

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: KIM S. HUTCHESON) DOCKET NOS. 10 11581, 10 14481, 10 14770,
2) 10 16783 & 10 16784
3)
3 CLAIM NO. AG-47107) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius

5 APPEARANCES:

6
7 Claimant, Kim S. Hutcheson, by
8 Williams, Wyckoff & Ostrander, PLLC, per
9 Dane D. Ostrander

10 Employer, Stormans, Inc., by
11 Employer Resources Northwest, Inc., per
12 Erin J. Dickinson

13 Department of Labor and Industries, by
14 The Office of the Attorney General, per
15 Judith C. W. Morton and Michael D. Rothman, Assistants

16 In Docket No. 10 11581, the employer, Stormans, Inc., filed an appeal with the Board of
17 Industrial Insurance Appeals on February 16, 2010, from an order of the Department of Labor and
18 Industries dated February 9, 2010. In this order, the Department accepted responsibility for a right
19 shoulder sprain as related to the industrial injury. The Department order is **AFFIRMED**.

20 In Docket No. 10 14481, the employer, Stormans, Inc., filed an appeal with the Board of
21 Industrial Insurance Appeals on May 3, 2010, from an order of the Department of Labor and
22 Industries dated April 22, 2010. In this order, the Department determined it was correct in ordering
23 the employer to pay time-loss compensation benefits from June 18, 2009, through July 29, 2009.
24 The Department order is **AFFIRMED**.

25 In Docket No. 10 14770, the employer, Stormans, Inc., filed an appeal with the Board of
26 Industrial Insurance Appeals on June 22, 2010, from an order of the Department of Labor and
27 Industries dated June 11, 2010. In this order, the Department cancelled a prior order dated
28 May 20, 2010, and directed the employer to pay time-loss compensation benefits from July 30,
29 2009, through August 17, 2009. The Department order is **AFFIRMED**.

1 In Docket No. 10 16783, the employer, Stormans, Inc., filed an appeal with the Board of
2 Industrial Insurance Appeals on July 13, 2010, from an order of the Department of Labor and
3 Industries dated July 2, 2010. In this order, the Department affirmed a prior order dated
4 June 2, 2009, in which the Department held the claim open for treatment. The Department order is
5 **AFFIRMED.**

6 In Docket No. 10 16784, the employer, Stormans, Inc., filed an appeal with the Board of
7 Industrial Insurance Appeals on July 13, 2010, from an order of the Department of Labor and
8 Industries dated July 7, 2010. In this order, the Department affirmed a prior order dated October 1,
9 2009, in which it directed the employer to pay time-loss compensation benefits for one day,
10 August 18, 2009, and set wages for the purposes of calculating time-loss compensation benefits.
11 The Department order is **AFFIRMED.**

12 PRELIMINARY MATTERS

13 On June 25, 2010, in Docket Nos. 10 11581 and 10 14481, the parties agreed to include the
14 Jurisdictional History in the Board's record. That history establishes the Board's jurisdiction in this
15 appeal.

16 On August 12, 2010, in Docket No. 10 14770, the parties agreed to include the Jurisdictional
17 History in the Board's record. That history establishes the Board's jurisdiction in this appeal.

18 On August 12, 2010, in Docket Nos. 10 16783 and 10 16784, the parties agreed to include
19 the Jurisdictional History in the Board's record. That history, as amended, establishes the Board's
20 jurisdiction in this appeal.

21 The deposition of George E. Sims, M.D., taken on September 9, 2010, was published on
22 receipt. All objections are overruled. All motions are denied.

23 The deposition of Stewart Kerr, M.D., two volumes, taken on September 21, 2010, and
24 September 27, 2010, respectively, was published on receipt. All objections are overruled, except
25 for the objection at page 27 is sustained. All motions are denied.

26 The deposition of Robert G.R. Lang, M.D., taken on October 13, 2010, was published on
27 receipt. All objections are overruled, except for the objections at pages 35, and 38, which are
28 sustained. All motions are denied. Deposition Exhibit No. 1 is renamed Exhibit No. 5 and is
29 admitted. Deposition Exhibit Nos. 2 and 3 are renamed Exhibit Nos. 6 and 7 and are rejected.

30 The deposition of Brian S. Zerger, PAC, taken on November 1, 2010, was published on
31 receipt. All objections are overruled. All motions are denied.

