

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

1 IN RE: FELICIA S. RABE) DOCKET NO. 09 21631
2 CLAIM NO. SD-39961) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Meng Li Che
4

5 APPEARANCES:

6 Claimant, Felicia S. Rabe, by
7 Williams, Wyckoff & Ostrander, PLLC, per
8 Douglas P. Wyckoff

9 Self-Insured Employer, System TWT Transportation, Inc., by
10 Evans, Craven & Lackie, P.S., per
11 Jon D. Floyd

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Jason D. Brown, Assistant

15 The employer, System TWT Transportation, Inc., filed an appeal with the Board of Industrial
16 Insurance Appeals on November 9, 2009, from an order of the Department of Labor and Industries
17 dated October 22, 2009. In this order, the Department affirmed the August 25, 2009 Department
18 order, which allowed the claim. The Department order is **AFFIRMED**.

19 **PROCEDURAL AND EVIDENTIARY MATTERS**

20 On December 22, 2009, the parties agreed to include the Jurisdictional History in the Board's
21 record. That history, as amended, establishes the Board's jurisdiction in this appeal.

22 Exhibit Nos. 1-9 were admitted.

23 **PRELIMINARY MATTERS**

24 The deposition of Michael W. Gillespie, M.D, taken on August 4, 2010, is published and
25 becomes part of the record pursuant to WAC 263-12-117, with all motions and objections appearing
26 therein being denied and overruled, respectively, except: the motion to strike on page 35, line 1, is
27 granted and page 34, lines 10-25, are stricken.

28 The deposition of Richard Gilbert, M.D., taken on August 10, 2010, is published and
29 becomes part of the record pursuant to WAC 263-12-117, without alteration as there were no
30 objections made therein.
31
32

1 The deposition of James W. Galbraith, M.D., taken on November 30, 2010, is published and
2 becomes part of the record pursuant to WAC 263-12-117, without alteration as there were no
3 objections made therein.

4 **ISSUE**

5 Whether the claimant suffered an occupational disease, which arose naturally and
6 proximately out of the distinctive conditions of her work, within the meaning of RCW 51.08.140.

7 **EVIDENCE PRESENTED**

8 Felicia Rabe was a resident of Lawton, Oklahoma. Ms. Rabe was born on August 19, 1974.
9 She stood 5 feet 4 inches tall. She was not employed at the time of the hearing; but instead, was
10 on time-loss benefits from System TWT Transportation (TWT). She was employed as a truck driver
11 by TWT from November 5, 2008, to May 7, 2009. During her first five weeks, she trained with
12 another truck driver. She got her own truck in January 2009 and began driving between
13 Washington, Oregon, and California delivering mainly refrigerated items. She also drove dry van
14 trailers and some non-refrigerated items.

15 Prior to working at TWT, Ms. Rabe did not have any major injuries, diseases, or right
16 shoulder problems. On June 10, 2009, Ms. Rabe filed a workers' compensation claim for her right
17 shoulder problems she was experiencing. Ms. Rabe did not have a specific incident that caused
18 her problems with her right shoulder. She believed that some of the duties within her job caused
19 her right shoulder problem. She noted that in March 2009 she had a trailer a couple of times that
20 was very hard to close. She recalled that she had to use a hammer at one point to get it to close
21 and she also had to ask for assistance at a pick up location to help close the trailer. Ms. Rabe
22 purchased a cheater bar sometime after she got her own truck. It was not something that was
23 issued by TWT. She noted that she had problems reaching the trailer release lever because she
24 was short and her arms were not quite long enough.

25 Between the sticky doors and her physical limitations, Ms. Rabe believed these combined to
26 cause her shoulder problems. She did not recall when her shoulder problems first started. She did
27 recall going home in the beginning of May and having a lot of pain, which caused her to see a
28 doctor. She had not engaged in any activities or sports during 2009 that may have contributed to
29 the cause of her problems. Ms. Rabe explained that she was on her truck 95 percent of the time.
30 She described her symptoms as a really bad ache. It got to the point where she would get a sharp
31 pain when doing certain activities within her job and then when she went home she could barely
32 move her arm altogether. This made performing her job very difficult.

1 Ms. Rabe went to see her doctor on May 12, 2009, and was placed on medication and
2 referred to physical therapy. Ms. Rabe was given a note to only perform light duty work.
3 Ms. Rabe's work did not have any light duty positions available. Ms. Rabe attended physical
4 therapy but did not notice any improvement. Ms. Rabe received further care through other doctors
5 to include more physical therapy and a cortisone injection. After Ms. Rabe filed her claim, she was
6 offered a light duty position in June in Spokane. That position ended in July.

