

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

1 IN RE: BARBARA L. WHEELER) DOCKET NO. 10 14316
2 CLAIM NO. AK-55755) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Robert H. Raymond, Jr.

4 APPEARANCES:

5 Claimant, Barbara L. Wheeler, by
6 Williams Wyckoff & Ostrander, PLLC, per
7 Wayne L. Williams

8 Employer, Pacific Coast Security, by
9 Sedgwick CMS, per
None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
Courtlan P. Erickson, Assistant

12 The claimant, Barbara L. Wheeler, filed an appeal with the Board of Industrial Insurance
13 Appeals on July 12, 2010, from an order of the Department of Labor and Industries dated July 6,
14 2010. In this order, the Department affirmed the provisions of an order dated May 3, 2010, which
15 denied an application to reopen the claim. The Department order is **REVERSED AND**
16 **REMANDED.**

17 ISSUE

18 Whether the conditions proximately caused by Ms. Wheeler's industrial
19 injury worsened, as demonstrated in part by objective evidence, between
20 July 17, 2009, and July 6, 2010.

21 PROCEDURAL AND EVIDENTIARY MATTERS

22 On August 23, 2010, the parties agreed to include the Jurisdictional History in the Board's
23 record. That history establishes the Board's jurisdiction in this appeal.

24 On November 15, 2010, the Department filed a motion for an examination of the claimant
25 pursuant to CR 35, or, in the alternative, for an order continuing hearings in this matter. The motion
26 was heard by Industrial Appeals Judge Robert H. Raymond, Jr., on November 29, 2010. By an
27 interlocutory order dated November 29, 2010, the motion was denied.

28 The appeal was heard on January 6, 2011, before Industrial Appeals Judge
29 Robert H. Raymond, Jr. at Olympia, Washington.

30 The deposition of Jeanne Boudrieau, ARNP, dated December 9, 2010, is published pursuant
31 to WAC 263-12-117, with all motions and objections appearing therein being denied or overruled,
32 respectively. Exhibit No. 1 to the deposition is remarked as Board Exhibit No. 1.

1 The deposition of Edward I. Dagher, M.D., dated February 8, 2011, is published pursuant to
2 WAC 263-12-117, with all motions and objections appearing therein being denied or overruled,
3 respectively.

4 Exhibit No. 1 is admitted.

5 **EVIDENCE**

6 Barbara L. Wheeler is a 62-year-old married woman. She stands five feet, two inches tall,
7 weighs 190 pounds, and is right hand dominant. On June 26, 2009, she was working as a security
8 officer at the Simpson Door Plant in McCleary, Washington, when she slipped on some sawdust
9 while checking valve houses at the plant. Her right foot slipped and she slid down a hill with her
10 right leg twisted under her body. She impacted her right ankle and knee. Her right foot was numb
11 as she stood and tried to walk immediately after the fall.

12 She went to the emergency room at the Aberdeen Hospital, where x-rays of her leg, knee,
13 and ankle were taken. She also saw her personal physician, Dr. Jackson, shortly thereafter.
14 Dr. Jackson ultimately released her to work, and the claim was closed on July 17, 2009. She
15 returned to work 12 days after the fall. Following closure of her claim she received medical care
16 principally from Jeanne Boudrieau.

17 Ms. Wheeler testified that between July 17, 2009, and July 6, 2010, her conditions
18 worsened. Her foot continued to go numb as she walked, she developed charlie-horses (cramps)
19 in the back of her right calf and low back, and the pain moved into her right hip and low back. She
20 also experienced muscle spasms in her hip and back, and on one occasion she was seen at the
21 emergency room of Saint Peters Hospital where she received an injection to relax her muscles.

22 Jeanne M. Boudrieau is a registered nurse practitioner, licensed to treat patients in
23 Washington State. She is employed by the Montesano Clinic. Ms. Boudrieau saw Ms. Wheeler for
24 her right lower extremity, hip and low back conditions beginning on December 30, 2009. At the
25 December 30, 2009 examination, Ms. Boudrieau found edema in the knee and evidence of possible
26 right knee derangement. She next saw Ms. Wheeler on January 27, 2010. Ms. Wheeler reported a
27 great deal of discomfort, reported having begun physical therapy and having bought a cane to use
28 when she walked because she was concerned about falling, and reported that her knee felt achy
29 and unstable, especially when going downstairs. Ms. Boudrieau noted edema and patellar femoral
30 crepitus in the right knee on examination. The following day, January 28, 2010, Ms. Boudrieau,
31 assisted Ms. Wheeler by preparing the physician's portion of an application to reopen the claim
32 (Exhibit No. 1.) In that application, Ms. Boudrieau recited the following objective signs of worsening

1 of Ms. Wheeler's conditions: (1) right patellar laxity; (2) 2+ effusion of the inferior patella; (3) positive
2 McMurray's syndrome; (4) tight IT (ilio-tibial) band on the right; (5) tight L5 paraspinal musculature;
3 and (6) spasm.

