BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBERTO MOLINA	**DOCKET NO. 10 15106**
CLAIM NO. AK-83762	**PROPOSED DECISION AND ORDER**

INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius

APPEARANCES:

Claimant, Roberto Molina, by
Williams, Wyckoff & Ostrander, PLLC, per
Wayne L. Williams

Employer, Wilcox Farms, Inc., by
Employer Resources Northwest, Inc., per
Erin J. Dickinson

Department of Labor and Industries, by
The Office of the Attorney General, per
W. Martin Newman, Assistant

On April 23, 2010, the claimant, Roberto Molina, filed an appeal with the Board of Industrial Insurance Appeals from the Department order dated April 14, 2010, in which the Department rejected the claim. **REVERSED AND REMANDED.**

PRELIMINARY MATTERS

On May 26, 2010, the parties agreed to include the Jurisdictional History in the Board's record. The history established the Board's jurisdiction in this appeal.

The deposition of Derek S. Scott, taken on November 2, 2010, was published on receipt. All objections are overruled. All motions are denied. All irregularities are deemed waived as contemplated by CR 30(e) and 32(d)(4).

The deposition of Marc F. Bodow, M.D., taken on November 23, 2010, was published on receipt. All objections are overruled, except for the objections at pages 33-34, which was sustained. All motions are denied, except for the motion at page 34, which was granted. The testimony at page 34, lines 16-18 was stricken.

The deposition of Laura M. Lindsay, M.D., taken on December 3, 2010, was published on receipt. All objections are overruled, except for the objection at page 10, which is sustained for

substantive purposes. All motions are denied. All irregularities are deemed waived as contemplated by CR 30(e) and 32(d)(4).

The deposition of Sheila M. Smitherman, taken on December 3, 2010, was published on receipt. All objections are overruled. All motions are denied.

ISSUE PRESENTED

Did the claimant sustain an industrial injury within the meaning of RCW 51.08.100?

EVIDENCE

The lay testimony included Mr. Molina, Rosemarie Hart, Mary Ann Brooks, James Hoapili, Larry Weaver, and Kurt Nelson. The medical testimony included Dr. Lindsay, a family medicine physician, Dr. Scott, a physiatrist, Dr. Bodow, a physiatrist and Dr. Smitherman, a neurosurgeon.

Exhibit No. 1 was the Department order under appeal that rejected the claim.

From the testimony, the following chronology emerged:

Roberto Molina, the claimant, was born in 1956, graduated from high school and attended university in Nicaragua. In 2008, the claimant worked in the chicken barns of Wilcox Farms.

In January 2009, the claimant sought and received medical treatment for his low back and neck. Mr. Molina testified he initially attempted to obtain medical treatment for both his neck and back as part of a low back claim. Mr. Molina had sought and received chiropractic treatments for both his neck and back. Diagnostic treatment in the form of MRIs had been provided to Mr. Molina prior to June 15, 2009.

On June 15, 2009, the claimant alleged he was cleaning a chicken barn and turned his neck suddenly when he was startled. The claimant testified he turned his head suddenly because someone threw a dead chicken that landed two meters behind him. The claimant explained the other chickens "made a noise, all of them at the same time. I was afraid and I went fast and suddenly turned my neck to see what happened." 11/3/10 Tr. at 12.

The claimant testified he heard his neck crack. He worked two more hours and then sought treatment for his progressive neck pain. Mr. Molina did not file an Application for Benefits alleging an industrial injury to his neck until July 2009, because he had an open industrial insurance back claim. He alleged the neck condition worsened after the June 15, 2009 incident.

Rosemarie Hart, the claimant's supervisor, denied the claimant reported an industrial injury in June 2009. Ms. Hart explained the chicken barns are large buildings, about 350 feet long. She admitted that a person can be unaware of the presence of another in the chicken barn because the barns are not well illuminated, but the pens are checked for dead chickens by shining a flashlight so

the beams of light or the noise of the other egg gatherers should have been seen or heard by the claimant.

