

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

1 **IN RE: MYLON K. DABBS** ) **DOCKET NO. 10 10349**  
2 **CLAIM NO. SD-38863** ) **PROPOSED DECISION AND ORDER**

3 INDUSTRIAL APPEALS JUDGE: William P. Gilbert  
4

5 **APPEARANCES:**

6 Claimant, Mylon K. Dabbs, by  
7 Williams, Wyckoff & Ostrander, PLLC, per  
8 Wayne L. Williams

9 Self-Insured Employer, Safeway Stores, Inc., by  
10 Pratt, Day & Stratton, PLLC, per  
11 Gibby M. Stratton

12 Department of Labor and Industries, by  
13 The Office of the Attorney General, per  
14 Cathy W. Marshall, Assistant

15 The self-insured employer, Safeway Stores, Inc., filed an appeal with the Board of Industrial  
16 Insurance Appeals on January 12, 2010, from an order of the Department of Labor and Industries  
17 dated November 16, 2009. In this order, the Department cancelled the Department order of  
18 August 14, 2009, denying the claim, and allowed the claim as an injury or an occupational  
19 disease/condition. The Department order is **AFFIRMED**.

20 **PROCEDURAL AND EVIDENTIARY MATTERS**

21 On March 18, 2010, the parties agreed to include the Jurisdictional History in the Board's  
22 record. That history establishes the Board's jurisdiction in this appeal.

23 The Deposition of James A. Champoux, M.D., to perpetuate his testimony of July 29, 2010,  
24 is published in accordance with WAC 263-12-117 with all objections overruled.

25 The Deposition of Christopher C. Kain, M.D., to perpetuate his testimony of September 10,  
26 2010, is published in accordance with WAC 263-12-117 with all objections overruled.

27 The Deposition of Paul J. Allen, M.D., to perpetuate his testimony of October 7, 2010, is  
28 published in accordance with WAC 263-12-117 with all objections overruled.

29 Exhibit No. 1: Self Insurer Accident Report which was admitted at the September 15, 2010  
30 hearing.

31 Exhibit No. 2: Stipulation of Parties Regarding Testimony of Donald N. Barron, M.A., C.D.  
32 and attached Exhibit A (Job Analysis) is hereby admitted on the record.

1 ISSUE(S)

2 Whether the claimant sustained an industrial injury, while in the course  
3 of his employment, within the meaning of RCW 51.08.100; and/or  
4 whether the claimant suffered an occupational disease, which arose  
5 naturally and proximately out of the distinctive conditions of his work,  
6 within the meaning of RCW 51.08.140.

6 EVIDENCE PRESENTED

7 Mylon K. Dabbs, Jr.

8 The claimant, Mr. Dabbs, is a 62-year-old married man. He finished high school and  
9 completed three years of junior college, but received no certification. He has previously been  
10 employed as a retailer of liquor and wine, retail store manager, and a general manager. He later  
11 pursued training as a carpenter's apprentice and began developing properties. During this time, he  
12 also hired on at Safeway as a helper clerk. He entered Safeway's management training program  
13 and began working in the Safeway meat-cutting department in 1989.

14 He described his duties as putting machines together and then breaking freight. He uses  
15 various tools such as a band saw and a grinder. He would have to move 25- to 30-pound rubber  
16 mats. His job involved a lot of handling of heavy freight, including items weighing up to 90 pounds.  
17 He testified that a particular problem in his job was many of these heavy items had to be moved in  
18 closed-in spaces.

19 Prior to 2009 Mr. Dabbs, received treatment from a chiropractor of approximately 10 visits,  
20 for a sore back in 2001.

21 Mr. Dabbs described a 2003 industrial injury as an incident where pork loins were on sale  
22 and he had to lift many cases of them weighing between 75 and 92 pounds. He described being  
23 injured when he had to lift the pork loin packages, moving them from the lifting position to the floor.  
24 He was taken to the emergency room in Port Angeles. He testified it took a couple weeks for him to  
25 see a physician. He stated he was off work for seven weeks, but returned to work before his  
26 treatment was complete. He had limited physical therapy and his claim was closed.

27 Mr. Dabbs testified he continued to work at Safeway between 2003 and 2009, but had low  
28 back pain after his shifts.