7 Ms. Rabe explained that the sticky doors were on the dry van trailers. A particular trailer
8 looked like it had a bent bar on the back of the trailer. To open or close the trailer door she had to
9 push very hard and use a hammer. It took everything in her to get the door to close. Ms. Rabe
10 noted that she reported the defective trailer door on her daily log. Ms. Rabe identified her
11 March 12, 13, 16, and 19, 2009 logs and at the bottom of the page she had written that the right
12 trailer door of 80013 looked like it had been crunched and it was very difficult to open and close.
13 Ms. Rabe noted that the other trailers did not have as bad a problem. She did explain that with
14 frozen loads, the doors were kind of sticky just because it was so cold, but that those doors were
15 not as hard to close as the crunched trailer door.

16 With refrigerated loads like produce, Ms. Rabe was required to open the door at least three
17 times per day to send in a temperature reading. She explained that as a newer driver, anytime she
18 stopped, she would check her load just to make sure everything was still intact. This was a learning
19 experience for her. She agreed that Exhibit Nos. 1-8 depicted the sort of trailer that she typically
20 drove, except for dry van trailers, which were older. However, all the trailers had similar
21 mechanisms to open the trailers as those depicted. The crunched trailer's bar on the right hand
22 side was pushed in right at about the point where one opened or closed it. The slight bend made it
23 more difficult to open and close. She agreed that she had about 16 refrigerated loads and about
24 seven dry runs.

25 Ms. Rabe agreed that she did not load or unload any of the products from the trailers. She
26 did not need to use any tarps to secure the loads, but she did have to use load locks, which were
27 bars that were placed to the back of the load to secure loads that did not reach the door.

28 In the driver's daily log sheets from March 21 through May 7, 2009, Ms. Rabe did not make
29 any reference to any defects regarding either the tractor or the trailer. It was fair to say that in all
30 the time that Ms. Rabe worked for TWT, the only time she had problems with a defective trailer was
31 with trailer 80013, which was a dry van trailer. The four loads with the defective trailer all involved
32 transporting transformers for recycling. She still checked on the loads to make sure they were

1 intact and had not shifted, despite the fact that the transformers were loaded completely to the back
2 of the trailer.

3 Ms. Rabe testified that her shoulder began to hurt in March 2009. Ms. Rabe drove eight to
4 nine hours per day if she had leeway to do so; otherwise, she drove ten hours per day. Some
5 deliveries took two to three days; some took less than a day. Opening and closing the trailer doors
6 took a matter of a couple minutes, maybe one or two minutes. Ms. Rabe agreed that opening and
7 closing the trailer door did not require her to raise her arms above her head, but instead the bars
8 came to about her chest level. Ms. Rabe believed that her right shoulder problem came about due
9 to opening and closing the trailer doors and because she had only been working throughout that
10 time as opposed to doing things outside of work.

11 The trailer release lever was situated between the back two tires and she had to reach in
12 between the two back tires to get to the lever. This did not require any over the shoulder reaching,
13 but it did require work at shoulder level. This required a person to bend down at the knees and get
14 there to shoulder level to reach inside. Ms. Rabe's arm was just barely long enough to reach the
15 release lever without a cheater bar. Trailer 80013 was the only trailer with defective doors, but it
16 was not the only trailer with which she had difficulty.

17 James Echardt was employed as a fleet manager for three years with TWT. Prior to being
18 fleet manager, he was with TWT as an over-the-road driver for approximately five years.
19 Mr. Echardt was Ms. Rabe's fleet manager while she was employed with TWT from November
20 2008 to May 2009. Ms. Rabe only drove refrigerated trucks and transported perishable food items
21 and some household goods. Ms. Rabe drove the west coast states and her typical delivery runs
22 lasted two days to a week. The law required Ms. Rabe to drive no more than 11 hours before
23 taking a 10-hour break.

24 Mr. Echardt noted that rear truck trailer doors were opened by hand and no special
25 equipment was used to assist in opening or closing doors. The handlebar and latch mechanisms
26 were about 4 feet 1 inch off the ground. Opening and closing the trailer doors would not have
27 required over the shoulder movement. Mr. Echardt took photographs of a trailer similar to the one
28 Ms. Rabe drove to demonstrate how trailer doors appeared, were opened, and were closed. None
29 of the TWT trucks were opened by pushing the trailer door upward (like a garage door).
30 Mr. Echardt also provided a photo of typical cheater bar used to secure loads on flatbed trucks (not
31 refrigerated trucks), but was something that Ms. Rabe mentioned that she used to open and close
32

1 trailer doors. The cheater bar weighed about 10 pounds and was about 3 feet long. The cheater
2 bar pictured was not the cheater bar that Ms. Rabe used.