Mary Ann Brooks, a Human Resources Manager employed by Wilcox Farms, described the employer's policy that all employees report injuries to their supervisor within 24 hours. The manager explained the employer's process for processing industrial injury claims is for the injured worker to complete a supervisor's report, file it with the supervisor. The supervisor then reviews the report with the injured worker, and the supervisor signs the report. Ms. Brooks reviewed the supervisor's reports of the claimant's industrial injuries in June and January 2009. The June 2009 report was completed in August 2009. The January report was filled out within 24 hours of the industrial injury.

Ms. Brooks conducted an investigation and determined James Hoapili, a co-worker, threw dead chickens over the cages in the chicken barns on June 15, 2009. 11/3/10 Tr. at 37-38.

James Hoapili explained his methods for gathering eggs and disposing of dead chickens. He throws dead chickens over the cages into the next aisle that he will walk down and pick up. He worked as a team, with one worker gathering eggs and the other worker walking the 48 aisles, a tenth of one mile long, between the 6-foot high stack of chicken pens, checking if any chickens are dead. The team alternated their duties throughout the day on June 15, 2009. Mr. Hoapili denied knowledge that the claimant was in the chicken barn at the same time. He testified "as far as I know there was no one else in the house." 11/3/10 Tr. at 51.

Larry Weaver, a Wilcox Farms manager of the egg breaking plant, discussed with the claimant the claimant's medical treatment for neck and back conditions. The claimant first reported a neck condition to Mr. Weaver on May 13, 2009. Mr. Weaver testified the claimant also reported his neck was sore on June 15, 2009. Between May 13, 2009, and June 15, 2009, Mr. Weaver testified the claimant talked about his back, but Mr. Weaver was unsure if the surgery the claimant needed was on the neck or the back. Mr. Weaver denied Mr. Molina notified him of an industrial injury occurring on June 15, 2009, when he turned his neck suddenly. Mr. Weaver testified the industrial injury seemed like a strange event and he tried to put pertinent information in an email to the human resources office. Mr. Weaver did not recall the event and did not document the occurrence of an incident involving chickens. 11/3/10 Tr. at 60.

Mr. Weaver documented Mr. Molina's report at 12:46 p.m. on June 15, 2009, that, "As he was working today he turned his neck and felt some popping and now his neck is hurting him. He

clocked out and left for today." Mr. Weaver further wrote on June 17, 2009, that: "Monday he left early to see the doctor because he moved his neck during work, felt a crack." 11/3/10 Tr. at 61.

Kurt Nelson, a Wilcox Farms manager of the egg production department, denied Mr. Molina filed a neck injury report involving someone throwing a dead chicken in June 2009. Mr. Nelson received the report of an industrial injury in August 2009 of an event occurring in June 2009.

DECISION

The basic requirements to present a case in an appeal where the Department has rejected a claim for an industrial injury are contained in RCW 51.08.100.

The definition has two elements: first, there is the tangible happening or incident which may be termed the accident. This incident must be something of notoriety, fixed as to time, and susceptible of investigation.

Second, there must be a resulting "physical condition," or what is termed the bodily harm. The law requires that a proximate causal relationship between the incident and the physical condition must be established by medical testimony. *In re Kenneth Heimbecker*, BIIA Dec., 41,998 (1975).

OCCURRENCE OF AN INCIDENT

Mr. Molina testified he turned his neck on June 15, 2009, and heard his neck crack, followed by pain in his neck. Mr. Weaver denied that Mr. Molina notified him of an industrial injury occurring on June 15, 2009, when he turned his neck suddenly, but then admitted he documented Mr. Molina's report of turning his neck at work, accompanied by his neck popping and pain. Mr. Weaver wrote on June 17, 2009, that Mr. Molina left early to seek treatment because he moved his neck during work and felt a crack. 11/3/10 Tr. at 60-61.

The testimony that the claimant did not report an accident in June 2009 was directly controverted by Mr. Molina's testimony and the fact Mr. Weaver documented an incident on June 15, 2009. The written report of Mr. Weaver corroborated Mr. Molina's verbal testimony that Mr. Molina turned his head and felt pain in his neck while in the course of his employment on June 15, 2009.

