

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

1 **IN RE: KENNETH E. OLGUIN**) **DOCKET NO. 17 19394**
2)
3 **CLAIM NO. BA-28286**) **DECISION AND ORDER**
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5 Kenneth E. Olguin was a delivery truck driver for the employer, Ostrom Mushroom Farm
6 Company (Ostrom). He was making deliveries when the door to his truck stuck while he tried to open
7 it. Mr. Olguin, who has a long history of bilateral shoulder problems, complains that he injured his
8 left shoulder when trying to open the door. The employer contends that Mr. Olguin hurt himself while
9 working at home, not while making deliveries. The Department denied this claim because Mr. Olguin
10 was not in the course of his employment when he injured his shoulder. Our industrial appeals judge
11 affirmed the Department's order that rejected the claim. We conclude that Mr. Olguin aggravated his
12 preexisting left shoulder conditions while in the course of his employment with Ostrom. We issue this
13 order to make necessary Findings of Fact and Conclusions of Law and to correct an evidentiary
14 ruling. The Department's May 16, 2017 order is **REVERSED** and this matter is **REMANDED** to the
15 Department to allow the claim for an industrial injury.
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DISCUSSION

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23 Sixty-eight-year-old Kenneth E. Olguin has a long work history doing warehouse labor and
24 driving delivery trucks. He also has a medical history of bilateral rotator cuff tears and other shoulder
25 problems dating back at least to 2011. R. Trent McKay, M.D., performed rotator cuff repair surgery
26 to Mr. Olguin's right shoulder, after which Mr. Olguin began having increased left shoulder pain. An
27 MRI dated April 27, 2012, showed a large tear in the left rotator cuff, and x-rays taken of Mr. Olguin's
28 left shoulder on May 23, 2013, showed chronic impingement and arthritis. Mr. Olguin elected not to
29 have left shoulder surgery at that time.
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34 On January 5, 2016, Mr. Olguin drove a refrigerated delivery truck from Lacey to Seattle to
35 deliver produce to two of Ostrom's customers, Sound Produce and Charlie's Produce. At 3 p.m., he
36 parked along the curb in front of Sound Produce and attempted to open the truck door. The door
37 stuck and Mr. Olguin "yanked" on it. He felt a pop and had pain along the ribs on his right side and
38 in his left arm. Mr. Olguin completed his deliveries that afternoon, but that evening his wife took him
39 to the emergency room (ER) at St. Peter's Hospital. He was prescribed narcotic pain medications
40 and released. He telephoned his supervisor, Richard Gaidrich, to say that he had been injured at
41 work, but Mr. Gaidrich had already gone to bed so Mr. Olguin spoke with his wife, Vickie Gaidrich.
42 Ms. Gaidrich testified that Mr. Olguin said he had been injured while working at home the previous
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1 Sunday, January 3, 2016; he also told her that he was on pain medications and apologized for
2 sounding "weird."
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4 On January 11, 2016, Mr. Olguin signed an Incident Statement in which he described hurting
5 his left shoulder and right rib cage while yanking on the trailer door on January 5, 2016. He testified
6 that he gave the Incident Statement to his employer. Mr. Gaidrich denies that Mr. Olguin ever gave
7 him the statement and said he never spoke with Mr. Olguin about the events of January 5, 2016.
8 However, this testimony is contradicted by that of Department investigator, Gregory Woehler.
9 Mr. Woehler testified that Mr. Gaidrich told him that Mr. Olguin had reported the January 5, 2016
10 injury to him on January 9, 2016.
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12 Testimony about the ER notes from January 5, 2016, revealed that they do not reflect any
13 work injury nor any left arm complaints, rather they record Mr. Olguin's complaints about his right side
14 and mention a fall at home two days before, on January 3, 2016. On January 3, 2016, Mr. Olguin
15 had been installing cabinets in his kitchen when he slipped down one step from a stepstool and slid
16 down the wall along his right side. He denied any injury resulting from that incident. The ER notes
17 themselves are not in evidence and none of the ER providers testified. Both Mr. and Ms. Olguin