29 Mr. Dabbs testified that in 2009, two days prior to the last day he worked for Safeway, he  
30 had a pretty "rough advertisement" and a "crooked board." 9/15/10 Tr. at 16. He testified he was  
31 getting lunchmeat off of the board and, in order to do so, he had to pull a box of pork loin to the end  
32 of the board. He felt a sharp pain down his back and spasms. He did not seek medical attention  
that day. He indicated to his supervisor that he did not feel it was an accident. Mr. Dabbs testified

1 he was off for five days, and this occurred sometime around the middle of May, but he was not  
2 sure. Mr. Dabbs testified he went back to work, however, he was not feeling better or healed and  
3 talked to his manager. The manager said he did not want Mr. Dabbs working if he was less than  
4 100 percent. Mr. Dabbs consulted a Safeway official, who indicated he should reopen his claim  
5 from 2003. He stated the official told him if his back gets worse, he can always reopen his claim,  
6 and it was not a big deal. Mr. Dabbs testified that after the industrial injury in 2003 he had pain in  
7 his left hip and leg. However, after the 2009 injury, he developed problems in his right leg.  
8 Mr. Dabbs testified it was approximately five to six weeks before he filed a new claim regarding the  
9 2009 incident. Mr. Dabbs testified his right leg gradually became worse and eventually he was  
10 hospitalized for it. In February 2010, he received treatment of injections and medication. On  
11 cross-examination, when questioned about exhibit No. 1, Mr. Dabbs said he did not feel there was  
12 a specific incident.

13 James A. Champoux, M.D.

14 Dr. Champoux is an orthopedic surgeon. He performed an independent medical evaluation  
15 on Mr. Dabbs, along with neurologist, Dr. William Stump. Dr. Champoux testified that Mr. Dabbs  
16 indicated he had a May 4, 2003 industrial injury while lifting a case of meat. Mr. Dabbs was  
17 evaluated by Dr. James Wallace and indicated he had prior episodes of low back pain which were  
18 less severe and were treated by a chiropractor. Dr. Champoux reviewed x-ray films from 2002,  
19 which showed degenerative joint disease significantly at L5-S1.

20 Dr. Champoux testified about an MRI from May 7, 2003. He indicated it showed multilevel  
21 degenerative disc changes. At L2-3 a left paracentral disc protrusion contoured the transverse  
22 single left-sided L3 nerve root. At L4-5 there was a mild broad-based disc protrusion superimposed  
23 upon the development of a small spinal canal, resulting in mild to moderate spinal stenosis and  
24 encroachment upon the transversing left L5 nerve root at the superior margin of the lateral recess.  
25 At L5-S1 central and left paracentral end plate spurring was present, associated with posterior  
26 displacement of the transversing left S1 nerve root.

27 Mr. Dabbs was referred to Dr. Kain, who is an orthopedic surgeon. Dr. Kain saw Mr. Dabbs  
28 on June 17, 2003, and diagnosed degenerative joint disease of the lumbar spine with no  
29 radiculopathy, but significant back pain. The treatment regimen was ibuprofen and physical  
30 therapy.

31 Mr. Dabbs began physical therapy on July 16, 2003, and continued to October 13, 2003. He  
32 achieved pain improvement, but his symptoms did not resolve. Mr. Dabbs did not follow up with

1 Dr. Kain and his claim was closed November 18, 2003. Mr. Dabbs reported his pain increased with  
2 increased activities and became more intense in May 2009 when he sought treatment from Dean  
3 Stout PA-C, who diagnosed bilateral lumbar pain with reduced range of motion, but neurologically  
4 intact.

5 Mr. Dabbs underwent a second MRI on June 10, 2009. This MRI showed the left  
6 paracentral disc with left L2-3 neural foraminal encroachment, central disc protrusion with mild right  
7 L3-4 neural foraminal encroachment by central disc and right facet joint hypertrophy. Moderate  
8 spinal stenosis and bilateral neural foraminal encroachment with small left synovial cyst at L4-5 and  
9 right L5-S1 neural foraminal encroachment by disc osteophyte complex and facet joint hypertrophy  
10 and widespread discogenic deterioration changes with marketed modic type II change at L5-S1.

