

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

1 IN RE: [REDACTED]) DOCKET NOS. [REDACTED]
 2)
 3 CLAIM NO. [REDACTED])
 4 **PROPOSED DECISION AND ORDER**

5 **Lance Palmer, Industrial Appeals Judge** — In February of 2016, [REDACTED] was
 6 injured while working for [REDACTED], Inc., a state fund employer. As Mr. [REDACTED]
 7 kneeled on the ground to connect a fire hydrant to a water main, a backhoe operator swung the
 8 backhoe's bucket arm and struck Mr. [REDACTED] in the low back and buttocks hard enough to propel
 9 Mr. [REDACTED] six feet through the air and onto on a pile of pipes. Mr. [REDACTED] who had no history of
 10 back problems, immediately felt severe low back pain that radiated into his legs. Over time, this pain
 11 increased. The Department of Labor and Industries allowed his industrial injury claim and accepted
 12 responsibility for the following conditions: post-traumatic stress disorder; major depressive disorder,
 13 low back strain of muscle, fascia, and tendon; lumbar radiculopathy;¹ and cervical strain of muscle,
 14 fascia, and tendon. It also issued orders denying responsibility for the conditions diagnosed as L4-5
 15 disc herniation (Docket No. [REDACTED]) and L5-S1 disc herniation (Docket No. [REDACTED]) on the ground
 16 that these conditions were not caused or aggravated by the industrial injury. Mr. [REDACTED] appealed
 17 the two segregation orders and proved by a preponderance of the evidence presented that the
 18 herniations were proximately caused by his industrial injury.² Therefore, the segregation orders are
 19 **REVERSED AND REMANDED** to the Department with direction to accept responsibility for
 20 Mr. [REDACTED] lumbar disc herniations.

DISCUSSION

The Industrial Injury

21 For 30 years, [REDACTED] now 59, performed heavy labor for [REDACTED]
 22 [REDACTED], a company that replaced underground municipal water mains. On

23 ¹ Throughout the hearing process, a third appeal (Docket No. [REDACTED]) was consolidated and litigated with these two
 24 appeals. The third appeal filed by Mr. [REDACTED] concerned a Department order denying responsibility for the condition
 25 diagnosed as lumbar radiculopathy and the parties presented testimony contesting whether Mr. [REDACTED] had lumbar
 26 radiculopathy that was proximately caused by his February 23, 2016 industrial injury. Much of that testimony concerned
 27 Mr. [REDACTED] symptoms, electrodiagnostic test findings, diabetes, and the Department's authorization of certain medical
 28 procedures. Counsel for the parties argued over whether—per *Clark County v. Maphet*, 10 Wn. App.2d 420 (2019)—the
 29 Department's authorization of these procedures meant that it administratively accepted the lumbar radiculopathy
 30 condition as a matter of law. On October 1, 2020, after both parties rested, but before I could rule, the parties entered
 31 into a binding Order on Agreement of Parties directing the Department "to issue an order accepting lumbar radiculopathy."
 32 For this reason, in this Proposed Decision and Order I will not reference the *Maphet* decision or any evidence in the
 33 record that relates to it.

34 ² *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498 (1949), overruled on other grounds by *Windust v. Dep't*
 35 *of Labor & Indus.*, 52 Wn.2d 33 (1958).

1 February 23, 2016, he was kneeling on the ground to attach a water main to a fire hydrant to when
2 his supervisor, who was operating a backhoe, swung the backhoe arm around and hit Mr. [REDACTED] in
3 the low back and buttocks with the backhoe's bucket. The force of impact knocked Mr. [REDACTED] off
4 the ground and into the air. When he landed on a pile of pipes six feet away from the fire hydrant,
5 he felt immediate low back pain that radiated into his legs. After the injury, Mr. [REDACTED] continued to
6 work for a week. He testified that he hoped his condition would improve, but it just got worse.
7 According to him, he developed numbness in his feet, and when he tried to move a piece of heavy
8 equipment at the jobsite, he crashed into another vehicle after failing to fully depress the brake pedal
9 because he could not feel it with his foot. After that incident, he went home and never worked again.