32

1 The claimant did not seek an award of permanent partial disability in this appeal. See *Letter*
2 *dated November 12, 2010*. Further, the precise period under appeal was argued and the ruling is
3 affirmed. 11/1/10 Tr. at 2-10. The parties subsequently filed a stipulation that tied in the pertinent
4 dates to the testimony of the experts.

5 ISSUES

- 6 1. As of July 2, 2010, did the claimant's conditions, proximately caused by
7 the industrial injury of April 6, 2008, include a right shoulder condition?
- 8 2. From June 2, 2009, through July 2, 2010, did the claimant's conditions,
9 proximately caused by the industrial injury of April 6, 2008, require
10 further medical treatment? Or, had they reached maximum medical
11 improvement?
- 12 3. Was the claimant a totally and temporarily disabled worker from
13 June 18, 2009, through August 18, 2009, inclusive?

12 EVIDENCE

13 In support of its appeals, the employer, Stormans, Inc., presented the medical testimony of
14 Drs. Sims and Kerr, orthopedic surgeons.

15 In response, the Department presented the testimony of Mr. Zenger, a physician's assistant,
16 and the medical testimony of Dr. Lang, a neurosurgeon.

17 The claimant, Ms. Hutcheson, testified and presented the lay testimony of her sister, Lori
18 Provoe, and the vocational testimony of Karin L. Larson.

19 Exhibit No. 1 is a letter from the Department of Labor and Industries to Dr. Sims and was
20 stipulated into evidence. Exhibit Nos. 2, 3, and 4 are job analyses of grocery checker/retail clerk,
21 cashier, and card dealer positions. Exhibit No. 5 is the APF's completed by Dr. Lang and is
22 admitted. A letter from Dr. Lang is rejected as Exhibit No. 6. Exhibit No. 7 is rejected as a
23 duplicate of Exhibit No. 2.

24 From the testimony and exhibits, the evidence is summarized as follows:

25 SUMMARY

26 Kim Hutcheson was born on October 23, 1962. Ms. Hutcheson testified she was 5 feet
27 6 inches tall and weighed about 135 pounds at the time of the hearing conducted in October 2010.
28 She is right hand dominant. The claimant graduated from high school and attended cosmetology
29 school from 1979 to 1980. She worked in that field from 1980 to 1992. The claimant does not
30 possess a current cosmetology license.

31 Karin L. Larson, a vocational rehabilitation counselor, explained the claimant was not a
32 licensed cosmetologist in Washington because she allowed her license to lapse and new guidelines

1 were enacted that required the claimant to complete cosmetology school again as a prerequisite to
2 licensure.

3 In 1998, Ms. Hutcheson began working as a grocery checker. The claimant reviewed a job
4 analysis of a checker and believed it was accurate. Exhibit No. 2.

5 In January 1999, Ms. Hutcheson sprained her thoracic spine and left shoulder in the course
6 of her employment as a checker. In December 2006, the claimant sustained a second industrial
7 injury to her thoracic spine and left shoulder, as well as her right knee. She continued to work full
8 time after both industrial injuries without restrictions on her exertions.

9 On April 6, 2008, the claimant was required by the distinctive conditions of her employment
10 to repetitively reach, grasp, turn, scan, lift, carry, and twist to maneuver 50 to 100 cases weighing
11 28 pounds each off a waist high conveyor, over a collapsible bag rack and onto a platform. The
12 claimant performed these movements and exertions at a production pace.

13 The claimant experienced spasm in the muscles of her shoulders, upper back, and neck.
14 Initially, the symptoms were limited to her neck, but spread to her left shoulder and thoracic spine
15 within the week. Before the week was up, the claimant testified she felt symptoms in both
16 shoulders as well. Ms. Hutcheson testified that she described right shoulder pain to her attending
17 medical treatment providers within one week of the onset of her occupational disease. The
18 claimant conceded that, at the time of completing an accident form, she did not describe right
19 shoulder symptoms in the form. She believed that within a week she advised her doctors of right
20 shoulder symptoms. 10/8/10 Tr. at 41.

21 Ms. Hutcheson was restricted from working until November 2008 and then attempted to
22 return to work. Within a short period of returning to work, the symptoms returned and progressed in
23 intensity. She last worked on January 23, 2009.

24 Between June 2009 and July 2010, inclusive, the claimant testified she continued to
25 experience burning pain radiating from her neck to her mid back, but her left shoulder symptoms
26 alleviated. Her right shoulder continues to be symptomatic, interrupting her sleep and function.
27 Ms. Hutcheson is limited in reaching, grasping, and lifting.

