

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: THEADORE HOLMES) DOCKET NO. 11 17390
2 CLAIM NO. AF-41143) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius
4

5 APPEARANCES:

6 Claimant, Theadore Holmes, by
7 Williams, Wyckoff & Ostrander, PLLC, per
8 Douglas P. Wyckoff

9 Employer, South Puget Sound Community College, by
10 The Office of the Attorney General, per
11 Thomas D. Angier

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Sarah E. Kortokrax, Assistant

15 The employer, South Puget Sound Community College, filed an appeal with the Board of
16 Industrial Insurance Appeals on July 7, 2011, from an order of the Department of Labor and
17 Industries dated May 18, 2011. In this order, the Department affirmed a prior order dated
18 December 27, 2010, and allowed the claim as an industrial injury. The Department order is
19 **AFFIRMED.**

20 **PRELIMINARY MATTERS**

21 On May 11, 2012, the parties agreed to include the Jurisdictional History in the Board's
22 record. That history, as amended, establishes the Board's jurisdiction in this appeal.

23 The deposition of Allen W. Jackson, M.D., taken on May 1, 2012, was published on receipt.
24 All objections are overruled, except for the objection at page 33, that is sustained. All motions are
25 denied.

26 The deposition of Craig Cheple, D.C., taken on June 11, 2012, was published on receipt. All
27 objections are overruled, except for the objection at page 27, that is sustained. All motions are
28 denied.

29 The deposition of Robert G.R. Lang, M.D., taken on June 11, 2012, was published on
30 receipt. All objections are overruled, except for the objection at page 14, that is sustained. All
31 motions are denied.
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1 The parties stipulated and agreed that the sole issue was whether Mr. Holmes sustained an
2 industrial injury. The issue of the occurrence of an occupational disease was not presented in this
3 appeal. The parties were fully informed and the issue was limited to the occurrence of an industrial
4 injury. The facts of this appeal did not mandate the application of the rule stated in *In re Moises*
5 *Cobian*, Dckt. No. 10 13290 (June 28, 2011) because the issue adjudicated in this appeal is within
6 the context of an industrial injury claim, not an occupational disease claim. The findings and
7 conclusions will only address the industrial injury because occupational disease was not at issue.

8 ISSUE

9 Whether the claimant sustained an industrial injury while in the course of
10 his employment with South Puget Sound Community College on
11 December 2, 2010?

12 DECISION

13 In support of its appeal, the employer, South Puget Sound Community College, presented
14 the testimony of Nancy A. Johnson, the claimant's supervisor. Further, the employer presented the
15 testimony of Dr. Allen W. Jackson, an orthopedic surgeon.

16 In response, the claimant testified and the Department presented the testimony of Dr. Robert
17 G.R. Lang, a neurosurgeon and Dr. Craig Cheple, a chiropractor.

18 Mr. Holmes was born on January 23, 1965. He is 6 feet 1 inch tall and weighs about
19 200 pounds. Mr. Holmes was employed as a custodian for six or seven years by the South Puget
20 Sound Community College.

21 On December 2, 2010, Mr. Holmes swept the floor of Room 35, a classroom. His custodial
22 duties required him to push chairs 5 to 6 inches under both sides of tables. While pushing a chair,
23 Mr. Holmes felt a sudden pain in his back. Mr. Holmes reported the back pain to his supervisor and
24 signed a form on December 2, 2010.

25 Nancy A. Johnson is the employer's supervisor of custodians. Ms. Johnson and Mr. Holmes
26 worked the same swing shift, from 4 p.m. to 1 a.m. Ms. Johnson inspected Mr. Holmes's
27 classrooms between 8 and 9 p.m. on November 30, 2010.

28 Mr. Holmes came to Ms. Johnson's office and notified her of his back injury. Ms. Johnson
29 testified that Mr. Holmes filled out the injury report and Mr. Holmes brought her the report on
30 December 1. Ms. Johnson testified she received the report on December 1 because that was the
31 date she signed the injury report. 5/11/12 Tr. at 9. However, Ms. Johnson agreed that the report
32 indicated the injury occurred at 12:30 a.m., but there was no date listed for the date of the accident.

1 Mr. Holmes sought treatment for his low back prior to the onset of sudden pain on
2 December 2, 2010. Mr. Holmes sought chiropractic treatment six months before the industrial
3 injury. On June, 12, 2010, Mr. Holmes complained of right leg pain to Dr. Cheple. Dr. Cheple did
4 not write out a diagnosis at that time, but treated Mr. Holmes' entire spine. Dr. Cheple testified that
5 Mr. Holmes showed fixations at the cervical, thoracic, and lumbar spine. Dr. Cheple did not note
6 spasm in the paravertebral muscles. Based on the chiropractic treatment provided, Dr. Cheple
7 testified he would have diagnosed a lumbar, cervical, and thoracic strain/sprain.