14 **Pre-Injury History**

15 Mr. [REDACTED] and his family physician of 15 years testified that Mr. [REDACTED] never complained
16 of—or treated for—lumbar pain prior to the February 23, 2016 industrial injury. Although Mr. [REDACTED]
17 sustained on-the-job injuries prior to February 23, 2016, there was no expert testimony (or any
18 argument) suggesting that the segregated lumbar disc conditions at issue preexisted the
19 February 23, 2016 industrial injury.³

23 **Post-Injury Symptoms**

24 At the time of his injury, Mr. [REDACTED] stood 6 feet 4 inches tall and weighed approximately 270
25 pounds. According to his wife, [REDACTED], he was a big, strong, and vigorous man who was able to labor
26 at work and then come home to perform physically-demanding chores on the property before going
27 to help friends and neighbors with similar chores. Of his post-injury condition, she said he "can't
28 basically do anything" because of his pain.⁴ She testified that he often falls while walking and that
29 because of his limited range of movement, she helps him shower and put his socks on. He is no
30 longer active, is irritable, and keeps to himself.

31 After the injury, Mr. [REDACTED] gained more than 50 pounds. At some unknown point in time
32 post-injury, he was diagnosed with diabetes. He testified that he went on a weight loss program after
33 receiving the diagnosis and was able to keep his blood sugar levels under control within the need for
34 insulin by changing his diet and taking Metformin. Although post-injury electrodiagnostic studies
35 confirmed that Mr. [REDACTED] has diabetic neuropathy in his feet, the experts offered no testimony that
36 would establish when the neuropathy started and they did not characterize its severity at any point in
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46 ³ Therefore, I will not discuss those prior injuries in this Proposed Decision and Order.

47 ⁴ 9/2/20 Tr. at 29.

1 time material to these consolidated appeals. While Mr. [REDACTED] orthopedic expert attributed
 2 Mr. [REDACTED] frequent falls to a loss of left ankle evtor muscle strength proximately caused by
 3 lumbar radiculopathy, the Department's neurology expert testified that the falling problems are due
 4 to diabetic neuropathy. All of the experts made clinical findings of left calf atrophy.
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7 ***Claim Allowance and Accepted Conditions***

8 Following his industrial injury, Mr. [REDACTED] filed a workers' compensation claim, which the
 9 Department allowed. The Department accepted the following conditions as being claim-related:
 10 post-traumatic stress disorder; major depressive disorder, low back strain of muscle, fascia, and
 11 tendon; lumbar radiculopathy; and cervical strain of muscle, fascia, and tendon.
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14 ***The Lumbar MRI Films***

15 Because of Mr. [REDACTED] symptom presentation, a lumbar MRI was taken on April 8, 2016.
 16 By all accounts, this MRI showed little in the way of significant findings, and was interpreted as
 17 showing no disc problems, no spinal canal narrowing, no foraminal compression, and only
 18 "age-appropriate degenerative changes of a mild, perhaps moderate degree."⁵
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21 Nevertheless, because of Mr. [REDACTED] persistent symptom presentation, a repeat lumbar
 22 MRI was taken a year-and-a-half later, on November 8, 2017. This film showed a mild disc bulge at
 23 L4-5 and a mild disc protrusion at L5-S1. The testifying experts all agreed that the terms "bulge,"
 24 "protrusion," and "herniation" can be used interchangeably. After this second MRI was taken, the
 25 Department authorized—and Mr. [REDACTED] received—a series of lumbar branch blocks and epidural
 26 steroid injections. However, on December 24, 2019, the Department issued an order in which it
 27 stated that Mr. [REDACTED] L4-5 lumbar disc herniation was not caused or aggravated by his industrial
 28 injury, and on December 26, 2019, it issued an order in which it concluded that Mr. [REDACTED] L5-S1
 29 disc herniation was not caused or aggravated by his industrial injury. The disposition of these two
 30 consolidated appeals turns on the interpretations of these lumbar MRI films given by the four testifying
 31 medical experts:
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38 ***Mr. Shearer's Medical Experts***

39 Mr. Shearer made a prima facie showing that the two segregation orders were incorrect
 40 through the testimony of Cole Hemmerling, M.D., who has been Mr. [REDACTED] family practitioner
 41 since 2006 and is his attending physician for Claim No. [REDACTED]. Dr. Hemmerling reviewed all of
 42 Mr. Shearer's medical treatment and diagnostic records that related to the February 23, 2016 injury
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⁵ Haynes 9/11/20 Dep. at 26.