11 Dr. Champoux testified that comparing the two MRI reports he found changes at L2-3  
12 similar, however changes at L3-4, which were primarily left-sided in 2003 had now become more  
13 right-sided. He noted that the stenosis at L4-5 was unchanged. He stated L5-S1 changes were  
14 similar, but facet changes were more right-sided on the newer study.

15 Dr. Champoux testified Mr. Dabbs' current status was on going back pain with continuous  
16 pain, increasing in intensity with sitting or standing, no reported leg pain; however, occasional  
17 numbness and tingling in the leg.

18 Dr. Champoux testified his findings were no palpable paravertebral spasm and tenderness  
19 with light percussion over the midline of the lumbar spine. Active range of motion testing revealed  
20 80 degrees flexion, 20 degrees extension, right and left bilateral bending 20 degrees right and left,  
21 rotation 20 to 30 degrees. Axial loading of the shoulders produced complaints of pain in the low  
22 back, however, enblock rotation revealed no pain. The seated straight leg test revealed no pain.  
23 Dr. Champoux found none of the test significantly outside of the normal range. The neurological  
24 exam showed no clear focal weakness, with the exception of flexion and extension of the toes,  
25 which was slightly reduced. Mr. Dabbs described decreased sensation in a stocking distribution to  
26 both legs. Knee reflexes were symmetrical bilaterally; the ankle reflexes were absent bilaterally.  
27 Dr. Champoux testified the reflex findings showed the deep tendon reflexes were normal and  
28 indicated there was no neurological involvement. He stated the stocking decrease sensation would  
29 suggest some inherent disease within the nerves themselves.

30 Dr. Champoux opined that Mr. Dabbs had a history of low back pain starting in 2001 prior to  
31 the industrial injury in 2003. He diagnosed Mr. Dabbs as having lumbosacral strain as a result of  
32

1 the May 2003 industrial injury, resolved. In addition, multilevel degenerative disc disease present  
2 prior to the May 2003 industrial injury.

3 Dr. Champoux opined that the degenerative change in Mr. Dabbs was at least moderate to  
4 moderately severe; however, he was unable to say the degenerative changes were due to  
5 Mr. Dabbs' work.

6 Dr. Champoux reviewed a job analysis of Donald Barron (Exhibit No. 2, Appendix A) and  
7 stated he was familiar with the physical demands of Mr. Dabbs work. Dr. Champoux opined he  
8 thought that Mr. Dabbs back pain was secondary to the degenerative disc disease, but it was  
9 impossible to tell if the degenerative disease was familial.

10 Asked how he can rule out work as a cause of the degenerative disc disease, Dr. Champoux  
11 testified he had no evidence of it. Additionally, he stated the medical literature does not suggest it.  
12 He rated Mr. Dabbs as Category 2 impairment, but not as a result of work. Dr. Champoux testified  
13 there were changes between the two MRIs, but nothing out of the ordinary given the degenerative  
14 disc disease.

15 Christopher C. Kain, M.D.

16 Dr. Kain is an orthopedic and spine surgeon who evaluated Mr. Dabbs on June 17, 2003.  
17 His examination revealed that Mr. Dabbs could heel walk, toe walk, and squat. Dr. Kain felt  
18 Mr. Dabbs' neurological signs were within normal limits. Dr. Kain thought range of motion of the  
19 hips, knees, and ankles was full and without pain. Dr. Kain found tenderness throughout the  
20 posterior lumbosacral spine. Dr. Kain's diagnosis based upon his examination and MRI results of  
21 May 2003 was arthritis of the spine. His prescribed treatment was physical therapy, strengthening  
22 exercises and ibuprofen. He did suggest Mr. Dabbs could return to work, but should be restricted  
23 to no greater than 40 hours per week.

24 Dr. Kain testified regarding the MRI of 2003, stating it showed multilevel disc degeneration  
25 with L5-S1 being the most to advanced, including modic changes at L5-S1 with protrusion of the  
26 nerve root at L5. He opined that these degenerative changes would be long-standing.

