BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE:	**Mr. B**	)	**DOCKET NO.**
		)	
CLAIM NO.	_____	)	**PROPOSED DECISION AND ORDER**

Tom M. Kalenius, Industrial Appeals Judge — **Mr. B** sustained an industrial injury when he slipped and fell on January 17, 2018. The Department closed the claim on March 27, 2019 with a permanent partial disability award equal to Category 4, WAC 296-20-280, taking into consideration a preexisting permanent dorsolumbar and/or lumbosacral impairment equal to Category 3.

On April 24, 2020, the Department denied the application to reopen, acknowledged responsibility for a lumbar strain, lumbar spondylosis with radiculopathy and lumbar radiculopathy and specifically denied responsibility for a right foot drop condition. The Department issued an order on January 28, 2021 that affirmed the order dated April 24, 2020.

The preponderance of the evidence was persuasive that the industrial injury was a proximate cause of L5 disc impingement, right ankle and foot drop conditions that worsened and required further medical treatment, including specific treatment modalities that the Department was notified of and had occasion to consider before denying the application to reopen.

The Department order dated January 28, 2021 was incorrect and is **REVERSED**. The matter is **REMANDED** to the Department with directions to reopen, accept responsibility for L5 disc impingement, L4-5 stenosis and spondylosis with radiculopathy, stenosis and spondylosis at L3-4, right ankle and foot drop conditions, osteoarthritis, subluxation of metatarsophalangeal (MTP) joint of right lesser toe(s), right ankle and foot tenosynovitis, and posterior tibial tendinitis of the right leg and provide further necessary and proper medical treatment, including but not limited to the lengthening of the calf muscle, fusion of the subtalar and talonavicular joints and repair of a dislocating second toe of the right foot and ankle also known as subtalar joint fusion, gastrocnemius recession, talonavicular joint fusion, second metatarsophalangeal joint plantar plate repair and second hammertoe repair, performed on November 7, 2020 and a neurosurgical evaluation to update, and if prescribed, to authorize specific medical modalities of treatment that were previously denied to decompress the L5 nerve root impingement, including but not limited to right L4-5 hemilaminectomy, medial facetectomy and a right L5-S1 foraminotomy and provide benefits according to law.

DISCUSSION

Mr. B is 59 years old and worked for **Employer** beginning in 1999. **Mr. B** injured his back in 1995, 1999 and 2010, requiring fusion surgery in 2012 at L5-S1. Following surgery, **Mr. B** performed the normal duties of his employment and denied any foot drop or pain for the six years prior to January 17, 2018.

Mr. B sustained an industrial injury on January 17, 2018 when he slipped and fell on a residential stair, landing on his back, sliding down stairs and jamming his heel into the concrete while in the course of his employment with **Employer** .

Following emergency treatment, **Mr. B** was referred to Dr. Ryan Halpin, a neurosurgeon. Dr. Halpin treated **Mr. B** four times for his low back, beginning on March 9, 2018 and continuing on April 20, 2018, September 28, 2018 and August 21, 2020. Dr. Halpin reviewed x-rays taken in March 2018 that depicted a prior L5-S1 intact fusion and degenerative changes at L3-4 and L4-5.

Dr. Halpin reviewed both the films and the reports of an MRI scan, EMG and nerve conduction studies taken in April 2018. A prior fusion was depicted at L5-S1 along with postsurgical changes at that level, obscuring the L5-S1 neural foramen as well as facet arthritis or spondylosis with lateral recess narrowing at L4-5. Dr. Halpin found impingement of the L5 nerve root and retrolisthesis and mild stenosis at L3-4 as well as electrodiagnostic evidence of a L5 radiculopathy.

Dr. Halpin denied the foot drop was preexisting because there was no data from **Mr. B** prior medical records, including after the 2012 L5-S1 fusion, that **Mr. B** had foot drop. Dr. Halpin relied on **Mr. B** statements to Dr. Halpin that he had foot drop after the January 17, 2018 industrial injury. Dr. Halpin found weakness in right foot dorsiflexion and decreased sensation in the L4 and L5 nerve distribution during the initial examination conducted on March 9, 2018.

Dr. Halpin concluded that the L5 nerve root damage due to nerve impingement, including the accepted L5 radiculopathy was the cause of **Mr. B** foot drop and recommended surgical decompression of the L5 nerve root. Dr. Halpin notified the Department that the residual effects of the industrial injury of January 17, 2018 included foot drop and were not limited to a lumbar strain when he wrote that "lumbar strains do not cause foot drops."[1] Dr. Halpin explained that the radiculopathy at L5 impinged the nerves that innervated the muscle that lifted the ankle up and prevented foot drop. Treatment was necessary and proper to decompress the L5 nerve root

[1] Halpin Dep. at 13-14

with the specific modalities of a right L4-5 hemilaminectomy, medial facetectomy and a right L5-S1 foraminotomy.

