NO. 100890-2

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL J. COLLINS,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Paul Weideman
Assistant Attorney General
WSBA No. 42254
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389–3820

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I. INTRODUCTION

This case presents no basis for review. Michael Collins failed to present medical testimony that supported his theory of causation in his workers' compensation case. The only medical witness that he called to testify openly disagreed with Collins's theory that his work duties caused or aggravated his degenerative neck condition. She instead testified that his age caused the condition. The courts below all dismissed his case, applying decades of case law that workers must present medical evidence to prove causation of a medical condition.

Collins's strategy to call a doctor who did not agree with his causation theory is unique to him and presents no reason for this Court's review. The Court of Appeals' opinion applies black letter law on causation. This Court should deny review.

II. ISSUE

> A worker must present medical testimony that an incident at work or the distinctive conditions of the worker's employment caused a medical condition in order to have the condition accepted as part of the claim. Collins's medical witness testified that his age, not his work, caused the degenerative condition in his neck.

Should L&I have accepted responsibility for the degenerative neck condition?

III. STATEMENT OF THE CASE

A. L&I Allowed Collins's Claim as an Occupational Disease of the Right Shoulder but Segregated a Degenerative Neck Condition, Based on the Medical Evidence It Received

In January 2017, Collins was hired as a drywall installer by Olympic Interiors, Inc. CP 2581, 2722. He worked for the company for four days. CP 3166. On his first day at work, he felt pain in his right shoulder and neck while hanging drywall. CP 2722-24, 3166. Several months later, in June 2017, he filed a workers' compensation claim. CP 2739.

L&I sent Collins for an independent medical exam to determine whether his drywall work caused any right shoulder or neck conditions. CP 3184; *see* RCW 51.36.070(1)(a). Dr. Joan Sullivan, an orthopedic surgeon, performed the exam. CP 1106-07. Dr. Sullivan diagnosed Collins with right shoulder rotator cuff arthropathy, which she believed was work related as

an occupational disease.[1] CP 1187, 3192. The doctor described Collins's neck condition as involving cervical disc degeneration and concluded that it was not work related. CP 1278, 3192.

Based on Dr. Sullivan's exam, L&I allowed Collins' workers' compensation claim as an occupational disease of his right shoulder under claim ZB-21147. CP 858. It also issued an order stating that L&I "is not responsible for the condition(s) diagnosed as: cervical disc degeneration, because it wasn't caused or aggravated by the industrial injury or occupational disease for which this claim was filed." CP 949. In workers' compensation parlance, this is known as a "segregation" order.

[1] When a worker is injured at work or sustains an occupational disease, the worker may file a claim for industrial insurance benefits. RCW 51.28.020. Industrial injuries result from a single traumatic event. RCW 51.08.100. Occupational diseases arise proximately and naturally out of employment over time and may include multiple exposures. RCW 51.08.140; *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 135, 814 P.2d 629 (1991).

Collins appealed this order to the Board of Industrial Insurance Appeals. CP 932-946.

In January 2018, while his appeal of the segregation order was pending, Collins filed a separate claim (claim ZB-23273) asserting that his neck condition resulted from an industrial injury, not an occupational disease. CP 2756. Collins testified that he filed his second claim because his "cervical neck was not adjudicated as an injury" in his prior claim. CP 2756. L&I rejected the claim, and he appealed to the Board. CP 2388-91.

B. Collins's Sole Medical Witness Testified that Collins's Age, Not His Work Duties, Caused the Degenerative Disease in His Neck

At appeals before the Board, a worker has the burden to present evidence to make a prima facie case. RCW 51.52.050(2)(a). The Board held separate hearings for Collins's appeals. In both appeals, Collins called Dr. Sullivan as his only medical witness. CP 1099-1199, 2762, 2782-2845.

At the hearing on the occupational disease claim (ZB-21147), Dr. Sullivan testified that Collins's "high demand shoulder work . . . accelerated what was happening" in his right shoulder. CP 1277-78. That opinion supported allowing the claim and treating the right shoulder, as L&I did. *See* CP 858.

Dr. Sullivan testified, however, that aging caused Collins's degenerative changes in his neck. CP 1247-48. She diagnosed cervical spondylosis, which includes degenerative disc disease, anterolisthesis, and facet degeneration. CP 1160. She testified that Collins's cervical conditions were unrelated to his occupation and that the changes in his neck "are related to aging on a more probable than not basis." CP 1247-48, 1277-78. Her opinion was that his "work did not cause, aggravate or worsen [his] cervical spine disease." CP 1278.