8 Dr. Cheple treated Mr. Holmes on December 9, 2010. Dr. Cheple diagnosed lumbar
9 subluxation complex, lumbar strain sprain, lumbalgia and sciatica, related to the industrial injury of
10 December 2, 2010. Dr. Cheple testified he did not relate the cervical and thoracic sprains to the
11 industrial injury because they were compensating for the lumbar trauma. Dr. Cheple compared the
12 loss of anterior spinal curve, as depicted in x-rays taken on April 27, 2009, and on December 9,
13 2010. The earlier x-ray portrayed a 72 percent loss of curve. By December 9, 2010, there was no
14 curve. Dr. Cheple testified that loss of the curve can cause the spine to be more susceptible to a
15 strain or sprain.

16 Dr. Cheple continued to treat the claimant's spinal conditions through February 14, 2011. By
17 February 14, 2011, Dr. Cheple testified the claimant's conditions were improving.

18 On March 14, 2011, Dr. Jackson, an orthopedic surgeon, examined Mr. Holmes.
19 Dr. Jackson took a history of global muscular complaints and lumbar pain for which treatment was
20 provided in the ten years leading up to the reported industrial injury on December 2, 2010.
21 Dr. Jackson took a medical history of multiple surgeries to Mr. Holmes' chest and lungs.
22 Mr. Holmes suffered from a spontaneous pneumothoraces that occurred when air entered the chest
23 cavity between the lungs and the chest lining. This condition caused chest and upper back pain.
24 Mr. Holmes had undergone extensive pulmonary treatment.

25 Dr. Jackson was informed of the claimant's similar lumbar symptoms prior to December 2,
26 2010. Dr. Jackson noted that Mr. Holmes had sought 5 to 6 sessions of chiropractic treatment that
27 alleviated his pre-existing lumbar symptoms.

28 On March 14, 2011, Dr. Jackson learned of Mr. Holmes' complaints of pain to his back, neck,
29 shoulders, and ribs. Dr. Jackson observed Mr. Holmes ambulate slowly and demonstrate
30 significant difficulty squatting and walking on his toes and heels. Dr. Jackson summarized the
31 claimant's performance during the evaluation as expressing reluctance to generally move anything.

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1 Dr. Jackson measured a slight lumbar range of motion restriction, during Mr. Holmes' lateral
2 bending to the right. Dr. Jackson found neither spasm nor asymmetry in the reflexes of the upper
3 extremities. Dr. Jackson testified the motor and sensory examination was normal.

4 Dr. Jackson testified there was no sudden traumatic event to Mr. Holmes' lumbar spine. The
5 degenerative disease, facet joint hypertrophy, developed over time. The spine had been treated
6 prior to the alleged industrial incident on December 2, 2010. Dr. Jackson testified the sprain
7 involved the neck and mid back as well as the low back. Dr. Jackson concluded there was no
8 proximate causal relationship between an event on December 2, 2010, and the spinal sprains.

9 On January 27, 2012, Dr. Lang, a neurosurgeon, examined Mr. Holmes. Dr. Lang testified
10 that Mr. Holmes did not mention low back pain. Mr. Holmes complained of foot, chest, hand, and
11 middle back symptoms. Dr. Lang related the spinal conditions to the industrial injury.

12 On examination, Dr. Lang found normal straight leg raising, sciatic stretching, and reflexes.
13 Dr. Lang noted good range of motion in the low back, consistent with Dr. Jackson's and
14 Dr. Cheple's findings of decreased lumbar lateral flexion.

15 Dr. Lang reviewed the medical history of treatment by Dr. Cheple, particularly the complaint
16 of right low back pain radiating down the right leg on December 9, 2010. Dr. Lang testified the
17 spinal strains were consistent with the claimant's complaints of sudden and sharp pain. Dr. Lang
18 testified the chiropractic findings on examination following the incident were consistent with
19 Mr. Holmes' description of the incident on December 2, 2010. Dr. Lang diagnosed sprains of the
20 lumbar, cervical, and thoracic spine, proximately caused by an industrial injury. Dr. Jackson
21 acknowledged that those diagnoses were accepted by the Department.