3 Trailers have two doors, left and right. The right side door was opened by first moving the
4 little top latches out of the way, then lifting the two handlebars upward out of their stationary locked
5 holding position, and lastly by swinging the handlebars out to the left side. The doors could then be
6 pulled opened. The left door had a separate lock, but was opened using the same type of motion
7 and system. To close the door a person had to line up the handlebars with their housing
8 station/welds and then drop the little top latches back into place. Mr. Echardt noted that it did not
9 require much pressure or strength to lift up the levers to unlatch the doors. They used a locking or
10 pin mechanism to secure the cargo, but not to keep the doors closed. Mr. Echardt noted that
11 Ms. Rabe used 36 different trailers and transported 56 or 57 loads while she worked with TWT.
12 Damaged trailers were reported and repaired depending on where the trailer was located.
13 Mr. Echardt was not aware of any incidents where Ms. Rabe reported that the trailer doors on the
14 trucks or trailers that she operated had defective equipment or hardware.

15 When transporting produce, TWT required their drivers to open the trailer three times a day
16 to check and report the temperature. Other types of cargo were sealed with a trailer seal and the
17 driver was not allowed to open the doors until delivery where the seal was first verified before
18 breaking/opening the trailer seal. Ms. Rabe was not responsible for loading or unloading the cargo.
19 Out of all Ms. Rabe's loads, 16 of those loads involved produce.

20 Mr. Echardt explained that drivers were to keep log books detailing their time and actions.
21 Upon completion of a trip, the logs were to be sent to the company where they were scanned and
22 sent to a third-party company that audits logs. Mr. Echardt did not review Ms. Rabe's logs.
23 Mr. Echardt agreed that Ms. Rabe also drove dry vans seven times. Dry vans typically were a little
24 older. Dry vans appeared the same as the refrigerated trailers except the walls did not have
25 insulation on the inside, there were no TWT logos, and instead of two latching mechanisms on the
26 right side door, there was only one latch/handlebar. Otherwise, the dry vans and the refrigerated
27 trailers opened the same.

28 Ms. Rabe was also responsible for unhooking trailers from the tractor. That was
29 accomplished by dollying the landing gear, which was located underneath the trailer. The driver
30 first secured the trailer; disconnected the air lines off the tractor and then the trailer; then
31 disconnected the fifth wheel; and slowly pulled the tractor away from the trailer. This process took
32 about five to ten minutes. Taking the air lines off and possibly using a tool to pull the fifth wheel, a

1 person might have to reach. Ms. Rabe did not have to change or undo the trailer each time she
2 dropped off a load.

3 Michael W. Gillespie, M.D., is a licensed physician, specializing in orthopedic surgery, in the
4 state of Washington. Dr. Gillespie ended his active patient practice in 2005. He has engaged in
5 performing independent medical examinations (IME) on a part-time basis. Dr. Gillespie examined
6 Ms. Rabe on July 6, 2009. Dr. Gillespie reviewed several medical records, including reports by
7 Dr. Gilbert and Dr. Harmon, and a right shoulder MRI dated June 24, 2009. Ms. Rabe complained
8 of a pretty constant dull ache in her shoulder that varied in severity. Dr. Gillespie's examination of
9 Ms. Rabe was normal. Dr. Gillespie found Ms. Rabe's exam unremarkable. He did not personally
10 review the MRI film, but reviewed the radiologist's report. Dr. Gillespie described tendinosis as a
11 normal wear and tear change of the tendons and muscles in the body. It was where the tendons
12 began to wear and fray. It really was an age type change. Signs of tendinosis were not unusual for
13 someone aged 35. Dr. Gillespie did note that it was unusual for someone 35 years old to have a
14 significant impingement syndrome or damage to the acromioclavicular joint unless there was some
15 athletic involvement or some other specific injury. Those kinds of problems usually start to occur
16 around age 50 and beyond. Ms. Rabe did not have any signs of impingement during his
17 examination.