4 Ms. Boudrieau next saw Ms. Wheeler on March 1, 2010. Ms. Wheeler continued to complain
5 of stiffness in her right leg, and she felt her knee to be "achy" and unstable. Ms. Boudrieau's
6 examination noted that Ms. Wheeler looked better, the swelling in the knee had resolved, her hip
7 had improved, but some tightness could still be felt in the IT band.

8 Ms. Boudrieau's diagnoses of these industrially related conditions included ankle and foot
9 pain, unresolved; ankle and knee spasm, unresolved; muscle spasm in the right piriformis muscles,
10 improved; unspecified derangement of the right knee, improved; and low back pain, resolved. She
11 prescribed a hinged knee brace for Ms. Wheeler, and referred her for physical therapy for the right
12 knee and ankle. Ms. Wheeler underwent 20 sessions of physical therapy between January 6,
13 2010, and March 18, 2010. Ms. Boudrieau also testified that if Ms. Wheeler had reached maximum
14 medical improvement for her industrially related conditions as of July 17, 2009, then based upon
15 Ms. Wheeler's need for additional treatment while she was being seen and treated by
16 Ms. Boudrieau, those industrially related conditions had worsened between July 17, 2009, and the
17 time of Ms. Boudrieau's treatment.

18 Edward I. Dagher, M.D., is a physician, licensed and practicing that profession in
19 Washington State. He is recognized by his peers as a specialist in physical and rehabilitative
20 medicine. Dr. Dagher examined Ms. Wheeler on January 11, 2011, at the request of the
21 Department. While preparing for that examination, he examined medical records related to
22 Ms. Wheeler, including the Application for Benefits in this claim dated June 27, 2009; chart notes
23 from Dr. Grant Johnson dated June 30, 2009, and July 9, 2009; chart notes from Jeanne Boudrieau
24 dated December 28, 2009, December 30, 2009, January 27, 2009, and March 1, 2010; chart notes
25 from the St. Peters Hospital emergency room dated January 2, 2010; chart notes from
26 Dr. Steven Snow dated April 4, 2010; chart notes from Dr. Andrew Manista dated May 21, 2010; a
27 report of an independent medical examination performed by Dr. James Harris dated April 20, 2010;
28 electrodiagnostic consult notes by Dr. Zachary Abbott dated June 7, 2010; a lumbar MRI dated
29 April 13, 2010; physical therapy notes dated from January 6, 2010, to March 2, 2010; and the
30 application to reopen the claim dated January 28, 2010.

31 Ms. Wheeler presented complaining of right foot numbness, right knee and hip pain, and low
32 back pain. Dr. Dagher testified his examination did not support any worsening of Ms. Wheeler's

1 industrially related conditions during the period at issue. He described the many tests he
2 performed, and testified most of those had negative results. However, he did note she limped and
3 wore a knee brace; he found a trigger point on the right side of the gluteus maximus; some
4 decreased sharp sensation in the right foot, but a decrease that did not follow a dermatomal
5 distribution; and redness but no tenderness in the right knee. Dr. Dagher diagnosed Ms. Wheeler
6 with the following conditions: (1) mild unrelated right S-1 radiculitis; (2) right sacroiliac joint
7 dysfunction and chronic strain, probably related; (3) subjective diminished sensation on the
8 right S-1 dermatome; (4) right gluteus maximus myofascial pain, probably related; (5) subjective
9 right foot numbness in a "sock" distribution, unrelated; (6) left heel contusion, resolved; and
10 (7) subjective right ankle stiffness. In addition Dr. Dagher noted perceived right knee weakness
11 and instability, not verified on examination, and he found no evidence of right hip pathology. He
12 summarized his diagnoses of the industrially related conditions as right knee contusion, right ankle
13 sprain, and left ankle/foot contusion, all of which were proximately caused by the industrial injury.
14 According to Dr. Dagher, Ms. Wheeler's industrially related conditions did not worsen between
15 July 17, 2009, and July 6, 2010. In reaching this conclusion, Dr. Dagher testified he considered the
16 inconsistent and subjective nature of the symptoms during the year between claim closure and the
17 order on appeal.