27 Dr. Kain next saw Mr. Dabbs in 2009 when he was contacted by Safeway to answer a  
28 question about the claim. He found Mr. Dabbs had increased pain despite the exercises.  
29 Mr. Dabbs complained of neck pain and intermittent numbness and tingling in his legs. Mr. Dabbs  
30 told Dr. Kain he had stopped working in June 2009 because of his back pain.

31 Dr. Kain found no changes between the 2003 and 2009 MRIs, but based this only on the  
32 report as he did not view the actual MRI results. Dr. Kain opined that there was nothing objectively

1 worse clinically. Dr. Kain stated it was difficult from one person to another to correlate pain with  
2 MRI findings. Dr. Kain opined that being a meat cutter should make Mr. Dabbs less likely to have  
3 significant degenerative changes when compared with other workers. Dr. Kain opined he would  
4 agree with Dr. Champoux, degenerative disc disease is primarily genetic and workers can  
5 experience increased symptoms with physical work activities. He stated it is a naturally occurring  
6 disorder.

7 Dr. Kain was asked about a chart note from 2009 in which he opined Mr. Dabbs had chronic  
8 low back pain secondary to degenerative disc disease, probably contributed to by employment, and  
9 possibly aggravated by continuous employment as a meat cutter. Dr. Kain admitted those facts in  
10 the chart note; however, he stated he could not state those facts as an opinion on a  
11 more-probable-than-not basis.

12 Dr. Kain explained there are two issues (1) what caused the degenerative disc disease, and  
13 (2) did the job aggravate it. Dr. Kain opined the degenerative disc disease was not caused by the  
14 employment, but it was very probable that the job would make Mr. Dabbs hurt his back.

15 Paul J. Allen, M.D.

16 Dr. Allen is a physical medicine and rehabilitation physician. He examined Mr. Dabbs on  
17 August 4, 2010. Dr. Allen reviewed exhaustive medical reports regarding Mr. Dabbs. Dr. Allen said  
18 Mr. Dabbs' chief complaint was low back pain with pain going down the inner part of his right thigh  
19 and leg to his heel area. Dr. Allen testified he was aware of Mr. Dabbs' work history with Safeway  
20 as a meat cutter. He stated this employment required lifting heavy cases weighing 80 to  
21 100 pounds, unloading freight with a total weight of 3,500 to 4,000 pounds per day, and significant  
22 bending, stooping, lifting, and twisting.

23 Dr. Allen testified the 2003 industrial injury involved Mr. Dabbs working as a closing cutter  
24 doing significant heavy lifting. Mr. Dabbs lifted approximately 11 packages weighing 90 pounds  
25 each, on the last package, he felt immediate low back pain so severe he had to lie on the floor for  
26 15 minutes. Dr. Allen stated he was aware Mr. Dabbs sought treatment from Dr. Kain who ordered  
27 an MRI, and that during this time Mr. Dabbs had complained of weakness in lifting his hip.

28 Mr. Dabbs told Dr. Allen that in 2009 he had been unloading freight after working as a  
29 morning meat cutter, unloading wooden pallets, and boxes weighing 60 to 90 pounds, he had to  
30 pull, lift, and twist to place the boxes into position. Mr. Dabbs also said he moved additional boxes  
31 from the floor weighing 60 to 90 pounds. Mr. Dabbs described a tightening of his muscles with pain  
32 in this low back after lifting eight boxes. Mr. Dabbs said he could not finish the shift. Mr. Dabbs

1 said he took five days off and when he returned he was told they would not be able to use him if he  
2 was not 100 percent.

3 Dr. Allen testified that Mr. Dabbs sought medical attention and an additional MRI was  
4 conducted on June 10, 2009. In addition, there was an IME done July 2009, which found no new  
5 injury and no relation to work activities. Mr. Dabbs stated he had been hurt later during physical  
6 therapy. Because of this, he underwent epidural steroid injection in March 2010, without benefit.  
7 Dr. Allen reviewed the records of Dr. Hsiang and found it was thought the MRI showed new neural  
8 foraminal encroachment and narrowing of the nerve roots.