28 Lori Provoe, the claimant's sister, described the claimant's inability to perform recreational
29 activities she previously enjoyed prior to the onset of symptoms following the occupational disease.

30 Drs. Kerr and Sims are orthopedic surgeons and examined the claimant a single time in
31 February and July 2009, respectively. Mr. Zerger is a physician's assistant to orthopedic surgeon,
32 Dr. Peterson. Dr. Peterson did not testify. Mr. Zerger testified of his treatment of the claimant's

1 right shoulder, under the supervision of Dr. Peterson, between October 8, 2009, and August 31,
2 2010. Dr. Lang is a neurosurgeon and attended the claimant's conditions between August 14,
3 2009, and September 29, 2010.

4 Cervical Condition

5 The medical experts reviewed diagnostic imaging studies, including reports from three
6 cervical MRIs conducted on April 22, 2002, June 12, 2008, and September 8, 2009. Dr. Kerr
7 testified the MRI in 2008 depicted increased findings as compared to the 2002 MRI because there
8 was multi-level disk bulging from C4 through C7 and a slight effacement of the thecal sac at C4-5.
9 The MRI in September 8, 2009, depicted the progression of degenerative changes, including a
10 herniated disc at C6-7. Drs. Sims and Kerr testified neither the development of the herniation, the
11 desiccation of the discs from C2-C7, or the increased indentation of the thecal sac were related to,
12 hastened, acted on, or accelerated by the residual effects of the occupational disease. Dr. Sims
13 testified there was no persuasive evidence of an injury that resulted in the compression of a nerve
14 innervating the upper extremity and the shoulder musculature. Sims Dep. at 49.

15 Dr. Kerr conceded there was more anterior indentation of the thecal sac and multilevel
16 degenerative changes depicted in 2009 than in 2002 or 2008. Dr. Kerr testified the changes were
17 consistent with the natural progression of minimal degenerative changes. Dr. Kerr described the
18 increased findings as "just part of a cascade that is associated with aging." Kerr Dep. at 60.
19 Dr. Kerr testified that, unless that was causing substantial compression of neural elements, or a
20 signal change within the MRI and a substantial disk herniation, not just a broad-based disk bulge,
21 but a substantial herniation that correlates with their symptoms, and it goes along with the
22 mechanism they have, it is a normal aging process. Kerr Dep. at 61-62.

23 Dr. Lang had found diminished pinprick sensation along the claimant's right forearm, hand,
24 and thumb in August 2009. Because strains resolve within six weeks, the claimant's ongoing pain,
25 weakness, and incapacity implied a neurological condition. To Dr. Lang, a neurosurgeon, the
26 clinical findings implied the sensory loss was in the dermatome of the C6 nerve. Dr. Lang also
27 found muscle atrophy in the arms. A negative muscle biopsy on April 13, 2010, established the
28 muscle loss was not caused by a muscle disease. Dr. Kerr deferred to Dr. Lang's diagnosis of no
29 muscle disease. However, Dr. Lang did not come to a definite diagnosis of the muscle atrophy or
30 its relationship to the claimant's conditions of employment. Lang Dep. at 60.

31 EMGs and nerve conduction studies were performed in fall 2008, December 2009, and in
32 January 2010. Dr. Sims agreed the December 2009 EMG was abnormal and suggested muscle

1 disease, but had "absolutely nothing to do with work at all." Sims Dep. at 47. Dr. Lang testified the
2 EMG findings were not attributable to the claimant's occupational disease.

3 The cause of the atrophy was not established by July 2010. The medical evidence, as of July
4 2010, did not establish the precise nature of the sensory loss or a condition that fully explained the
5 clinical findings of muscle loss and diminished pin prick sensation. Lang Dep. at 23.

6 Dr. Lang reviewed the actual 2009 MRI that depicted more significant disc protrusion at C6-7
7 than the 2008 MRI depicted. Dr. Lang acknowledged that a disc herniation was not always
8 accompanied by symptoms, but nevertheless concluded the herniation was significant and
9 proximately caused by the residual effects of the claimant's occupational disease. Lang Dep. at 23.
10 Dr. Lang explained the claimant's pre-existing degenerative changes could make her more
11 susceptible to disc protrusion that worsened as a result, in part, of the distinctive conditions of her
12 employment as a checker. Lang Dep. at 61.