After the Department refused to authorize the necessary and proper treatment modalities recommended by Dr. Halpin, Dr. Halpin found persistent clinical findings of right foot drop and weakness in dorsiflexion. Due to the duration of these signs and the time that lapsed because the Department refused to authorize surgical decompression of the L5 nerve root, Dr. Halpin expressed frustration with the Department's refusal to authorize further surgical treatment. It was this testimony that was incorrectly argued as the basis for an opinion of Dr. Halpin that **Mr. B** was at maximum medical improvement on September 28, 2018.[2] The context of the statements was persuasive that Dr. Halpin's opinion was that **Mr. B** was in need of surgery to decompress the L5 nerve root, proximately caused by the industrial injury as of January 28, 2021. The foot drop was already, basically, as bad as it was going to get between September 18, 2018 and 2020.[3]

As of August, 2020, Dr. Halpin testified **Mr. B** objective findings proximately caused by the industrial injury were weakness in right foot dorsiflexion and decreased sensation in the L4 and L5 nerve distribution, accompanied by worsening back and leg pain. Dr. Halpin testified an MRI performed on August 11, 2020 depicted the postsurgical changes at L5-S1 and a progression of the nerve impingement at L4-5 and stenosis at L3-4. Dr. Halpin testified that the industrial injury was a proximate cause of L4-5 stenosis and spondylosis with radiculopathy and the spondylosis at L3-4 was contributing to the stenosis. The preponderance of the evidence was persuasive that the L4-5 stenosis and spondylosis with radiculopathy and L3-4 spondylosis and stenosis were proximately caused by the residual effects of the industrial injury.

Dr. Michael Lundborg, a podiatrist, performed foot surgery on November 7, 2020. Dr. Lundborg lengthened the calf muscle, fused the subtalar and talonavicular joints and repaired a dislocating second toe of the right foot. Dr. Lundborg explained these procedures were technically a subtalar joint fusion, gastrocnemius recession, talonavicular joint fusion, second metatarsophalangeal joint plantar plate repair and second hammertoe repair. Dr. Lundborg testified these modalities were necessary and proper medical treatment for conditions proximately caused by the industrial injury but did not correct the foot drop. The treatment procedures only corrected the consequences of the foot drop to decrease the pain and restore, partially, ambulatory function.

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[2] Halpin Dep. at 15
[3] Halpin Dep. at 19

Dr. Lundborg examined **Mr. B** on January 4, 2021, near the second terminal date of January 28, 2021. Dr. Lundborg found the consequences of surgery were healing and **Mr. B** was participating in physical therapy with the progressive replacement and removal of casts. Dr. Lundborg reported **Mr. B** was going to start slowly transitioning to weight bearing but was not bearing any weight on his foot. Dr. Lundborg testified weakness in dorsiflexion persisted. Dr. Lundborg agreed with the assumed testimony of Dr. Halpin that between March 27, 2019 and the filing of the application to reopen on February 18, 2020, **Mr. B** foot drop was "as bad as it was going to get."[4]

Dr. Patrick Bays, an orthopedic surgeon, examined **Mr. B** a single time on January 6 2021. Dr. Bays found **Mr. B** right foot was still dressed in post-operative bandages and remarked the bandaged foot was consistent with **Mr. B** report of a recent foot surgery. Dr. Bays testified that his examination omitted "many of the things typically examined."[5] The omission meant Dr. Bays did not examine **Mr. B** fully for a foot drop condition because **Mr. B** gait, station and walking were not observed by Dr. Bays. Dr. Bays did not perform any provocative testing to the ankle. Instead, Dr. Bays measured range of motion and circumference while **Mr. B** was in a stationary upright position, without any weight bearing on his right foot and ankle.

Dr. Bays did not review the operative report of the surgery performed on November 7, 2020 and concluded only from his observation of four incisions that the surgery was limited to a subtalar fusion. Dr. Bays testified that a subtalar fusion "would really not help a footdrop."[6] Instead, Dr. Bays suggested tendon transfers and stated it did not appear than tendon transfers were performed.

Dr. Bays interpreted Dr. Lundborg's opinion that the podiatric surgery was not to correct the footdrop. Dr. Lundborg's statement was that the podiatric procedure was to correct and alleviate the consequences of persistent foot drop and partially restore ambulatory function. Dr. Bays testified that the November 7, 2020 podiatric procedure treated the preexisting degenerative changes to the right foot and tibialis tendinitis and not the foot drop. Dr. Bays testified that he did not find foot drop on his examination.

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[4] Lundborg Dep. at 22
[5] Bays Dep. at 19
[6] Bays Dep. at 26

DECISION

The findings and conclusion address the specific treatment modalities because the scope of the claim includes the treatment modalities for three reasons.

First, Dr. Halpin put the Department on notice that foot drop was related to the industrial injury when he wrote the Department on January 28, 2018 that lumbar strains do not cause foot drop. The Department was requested but did not authorize the necessary and proper lumbar treatment modalities recommended by Dr. Halpin.

Second, the preponderance of the evidence was persuasive that the foot drop and right ankle conditions were related to the industrial injury, worsened between the terminal dates and were in need of further medical treatment, including podiatric surgery performed on November 7, 2020 and lumbar surgery previously prescribed. The Board's jurisdiction may be limited where a new condition is not related to the original injury.[7] But here, the Department's stated basis for denying the reopening application because it was not responsible for foot drop was not denial of a new condition because the Department clearly had occasion to consider the treatment if the condition were allowed.

Third, foot drop and ankle conditions were specifically identified in the application to reopen, filed on February 18, 2020. The application was admitted as Exhibit 3. The claimant informed the Department in the application that the right foot and nerve damage in the back were the parts of the body affected and described physical complaints as drop foot and pain in the right foot and ankle.

Dr. Michael Lundborg, DPM, notified the Department in the provider section of the application that **Mr. B** symptoms of right foot drop with compensatory tendinitis, arthritis and pain in the right forefoot, ankle and mid foot were the result of the covered injury. Dr. Lundborg listed all the elements of current medical findings that supported an objective worsening of the industrial injury since claim closure as right foot drop was accompanied by decreased dorsiflexion and weakness in the right ankle. Dr. Lundborg wrote on the application that the drop foot is a result of the back injury and has led to further pain in the right foot. Dr. Lundborg stated in the application that the treatment plan was bracing and possible surgery with a 3-plus month recovery.

In Docket No. 21 10899, the claimant, **Mr. B** , filed an appeal with the Board of Industrial Insurance Appeals on January 28, 2021. The claimant appeals a Department order dated January 28, 2021. In this order, the Department affirmed the Department order dated April 24, 2020 that denied **Mr. B** application to reopen filed on March 2, 2020. The order is incorrect and is

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[7] *In re Ronald Holstrom*, BIIA Dec., 70,033 (1986)

reversed. The matter is remanded to the Department with directions to reopen the claim, accept responsibility for L5 disc impingement, L4-5 stenosis and spondylosis with radiculopathy and stenosis and spondylosis at L3-4, right ankle and foot drop conditions, osteoarthritis, subluxation of metatarsophalangeal (MTP) joint of right lesser toe(s), right ankle and foot tenosynovitis, and posterior tibial tendinitis of the right leg and provide further necessary and proper medical treatment, including but not limited to the lengthening of the calf muscle, fusion of the subtalar and talonavicular joints and repair of a dislocating second toe of the right foot and ankle also known as subtalar joint fusion, gastrocnemius recession, talonavicular joint fusion, second metatarsophalangeal joint plantar plate repair and second hammertoe repair, performed on November 7, 2020 and a neurosurgical evaluation to update and if prescribed, to authorize specific medical modalities of treatment that were previously denied to decompress the L5 nerve root impingement, including but not limited to a right L4-5 hemilaminectomy, medial facetectomy and a right L5-S1 foraminotomy and provide benefits according to law.

FINDINGS OF FACT

1. On April 13, 2021, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. **Mr. B** sustained an industrial injury on January 17, 2018 when he slipped and fell, landing on his back, sliding down stairs and jamming his heel into the concrete while in the course of his employment with **Employer** sustaining lumbar conditions of L5 nerve impingement, L4-5 stenosis and spondylosis with radiculopathy and stenosis and spondylosis at L3-4 as well as right ankle and foot drop conditions, osteoarthritis, subluxation of metatarsophalangeal (MTP) joint of the right lesser toes, right ankle and foot tenosynovitis and posterior tibial tendinitis of the right leg proximately caused or aggravated by the industrial injury.

3. On March 27, 2019, **Mr. B** objective findings proximately caused by the industrial injury were weakness in right foot dorsiflexion and decreased sensation in the L4 and L5 nerve distribution.

4. On January 28, 2021, **Mr. B** objective findings proximately caused by the industrial injury were continuing and worsened as shown by worsening signs of right foot drop and weakness in right foot dorsiflexion as well as decreased sensation in the L4 and L5 nerve distribution, L5 nerve impingement, L4-5 stenosis and spondylosis with radiculopathy and stenosis and spondylosis at L3-4.

5. The lengthening of the calf muscle, fusion of the subtalar and talonavicular joints and repair of a dislocating second toe of the right foot

and ankle also known as subtalar joint fusion, gastrocnemius recession, talonavicular joint fusion, second metatarsophalangeal joint plantar plate repair and second hammertoe repair, performed on November 7, 2020 was necessary and proper medical treatment for conditions proximately caused by the industrial injury.

6. As of January 28, 2021, **Mr. B** conditions, proximately caused by the industrial injury had undergone podiatric surgery that attempted to correct the consequences of the foot drop to decrease the pain and restore partial ambulatory function, and **Mr. B** was unable to bear weight due to the residual effects of the industrial injury.

7. **Mr. B** conditions, proximately caused by the industrial injury, objectively worsened between the terminal dates of March 27, 2019 and January 28, 2021.

8. **Mr. B** conditions, proximately caused by the industrial injury, were not fixed and stable and needed further proper and necessary medical treatment, including the lengthening of the calf muscle, fusion of the subtalar and talonavicular joints, repair of a dislocating second toe of the right foot and ankle also known as subtalar joint fusion, gastrocnemius recession, talonavicular joint fusion, second metatarsophalangeal joint plantar plate repair and second hammertoe repair, performed on November 7, 2020 and a neurosurgical evaluation to update and, if prescribed, authorize specific medical modalities of treatment that were previously denied to decompress the L5 nerve root impingement, including but not limited to a right L4-5 hemilaminectomy, medial facetectomy and a right L5-S1 foraminotomy.

CONCLUSIONS OF LAW

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

2. Between March 27, 2019 and January 28, 2021, **Mr. B** conditions proximately caused by the industrial injury objectively worsened within the meaning of RCW 51.32.160.

3. Mr. **Mr. B** lumbar and foot drop conditions proximately caused by the industrial injury were not fixed and stable as of January 28, 2021, and he is entitled to further treatment. RCW 51.36.010.

4. The Department order dated January 28, 2021, is incorrect and is reversed. The matter is remanded to the Department to the Department with directions to reopen, accept responsibility for L5 disc impingement, L4-5 stenosis and spondylosis with radiculopathy and stenosis and spondylosis at L3-4, right ankle and foot drop conditions, osteoarthritis, subluxation of metatarsophalangeal (MTP) joint of right lesser toe(s), right ankle and foot tenosynovitis, and posterior tibial tendinitis of the right leg and provide further necessary and proper medical treatment, including

but not limited to the lengthening of the calf muscle, fusion of the subtalar and talonavicular joints and repair of a dislocating second toe of the right foot and ankle also known as subtalar joint fusion, gastrocnemius recession, talonavicular joint fusion, second metatarsophalangeal joint plantar plate repair and second hammertoe repair, performed on November 7, 2020 and a neurosurgical evaluation to update and if prescribed, authorize specific medical modalities of treatment that were previously denied to decompress the L5 nerve root impingement, including but not limited to a right L4-5 hemilaminectomy, medial facetectomy and a right L5-S1 foraminotomy and provide benefits according to law.

Dated: January 31, 2022

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

Addendum to Proposed Decision and Order
In re
Docket No.
Claim No.

Appearances

Claimant, **Mr. B** , by Williams, Wyckoff & Ostrander, PLLC, per Breanna M. Deul

Employer, **Employer** (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Joseph A. Just

Hearing Testimony Considered

Claimant Witnesses

1. **Mr. B**
2. **Mrs. B**

Perpetuation Deposition Testimony Considered

The following depositions are published in accordance with WAC 263-12-117 with all objections overruled and all motions denied except as indicated below.

Claimant Witnesses

1. Ryan Halpin, M.D., taken on August 18, 2021.
2. Dr. Michael Lundborg, taken on August 24, 2021.

Department Witnesses

1. Patrick Bays, D.O., taken on November 19, 2021. The objection to the taking of the deposition is overruled consistent with the ruling on November 24, 2021 as to the scope of review and returning the IME report. The objection to the admission of the IME report, identified as Exhibit 4, is sustained and the exhibit is returned.

Exhibits 1-3 were redacted and admitted. The motions and pleadings regarding the Board's scope of review to address specific treatment modalities were considered and the ruling that they were within the Board's scope of review is affirmed.