18 Thirty seven days after Dr. Gillespie's examination, Dr. Gilbert reported normal findings on
19 abduction, flexion, external and internal rotation, and extension. Further Dr. Gilbert's findings on
20 examination of Ms. Rabe's rotator cuff strain in flexion, abduction, extension, and adduction were all
21 normal. Dr. Gillespie noted that Dr. Gilbert's findings 37 days later would indicate Ms. Rabe's
22 rotator cuff was intact, there were no significant tears. The possibility of a partial tear, especially of
23 the distal supraspinatus, could not be entirely excluded based on the MRI report. Medical reports
24 beginning August 26, 2009, and beyond by Dr. Gilbert demonstrated that Ms. Rabe's range of
25 motion became strikingly different. Dr. Gilbert recorded normal rotator cuff strength. Dr. Gillespie
26 noted that Dr. Gilbert's findings did not demonstrate a pattern of an adhesive capsulitis. Gillespie
27 Dep. at 19-20. Ms. Rabe's doctors requested surgery after she failed conservative measures, but
28 Dr. Gillespie did not agree the findings and the procedure matched. Further, diagnostic testing had
29 not been completed to confirm that surgery would be needed.

30 Dr. Gillespie diagnosed Ms. Rabe with a strain of the right shoulder. She did not
31 demonstrate findings of a rotator cuff tear. She did not describe any pain, suggesting shoulder
32 instability, which was between the ball and the socket of the shoulder. There was nothing that

1 would suggest to Dr. Gillespie that she had a tear of the labrum or that she had a loose body or
2 other mechanical problem inside her shoulder. Dr. Gillespie reviewed photos of the semi-trailers
3 and of the door being opened by a male. Dr. Gillespie noted that Ms. Rabe was shorter and she
4 would have reached up slightly higher than the male in the photo. But had she reached up higher,
5 her elbow would have been bent, and she could have pushed up almost using her leg power to
6 open, to release the latch to swing open the doors. She would have had to reach forward and
7 slightly up to pull them, not really actions that produced impingement or friction along the rotator
8 cuff. That typically occurred with hard abduction, which was pulling your arm back and holding it up
9 in the closed posture. Ms. Rabe did not describe that kind of an injury. Ms. Rabe had worked for
10 six months opening trailer doors, but it would be an unusual mechanism to tear up the shoulder.
11 Gillespie Dep. at 26-28. Dr. Gillespie would not consider opening these types of doors from four to
12 five times per day a repetitive type of activity.

13 Based on Ms. Rabe's height and the height of the latching mechanisms, Dr. Gillespie would
14 not think that Ms. Rabe would be required to operate at a level that was above her shoulder or head
15 height. Dr. Gillespie noted that Ms. Rabe's shoulder was pretty close to level with the levers in the
16 photos and all she had to do was to flex her elbow, grab the handle from underneath, and push it
17 up using leg strength. It was hard for Dr. Gillespie to imagine how this was going to wear on the
18 rotator cuff.

19 Ms. Rabe did explain to Dr. Gillespie that she had difficulty with releasing the fifth wheel to
20 disengage the tractor from the trailer. That was most likely to be troublesome if she used a cheater
21 bar that could attach to the lever, otherwise it was hard for her to reach underneath the trailer.
22 Dr. Gillespie did not recall Ms. Rabe telling him that she used a cheater bar in the latter part of her
23 employment. Ms. Rabe also mentioned that some trailers had stiff doors that required her to use a
24 hammer to open and close.

25 Dr. Gillespie thought there was very little evidence that Ms. Rabe had a right shoulder strain.
26 Dr. Gillespie was giving her the benefit of the doubt. Dr. Gillespie thought Ms. Rabe's June 24,
27 2009 MRI report did not demonstrate really abnormal findings. However, Dr. Gillespie would agree
28 that Ms. Rabe's work as a truck driver did contribute one iota to his diagnosis of a right shoulder
29 strain. It was normal wear and tear. Dr. Gillespie would agree some of the wear and tear coming
30 from opening and closing stiff doors and other related truck driver work may be one cause of her
31 shoulder condition. Gillespie Dep. at 36-37. Dr. Gillespie concluded that based on his diagnosis of
32 right shoulder strain and Ms. Rabe's activities as a truck driver, there was not anything distinctive

1 about those activities, other than driving a truck, turning a big steering wheel, shifting gears, and
2 attaching and releasing trailers from a tractor that would be different from activities in everyday life
3 that Dr. Gillespie felt would have caused or contributed to the diagnosed right shoulder strain. The
4 diagnosis of right shoulder strain could have been related to her distinctive conditions of her
5 employment as a truck driver. The diagnosis of a right shoulder strain was not saying much
6 because it was a pretty vague diagnosis. However, if there was a strain, then Dr. Gillespie would
7 expect it to only last hours to days long. With a diagnosis of shoulder strain, Dr. Gillespie would not
8 recommend surgical intervention. Gillespie Dep. at 42-44.