Dr. Sullivan testified that Collins had progression of his neck disease and explained to him, "You're now in your sixties, you've had neck issues before this." CP 1250. When Collins asked, "And where do you derive that from?" Dr. Sullivan

responded, "Actually I derive it from an IME that I did on you quite a few years ago in 2007." CP 1250. Dr. Sullivan also concluded that she "did not feel that [Collins's] underlying disease was lit up" by his work. CP 1180.[2] The stress of heavy lifting does not cause spondylosis. CP 1221-22.

The Board held a second hearing on the injury claim, claim ZB-23273. At that hearing, Dr. Sullivan testified that Collins's degenerative cervical conditions were "not caused by nor lit up by nor aggravated" by occupational exposure. CP 2789-90. She opined that, "The cervical spine disease on a more-probable-than-not basis is not work related." CP 3193.

When Collins asked Dr. Sullivan her opinion about whether he had an industrial injury, Dr. Sullivan testified, "I

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[2] Under a theory of causation in workers' compensation law that is known as "lighting up," when a worker has a medical condition that pre-exists a workplace injury or occupational disease and the injury or disease "lights up" the condition and makes it symptomatic, the condition is covered under the claim. *See, e.g.*, *Zavala v. Twin City Foods*, 185 Wn. App. 838, 860, 343 P.3d 761 (2015); *Cooper v. Dep't of Lab. & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189 (2015).

was never asked if he had an injury, I did not address it, and so I can't give an opinion." CP 2841-42.

C. The Board Denied Collins's Request to Call His Claims Manager to Testify

Collins also requested to have his L&I claims manager testify at his appeal hearings. CP 646-47, 2181-82. The Board denied Collins's request, concluding that case law was clear that the claim manager's deliberative process was irrelevant and that any testimony would improperly probe the decision-making process of an administrative officer. *See* CP 2012-13 (citing *Nationscapital Mortg. Corp. v. Dept. of Fin. Insts.*, 133 Wn. App. 723, 137 P.3d 78 (2006); *McDonald v. Dep't of Lab. & Indus.*, 104 Wn. App. 617, 17 P.3d 1195 (2001)).

D. Because Collins Did Not Present Medical Evidence to Support Causation, the Board Dismissed His Appeals, and the Courts Affirmed

The Board found that Collins had failed to prove that his cervical disc degeneration was work related or that an injury had occurred to his neck and was work related. CP 142-45, 1608-12. The Board dismissed both appeals because Collins

had failed to satisfy his duty of establishing a prima facie case. CP 142-45, 1608-12.

Collins appealed, and the superior court affirmed. CP 5-66, 118. The superior court affirmed dismissal of the appeals, stating that "the testimony provided by Dr. Sullivan did not support either of [Collins's] medical claims." CP 116. The court also denied a writ of mandamus that Collins had filed asking L&I to "legally justify" segregating his neck condition and to "provide medical evidence" to support rejecting his neck injury claim. CP 1-4, 68.

The Court of Appeals affirmed in an unpublished opinion. *Collins v. Dep't of Lab. & Indus.*, No. 54939-5-II, 2022 WL 168101, at *1 (Wash. Ct. App. Jan. 19, 2022). The court held that Collins failed to establish a prima facie case because he "did not provide any evidence to show his cervical disc degeneration was work related or that he suffered an injury." *Collins*, 2022 WL 168101, at *4.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Collins meets none of the RAP 13.4 criteria that he cites for review. His strategy in calling a medical witness that did not support his case is not a matter of substantial public interest under RAP 13.4(b)(4), as it affects only his case. Collins shows no conflict with any other appellate case warranting review under RAP 13.4(b)(1) or (2), as the Court of Appeals applied well-settled law on causation. Nor does Collins's failure to present necessary evidence raise any significant constitutional question under RAP 13.4(b)(3).

A. The Court of Appeals Applied Well-Settled Law that a Worker Must Present Medical Evidence of Causation

Decades of this Court's case law establish that a party who appeals an L&I order that involves a medical question—such as whether a workplace incident or work duties caused a medical condition—must present expert medical evidence to establish that the incident or duties caused the medical condition on a more-probable-than-not basis. *Sacred Heart*

Med. Ctr. v. Carrado, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979); RCW 51.52.050(2)(a).[3] The Court of Appeals applied