18 ANALYSIS

19 The appealing party has the burden of establishing a prima facie case that the
20 Department order under appeal is incorrect and the appealing party is entitled to the relief
21 sought. RCW 51.52.050. Accordingly, Ms. Wheeler must establish a prima facie case that the
22 Department's July 6, 2010 order is incorrect, and that her conditions proximately caused by the
23 industrial injury worsened, as evidenced in part by objective medical evidence, between July 17,
24 2009, and July 6, 2010. Ultimately, the claimant is held to strict proof that she is entitled to the
25 benefits she seeks under the industrial insurance laws. *Olympia Brewing Co. v. Department of*
26 *Labor & Indus.*, 34 Wn.2d 498 (1949).

27 A claim may be reopened at any time, on application, in order to provide proper and
28 necessary medical treatment for conditions proximately caused by the industrial injury.
29 RCW 51.32.160 (a). In order to reopen the claim there must be an aggravation or worsening of the
30 conditions proximately caused by the industrial injury, which results in increased disability.
31 *In re Jean Wassman*, BIIA Dec, 69 953 (1986). Increased disability means increased loss of bodily
32 function. *Jean Wassman*. The loss of function must be shown, in part, by objective medical

1 evidence. *Grimes v. Lakeside Industries*, 78 Wn. App. 554 (1995). The worsening, *i.e.* the
2 increased loss of function, must occur after the last Department order that closed the claim, or
3 denied an application to reopen the claim, based upon a Department adjudication of claimant's
4 medical condition (referred to as T-1), and the last Department order which denied an application to
5 reopen the claim (referred to as T-2). *Moses v. Department of Labor & Indus.*, 44 Wn.2d 511
6 (1954); *Karniss v. Department of Labor & Indus.*, 39 Wn.2d 898 (1952). An unappealed order
7 closing the claim is *res judicata* as to the extent of a worker's injury at the time the claim is closed,
8 but not as to any subsequent aggravation of that injury. *White v. Department of Labor & Indus.*,
9 48 Wn.2d 413, 414-15 (1956).

10 Both medical professionals were hampered by the fact that neither had seen or treated
11 Ms. Wheeler after the industrial injury and before the claim was closed. Neither had first-hand
12 knowledge of her condition at the time of initial claim closure, and each had to rely on the medical
13 records when testifying as to worsening of the conditions caused by the industrial injury.
14 Ms. Boudrieau, however, had seen Ms. Wheeler several times for her industrially related conditions
15 after the claim was closed, and had the opportunity to observe her conditions during the interim
16 between T1 and T2.

17 The evidence does not clearly identify Ms. Wheeler's medical condition at the time the claim
18 was first closed on July 17, 2009. However, by closing the claim, the Department determined
19 Ms. Wheeler did not need further proper and necessary medical care for her industrially related
20 conditions. RCW 51.36.010. Accordingly, if the medical evidence supports a finding that she
21 needed treatment for those conditions as of July 6, 2010, then she has established a worsening of
22 her conditions within the meaning of the Act.

23 Dr. Dagher diagnosed Ms. Wheeler's conditions caused by her industrial injury as right
24 sacroiliac joint dysfunction and chronic strain; myofascial pain in the right gluteus maximum; and
25 left heel contusion. Ms. Boudrieau diagnosed the industrially related conditions as ankle and foot
26 pain; ankle and knee spasm; muscle spasm in the right piriformis muscle (hip); low back pain; and
27 derangement of the right knee. Both practitioners diagnosed conditions related to the hip;
28 Dr. Dagher testified as to signs and symptoms in the right gluteus maximus muscle, and
29 Ms. Boudrieau testified as to the right piriformis muscle. Ms. Boudrieau made objective medical
30 findings concerning Ms. Wheeler's lower extremities, including edema or effusion in the patella,
31 patellar laxity, right patella-femoral crepitus, and tightness in the right ilio-tibial band (in the vicinity
32 of the hip). Even Dr. Dagher, despite his denials, testified Ms. Wheeler limped, and he noted a

1 trigger point in her right gluteus maximus. Ms. Wheeler needed appropriate medical treatment for
2 these conditions. Ms. Boudrieau diagnosed a knee brace, and Ms. Wheeler obtained a cane and
3 attended physical therapy after claim closure because of these conditions.

4 Dr. Dagher discounted Ms. Boudrieau's objective findings because they were not
5 consistently present throughout the six months of treatment provided by Ms. Boudrieau. He does
6 not, however, opine that Ms. Boudrieau did not make the objective medical findings about which
7 she testified, and medical conditions such as edema tend to change over time. This is the nature of
8 healing. Under these circumstances, Ms. Boudrieau's testimony is more persuasive than that of
9 Dr. Dagher.

10 The evidence supports a finding that Ms. Wheeler's conditions proximately caused by her
11 industrial injury temporarily worsened after the claim was closed on July 17, 2009, and before
12 July 6, 2010, when the Department denied the application to reopen the claim. The claim should be
13 reopened for a temporary aggravation of Ms. Wheeler's industrially related conditions.

14 FINDINGS OF FACT

- 15 1. The claimant, Barbara L. Wheeler, was injured on June 26, 2009, while in
16 the course of her employment with Pacific Coast Security. The
17 Application for Benefits in Claim No. AK-55755 was filed with the
18 Department on July 2, 2009, and on July 8, 2009, the Department
19 entered an order allowing the claim. The claim was closed by an order of
20 the Department dated July 17, 2009.

21 On February 8, 2010, the claimant filed an application to reopen the
22 claim. The Department issued an order on May 3, 2010, denying the
23 application. The claimant filed Protests and Requests for
24 Reconsideration with the Department on May 27, 2010, and on June 17,
25 2010, directed to the May 3, 2010 order. On July 6, 2010, the
26 Department entered an order affirming the May 3, 2010 order. The
27 claimant filed an appeal with this Board on July 12, 2010, directed to the
28 order dated July 6, 2010. The appeal was assigned Docket
29 No. 10 14316, and was granted by an order of the Board dated July 21,
30 2010. These proceedings followed.

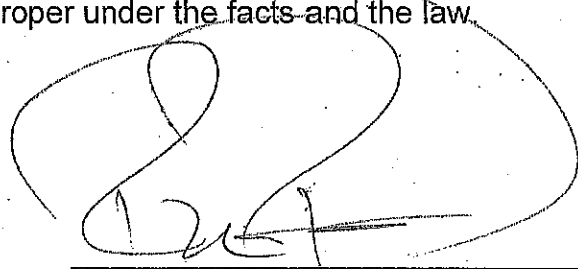
- 31 2. The claimant, Barbara L. Wheeler, was injured on June 26, 2009, when
32 she slipped on some sawdust while on her security rounds at the
Simpson Door Plant in McCleary, Washington. That fall proximately
caused injuries, including but not limited to, injuries to her right knee and
hip.
3. On July 17, 2009, the conditions resulting from Ms. Wheeler's June 26,
2009 industrial injury were fixed and stable, had reached maximum
medical improvement, and resulted in no permanent partial disability.

- 1 4. On July 17, 2009, the conditions resulting from Ms. Wheeler's June 26,
2 2009 industrial injury were not evidenced by medical findings.
3 5. On July 6, 2010, Ms. Wheeler's conditions proximately caused by her
4 June 26, 2009 industrial injury objectively worsened and were in need of
5 further necessary and proper treatment.

6 **CONCLUSIONS OF LAW**

- 7 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
8 to and the subject matter of this appeal.
9 2. Between July 17, 2009, and July 6, 2010, Barbara L. Wheeler's conditions
10 caused by the industrial injury of June 26, 2009, objectively worsened
11 within the meaning of RCW 51.32.160.
12 3. As a result of the worsening of Ms. Wheeler's industrially related
13 conditions, Barbara L. Wheeler required necessary and proper medical
14 treatment within the meaning of RCW 51.36.010.
15 4. The July 6, 2010 order of the Department of Labor and Industries is
16 incorrect and is reversed. This matter is remanded to the Department with
17 directions to reopen the claim for a temporary aggravation of
18 Ms. Wheeler's industrially related conditions, and to take such other and
19 further action as is necessary and proper under the facts and the law.

20 DATED: MAR 11 2011



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22 Robert H. Raymond, Jr.
23 Industrial Appeals Judge
24 Board of Industrial Insurance Appeals
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