1 and offered his opinion that Mr. [REDACTED] has L4-5 and L5-S1 disc herniations that were proximately
 2 caused the industrial injury. He attributed the difference between the two MRIs to a progression of
 3 damage to the discs that was done by the backhoe. On that point, his testimony was as follows:
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5 Well, the path of physiology that is suggested usually with disk herniation is that it incurs
 6 microtears in the annulus and the nucleus pulposus, eventually works its way through
 7 that microtear and extends into a bulge. And that bulge then becomes a herniation of
 8 the nucleus pulposus into the spinal canal, potentially compressing the spinal cord or
 9 the facets or sort of the nerve root exiting the spinal cord through the foramen.⁶
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11 Mr. [REDACTED] also presented the testimony of H. Richard Johnson, M.D., a long-retired
 12 orthopedic surgeon who performs forensic examinations for the claimant's bar. Like Dr. Hemmerling,
 13 Dr. Johnson reviewed some 368 pages of Mr. [REDACTED] medical treatment records (including the
 14 radiology reports), examined Mr. [REDACTED] (on June 5, 2020), and offered the opinion that
 15 Mr. [REDACTED] lumbar disc herniations were proximately caused by the February 23, 2016 industrial
 16 injury. He pointed out that these discs were the source of Mr. [REDACTED] lumbar radiculopathy
 17 condition, based upon the clinical findings—left calf atrophy, decreased left ankle evolver strength,
 18 muscle spasms from T9 to S1, flattening of the normal lumbar curvature, loss of lumbar range of
 19 motion, and some left toe muscle weakness in the L5 nerve distribution—he made during his physical
 20 examination of Mr. [REDACTED]. He was of the view that Mr. [REDACTED] had "little in the way of any
 21 [degenerative] change that would normally be seen in a patient who has a 40-year history of
 22 aggressive labor-intensive-type activity,"⁷ and thus attributed the two herniated discs to significant
 23 blows he received during the industrial injury, when Mr. [REDACTED] pain and radicular symptoms
 24 started:
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26 The initial study—and this is 20/20 hindsight now—but the initial MRI did not reveal any
 27 evidence of a herniated disc. That's not to say that the discs were not damaged, for
 28 the significant compressive forces applied to his low back as a result of being struck by
 29 the backhoe did on a more-probable-than-not basis pre-damage his lumbar discs. A
 30 study that would have revealed that damage would have been a bone scan, for it would
 31 have demonstrated on a more-probable-than-not basis an increased uptick in the lower
 32 lumbar spine because of the injuries that he sustained to his low back as a result of the
 33 backhoe striking his low back.⁸
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45 ⁶ Hemmerling Dep. at 9-10.

46 ⁷ Johnson Dep. at 32.

47 ⁸ Johnson Dep. at 42.

1 **The Department's Medical Experts**
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3 The Department presented testimony from two retired doctors who jointly performed an
4 RCW 51.32.110 medical examination of Mr. ██████████ on August 2, 2019, not quite two years after the
5 second MRI that showed the two herniated lumbar discs was taken. In their report, they offered the
6 following diagnoses: lumbar strain/contusion, occurring on February 23, 2016, related, resolved
7 without objective residual; "good-looking lumbar spine, as per MRI of April 8th of 2016";⁹ and diabetic
8 polyneuropathy, not related, not caused by trauma. They did not diagnose Mr. ██████████ as having
9 lumbar disc herniations, which puts them in a difficult position on appeal, given that they are now
10 offering causation opinions concerning disc herniations they once thought were non-existent.
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12 James M. Haynes, M.D. is a retired neurologist. He performed the panel's medical records
13 review. Not only did he not look at the actual lumbar MRI films, according to Dr. Haynes, he did not
14 even have the November 8, 2017 lumbar MRI report to review, but instead relied upon "a quote from
15 the physician's assistant" concerning the findings in that report.¹⁰ During his testimony, he offered
16 asides such as "I think the disc herniation is not a correct characterization of his imaging"¹¹ and "we
17 were asked to address a newly contended condition of lumbar herniated discs. And my comment
18 there is: What herniation?"¹² Given this testimony, I find it hard to give much weight to his opinion
19 that Mr. ██████████ L4-5 and L5-S1 disc herniations represent a natural progression of preexisting
20 degenerative processes unrelated to the industrial injury.
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22 James Robbins, M.D. is a retired general orthopedic surgeon who specialized in shoulder and
23 knee arthroscopies. On direct examination, the Department did not ask him whether Mr. ██████████ has
24 L4-5 and L5-S1 disc herniations—it merely asked him whether the disc herniations were related to
25 the February 23, 2016 industrial injury, and he answered that "it was our opinion that the later
26 appearance of a disk protrusion was related to normal wear and tear and progression of age-related
27 problems."¹³ While he testified that he personally reviewed the April 8, 2016 MRI film prior to his
28 perpetuation deposition, he was not asked whether he reviewed the November 8, 2017 MRI film or
29 report, but conceded that the MRI did "did show mild disk bulge at L4-5 . . . [a]nd at L5-S1 there was
30 a mild disk protrusion."¹⁴ And while Dr. Robbins did not abandon his own opinion, during cross
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43 ⁹ Haynes 9/10/20 Dep. at 19.