Further, the claimant presented similar histories of an industrial incident to treating physicians on June 15, 2009, and June 16, 2009. Lindsay Dep. at 16-17. Mr. Molina subsequently described the same mechanism of injury when he provided a consistent history to a treating physician when he sought treatment for his neck at St. Peter's Hospital on July 16, 2009.

Bodow Dep. at 23. Statements made for the purposes of treatment are reliable because it is assumed that the self-interest of healing compels honesty. ER 803(a)(4).

The testimony of Ms. Hart, Ms. Brooks, and Mr. Hoapili was unpersuasive that there was no sudden, traumatic incident as contemplated by the first element of RCW 51.08.100. Egg gatherers may have failed to notice Mr. Molina in the chicken barns due to the large area the barns covered (up to 350 feet long) and the large numbers of chickens present (50,000 estimated by Dr. Bodow).

The evidence in the record was persuasive that a tangible happening or incident occurred on June 15, 2009, while the claimant was in the course of his employment with Wilcox Farms. This incident was something of notoriety, fixed as to time, and susceptible of investigation.

PROXIMATE CAUSAL RELATIONSHIP

Having established the first element, Mr. Molina must show a proximate, causal relationship between a condition and the incident by medical testimony, expressed in terms of probability rather than possibility. *Jackson v. Department of Labor & Indus.*, 54 Wn.2d 643 (1959); *Seattle School Dist. No. 401 v. Mintum*, 83 Wn. App. 1 (1996).

Dr. Scott, a physiatrist certified in his specialty of physical medicine and rehabilitation, treated the claimant as early as August 2009. At that time, the claimant presented objective findings of decreased cervical lordosis that correlated with clinical findings on examination and cervical MRI findings. Dr. Scott diagnosed cervical radiculopathy. Dr. Scott's testimony that the June 2009 incident could have definitely exacerbated the claimant's pre-existing neck symptoms was insufficient to establish the requisite proximate causal relationship between the June 2009 incident and a cervical condition because it is not enough to show that an injury "might have" or "could probably have" caused a condition. *Rambeau v. Department of Labor & Indus.*, 24 Wn.2d 44, 49 (1945).

Dr. Lindsay, a physician certified in her specialty of family practice, first treated the claimant on June 17, 2008, and then after January 2009 for the effects of an industrial injury to the claimant's low back. The incident was fully described as repetitively lifting and carrying boxes of liquid eggs weighing 6.7 pounds. Bodow Dep. at 13. Dr. Lindsay denied the claimant complained of neck pain after the industrial injury in January 2009.

Dr. Lindsay first discussed the claimant's neck symptoms with him on April 17, 2009, after reviewing the chart notes of a non-testifying physician who noted neck symptoms on April 8, 2009. By May 26, 2009, Dr. Lindsay concluded most of the claimant's complaints were from the neck, not the low back. Dr. Lindsay denied the claimant's request for treatment of his neck pain under the

open industrial insurance back claim. Lindsay Dep. at 21. Dr. Lindsay compared the findings depicted on cervical MRI's performed on May 20, 2009, and October 3, 2009.

Dr. Lindsay testified she would respond to questions posed by the Assistant Attorney General calling for an opinion on a more-probable-than-not basis, even if the specific question did not include that standard recital. Dr. Lindsay then stated the requisite medical opinion that Mr. Molina was having chronic neck issues that were exacerbated by the injury on June 15, 2009. Lindsay Dep. at 27.

The testimony of Dr. Smitherman, a neurosurgeon, and Dr. Bodow, a physiatrist, did not counter the medical testimony of Dr. Lindsay. Dr. Smitherman suggested cervical surgery after accepting the referral of the claimant from Dr. Lindsay. Dr. Smitherman interpreted the claimant's cervical MRI of May 20, 2009, as demonstrating degenerative joint disease that required a surgical fusion.

Dr. Bodow, a physician certified by the American Board of Preventative Medicine in occupational medicine, examined the claimant a single time on January 18, 2010. Dr. Bodow diagnosed a neck strain by history because the findings on examination did not include spasm or objective findings. Dr. Bodow concluded the claimant suffered neck symptoms prior to the industrial injury of June 15, 2009. However, the claimant is not precluded from establishing the occurrence of an industrial injury solely because he experienced neck symptoms previously.