13 Dr. Lang considered the possibility that the worsened findings on MRI could be a reflection of
14 the claimant's age and gender. Dr. Lang concluded the C6-7 herniation and increased degenerative
15 changes were, in part, related to the claimant's work experience, on a more-probable-than-not
16 basis. Dr. Lang diagnosed cervical and thoracic strains as well as the worsened cervical disc
17 protrusion, which he related to the claimant's employment. Lang Dep. at 23.

18 Right Shoulder Condition

19 Dr. Kerr assumed the claimant had no right shoulder pain at the time of the onset of the
20 occupational disease or by the time of his examination on February 21, 2009. Dr. Kerr testified that
21 if there were right shoulder complaints, it may possibly change his opinions, diagnoses, and
22 recommendations. When the right shoulder symptoms occurred was important because if they
23 were due to trauma, Dr. Kerr testified symptoms would immediately occur. Kerr Dep. at 76. At the
24 time of his single examination in July 2009, Dr. Sims noted the claimant's current complaints
25 included shoulder pain and at the trapezius, bilaterally.

26 At the time of Dr. Lang's treatment on August 14, 2009, the neurosurgeon noted pain at the
27 top of the right shoulder and spasms under the right shoulder blade. Dr. Lang referred the claimant
28 to Dr. Peterson for evaluation of the right shoulder.

29 Mr. Zerger, Dr. Peterson's physician's assistant, treated the claimant's right shoulder
30 beginning on October 8, 2009. Mr. Zerger did not relate the claimant's right shoulder condition to
31 her work activities, even if she complained of right shoulder symptoms soon after April 2008.
32 Mr. Zerger explained that trauma can cause a shoulder impingement because inflammation of a

1 tendon can compromise the subacromial space and can occur with multiple repetitive micro events
2 that eventually result in inflammation. Mr. Zerger testified as to the possibility of the claimant's
3 activities causing the claimant's right shoulder impingement. No other event was identified as a
4 cause and the flu vaccine injection in December 2008 was specifically excluded by Dr. Lang.
5 Lang Dep. at 62.

6 On October 8, 2009, Mr. Zerger learned of the claimant's pain complaints at the trapezius
7 and along the shoulder toward the outside of the body. On rotation of the shoulder, pain was
8 reproduced. A contemporaneous x-ray indicated the acromion joint had minimal narrowing.
9 Mr. Zerger explained that impingement develops due to inflammation that causes the surrounding
10 structures to be pinched.

11 An MRI of the right shoulder was performed on September 8, 2009. Dr. Lang described the
12 MRI as indicating mild changes, including shoulder impingement. Mr. Zerger testified the MRI
13 demonstrated mild tendinopathy and impingement of the right shoulder at the hypertrophic
14 acromion joint.

15 Mr. Zerger diagnosed right shoulder impingement with acromioclavicular degenerative joint
16 disease and injected the right shoulder. The injection alleviated the symptoms for about four
17 months. Repeat injections continued to alleviate the symptoms.

18 Mr. Zerger testified the impingement was in the subacromial space, as opposed to the right
19 trapezius, which was the most common area complained of by the claimant previously. Mr. Zerger
20 stated his opinion of a relationship between the right shoulder impingement and the claimant's
21 employment as possible but not probable. Zerger Dep. at 13-14.

22 As of September 8, 2009, Dr. Lang diagnosed right shoulder impingement. Dr. Kerr agreed
23 that the MRI indicated right shoulder impingement, but related it to the natural progression of a
24 degenerative condition: a degenerative acromion joint or thickening of the ligaments at the
25 shoulder. Kerr Dep. at 38. He agreed that activity can light it up.

26 DECISION

- 27 **1. As of July 2, 2010, did the claimant's conditions, proximately**
28 **caused by the industrial injury of April 6, 2008, include a right**
29 **shoulder condition?**

30 The controversy presented by the evidence surrounds the conditions related to the
31 claimant's work activities. There must be a legally sufficient causal nexus between the condition or
32 disability for which a claim was filed and the alleged injury or occupational exposure. In
Washington, that legal nexus is "proximate cause."

1 Proximate cause means a cause which, in a direct sequence, unbroken by any new
2 independent cause, produces the condition or disability complained of, and without which such
3 condition or disability would not have happened." WPI 155.06.

4 An "occupational disease" is "such disease or infection as arises naturally and proximately
5 out of employment." RCW 51.08.140.