44 ¹⁰ Haynes 9/11/20 Dep. at 13.

45 ¹¹ Haynes 9/11/20 Dep. at 13.

46 ¹² Haynes 9/10/20 Dep. at 40.

47 ¹³ Robbins Dep. at 11.

¹⁴ Robbins Dep. at 13.

1 examination he agreed that the causation opinions offered by Dr. Hemmerling and Dr. Johnson were
2 plausible:
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4 Q: And if this [the backhoe] strikes him in his low back, would you agree that this had
5 the potential to do damage to his disk structures, and the supporting ligaments,
6 tendons, and musculature surrounding it, even if it didn't cause an immediate
7 herniation?

8 A: Yes, it had that potential.

9 Q: And so if this gentleman was struck with enough force that it did disrupt those
10 structures even without causing a disk herniation immediately, might that have
11 contributed to the age related, as you've described later, manifestation of those disk
12 bulges and protrusions?

13 A: It would be a contributing factor, yes.¹⁵
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16 Given the history of no prior back problems, the severity of the industrial injury, the immediate
17 onset and progressive worsening of lumbar symptoms, and the presence of clinical findings, I believe
18 that the causation opinions offered by Dr. Hemmerling and Dr. Johnson outweigh those offered by
19 Dr. Haynes and Dr. Robbins, and that Mr. [REDACTED] L4-5 and L5-S1 disc herniations were
20 proximately caused by the industrial injury.
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22 DECISION.

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24 In Docket No. [REDACTED], the claimant, [REDACTED], filed an appeal with the Board of
25 Industrial Insurance Appeals on January 10, 2020. The claimant appeals a Department order dated
26 December 24, 2019. In this order, the Department denied responsibility for the condition diagnosed
27 as L4-5 disc herniation. This order is incorrect and is reversed and remanded to the Department with
28 direction to accept responsibility for the condition.
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31 In Docket No. [REDACTED], the claimant, [REDACTED], filed an appeal with the Board of
32 Industrial Insurance Appeals on January 10, 2020. The claimant appeals a Department order dated
33 December 26, 2019. In this order, the Department denied responsibility for the condition diagnosed
34 as L5-S1 disc herniation. This order is incorrect and is reversed and remanded to the Department
35 with direction to accept responsibility for the condition.
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38 FINDINGS OF FACT

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42 1. On March 17, 2020, an industrial appeals judge certified that the parties
43 agreed to include the Jurisdictional History in the Board record solely for
44 jurisdictional purposes.
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47 ¹⁵ Robbins Dep. at 21.

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2. [REDACTED] sustained an industrial injury on February 23, 2016 when he was struck in the low back and buttocks by a backhoe and propelled six feet through the air into a pile of pipes. This industrial injury proximately caused the following conditions: post-traumatic stress disorder; major depressive disorder; low back strain of muscle, fascia, and tendon; lumbar radiculopathy; and cervical strain of muscle, fascia, and tendon.

Docket No. [REDACTED]

3. In addition, the industrial injury proximately caused the condition diagnosed as L4-5 disc herniation.

Docket No. [REDACTED]

4. In addition, the industrial injury proximately caused the condition diagnosed as L5-S1 disc herniation.

CONCLUSIONS OF LAW

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

Docket No. [REDACTED]

2. The Department order dated December 24, 2019, is incorrect and is reversed. This matter is remanded to the Department to issue an order accepting responsibility for the condition diagnosed as L4-5 disc herniation.

Docket No. [REDACTED]

3. The Department order dated December 26, 2019, is incorrect and is reversed. This matter is remanded to the Department to issue an order accepting responsibility for the condition diagnosed as L5-S1 disc herniation.

Dated: December 14, 2020



Lance Palmer
Industrial Appeals Judge
Board of Industrial Insurance Appeals