9 Richard Gilbert, M.D., is a licensed physician, specializing in family practice, in the state of
10 Washington. Dr. Gilbert retired three years ago and had started working part-time for MultiCare in
11 their occupational medicine clinic about a year and a half ago. Dr. Gilbert had some on-the-job
12 training in occupational medicine. Dr. Gilbert first examined Ms. Rabe on June 10, 2009. Ms. Rabe
13 complained of pain in her right shoulder and weakness with most movements beginning around
14 May 1. Ms. Rabe contributed this to repetitively operating heavy truck doors. During the physical
15 examination, Ms. Rabe had tenderness over the trapezius muscles, supraspinatus; her range of
16 motion was limited. Her major range of motion limitation was with abduction, which was moving the
17 arm away from the torso. Ms. Rabe was not able to move it above 90 degrees. She also had pain
18 when she raised her arm up away from the torso through 90 to 160 degrees of abduction.
19 Two other diagnostic tests were positive suggesting inflammation of the rotator cuff.

20 Dr. Gilbert's impression was that Ms. Rabe had a rotator cuff syndrome, which implied
21 inflammation of tendons or maybe even more of an injury like a possible partial tear. Dr. Gilbert
22 thought her movement was restricted. It was Dr. Gilbert's impression that Ms. Rabe's job as a truck
23 driver proximately resulted in the development of the right shoulder condition. Ms. Rabe definitely
24 had a problem in her shoulder, probably the rotator cuff, and Dr. Gilbert did not see any other
25 reason for it. Her job certainly had the potential to produce that kind of injury. Specifically,
26 repetitively opening and closing trailer doors contributed to the development of her shoulder
27 condition. Dr. Gilbert defined repetitively as two or three times per day, and if it required some
28 force, then that probably would be repetitive. Ms. Rabe did not mention any non-work activities that
29 might have contributed to her shoulder condition and Dr. Gilbert did not see any evidence of
30 pre-existing right shoulder abnormalities or injuries. Gilbert Dep. at 9-11.

31 Dr. Gilbert ordered modified duty work for Ms. Rabe and referred her to physical therapy.
32 Dr. Gilbert ordered an MRI test and the findings of inflammation of the tendons of the rotator cuff, a

1 question of a partial tear in one of the tendons, and some calcium deposition, which might be an
2 indication of the chronicity of that situation that had been going on for a while, were consistent with
3 his diagnosis. Further, these findings were consistent with Dr. Gilbert's opinion that Ms. Rabe's
4 truck driving job and the opening and closing of doors was at least partially responsible for her
5 diagnosed condition. Gilbert Dep. at 13-14. Ms. Rabe also saw a specialist and received an
6 injection.

7 Dr. Gilbert noted that two weeks prior to his examination of Ms. Rabe, his partner performed
8 a physical examination of Ms. Rabe and her range of motion testing was within normal limits.
9 Further, at that time, Ms. Rabe did not have any signs of impingement. Strength testing was
10 normal too.

11 Dr. Gilbert thought Ms. Rabe's condition was consistent with tendinopathy of the right rotator
12 cuff, more likely than not aggravated by her work; specifically pulling down on trailer doors was the
13 most likely mechanism of injury. So, it was Dr. Gilbert's understanding that Ms. Rabe's job as a
14 truck driver involved opening and closing trailer doors periodically throughout the day, reaching
15 overhead to open and close the door by raising the door and then bringing the door down to close
16 it. Engaging in over the shoulder or over the head activities with her right arm would be the
17 mechanism most likely to cause that injury to Ms. Rabe's right shoulder. It could be caused in other
18 ways, but that was the most common one. The fact that Ms. Rabe did not have to work over the
19 shoulder to open and close the doors would not necessarily change his opinion because forceful
20 use of the shoulder and rotator cuff could still cause that sort of injury. It would not necessarily
21 involve reaching overhead. Dr. Gilbert would expect Ms. Rabe's right shoulder condition to improve
22 if she was removed from the activity that was causing the aggravation of that pain. Dr. Gilbert
23 would not expect to see a rotator cuff tear in a 35-year-old woman in the absence of trauma to the
24 shoulder. Gilbert Dep. at 20-22.