18 testified that Mr. Olguin complained of his January 5, 2016 injury while in the ER, not of any other
19 injury, although Ms. Olguin explained that she had commented on the January 3, 2016 incident,
20 saying only "that probably didn't help."
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22 Mr. Olguin went to work on January 4, 2016, and drove to and from Seattle to make deliveries.
23 He went to work the morning of January 5, 2016, where he loaded his truck and again drove to
24 Seattle. There is no evidence that he had any pain complaints or problems performing his job on
25 January 4, nor on January 5, before trying to open the stuck door of his truck.
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27 Mr. Olguin saw his primary care physician, J. Scott Smitherman, M.D., on January 15, 2016.
28 He complained of a shoulder injury that occurred on January 5, 2016. Mr. Olguin then saw Dr. McKay
29 on January 25, 2016. Mr. Olguin also told Dr. McKay that he had injured himself on January 5, 2016,
30 while yanking on a truck door. This caused a substantial increase in Mr. Olguin's left shoulder pain
31 and shoulder dysfunction. An MRI taken February 10, 2016, revealed a large tear in the rotator cuff
32 and retraction of about two-thirds across the humeral head, substantial atrophy of the supraspinatus
33 and infraspinatus, acromioclavicular osteoarthritis and impingement, and a biceps rupture.
34 Dr. McKay describes the 2016 MRI as showing both chronic and acute recent changes when
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1 compared to the 2012 MRI. Dr. McKay testified that the events of January 5, 2016, aggravated
2 Mr. Olguin's preexisting left shoulder conditions.
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4 Dr. McKay performed surgery to repair Mr. Olguin's left shoulder on April 19, 2016. Mr. Olguin
5 had not applied for industrial insurance benefits at that time and the surgery was paid for through
6 private insurance. He testified that his concern was to have the surgery as quickly as possible and
7 that he understood from Dr. McKay that it would be quicker to have the procedure done using his
8 private insurance rather than have his shoulder treated under the Industrial Insurance Act. Dr. McKay
9 did not recall having that conversation with Mr. Olguin, but he testified that this observation was
10 consistent with his experience. Later, on October 3, 2016, Dr. McKay assisted Mr. Olguin with
11 preparing his application for industrial insurance benefits for the January 5, 2016 injury under Claim
12 No. BA-28286.
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14 Edward I. Dagher, M.D., reviewed selected medical records relating to Mr. Olguin's shoulders
15 but did not examine him. Based on this review, Dr. Dagher diagnosed Mr. Olguin with chronic left
16 shoulder pain due to rotator cuff tear and retraction, displaced humerus with subluxation of the
17 humeral head, and osteoarthritis of the acromioclavicular joint. He testified that the 2016 MRI did not
18 show evidence of acute injury to the left shoulder and said that Mr. Olguin's conditions in 2016 were
19 due to a natural progression of his preexisting conditions. His review of the 2012 and 2016 MRIs
20 was limited to the reports of those images; unlike Dr. McKay, Dr. Dagher did not review the images
21 themselves.
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23 We disagree with our judge where she found that loading mushrooms into his truck and
24 delivering them to his customers are not distinctive conditions of Mr. Olguin's employment. Distinctive
25 conditions of employment need not be peculiar or unique to a worker's job, rather they "must be
26 conditions of **employment**, that is, conditions of the worker's particular occupation as opposed to
27 conditions coincidentally occurring in his or her workplace."¹ We are comfortable saying that loading
28 and delivering mushrooms are particular to Mr. Olguin's job and do not occur merely coincidentally in
29 his workplace. Moreover, we also consider lifting an 800-pound door on the trailer of his truck several
30 times each day to be a distinctive condition of his employment. Nevertheless, there is no medical
31 evidence that relates repeated lifting of that door, or loading and unloading his truck and delivering
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¹ *Dennis v. Department of Labor & Indus.*, 109 Wn. 2d 467, 481 (1987) (Emphasis in text).