9 Mr. Dabbs told Dr. Allen he rates his pain as 8 out of 10, averaging 6 out of 10, for 7 out of  
10 7 days, approximately 100 percent of the time. He told Dr. Allen activities such as sitting, standing,  
11 working, bending, lifting, and coughing or sneezing increases his pain. Mr. Dabbs says he limits  
12 walking to one-quarter mile and can sit in a chair for one hour and stand for approximately 10  
13 minutes. He also stated his sleep was impaired due to pain. He stated he has anxiety and  
14 depression, which is improved somewhat with medication.

15 Dr. Allen testified that he reviewed the diagnostic tests and compared the May 2003 MRI  
16 with the June 2010 MRI. Dr. Allen testified the findings of the May 2003 MRI were: a 3 or  
17 4 millimeter posterior offset L5 relative to S1; L1-2 mild loss of disc signal without protrusion;  
18 L2-3 left paracentral disc extrusion; 1 centimeter transverse by 5-millimeter cephalocaudal, this  
19 extrusion extends along the posterior margin of L2; posterior displacement of the traversing left  
20 L3 nerve root; L3-4 shows far lateral hyper intensity with 2 to 3 millimeter far lateral protrusion; L4-5  
21 showed central sub annular T2 hyper intensity with 2 millimeter broad-based disc protrusion; facets  
22 unremarkable; L5-S1 showed broad posterior end plate ridging, greater on the left; posterior  
23 displacement of traversing left S1 nerve root moderate left and right side; bony foraminal narrowing.  
24 Dr. Allen made a note that there was no mention or description by the radiologist of modic  
25 degenerative and plate changes at the L5-S1 level.

26 Dr. Allen testified regarding the June 2009 MRI. His findings were: modic type II  
27 degenerative changes around L5-S1 were loss of disc height at multiple levels. He stated these  
28 modic type II changes suggest disk instability. Also, posterior protrusion at L3-4, L4-5 and L5-S1.

29 At L2-3, there was a 4-millimeter central disc protrusion that impresses the fecal sac and  
30 encroachment of the left L2-3 neuroforeman, bilateral joint arthropathy. The L3-4 level showed  
31 5-millimeter central disc protrusion effacing the thecal sac. This combined with facet joint  
32 hypertrophy narrows the right L3-4 neuroforamen. The L4-5 level showed marked central bulging

1 disc with ligamentum flavum hypertrophy and facet joint hypertrophy producing moderate spinal  
2 stenosis and bilateral neuroforamen encroachment, a small left facet synovial cyst with no tear.  
3 The L5-S1 level showed an osteophyt complex protruding to the left and significant narrowing of the  
4 left L5-S1 neuroforamen.

5 Dr. Allen looked at the MRI film and noted modic type II changes, which he described as  
6 wear and tear at the inferior end plate of L5, as well as the superior aspect of the sacrum.

7 Dr. Allen testified he reviewed all of the records of Dr. Christopher Kain from June 17, 2003,  
8 through October 10, 2009, he noted that Dr. Kain felt Mr. Dabbs was medically fixed and stable  
9 requiring no further treatment as of May 4, 2003. He further reviewed records of Dean Short PA-C  
10 from June 2009 through May 2010: Mr. Short's examination revealed lumbar flexion was  
11 50 percent, extension 0 percent, and straight leg raise was positive bilaterally. Motor strength  
12 testing was normal in all major muscle groups. His assessment included discogenic, mediated  
13 back pain. A chart note of January 13, 2010, describes ongoing symptoms of low back pain, but  
14 physical therapy had been discontinued. Dr. Allen noted that in an addendum to their report of  
15 December 17, 2009, Drs. Stump and Champoux stated Mr. Dabbs developed limitations to his work  
16 activities, over time, due to development of lumbar degenerative disc disease. This led to a need  
17 for work restrictions. The doctors felt this condition would limit his ability to carry out the job of meat  
18 cutter; however, he could be employed in a lighter-duty capacity. The original IME of Drs. Stump  
19 and Champoux indicates Mr. Dabbs had an impairment of the lumbar spine due to degenerative  
20 disc disease best described as a Category 2, but they felt this impairment was not a consequence  
21 of his work activities, however, it represented a pre-existing, naturally progressive disorder.