25 James W. Galbraith, M.D., is a licensed physician in the state of Texas. Dr. Galbraith
26 primarily works with insurance companies in Texas. Dr. Galbraith first saw Ms. Rabe on
27 February 12, 2010. Ms. Rabe presented with right shoulder pain. She explained to Dr. Galbraith
28 that she was injured when the trailer door stuck as she was trying to open them on her truck.
29 Dr. Galbraith performed a physical examination and Ms. Rabe had mild pain on any range of
30 motion from the right shoulder. Every direction she moved it, she complained of pain, but not
31 much. The pain was worse when she abducted, moved it away from her body greater than
32 90 degrees, when she tried to raise her arm above her head. Dr. Galbraith concluded that

1 Ms. Rabe had strained the ligaments or muscles in her right shoulder. Dr. Galbraith prescribed
2 anti-inflammatory medication and recommended physical therapy. Further, he referred her to an
3 orthopedic surgeon. Ms. Rabe was placed onto light duty work with no lifting over five pounds. The
4 surgeon ordered an x-ray of the shoulder and an ultrasound of the right shoulder. Ms. Rabe had
5 biceps tendinosis and impingement syndrome. Ms. Rabe had an MRI on June 1, 2009, which
6 demonstrated tendinitis of the supraspinatus tendon and the distal subscapularis tendon. She had
7 a possibility of a partial tear of the distal supraspinatus tendon, or at least, it could not be excluded.
8 She also had a possibility of calcific tendinitis. Dr. Galbraith noted that when he saw Ms. Rabe, her
9 symptoms were of a minimal nature.

10 It was Dr. Galbraith's opinion that the distinctive conditions of Ms. Rabe's job as a truck
11 driver proximately resulted in the development of her right shoulder condition. Ms. Rabe described
12 a more sudden injury on the day of the maximum pain, which was consistent with the chronic
13 nature of the pain that she demonstrated throughout her care. Dr. Galbraith agreed that rotator cuff
14 problems normally occur in people who perform activities over the shoulder level, but it could occur
15 from almost any type of strenuous movement of the shoulder. Galbraith Dep. at 14.

16 DECISION

17 Every party appealing a Department order to the Board has the burden of proving by a
18 preponderance of the evidence that the order is incorrect, except in an employer appeal where the
19 employer has filed the appeal in an industrial insurance case. RCW 51.52.050 and WAC 263-12-
20 115(2) (a)(c) charge the employer with proceeding initially with evidence sufficient to establish a
21 prima facie case for the relief sought. *In re Michael Hansen*, BIIA Dec., 95 4568 (1996). Once the
22 employer has presented a prima facie case that the Department order is incorrect, the burden shifts
23 to the claimant and Department to prove by a preponderance of the evidence that the Department
24 order on appeal is correct. *Olympia Brewing Co. v. Department of Labor and Industries*, 34 Wn.2d
25 498 (1949); *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).

26 Black's Law Dictionary, 6th Edition (1990), defines a prima facie case as, "Such as will
27 prevail until contradicted and overcome by other evidence." Though the Washington courts often
28 deal with the issue, the only specific definition is that given in *McCoy v. Courtney*, 25 Wn.2d 956,
29 962 (1946). The court, in dealing with the issue of negligence, defined a prima facie case as: "one
30 where the evidence is sufficient to justify, but not compel, an inference of liability, or, in other words,
31 evidence to be weighed, but not necessarily to be accepted, by a jury or other trier of the fact."

32 The Board has also given its own definition of prima facie in *In re William S. Morgan*,

1 Dkt. No. 91 3417 (January 14, 1993). The Board stated that to satisfy the requirement of
2 presenting evidence sufficient to make a prima facie case, a party "must present substantial
3 evidence, evidence of a character which, if un rebutted or uncontradicted, would convince an
4 unprejudiced, thinking mind of the truth of the issues on appeal. *Omeitt v. Dep't of Labor & Indus.*,
5 21 Wn.2d 684 (1944)."

6 In this case, **the employer has not presented evidence to establish a prima face case**
7 **for the relief sought.** Dr. Gillespie found that Ms. Rabe's right shoulder physical examination was
8 normal however; he diagnosed Ms. Rabe with a strain of the right shoulder. Dr. Gillespie noted that
9 there was very little evidence to support his diagnosis and he gave Ms. Rabe every benefit of the
10 doubt. But, ultimately he found that her work as a truck driver did contribute something, an iota to
11 his diagnosis of right shoulder strain. He further went on to say that her work may be one of the
12 causes of her shoulder condition. Lastly, Dr. Gillespie commented that releasing the fifth wheel, or
13 working at shoulder height, may have caused problems if Ms. Rabe used a cheater bar, but he did
14 not know whether she used a cheater bar. For these reasons, I do not find that the employer
15 presented substantial evidence, which if un rebutted or uncontradicted, would convince an
16 unprejudiced thinking mind of the truth of the issue on appeal.