6 In *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467 (1987), our Supreme Court
7 determined, in order to satisfy the "naturally" requirement, the worker must show:

8 [H]is or her particular work conditions more probably caused his or her
9 disease or disease-based disability than conditions in everyday life or all
10 employments in general; the disease or disease-based disability must
11 be a natural incident of conditions of that worker's particular
12 employment. Finally, the conditions causing the disease or disease-
13 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.

14 *Dennis* at 481.

15 While not at issue in the case, the court did reiterate that a worker must also satisfy the
16 "proximately" requirement of RCW 51.08.140.

17 The procedural history of this claim demonstrated there is no issue in these appeals that the
18 claimant sustained an occupational disease on April 6, 2008, and the occupational disease
19 naturally and proximately caused several conditions. Department orders became final that
20 established:

- 21 • Thoracic and left shoulder sprain—February 24, 2009; and
- 22 • Cervical sprain—June 17, 2009; and
- 23 • The date of manifestation of the occupational disease was April 6, 2008.

24 The Department order of February 9, 2010, placed the proximate cause of the claimant's
25 right shoulder sprain at issue in this appeal. The claimant first complained of right shoulder
26 complaints after the manifestation of the occupational disease on April 6, 2008.

27 There were differences in the medical testimony reviewing the timing of the claimant's
28 complaints of right shoulder symptoms. There was no persuasive evidence that the claimant had
29 complained of symptoms prior to the occupational disease on April 6, 2008. The absence of a
30 symptomatic pre-existing right shoulder condition undermines the factual basis for Drs. Sims and
31 Kerr's opinions that the claimant's right shoulder symptoms were a natural progression of a
32 pre-existing degenerative right shoulder condition.

1 Also, even if the claimant's right shoulder was weakened prior to the manifestation on
2 April 6, 2008, and the latent or quiescent infirmity or weakened physical condition was made
3 symptomatic by the occupational disease, then the resulting disability is to be attributed to the
4 occupational disease and not to the pre-existing condition. *Miller v. Department of Labor & Indus.*,
5 200 Wash. 674 (1939). Because the pre-existing infirmity was quiescent, no attempt at segregation
6 of pre-existing disability is allowed under RCW 51.32.080(5). If the pre-existing condition is
7 symptomatic, then rating and segregation of pre-existing disability is allowed under
8 RCW 51.32.080(5). Here, the extent of permanent partial disability was specifically waived as an
9 issue and the parties chose not to litigate the extent of the claimant's impairment.

10 I do not base my decision to affirm the Department order that accepted responsibility for a
11 right shoulder sprain on a "lighting up" theory, although it is relevant because the claim has been
12 allowed as an occupational disease. *In re Harry Q. Findley*, Dckt. No. 01 19588 (August 1, 2002).
13 A worker can receive industrial insurance benefits if an occupational injury or exposure worsens a
14 pre-existing unrelated condition, whether symptomatic or not. *In re Santos E. Saucedo*,
15 Dckt. No. 99 18557 (January 25, 2001).

16 Here, the claimant's right shoulder condition, even if pre-existing, was merely a condition
17 upon which the occupational disease operated. The claimant was taken as she was, with all her
18 pre-existing frailties and bodily infirmities. *Fochtman v. Department of Labor & Indus.*,
19 7 Wn. App. 286 (1972). *In re Doris Long*, Dckt No. 04 22508 (February 14, 2006).

20 Dr. Lang was asked whether the claimant's right shoulder condition was proximately caused
21 by the occupational disease in April 2008. Dr. Lang initially deferred to Dr. Peterson for an opinion
22 of the causal relationship between the right shoulder and the occupational disease, but then stated
23 the claimant's shoulder pain, condition, and history were consistent with a shoulder condition.

24 Dr. Lang's opinion was persuasive because he was best informed. He treated the claimant
25 15 times during the pertinent period and investigated multiple causes of the claimant's conditions.
26 Because his opinions were based on a well informed foundation and he considered all material
27 facts, Dr. Lang's opinions were persuasive.

28 The conditions proximately caused by the claimant's work activities blended together and
29 were not capable of being sorted out by July 2, 2010. Dr. Lang was persuasive when he explained
30 there could be overlap between the shoulder and spinal conditions. The residual effects of the
31 occupational disease were a proximate cause of the claimant's shoulder and spinal conditions.

