BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

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

INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius

APPEARANCES:

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

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

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

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

PRELIMINARY MATTERS

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

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

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

The deposition of Robert G.R. Lang, M.D., taken on June 11, 2012, was published on receipt. All objections are overruled, except for the objection at page 14, that is sustained. All motions are denied.

The parties stipulated and agreed that the sole issue was whether Mr. Holmes sustained an industrial injury. The issue of the occurrence of an occupational disease was not presented in this appeal. The parties were fully informed and the issue was limited to the occurrence of an industrial injury. The facts of this appeal did not mandate the application of the rule stated in *In re Moises Cobian,* Dckt. No. 10 13290 (June 28, 2011) because the issue adjudicated in this appeal is within the context of an industrial injury claim, not an occupational disease claim. The findings and conclusions will only address the industrial injury because occupational disease was not at issue.

ISSUE

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

DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

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

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

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

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

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

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

CONCLUSION

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

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

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

DATED: AUG 23 2012.

Tom Kalenius

Tom M. Kalenius
Industrial Appeals Judge
Board of Industrial Insurance Appeals