22 Dr. Allen reviewed the job description and noted it required lifting 10 pounds constantly and  
23 up to 50 pounds from floor to shoulder level frequently and up to 75 pounds occasionally. He  
24 performed a physiatry exam. Dr. Allen noted Mr. Dabbs had groaning and grimacing behaviors and  
25 some shaking when testing the right lower extremity and lumbar range of motion. He observed  
26 reduced lumbar lordotic curvature on standing. Dr. Allen noted there was difficulty testing the right  
27 lower extremity due to pain complaints. He found right hip flexion decreased to 4 or 5 in a seated  
28 position and right knee flexion and extension decreased to 4 of 5 with subjective complaints of pain.  
29 During the seated knee extension, Mr. Dabbs complained of significant electric shock pain down  
30 the right lower extremity. During this muscle strength testing, Mr. Dabbs had significant pain and  
31 had to take a break. Dr. Allen performed dynamic strength testing. He noted Mr. Dabbs was  
32 unable to perform a toe walk because of weakness in the right foot and also was unable to do a



1 single foot toe raise on the right foot. His heel walk showed decreased ability on the right, and a  
2 reverse squat revealed significant decrease in excursion with significant pain. Active range of  
3 motion testing revealed flexion globally at 40 percent, although there was very little movement  
4 throughout the lumbar spine. Dr. Allen noted most of the action and motion was through  
5 Mr. Dabbs' hip. He noted the spine remained flat without typical reversal of lordotic curvature.  
6 Dr. Allen stated Mr. Dabbs lumbar extension was essentially zero, and he complained of severe  
7 pain. Dr. Allen noted that sensation testing was abnormal to pain sensations in the right lower  
8 extremity distally, including L5 and S1 dermatomes. The straight leg raise test on the right was  
9 positive and 15 degrees with significant pain reaction.

10 Dr. Allen made the following diagnosis: (1) work-related disc herniation related to the events  
11 described as occurring at the end of May 2009 by Mr. Dabbs; with the date of injury listed as  
12 June 30, 2009, and the actual event occurring at the end of May 2009; (2) disc herniation  
13 protrusions at L3-4 based on an MRI of June 10, 2009, with combined joint hypertrophy causing  
14 narrowing of the right L3-4 neuroforamen related to the work injury of May 2003; (3) aggravation of  
15 pre-existing modic type II degenerative bone changes at L5-S1 by work activities of June 30, 2009;  
16 and (4) pre-existing lumbar strain, sprain with disc extrusion at L2-3 affecting low back and left  
17 proximal nerve roots, related to the May 2003 work injury.

18 Dr. Allen opined the May MRI indicates the neuroforamen were widely patent on the right at  
19 L2-3 and L3-4. At L2-3, there was left paracentral disc extrusion at L3-4 and there was a left, far  
20 lateral subannular T2 hyperintensity with far lateral disc protrusion on the left. Dr. Allen opined that  
21 the June 2009 MRI revealed L2-3 actually appeared improved; however, at L3-4 there was now a  
22 5 millimeter central disc protrusion that combined with facet joint hypertrophy caused narrowing of  
23 the right L3-4 neuroforamen. He stated that at L4-5 there is now moderate spinal stenosis related  
24 to central disc bulge, ligamentum flavum hypertrophy, and facet joint hypertrophy.

25 There is also a small, left facet joint synovial cyst at L5-S1. There are now significant modic  
26 type II degenerative changes above and below the disc signifying loss of height consistent with disc  
27 degeneration and instability.

28 Dr. Allen opined there were clearly new findings, as well significant degenerative disc and  
29 joint disease on the June MRI that were not evident on the May 7, 2003 MRI. Dr. Allen testified the  
30 level that caused Mr. Dabbs' problem in May 2003, had improved. Therefore, his opinion was that  
31 the new findings were not a significant worsening of the May 4, 2003 industrial injury. He opined  
32 the work activities described as taking place at the end of May 2009 were a specific event or work

1 injury leading to the current subjective and objective findings. He further opined that, if not for the  
2 bending, stooping, and twisting work activities from the end of May 2009, the claimant would not  
3 have aggravated the significant pre-existing degenerative disc and joint disease at the L5-S1 level  
4 and would not have the L3-4 central disc protrusion.