1 product, to the worsened left shoulder conditions. Accordingly, we cannot find that he suffers from
2 an occupational disease of his left shoulder.²
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4 We do believe that Mr. Olguin suffered an industrial injury on January 5, 2016, and that the
5 injury aggravated his preexisting left shoulder conditions. He testified that he injured himself when
6 attempting to open the door of his truck, but the door stuck and he was required to yank on it. He felt
7 immediate pain in his left shoulder and right side for which he sought treatment immediately after
8 returning home. Dr. McKay testified that this incident aggravated Mr. Olguin's preexisting left
9 shoulder conditions, and on that issue we find Dr. McKay to be more persuasive than Dr. Dagher.
10 Dr. McKay is Mr. Olguin's attending physician, and has been since 2012, during which time he treated
11 Mr. Olguin's left and right shoulders, thus the bases for his opinions is significantly greater than
12 Dr. Dagher's. As the attending physician, Dr. McKay's opinion is entitled to special consideration.³
13 Dr. Dagher has never examined Mr. Olguin; he merely performed a forensic review of medical records
14 and there is no evidence of how comprehensive those records may have been. And Dr. McKay
15 reviewed the actual diagnostic images of the MRIs taken in 2012 and 2016, while Mr. Dagher relied
16 only on the interpretations provided by others in the reports of those images.
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24 The employer argues that Mr. Olguin's inconsistent statements concerning the cause of his
25 left shoulder pain in 2016, and his delay in reporting an injury on January 5, 2016, prevent a finding
26 that he sustained a work-related injury or any injury while in the course of his employment. We
27 disagree. Mr. Olguin's statements to Ms. Gaidrich on the evening of January 5, 2016, do not influence
28 our decision. Mr. Olguin was on Oxycodone when he spoke with Ms. Gaidrich after returning from
29 the ER on January 5; he apologized to her for sounding weird. He testified that he told her that he
30 had been hurt that day at work; she testified that he spoke only about the January 3, 2016 events.
31 Under the circumstances it is hard to credit either witness about the contents of that conversation.
32 The evidence about the ER notes is similarly inconclusive. Neither the notes nor the testimony of
33 providers who prepared them and treated Mr. Olguin that evening are in the record. On the other
34 hand, both Mr. and Ms. Olguin testified that he told the ER providers that he hurt himself at work that
35 day; and Ms. Olguin explained that she mentioned his slipping while working in the kitchen on
36 January 3, 2016, in passing. Those comments may have been recorded out of context. It is clear,
37 however, that Mr. Olguin returned to work on each of the following two days and there is no evidence
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46 ² RCW 51.08.140; *Dennis*, at 477.

47 ³ *Spalding v. Department of Labor & Indus.*, 29 Wn.2d 115 (1947).

1 concerning pain complaints or problems doing his job before late afternoon on January 5, 2016. We
2 would expect some evidence of him having difficulty doing his job before late afternoon on January 5,
3 2016, if he had been injured on January 3, 2016, but there is none. And finally, we find Mr. Olguin's
4 explanation for his delay in filing for benefits under the Industrial Insurance Act to be entirely
5 consistent with his actions. He wanted prompt treatment of his aggravated condition and believed
6 that he would receive that treatment more quickly by using his private resources and not relying on
7 the Department of Labor and Industries to provide it. He testified that this is the advice he received
8 from Dr. McKay. While Dr. McKay did not recall that conversation, he did not deny that it occurred
9 and his experience is consistent with Mr. Olguin's understanding. Mr. Olguin may also have had
10 other motivations to avoid seeking benefits under the Industrial Insurance Act immediately after his
11 injury. But neither the benefits nor the burdens under the Act may be avoided,⁴ and if Mr. Olguin
12 suffered an industrial injury on January 5, 2016, he is entitled to benefits for that injury.⁵

13 We are persuaded that Mr. Olguin suffered an industrial injury on January 5, 2016, that he was
14 in the course of his employment at the time, and that the claim should be allowed for an aggravation
15 of his preexisting left shoulder conditions.

16 **DECISION**

17 In Docket No. 17 19394, the claimant, Kenneth E. Olguin, filed an appeal with the Board of
18 Industrial Insurance Appeals on June 16, 2017, from an order of the Department of Labor and
19 Industries dated May 16, 2017. In this order, the Department affirmed the provisions of an order
20 dated February 24, 2017, rejecting the claim because at the time of his injury Mr. Olguin was not in
21 the course of employment. This order is incorrect and is reversed, and this matter is remanded to
22 the Department to allow the claim as an industrial injury.

23 **FINDINGS OF FACT**

- 24 1. On August 28, 2017, an industrial appeals judge certified that the parties
25 agreed to include the Jurisdictional History in the Board record solely for
26 jurisdictional purposes.
- 27 2. Kenneth E. Olguin worked as a delivery truck driver for over ten years. His
28 job duties in January 2016 included loading his delivery truck using an
29 electric pallet jack, driving his truck to make deliveries to customers, making
30 those deliveries, opening a door to the truck which weighed approximately
31 800 pounds, and unloading his truck.

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46 ⁴ RCW 51.04.060.

47 ⁵ RCW 51.32.010, 51.36.010.

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3. Loading his delivery truck using an electric pallet jack, driving his truck to make deliveries to customers, making those deliveries, opening a door to the truck weighing approximately 800 pounds, and unloading his truck, constitute distinctive conditions of Kenneth E. Olguin's employment.
 4. Kenneth E. Olguin's conditions diagnosed as left shoulder rotator cuff tear, atrophy of the supraspinatus and infraspinatus, left biceps rupture, and acromioclavicular osteoarthritis of the left shoulder did not arise naturally and proximately out of the distinctive conditions of Kenneth E. Olguin's employment with Ostrom Mushroom Farm Co.
 5. Kenneth E. Olguin sustained an injury in the course of employment on January 5, 2016, when he opened the door to his delivery truck and aggravated his preexisting left shoulder rotator cuff tear, atrophy of the supraspinatus and infraspinatus, and acromioclavicular osteoarthritis of the left shoulder, and ruptured left biceps.

CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
 2. Kenneth E. Olguin sustained an industrial injury within the meaning of RCW 51.08.100 on January 5, 2016.
 3. Kenneth E. Olguin's left shoulder conditions are not an occupational diseases within the meaning of RCW 51.08.140.
 4. The Department order dated May 16, 2017, is incorrect and is reversed. The claim is remanded to the Department to issue an order allowing the claim.

29 Dated: September 14, 2018.

30 BOARD OF INDUSTRIAL INSURANCE APPEALS

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32 LINDA L. WILLIAMS, Chairperson

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34 FRANK E. FENNERTY, JR., Member

DISSENT

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41 I respectfully dissent from the majority decision to allow Kenneth Olguin's claim, as the
42 preponderance of the credible evidence is that Kenneth Olguin was not injured at work on January 5,
43 2016. He has preexisting bilateral shoulder problems that probably were aggravated when he fell
44 from a ladder while working at home on January 3, 2016. I am not persuaded that he was injured or
45 that he aggravated his left shoulder on January 5, 2016, while driving for Ostrom.
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1 The evidence establishes that Mr. Olguin initially and consistently maintained that he did not
2 have an industrial injury on January 5, 2016. He told the emergency room providers after work that
3 evening that he injured himself two days earlier while hanging cabinets at home in his kitchen. When
4 Mr. Olguin spoke with Vickie Gaidrich after returning from the emergency room he told her that he
5 would not be at work the following day because he had injured himself two days earlier. His
6 application for short term disability benefits states that the benefits were not based on an accident
7 and that his disability was not work related, that he was not eligible for worker's compensation or
8 other state disability benefits, and that no injury occurred at work. In October 2016, 10 months later
9 and after his short term disability benefits ended, he applied for Industrial Insurance benefits, and is
10 suddenly alleging an injury on January 5, 2016, contrary to all of his prior statements. Mr. Olguin's
11 testimony that he injured himself while opening the door to his truck on January 5, 2016, is not
12 credible in the face of his many inconsistent statements and actions.