22 Drs. Lang and Jackson reviewed the reports of two MRIs, performed on February 23, 2011,
23 and March 1, 2012. Dr. Jackson testified that the February 2011 MRI was reported to show facet
24 joint hypertrophy. Dr. Jackson diagnosed a mild multilevel degenerative disc disease that
25 developed over time. Dr. Lang agreed there was no objective finding, such as a herniated disc,
26 depicted by MRI in the claimant's lumbar vertebrae.

27 ANALYSIS

28 In an employer appeal, the employer must first present evidence sufficient to make a prima
29 facie case under RCW 51.52.050. To satisfy this burden in this appeal, the employer must present
30 substantial evidence, evidence of a character, which, if un rebutted or uncontradicted, would
31 convince an unprejudiced thinking mind that the Department erred in its decision to allow the claim.

1 *Omeitt v. Department of Labor & Indus.*, 21 Wn.2d 684 (1944). The burden then shifts to the
2 worker or the Department to establish entitlement to benefits by a preponderance of the evidence.
3 *In re Christine Guttromson*, BIIA Dec. 55,804 (1981).

4 Based on a careful review of the record, I find that the employer presented sufficient
5 evidence to make a prima facie case. The employer presented the medical evidence of
6 Dr. Jackson, a competent medical expert witness. Dr. Jackson's opinion was rebutted by the
7 claimant's testimony of a sudden sharp pain, Dr. Cheple's subsequent findings on examination of a
8 strain and Dr. Lang's opinion that the spinal sprains were caused by the industrial injury.
9 Dr. Jackson's opinion lacked probative value because it was based on a defective assumption that
10 there was no sudden traumatic happening. The testimony of Mr. Holmes and Dr. Cheple was
11 persuasive that there was a sudden traumatic event that occurred while Mr. Holmes was in the
12 course of his employment on December 2, 2010.

13 The lay testimony of Ms. Johnson failed to rebut the testimony of Mr. Holmes. Ms. Johnson
14 did not recall Mr. Holmes' report to her on November 30, 2010, at 4 p.m. The confusion was
15 created by Ms. Johnson's reference to various notes she relied on for her testimony. The notes
16 were not identified except for an internal accident report required by the employer. Ms. Johnson did
17 not review the Application for Benefits filed with the Department of Labor and Industries. The
18 source document for her statement that Mr. Holmes reported to her on November 30, 2010, at
19 4 p.m., was not identified clearly.

20 The lay testimony and evidence was persuasive that Mr. Holmes sustained an industrial
21 incident on December 2, 2010. Although there was no independent eyewitness, the actions
22 described by Mr. Holmes were consistent with his duties of pushing chairs. There was consistency
23 between Mr. Holmes' report of a sudden traumatic injury and his pushing chairs. The increased
24 symptoms after the industrial injury required additional treatment. Although there were pre-existing
25 lumbar conditions, the evidence was persuasive that the industrial incident was a proximate cause
26 of lumbar, cervical, and thoracic sprains.

27 The expert medical testimony was persuasive that Mr. Holmes' pre-existing spinal condition
28 was aggravated by the residual effects of the industrial injury. The spinal conditions were described
29 as both strain and sprain by the medical experts. The findings of fact will use the term strain/sprain
30 to reflect the diagnoses in the record.

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1 **CONCLUSION**

2 The order of the Department of Labor and Industries dated May 18, 2011, in which the
3 Department affirmed its order dated December 27, 2010, and allowed claim of an industrial injury
4 was correct and should be affirmed.

5 **FINDINGS OF FACT**

- 6 1. On May 11, 2012, an industrial appeals judge certified that the parties
7 agreed to include the Jurisdictional History in the Board record solely for
8 jurisdictional purposes.
9 2. Mr. Holmes sustained an industrial injury on December 2, 2010, when
10 he pushed a chair, injuring his back, while in the course of his
11 employment with South Puget Sound Community College.
12 3. Mr. Holmes has a cervical, thoracic, and lumbar strain/sprain
13 proximately caused by the industrial injury of December 2, 2010.

14 **CONCLUSIONS OF LAW**

- 15 1. Based on the record, the Board of Industrial Insurance Appeals has
16 jurisdiction over the parties to and the subject matter of this appeal.
17 2. Mr. Holmes did sustain an industrial injury within the meaning of
18 RCW 51.08.100 on December 2, 2010.
19 3. The Department order dated May 18, 2011, is correct and is affirmed.

20 DATED: AUG 23 2012

21 *Tom Kalenius*

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23 Tom M. Kalenius
24 Industrial Appeals Judge
25 Board of Industrial Insurance Appeals
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