5 Dr. Allen testified he recommended additional diagnostic testing including a psychological  
6 consult before considering surgical intervention such as a fusion.

7 On cross-examination, Dr. Allen agreed that Mr. Dabbs had told Dr. Kain he could recall no  
8 specific recent episodes of injury, just increased pain. Dr. Allen agreed that that was different from  
9 what Mr. Dabbs had told him. Dr. Allen also testified the paperwork submitted as an accident report  
10 indicated that Mr. Dabbs stated that he had never recovered from the 2003 injury and continued to  
11 work and then in May 2009 his back had reached the point where he simply could not continue  
12 work. Dr. Allen agreed that was different from what the claimant had originally stated to him.

### 13 DISCUSSION

14 This is an employer appeal, thus, the burden to present a prima facie case falls to the  
15 employer. Once a prima facie case has been shown, the burden shifts to the claimant and  
16 Department to establish the correctness of the Department's orders. RCW 51.52.050(2)(a).

17 It should first be noted that the Department order under appeal allowed this worker's claim  
18 as an injury or an occupational disease. The self-insured employer's case focused heavily on  
19 proving the claimant did not suffer from an occupational disease. However, since the Department  
20 order allows the claim as either an injury or an occupational disease, proof of an injury alone would  
21 suffice to uphold the Department order. The self-insured employer did present factual evidence  
22 regarding whether or not an injury occurred. This consisted primarily of statements of the claimant  
23 that he did not suffer an accident and there was no tangible identifiable incident.

24 An injury is a sudden tangible happening, of a traumatic nature producing an immediate or  
25 prompt result, and occurring from without, and such physical conditions that arise therefrom. Wide  
26 latitude is given in interpreting this definition in support of coverage. *Johnson v. Weyerhaeuser Co.*,  
27 *134 Wn.2d 795 (1998)*. The time of the event need not be precise, but there must be a relationship  
28 in time and place that can be investigated. *Favor v. Department of Labor and Indus.*, *53 Wn.2d 698*  
29 *(1959)*.

30 In this case, Mr. Dabbs, who is a layman, testified and appeared credible. He readily  
31 admitted he suffered no accident. However, in relating the history of his back problems it was clear  
32 that in May 2009, just before he stopped working for Safeway, he suffered an injury. Mr. Dabbs

1 testified that in late May 2009, he was working on a heavy advertisement and a crooked board. He  
2 described this as having a lot of freight to break down, transition, and move in his workspace. The  
3 term "crooked board" related to the way that the freight was stacked on pallets. Mr. Dabbs clearly  
4 described lifting, twisting, and moving several heavy items when he experienced pain in his lower  
5 back. He was unable to work for several days thereafter. Given the history of Mr. Dabbs' low back  
6 and back complaints, since 2003, and the fact that he clearly testified the back pain never relented  
7 totally, it is not unnatural, nor unwarranted to assume he would describe his pain as arising from a  
8 continuous process rather than as a sudden tangible event. In fact, his denials of the sudden  
9 accident or event gives more credibility to the very facts he describes as occurring in late May  
10 2009, which are legally sufficient to find that an injury occurred. *In re Renford Gallier*,  
11 *BIIA Dec.*, 89 3109 (1990). In *Gallier*, two hours of carrying boxes which aggravated a pre-existing  
12 shoulder strain was found to meet the definition of an injury.

13 The next question that arises is whether medical evidence can tie Mr. Dabbs' pain to the  
14 injurious event. In this case, the self-insured employer presented the testimony of two doctors,  
15 Champoux and Kain. Both doctors testified that Mr. Dabbs had long-standing degenerative disc  
16 disease, and neither of them was willing to say the findings of the June 2009 MRI, on a  
17 more-probable-than-not basis were caused by the May 2009 incident. Although, both doctors  
18 conceded Mr. Dabbs needed work restrictions and that his activities may result in increased  
19 symptomology.