17 Assuming *arguendo* that the employer has met their burden of proof, the burden now shifts
18 to the claimant to prove by a preponderance of the evidence that the Department order on appeal is
19 correct and therefore entitled to the benefits she is seeking. RCW 51.52.050, *Olympia Brewing Co.*
20 *v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949). *Stafford v. Department of Labor & Indus.*,
21 33 Wn. App. 231 (1982). It is my understanding that the claimant is not seeking benefits under an
22 industrial injury theory. The claimant herself noted that there was no specific incident that caused
23 her right shoulder problems and an industrial injury theory requires a sudden, tangible happening,
24 which is absent in this case.

25 RCW 51.08.140 defines occupational disease:

26 "Occupational disease" means such disease or infection as arises
27 naturally and proximately out of employment under the mandatory or
elective adoption provisions of this title.

28 In *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 476-7 (1987), the Court discussed
29 what is required to show that a disease arose "proximately" and "naturally" out of employment:

30 Nearly forty years ago this court addressed the requirement that an
31 occupational disease arise "proximately" out of employment:

32 The legislature is presumed to have been familiar with the meaning of
"proximate cause" as used by the courts, and that being so, when they

1 defined as an occupational disease those diseases or infections as arise
2 naturally and *proximately* out of extrahazardous employment, it would
3 follow that they meant that the condition of the extrahazardous
4 employment must be the proximate cause of the disease for which claim
5 for compensation is made, and that the cause must be proximate in the
6 sense that there existed no intervening independent and sufficient cause
7 for the disease, so that the disease would not have been contracted but
8 for the condition existing in the extrahazardous employment.

9 The footnote to the above paragraph indicates that the term "occupational disease" may include
10 disability due to aggravation of a nonwork-related disease. The term "proximate cause" means a
11 cause which in a direct sequence, unbroken by any new independent cause, produces the condition
12 complained of and without which the condition would not have happened. There may be one or more
13 proximate causes of a condition. A worker is entitled to benefits under the Industrial Insurance Act if
14 the industrial injury is a proximate cause of the alleged condition for which benefits are sought. The
15 law does not require that the industrial injury be the sole proximate cause of the condition. *Wendt v.*
16 *Department Labor & Indus.*, 18 Wn. App. 674 (1977).

17 While an injury need not "arise out of employment" to be compensable, *Tilly v. Department of*
18 *Labor & Indus.*, 52 Wn.2d 148, 155 (1958); in the context of occupational disease, the Act expressly
19 requires that the disabling condition "arise out of employment" and therefore,

20 a worker must establish that his or her occupational disease came about
21 as a matter of course as a natural consequence or incident of distinctive
22 conditions of his or her particular employment. The conditions need not be
23 peculiar to, nor unique to, the worker's particular employment. Moreover,
24 the focus is upon conditions giving rise to the occupational disease, or the
25 disease-based disability resulting from work-related aggravation of a
26 nonwork-related disease, and not upon whether the disease itself is
27 common to that particular employment. The worker, in attempting to
28 satisfy the "naturally" requirement, must show that his or her particular
29 work conditions more probably caused his or her disease or disease-
30 based disability than conditions in everyday life or all employments in
31 general; the disease or disease-based disability must be a natural incident
32 of conditions of that worker's particular employment. Finally, the
conditions causing the disease or disease-based disability must be
conditions of *employment*, that is, conditions of the worker's particular
occupation as opposed to conditions coincidentally occurring in his or her
workplace. Our analysis here does not, in any way, modify the
longstanding requirement that a claimant satisfy the "proximately"
requirement of RCW 51.08.140. See *Simpson Logging Co. v. Department*
of Labor & Indus., *supra* at 479.

Dennis, 109 Wn.2d at 481.

1 In *Dobbins v. Commonwealth Aluminum Corp.*, 54 Wn. App. 788, 792 (1989), the court stated:
2 "The causal connection between the claimant's physical condition and the industrial injury must be
3 established by medical testimony. The Court has long recognized that benefits are not limited to those
4 workers previously in perfect health. *Groff v. Department of Labor & Indus.*, 65 Wn.2d 35 (1964);
5 *Kallos v. Department of Labor & Indus.*, 46 Wn.2d 26 (1955).

6 **I find that the claimant meets her burden.** Ms. Rabe's work as a truck driver required her to
7 check on her loads. She was required to open and close the rear door at least three times per shift
8 when transporting refrigerated goods. Ms. Rabe noted that she checked her load every time she
9 stopped. She noted that she even checked her non-refrigerated items to be sure that things had not
10 shifted during transport. Ms. Rabe noted that she had difficulty with trailers that carried frozen items
11 because the doors froze closed. Ms. Rabe noted that she had difficulty opening and closing one dry
12 van trailer over four days of driving logs and required the use of a hammer and/or assistance by
13 another person to close the trailer door.

14 Ms. Rabe presented with a constant dull ache that varied in intensity. She noted pain and
15 weakness starting around May 1 and sought care after the pain became more sharp. Upon her first
16 visit with Dr. Gilbert and his colleague, she had limited range of motion, tenderness, and was positive
17 on two tests for inflammation of the rotator cuff. While Dr. Gillespie and even Dr. Gilbert thereafter
18 examined her and she had normal findings and no impingement, as Dr. Gilbert noted, she could have
19 gotten better based on medication and physical therapy. Ms. Rabe noted that physical therapy did not
20 help, but the doctors noted that physical therapy did provide some relief. It was uncontested that
21 Ms. Rabe did not have other outside activities or injuries that contributed or could have caused her
22 right shoulder strain. Her particular work conditions more probably caused her right shoulder strain
23 disability than conditions in everyday life or all employments in general.

24 In this case, I find that Ms. Rabe's right shoulder condition arose naturally and proximately out
25 of the distinctive conditions of her employment. Ms. Rabe's requirement to open and close the rear
26 refrigerated trailer doors at least three times per day (at times forcefully); opening and closing the dry
27 van doors multiple times per day (at times forcefully); and reaching between the wheels to release the
28 trailer from the truck and using a cheater bar to aid in doing so proximately caused Ms. Rabe's right
29 shoulder strain. The law does not require a number of occurrences or a number of days on the job for
30 a finding of an occupational disease. Further, I find that the right shoulder strain would not have been
31 contracted but for those conditions existing in her employment.

FINDINGS OF FACT

- 1
- 2 1. The claimant, Felicia S. Rabe, filed an Application for Benefits with the
- 3 Department of Labor and Industries on June 10, 2009, alleging she
- 4 sustained an occupational disease during the course of her employment
- 5 with System TWT Transportation, Inc. On August 25, 2009, the claim was
- 6 allowed and benefits paid.

7 On September 14, 2009, the employer, System TWT Transportation, Inc.,

8 protested the August 25, 2009 Department order. On October 22, 2009,

9 the Department affirmed the August 25, 2009 Department order. On

10 October 23, 2009, System TWT Transportation, Inc. filed a protest to the

11 October 22, 2009 Department order. On November 9, 2009, the

12 Department forwarded the System TWT Transportation, Inc. protest to the

13 Board of Industrial Insurance Appeals as a direct appeal.

14 The Board issued an order on November 16, 2009, granting the appeal

15 under assigning it Docket No. 09 21631 and ordered that further

16 proceedings be held.

- 17 2. The employer, System TWT Transport, Inc., failed to present prima facie
- 18 medical testimony demonstrating that Ms. Rabe's right shoulder condition
- 19 was not proximately caused by an industrial injury or occupational
- 20 disease.

- 21 3. From November 5, 2008, through May 7, 2009, Ms. Rabe had worked as
- 22 a truck driver. She was required to transport goods in trailers. Her job
- 23 duties included opening and closing rear trailer doors multiple times per
- 24 day. Refrigerated items required a minimum of three checks per shift.
- 25 Ms. Rabe checked her load every time she stopped.

26 Sometimes the trailer doors were difficult to open and/or close and

27 required Ms. Rabe to use a hammer, request aid, or use more force or

28 effort. Ms. Rabe was also required to squat or bend over to access the

29 lever to release the fifth wheel so that the trailer and truck could be

30 separated. Ms. Rabe would have been working at about shoulder height.

31 Ms. Rabe was 5 feet 4 inches and her limbs were barely long enough to

32 reach the lever. She, at times, needed to use a cheater bar to aid her in

accomplishing her task.

- 33 4. The repetitive nature of opening and closing damaged, frozen, or normal
- trailer doors several times a day and having to reach between the wheels
- to release the fifth wheel lever with the aid of a cheater bar constituted
- distinctive conditions of employment with System TWT Transportation,
- Inc.

5. Ms. Rabe did not engage in activities outside of her work that could have
- proximately caused her right shoulder condition and Ms. Rabe did not
- have any prior injuries or major illnesses that involved her right shoulder.

6. Ms. Rabe's right shoulder condition arose naturally and proximately out of
- the distinctive conditions of her employment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. The employer, System TWT Transportation, Inc. failed to establish a prima facie case that Ms. Rabe did not suffer an occupational disease as contemplated by RCW 51.08.140.
3. The application for benefits for an occupational disease was timely filed within the meaning of RCW 51.28.055.
4. The order of the Department of Labor and Industries, dated October 22, 2009, is correct, and is AFFIRMED.

FEB 15 2011

DATED: _____


for Meng Li Che
Industrial Appeals Judge
Board of Industrial Insurance Appeals