32

1 TREATMENT

- 2 2. ***From June 2, 2009, through July 2, 2010, did the claimant's***
3 ***conditions, proximately caused by the industrial injury of April 6,***
4 ***2008, require further medical treatment? Or, had they reached***
5 ***maximum medical improvement?***

6 The claimant was prescribed anti-inflammatory medication and a TENS unit by Dr. Lang to
7 reduce pain and improve function. The claimant's right shoulder was periodically injected with
8 cortisone. Further, Ms. Hutcheson received diagnostic testing, particularly MRI's of the cervical
9 spine and right shoulder. Also, extensive testing and evaluation of the upper extremities was
10 conducted to determine the presence of a muscle disease. Finally, the claimant was compliant with
11 all treatment and participated fully.

12 Ms. Hutcheson is seeking further treatment in the form of further evaluations, as well as work
13 conditioning and hardening. Dr. Lang testified the claimant's conditions, proximately caused by the
14 April 2008 work activities, had not reached maximum medical improvement and were in need of
15 further medical treatment as of July 2, 2010. Drs. Kerr and Sims declared the claimant not in need
16 of further medical treatment and had no restrictions because, in part, they did not consider all of the
17 conditions proximately caused by the onset of the occupational disease.

18 Dr. Lang recommended conditioning because he found that treatment successful in "getting
19 people tuned up to get back to work." Lang Dep. at 17. Dr. Lang prescribed more than four weeks
20 of conditioning for three days per week and then work hardening for up to five times per week up to
21 six hours per day. Lang Dep. at 30-32.

22 TIME-LOSS COMPENSATION

- 23 3. **Was the claimant a totally and temporarily disabled worker from**
24 **June 18, 2009, through August 18, 2009, inclusive?**

25 In evaluating whether a worker is capable of gainful employment, the worker's pre-existing
26 disabilities and physical limitations, age, education, training and work experience, all must be taken
27 into account in determining whether the injury, superimposed upon all of these pre-injury
28 considerations, has rendered the worker unable to work. *Fochtman v. Department of Labor &*
29 *Indus.*, 7 Wn. App. 286 (1972)

30 The claimant was born on October 23, 1962. She was 5 feet 6 inches tall and weighed
31 about 135 pounds at the time of the hearing conducted in October 2010. She is right hand
32 dominant. The claimant graduated from high school and attended cosmetology school from 1979
to 1980. She worked in that field from 1980 to 1992. The claimant does not possess a current

1 cosmetology license. The claimant completed training as a card dealer. The claimant worked as a
2 grocery checker.

3 Ms. Hutcheson completed training as a card dealer between April 2009 and June 2009. She
4 explained she was off work and wanted to find a job that was less demanding than a grocery
5 checker job. Ms. Hutcheson concluded she could not work full time as a card dealer for three
6 reasons. First, card dealers must look down and reach across the card table continuously.
7 Second, these exertions and postures aggravated her discomfort. Third, she tried dealing at
8 smaller tables, but the symptoms persisted despite accommodations during training.
9 Ms. Hutcheson testified she was unable to perform the demands imposed on card dealers full time.

10 Ms. Larson reviewed the modified restrictions imposed on the claimant by the occupational
11 disease and concluded the claimant was incapable of obtaining reasonably continuous employment
12 on a full-time basis as a checker/retail clerk, cashier, or gambling dealer. Ms. Larson reviewed the
13 work demands summarized by past labor market surveys. Further, Ms. Larson met with the
14 claimant and conducted four telephone conferences with the claimant to confirm her understanding
15 of the claimant's socio-economic history and vocational profile. Ms. Larson considered the skills
16 that the claimant possessed, but concluded the claimant required further training to perform
17 additional jobs not fully analyzed such as greeter, parking lot attendant, and video clerk.

18 Job analyses of a checker/retail clerk, cashier or gambling dealer were provided to Dr. Lang.
19 Dr. Lang did not approve them, noting "patient needs work conditioning, work hardening, four
20 weeks each." 10/8/10 Tr. at 69 & 71.

21 The medical and vocational testimony of Dr. Lang and Ms. Larson was persuasive that the
22 claimant was incapable of gainful employment on a reasonably continuous basis from June 18,
23 2009, through August 18, 2009, inclusive.

24 CONCLUSION

25 In Docket No. 10 11581, the Department order dated February 9, 2010, in which the
26 Department accepted responsibility for a right shoulder sprain as related to the industrial injury, is
27 correct and should be affirmed.