[3] Many cases from this Court support that a worker must prove causation through medical testimony. *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 194, 399 P.3d 1156 (2017) (causal connection in the "arises proximately" test for an occupational disease must be established by competent medical testimony on a medically more-probable-than-not basis); *Dennis v. Dep't of Lab. & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987) ("The causal connection between a claimant's physical condition and his or her employment must be established by competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment."); *Sayler v. Dep't of Lab. & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966) ("A claimant must establish by the testimony of competent medical experts that there is a Probable (as distinguished from a Possible) causal relationship between an industrial injury and a subsequent physical condition."); *Favor v. Dep't of Lab. & Indus.*, 53 Wn.2d 698, 704-05, 336 P.2d 382 (1959) ("Statements by a claimant as to purely subjective conditions, peculiar to himself, do not provide the objective circumstances necessary to establish that a claimant's disease arose naturally and proximately from his employment."); *Page v. Dep't of Lab. & Indus.*, 52 Wn.2d 706, 709, 328 P.2d 663 (1958) ("The extent of the disability, as it exists at any relevant date, must be determined by medical testimony, some of it based upon objective symptoms." (internal quotations omitted)); *Stampas v. Dep't of Lab. & Indus.*, 38 Wn.2d 48, 50, 227 P.2d 739 (1951) ("The probability of a causal connection between the industrial injury and the subsequent physical condition, must be established by the testimony of medical experts."); *Ehman v. Dep't of Lab. &*

this well-established case law to Collins's case. He failed to present causation testimony that supported his case. Applying the law correctly offers no reason for review under RAP 13.4.

1. L&I must rely on medical evidence to make segregation decisions

Not showing any basis under RAP 13.4 for review, Collins fails to discuss this firmly-rooted precedent and instead advocates a novel theory about segregation orders, without any supporting legal authority. He argues that "segregation" of a medical condition—that is, a determination by L&I that a workplace event or a worker's job duties did not cause a medical condition—is a "legal determination" that only L&I can make, not a "medical doctor." Pet. 6, 15. He asserts segregation "is a 'legal concept' to be determined by [L&I], not a medical concept determined by a medical doctor." Pet. 18. So he argues that his writ of mandamus should have been granted since L&I "had no discretion to 'segregate' [his] [n]eck

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Indus., 33 Wn.2d 584, 598, 206 P.2d 787 (1949) (medical testimony must be in terms of probability, not possibility).

[i]njury." Pet. 9; *see also* Pet. 14, 29, 36. He cites no case law for these propositions, so the Court should disregard them, just as the Court of Appeals did. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Collins*, 2022 WL 168101, at *2 n.1. An unsupported legal theory offers no basis for review under RAP 13.4.

In any case, this unsupported theory is wrong. L&I cannot determine the cause of a medical condition in the absence of medical evidence. Causation is a medical question. *E.g. Street*, 189 Wn.2d at 194; *Dennis*, 109 Wn.2d at 477; *Sacred Heart Med. Ctr.*, 92 Wn.2d at 636. L&I cannot make medical determinations in a vacuum: it needs medical opinions to process claims. Collins's unsupported theory would lead to arbitrary decisions on causation with no basis in medical science.

Here, the Court of Appeals correctly applied the law on causation and segregation. Failing to identify any legal authority that supports his claim, Collins instead cites three

pages in L&I's Medical Examiners' Handbook to support a claim that segregation is a "legal concept."[4] Pet. 18. The handbook is not legal authority—it is guidance for doctors performing independent medical exams—but it also does not support Collins's claim, as it informs medical examiners that L&I needs their "best medical judgment" to determine whether a preexisting condition should be segregated from a claim. Wash. State Dep't of Lab. & Indus., *Medical Examiners' Handbook* 38 (2021). Medical opinions are needed for claim decisions.

Collins argues that the Court of Appeals never "addressed the factual/legal argument in my Appeal," which appears to be his argument that L&I's order segregating his cervical degenerative disc disease was illegal for the reasons above. Pet. 1, 3. But the court did address his argument. It

[4] The Medical Examiners' Handbook can be found at https://lni.wa.gov/forms-publications/F252-001-000.pdf.

identified his argument that L&I's "decision was not discretionary because segregation is a legal concept that his claim manager was incapable of reaching . . . ." *Collins*, 2022 WL 168101, at *2 n.1. But it refused to consider the argument because it was not briefed and lacked citations to the record and legal authority. *Id*.

Collins also seems to argue that L&I had the burden in his case, despite that the Legislature specifically requires a party challenging an L&I order to make a prima facie case. RCW 51.52.050(2)(a). He says L&I had to "present an affirmative defense" and "prove with a specific Neck medical exam" that he had a pre-existing neck condition that had been diagnosed and treated before he filed his claim. Pet. 6. He cites no authority for this theory and it is contrary to the Court's oft-stated explanation that, under the Industrial Insurance Act, workers are "held to strict proof of their right to receive benefits" under the Act. *Cyr v. Dep't of Lab. & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) (internal quotation omitted);

Hastings v. Dep't of Lab. & Indus., 24 Wn.2d 1, 12, 163 P.2d 142 (1945); *Clausen v. Dep't of Lab. & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777 (1942); *accord Kirk v. Dep't of Lab. & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937); *Robinson v. Dep't of Lab. & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744 (2014) (internal quotation omitted).