13 Furthermore, Mr. Olguin's explanation for why he did not initially seek treatment for his left
14 shoulder under the Industrial Insurance Act is contradicted by the testimony of his surgeon,
15 Dr. McKay. Mr. Olguin testified that he wanted the surgery to be performed quickly, and that
16 Dr. McKay told him that using his private insurance to obtain shoulder surgery would be quicker than
17 using Industrial Insurance benefits. However, Dr. McKay testified that he would not generally make
18 such a recommendation to a patient, and he did not recall telling Mr. Olguin that obtaining surgery
19 under his private insurance would be quicker than being treated through the Department of Labor
20 and Industries.

21 Nor am I persuaded by the medical evidence provided by Dr. McKay that this claim should be
22 allowed. When Mr. Olguin finally applied for industrial insurance benefits in October 2016, 10 months
23 after the injury, Dr. McKay assisted him. But in the provider's portion of the Report of Accident in this
24 claim Dr. McKay stated that there was no preexisting impairment of Mr. Olguin's left shoulder, and
25 that Mr. Olguin had never been treated for the same or a similar condition. The medical evidence
26 clearly shows otherwise. Mr. Olguin had a left shoulder rotator cuff tear since 2012, at least, as
27 shown on an MRI and for which Mr. Olguin had seen Dr. McKay. Dr. McKay's May 23, 2013 chart
28 notes reflects that Mr. Olguin suffered from an extensive history of bilateral shoulder pain. While
29 Dr. McKay testified that a 2016 MRI showed acute changes to Mr. Olguin's left shoulder, that
30 testimony was contradicted by Dr. Dagher. The medical evidence does not reflect any new condition
31 attributable to the alleged injury that Mr. Olguin belatedly claims happened on January 5, 2016.

1 As the appealing party Mr. Olguin has the burden of proof to prove his entitlement to benefits.
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3 Mr. Olguin is not credible and his belated contention 10 months later is simply not believable. I agree
4 with our industrial appeals judge that Mr. Olguin has not met his burden of proof. The preponderance
5 of the evidence supports that the Department order rejecting the claim is correct and should be
6 affirmed.
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8 Dated: September 14, 2018.
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10 BOARD OF INDUSTRIAL INSURANCE APPEALS

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13 JACK S. ENG, Member
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**Addendum to Decision and Order
In re Kenneth E. Olguin
Docket No. 17 19394
Claim No. BA-28286**

Appearances

Claimant, Kenneth E. Olguin, by Williams, Wyckoff & Ostrander, PLLC, per Wayne L. Williams
Employer, Ostrom Mushroom Farm Co., by AMS Law PC, per Richard Skeen
Retrospective Rating Group, PITB Services Inc. Retro #10626 & 10962, None
Department of Labor and Industries, by Office of the Attorney General, per Leslie V. Johnson

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on June 18, 2018, in which the industrial appeals judge affirmed the Department order dated May 16, 2017. The employer, Ostrom Mushroom Farm Co. filed a response to the Claimant's Petition for Review on August 2, 2018.

Evidentiary Rulings

Exhibit 2 to the Deposition of Dr. Robert McKay was renumbered as Exhibit 7. There was no objection to its admission, however, it was rejected in the Proposed Decision and Order as a duplicate of Exhibit 1. It is not. Exhibit 7 and Exhibit 1 are both copies of the Report of Accident in Claim No. BA-28286. However, Exhibit 1 has a substantial portion of the Report of Accident redacted. Exhibit 7 shows the entire Report of Accident without redaction and is supported by the testimony of Dr. McKay. Exhibit 7 is admitted.

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