28 In Docket No. 10 14481, the Department order dated April 22, 2010, in which the
29 Department determined it was correct in ordering the employer to pay time-loss compensation
30 benefits from June 18, 2009, through July 29, 2009, is correct and should be affirmed.

1 In Docket No. 10 14770, the Department order dated June 11, 2010, in which the
2 Department cancelled a prior order dated May 20, 2010, and directed the employer to pay time-loss
3 compensation benefits from July 30, 2009, through August 17, 2009, is correct and should be
4 affirmed.

5 In Docket No. 10 16783, the Department order dated July 2, 2010, in which the Department
6 affirmed a prior order dated June 2, 2009, in which it held the claim open for treatment, is correct
7 and should be affirmed.

8 In Docket No. 10 16784, the Department order dated July 7, 2010, in which the Department
9 affirmed a prior order dated October 1, 2009, that directed the employer to pay time-loss
10 compensation benefits for one day, August 18, 2009, and set wages for the purposes of calculating
11 time-loss compensation, is correct and should be affirmed.

12 FINDINGS OF FACT

- 13 1. On April 23, 2008, the claimant, Kim S. Hutcheson, filed an Application
14 for Benefits with the Department of Labor and Industries in which she
15 alleged an occupational disease while in the course of her employment
16 with Stormans, Inc. On February 24, 2009, the claim was allowed as an
17 occupational disease of thoracic and left shoulder sprain.

18 On March 9, 2009, the Department issued an order in which it
19 determined time-loss compensation benefits were ended as paid
20 through November 10, 2008, and closed the claim because no further
21 treatment was necessary and with no permanent partial disability. On
22 April 20, 2009, the claimant filed a Protest and Request for
23 Reconsideration of the March 9, 2009 order. On June 2, 2009, the
24 Department cancelled the March 9, 2009 order and determined the
25 claim remained open for further treatment and benefits. On June 4,
26 2009, the employer filed a Protest and Request for Reconsideration of
27 the June 2, 2009 order.

28 The Department issued an order on June 17, 2009, in which it accepted
29 responsibility for a cervical sprain.

30 On October 1, 2009, the Department issued an order in which it directed
31 the employer to pay time-loss compensation benefits for one day,
32 August 18, 2009, and determined the rate for this time period to be
\$2,509.82 per month, or \$83.66 per day. On October 29, 2009, the
employer filed a Protest and Request for Reconsideration of the
October 1, 2009 order.

1 On February 9, 2010, the Department issued an order in which it
2 accepted responsibility for a right shoulder sprain. On February 16,
3 2010, the employer filed a Notice of Appeal with the Board of Industrial
4 Insurance Appeals from the Department order dated February 9, 2010.
5 On March 15, 2010, the Board agreed to hear the appeal under Docket
6 No. 10 11581.

7 On March 23, 2010, the Department reconsidered the Department order
8 of February 9, 2010. On March 24, 2010, the Department cancelled the
9 order of March 23, 2010.

10 On April 22, 2010, the Department determined it was correct in ordering
11 the employer to pay time-loss compensation from June 18, 2009,
12 through July 29, 2009. On May 3, 2010, the employer filed a Notice of
13 Appeal with the Board of Industrial Insurance Appeals from the
14 Department order dated April 22, 2010. On May 18, 2010, the Board
15 agreed to hear the appeal under Docket No. 10 14481.

16 On May 20, 2010, the Department determined it was correct in ordering
17 time-loss compensation benefits for the period of July 30, 2008, through
18 August 17, 2009. On June 2, 2010, the employer filed a Notice of
19 Appeal with the Board of Industrial Insurance Appeals from the
20 Department order dated May 20, 2010. On June 11, 2010, the
21 Department cancelled the May 20, 2010 order, and determined the
22 payment of time-loss compensation benefits from July 30, 2009, through
23 August 17, 2009, was correct. On June 21, 2010, the Board denied the
24 employer's appeal of the May 20, 2010 order. On June 22, 2010, the
25 employer filed a Notice of Appeal with the Board from the Department
26 order dated June 11, 2010. On July 9, 2010, the Board agreed to hear
27 the appeal under Docket No. 10 14770.

28 On July 2, 2010, the Department affirmed the Department order dated
29 June 2, 2009, in which it held the claim open for treatment. On July 13,
30 2010, the employer filed a Notice of Appeal with the Board of Industrial
31 Insurance Appeals from the Department order dated July 2, 2010. On
32 August 3, 2010, the Board agreed to hear the appeal under Docket
No. 10 16783.