20 On the other hand, Dr. Allen, who was presented by the claimant, gave an extremely  
21 thorough and exhaustive review of the available medical records and physical examinations of the  
22 claimant along with a painstaking analysis of his condition. The most salient feature of this was  
23 Dr. Allen's comparison of the May 2003 MRI to the June 2009 MRI. Dr. Allen opined the area of the  
24 spine, which gave Mr. Dabbs trouble in 2003, had actually improved by 2009 based on the MRI  
25 results. However, Dr. Allen saw significantly increased worsening at the L5-S1 level, including  
26 modic type II changes. Dr. Allen related these on a more-probable-than-not basis to the events of  
27 May 2009 saying there were clearly new findings on the June 2009 MRI which gave an objective  
28 explanation of Mr. Dabbs' symptoms related shortly after and closely in time to the late May 2009  
29 work incident involving the heavy advertisement and crooked board. This clarity and focus on the  
30 objective changes in Mr. Dabbs' spinal cord is a reason to weigh Dr. Allen's opinion more heavily  
31 than Drs. Champoux and Kain. Drs. Champoux and Kain took a more global and benign view that  
32 all Mr. Dabbs' symptomology was solely and inextricably related to his degenerative disc disease.

1 Their views essentially were that Mr. Dabbs would have experienced his symptoms and the  
2 objective findings even in the absence of working, which contradicts their assertion that he needed  
3 work restrictions and increased working hours and activities would make him more symptomatic.  
4 Dr. Kain admitted it was very probable that Mr. Dabbs' job would make him hurt his back.

5 The self-insured employer presented a prima facie case that there was no injury, and there  
6 was no occupational disease. The claimant has overcome that initial showing through Dr. Allen's  
7 testimony that there was a medical condition, low back pain associated with disc injury, causally  
8 related to the work events of late May 2009 given a date of occurrence of June 30, 2009. Thus,  
9 there is proof by a preponderance of the evidence that Mr. Dabbs suffered an injury and his  
10 symptoms and medical problems were causally related to the injury. There was insufficient  
11 evidence upon which to conclude Mr. Dabbs suffered an occupational disease. Therefore, since  
12 injury has been proven and the Department allowed the claim as an either or proposition, the  
13 November 16, 2009 Department order is correct.

#### 14 FINDINGS OF FACT

- 15 1. On July 1, 2009, the claimant, Mylon K. Dabbs, filed an Application for  
16 Benefits with the Department of Labor and Industries alleging he  
17 sustained an industrial injury on June 30, 2009, during the course of his  
18 employment with Safeway Stores, Inc. On August 12, 2009, the  
19 self-insured employer filed a Protest and Request for Reconsideration  
20 questioning the validity of the claim. The Department entered an order  
21 on August 14, 2009, denying the claim on the basis that the claimant's  
22 condition was not a result of the injury alleged, or was not a result of  
23 industrial injury, or pre-existed the alleged injury. On August 24, 2009,  
24 the claimant's provider filed a Protest and Request for Reconsideration  
25 of the Department order of August 14, 2009. On September 17, 2009  
26 the claimant, pro se, filed a Protest and Request for Reconsideration  
27 of the Department order of August 14, 2009. On November 16, 2009, the  
28 Department entered an order canceling the department order of  
29 August 14, 2009, and allowing the injury or occupational  
30 disease/condition and benefits were paid.

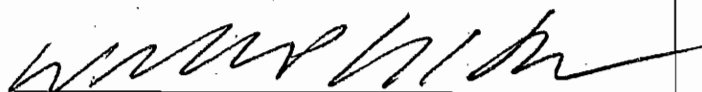
31 The self-insured employer filed a Notice of Appeal from the Department  
32 order of November 16, 2009 order on January 12, 2010, with the Board  
of Industrial Insurance Appeals. The Board issued an order on  
January 21, 2010, granting the appeal, assigning it Docket  
No. 10 10349, and ordering that further proceedings be held.

- 33 2. On or about late May 2009, with a given date of June 30, 2009, claimant  
sustained an industrial injury during the course of his employment with  
Safeway Stores Inc., when he was lifting, carrying, and placing heavy  
freight, and experienced severe low back and leg pain.

**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. On or about late May 2009 with a given date of June 30, 2009, claimant did sustain an industrial injury to his low back during the course of his employment with Safeway Stores Inc., within the meaning of RCW 51.08.100.
3. The order of the Department of Labor and Industries dated November 16, 2009, is correct, and is affirmed.

DATED: DEC 22 2010



William P. Gilbert  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals