over what conditions, if any, were still related to that industrial injury. Pursuant to the rule we enunciated in Madrid, the self-insured employer has met its burden of showing the existence of reasonable medical doubt and the penalty order must be reversed.

FINDINGS OF FACT

1. On January 9, 2002, the claimant, Suzanne E. Dyer, filed an application for benefits with the Department of Labor and Industries, alleging that she sustained an industrial injury on December 3, 2001, while in the course of employment with the Yakima County. On January 15, 2002, the Department allowed the claim. On May 9, 2003, the Department issued an order in which it directed the self-insured employer to authorize a hemi-laminectomy with discectomy at the L4-5

level. On June 5, 2003, the self-insured employer protested the order. On July 18, 2003, the Department affirmed the order. On August 18, 2003, the self-insured employer appealed the July 18, 2003 order to the Board of Industrial Insurance Appeals. On September 16, 2003, the Board issued an Order Granting Appeal and assigned it Docket No. 03 15747.

**6 2. On May 13, 2003, the Department issued an order in which it directed the self-insured employer to pay time-loss compensation for the period February 18, 2003 through May 12, 2003. On June 4, 2003, the self-insured employer protested the order. On July 23, 2003, the Department affirmed the order. On August 18, 2003, the self-insured employer appealed the July 23, 2003 order to the Board of Industrial Insurance Appeals. On September 16, 2003, the Board issued an Order Granting Appeal and assigned it Docket No. 03 15748.

3. On May 12, 2003, the Department issued an order in which it directed the self-insured employer to pay an additional amount to the claimant for unreasonably delaying the payment of benefits for the period from February 18, 2003 through April 28, 2003. On June 5, 2003, the self-insured employer protested the order. On August 26, 2003, the Department affirmed the order. On September 8, 2003, the self-insured employer appealed the August 26, 2003 order to the Board of Industrial Insurance Appeals. On October 1, 2003, the Board issued an Order Granting Appeal and assigned it Docket No. 03 16355.

4. On December 3, 2001, Suzanne E. Dyer slipped and fell at work and strained her low back, requiring medical treatment.

5. Before the December 3, 2001 injury, Ms. Dyer had disc degeneration and bulging at L4-5 and L5-S1. The industrial injury aggravated her pre-existing low back disc degeneration, causing it to become symptomatic and accelerating the progression of that condition.

6. Between February 18, 2003 and May 12, 2003, Ms. Dyer's physical restrictions, preventing her return to work, were proximately caused by the progression of the pre-existing degenerative condition in her low back, as aggravated and

accelerated by the December 3, 2001 industrial injury.

7. Between February 18, 2003 and May 12, 2003, Ms. Dyer was precluded by the residuals of her pre-existing low back condition, as aggravated and accelerated by the December 3, 2001 industrial injury, from engaging in any reasonably continuous, gainful employment.

8. As of August 26, 2003, the self-insured employer had not paid time-loss compensation to Ms. Dyer for the period of February 18, 2003 through April 28, 2003. As of that date, the self-insured employer had genuine doubt from a medical standpoint as to Ms. Dyer's entitlement to time-loss compensation for that period.

9. On November 3, 2003, Ms. Dyer received surgical treatment for her low back degenerative disc condition at L4-5, as aggravated and accelerated by the December 3, 2001 industrial injury. The surgical treatment improved her low back condition by relieving many of her symptoms and decreasing her reliance on narcotic painkilling medication.

CONCLUSIONS OF LAW

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

2. The November 3, 2003 low back surgery constituted proper and necessary surgical services within the meaning of RCW 51.36.010.

**7: 3. Between February 18, 2003 and May 12, 2003, the claimant was a temporarily totally disabled worker within the meaning of RCW 51.32.090.

4. The self-insured employer did not unreasonably delay payment of time-loss compensation for the period February 18, 2003 through April 28, 2003, pursuant to RCW 51.48.017.

5. The Department order dated July 18, 2003, is correct and is affirmed.

6. The Department order dated July 23, 2003, is correct and is affirmed.

7. The Department order dated August 26, 2003, is incorrect and is reversed. This matter is remanded to the Department to issue an order in which it denies Ms. Dyer's request for a penalty against the self-insured employer for unreasonable delay in the payment of time-loss compensation for the period of February 18, 2003 through April 28, 2003.

It is so ORDERED.

Dated this 1st day of March, 2005.

Thomas E. Egan

Chairperson

Calhoun Dickinson

Member

I agree with the majority that the July 18, 2003 and July 23, 2003 Department orders should be affirmed. I defer in the decision to reverse the August 26, 2003 penalty order.

Dated this 1st day of March, 2005.

Frank E. Fennerty, Jr.

Member