On July 7, 2010, the Department affirmed the order dated October 1,
2009, in which it directed the employer to pay time-loss compensation
benefits for one day, August 18, 2009. On July 13, 2010, the employer
filed a Notice of Appeal with the Board of Industrial Insurance Appeals
from the Department order dated July 7, 2010. On August 3, 2010, the
Board agreed to hear the appeal under Docket No. 10 16784.

2. Ms. Hutcheson sustained an occupational disease with a manifestation
date of April 6, 2008, while performing distinctive conditions of
employment that required her to repetitively reach, grasp, turn, scan, lift,
carry, and twist to maneuver 50 to 100 cases weighing 28 pounds each
off of a waist-high conveyor, over a collapsible bag rack, and onto a
platform in the course of her duties as a grocery checker.

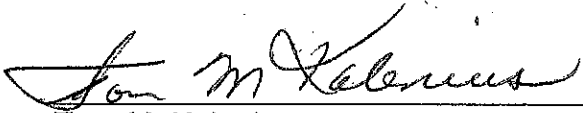
- 1 3. The occupational disease with a manifestation date of April 6, 2008,
2 naturally and proximately caused a cervical thoracic strain and a
3 worsened disc protrusion at C6-7, resulting in cervical, thoracic, bilateral
4 shoulder and right upper extremity conditions that required further
5 medical treatment from June 2, 2009, through July 2, 2010.
- 6 4. As of July 2, 2010, the claimant's conditions, proximately caused by the
7 occupational disease had not reached maximum medical improvement
8 and were in need of further medical treatment.
- 9 4. The occupational disease of April 6, 2008, was a proximate cause of
10 physical limitations on the claimant's ability to lift, carry, reach, and
11 maneuver her upper extremities.
- 12 5. The claimant was born on October 23, 1962. She was 5 feet 6 inches
13 tall and weighed about 135 pounds at the time of the hearing conducted
14 in October 2010. She is right hand dominant. The claimant graduated
15 from high school and attended cosmetology school from 1979 to 1980.
16 She worked in that field from 1980 to 1992. The claimant does not
17 possess a current cosmetology license. The claimant completed
18 training as a card dealer. The claimant worked as a grocery checker.
19 The restrictions imposed by the occupational disease include no lifting,
20 grasping, reaching, maneuvering, or carrying more than 15 pounds on a
21 seldom basis. The claimant could only perform the exertions frequently
22 with no more than 5 pounds and occasionally with no more than
23 10 pounds.
- 24 6. During the period from June 18, 2009, through August 18, 2009,
25 inclusive, the residual effects of the occupational disease precluded the
26 claimant from obtaining or performing reasonably continuous, gainful
27 employment in the competitive labor market, when considered in
28 conjunction with the claimant's age, high school, cosmetology and card
29 dealing education, work history as a cashier, and lack of transferable
30 skills to employment within her physical capacities.

CONCLUSIONS OF LAW

- 31 1. The Board of Industrial Insurance Appeals has jurisdiction over the
32 parties to and the subject matter of this appeal.
1. The occupational disease of April 6, 2008, was a proximate cause of the
claimant's cervical, thoracic, bilateral shoulder and right upper extremity
conditions.
3. From June 2, 2009, through July 2, 2010, the claimant's conditions,
proximately caused by the occupational disease were in need of further
medical treatment, as contemplated by RCW 51.36.010.
3. During the period from June 18, 2009, through August 18, 2009,
inclusive, the claimant was a totally and temporarily disabled worker
within the meaning of RCW 51.32.090 as the result of conditions,
proximately caused by the occupational disease.

- 1 4. In Docket No. 10 11581, the Department of Labor and Industries order
2 dated February 9, 2010, is correct and affirmed.
3 5. In Docket No. 10 14481, the Department of Labor and Industries order
4 dated April 22, 2010, is correct and affirmed.
5 6. In Docket No. 10 14770, the order of the Department of Labor and
6 Industries dated June 11, 2010, is correct and affirmed.
7 7. In Docket No. 10 16783, the order of the Department of Labor and
8 Industries dated July 2, 2010, is correct and affirmed.
9 8. In Docket No. 10 16784, the order of the Department of Labor and
10 Industries dated July 7, 2010, is correct and affirmed.

11 DATED: JAN 18 2011

12 

13 Tom M. Kalenius
14 Industrial Appeals Judge
15 Board of Industrial Insurance Appeals
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32