Workers with pre-existing and symptomatic conditions and disabilities can sustain new injuries. *In re Lawrence L. Warner*, Dckt. No. 04 21898 (March 28, 2006). Similarly, RCW 51.32.080(5) allows for taking into account pre-existing disabilities when making permanent partial disability awards. A worker is entitled to benefits if the conditions of employment aggravated a pre-existing condition, whether symptomatic or not. *Wendt v. Department of Labor & Indus.*, 18 Wn. App. 674 (1977).

The new injury in June 2009 was a proximate cause of an aggravated cervical condition, new and materially different from the industrial injury of January 2009, because the medical records reported greater muscle spasm, reduced cervical lordosis, and acute pain secondary to a twist at work on June 15, 2009. Bodow Dep. at 41-42.

Even though the cervical MRI studies before and after the June 15, 2009 incident did not show a significant change, the objective clinical findings of increased spasm, reduced lordosis and acute pain were sufficient proof of an aggravated cervical condition.

The flare up or worsening of the claimant's cervical symptoms in June 2009 "to the point of requiring treatment" was sufficient to establish the elements of an industrial injury new and materially different from the industrial injury of January 2009. *In re Doris E. Long*, Dckt. No. 04 22508 (February 14, 2006); *In re Geraldine E. Clawson*, Dckt. No. 97 7773 (January 19, 1999).

Dr. Bodow concluded the claimant's industrial injury was a neck strain by history that essentially resolved by April 14, 2010. Dr. Bodow's conclusion implied a temporary aggravation. The temporary or permanent nature of the aggravation is beyond the issue presented in this appeal. It is premature to determine whether the claimant's degenerative cervical disc disease was permanently aggravated.

The Department order dated April 14, 2010, in which the Department rejected the claim is incorrect and should be reversed. The matter should be remanded to the Department to issue an order accepting the aggravation of the claimant's cervical spine condition as an industrial injury and to take such other and further action as is indicated by the law and the facts.

FINDINGS OF FACT

1. On July 30, 2009, the claimant, Roberto Molino, filed an Application for Benefits in which he alleged he sustained an industrial injury to his neck on June 15, 2009, while working for Wilcox Farms, Inc. On February 18, 2010, the Department allowed the claim. On February 19, 2010, the Department issued an order denying responsibility for neck sprain, degenerative disc disease of the neck and herniated disc-neck. On February 23, 2010, the Department issued an order closing the claim. On March 3, 2010, the claimant filed a Protest and Request for Reconsideration.

   On March 24, 2010, the claimant filed a Notice of Appeal from the Department orders dated February 19, 2010, and February 23, 2010. On April 13, 2010, the Department reassumed jurisdiction and reconsidered the Department orders dated February 19, 2010, and February 23, 2010. On April 14, 2010, the Department rejected the claim and cancelled the Department orders dated February 19, 2010, and February 23, 2010. On April 15, 2010, the Board issued an order returning the matter to the Department regarding the appeal from the Department orders dated February 19, 2010, and February 23, 2010.

   On April 23, 2010, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department order dated April 14, 2010. On May 13, 2010, the Board issued an Order Granting Appeal under Docket No. 10 15106, and agreed to hear the appeal.

2. On June 15, 2009, while in the course of his employment with Wilcox Farms, Inc., Mr. Molina experienced a sudden and tangible happening when he twisted his neck suddenly to react to a sound behind him, felt a pop in his neck, and neck pain. That sudden traumatic event produced immediate pain in the claimant's neck. As a result of this traumatic incident, Mr. Molina suffered from a resultant increase in muscle spasm and a cervical sprain.

CONCLUSIONS OF LAW

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

2. Mr. Molina suffered an industrial injury as contemplated by RCW 51.08.100 on June 15, 2009, while in the course of his employment with Wilcox Farms, Inc.

3. The Department order dated April 14, 2010, is incorrect and is reversed. The matter is remanded to the Department to allow the claimant's claim of an industrial injury on June 15, 2009, while in the course of his employment with Wilcox Farms, Inc. and take such other and further action as is indicated by the law and the facts.

DATED: FEB 07 2011

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