2. Because causation is a medical question, the deliberative process of an L&I claims manager is irrelevant

The Court of Appeals held that "Collins was not entitled to have his claim manager testify, because such testimony would not help him establish his prima facie case." *Collins*, 2022 WL 168101, at *4. That is a correct application of the law on medical causation. A claims manager is not a doctor who can opine on medical causation. Collins's premise is that segregation is a "'legal concept' to be determined by [L&I]" (Pet. 18), so the claims manager is a necessary witness. Pet. 16, 40. But, as explained above, that premise is wrong, so his argument for compelling the claim's manager's testimony is

baseless. Additionally, as discussed further below, well-established law makes clear that L&I's deliberative processes for making claim decisions are irrelevant. *Nationscapital*, 133 Wn. App. at 762 (2006); *McDonald*, 104 Wn. App. at 623.

B. Collins Fails to Show Any Conflict Warranting Review Under RAP 13.4(b)(1), (2)

Collins cannot show that the Court of Appeals decision in his case conflicts with any decision of this Court or the Court of Appeals. RAP 13.4(b)(1), (2). None of the three cases that he cites—*McGuire*, *McDonald*, and *Orr*—are in any way inconsistent with the Court of Appeals' opinion. Pet. 18, 37-38.

First, there is no conflict with *McGuire v. Department of Labor & Industries*, 179 Wash. 645, 38 P.2d 266 (1934), the only case Collins cites as a basis for review under RAP 13.4(b)(1). Pet. 20, 26, 38. In *McGuire*, a worker presented "medical testimony" that a work injury "lighted up and made active" a pre-existing arthritic condition. *McGuire*, 179 Wash. at 648-49. *McGuire* is consistent with the Court of Appeals' opinion here because it requires "medical testimony" to support

causation—in this case, under the "lighting up" theory of causation. *Id.* Though Collins's theory also appears to be that his work injury or work conditions "lit up" his degenerative neck condition, he failed to present any medical evidence supporting that theory, unlike the worker in *McGuire*. Indeed, his medical witness said the opposite, testifying that Collins's degenerative cervical conditions were "not caused by nor lit up by nor aggravated" by occupational exposure. CP 2789-90. *McGuire* is consistent with the Court of Appeals' decision—Collins just didn't present enough evidence to meet the *McGuire* standard. There is no conflict with *McGuire*.

Second, Collins shows no conflict with *Orr v. Department of Labor & Industries*, 10 Wn. App. 697, 519 P.2d 1334 (1974). Pet. 37, 38. That case addressed whether substantial evidence supported a permanent partial disability award under a statute not at issue here. *Orr*, 10 Wn. App. at 700, 705 (citing RCW 51.32.080(3)). Collins's case does not involve calculation of permanent partial disability.

Finally, Collins shows no conflict with *McDonald*. Pet. 7. That case held that "the processes [L&I] employed in reaching its ultimate decision" on a claim decision are irrelevant. *McDonald*, 104 Wn. App. at 623; *see also Nationscapital*, 133 Wn. App. at 762 ("Courts should not probe the mental processes of administrative officials in making a decision."). *McDonald* is why L&I officials had no "legal obligation to testify" (Pet. 7), contrary to Collins's arguments, because the reasons they made decisions on Collins's claim are not relevant.[5]

Here, the Court of Appeals did not discuss *McDonald* but held that Collins was not entitled to have his claim manager testify because "such testimony would not help him establish

[5] Collins also cites *State v. Fitzpatrick*, 5 Wn. App. 661, 491 P.2d 262 (1971), while mentioning "conflict," but it is unclear whether he asserts a conflict with this case. Pet. 17-18. There is none. *Fitzpatrick* addressed criteria for publishing opinions and an interpretation of a criminal statute that has no bearing here. *Fitzpatrick*, 5 Wn. App. 668-70.

his prima facie case." *Collins*, 2022 WL 168101, at *4. This statement recognizes that Collins needed medical evidence to support his causation claim, and that an L&I claims manager could not provide medical testimony.

Collins seems to argue that because the Court of Appeals did not "address" *McDonald* in its opinion, this presents a basis for review. Pet. 8, 18. A failure to address a case is not a basis for review. RAP 13.4. More to the point, a court has no obligation to address a case that a party raises when, as here, the court had another basis for resolving the issue.

Collins also tries to factually distinguish his case from *McDonald*, but any factual differences would affect only him and would not be a basis for review. *See* Pet. 7 (saying the worker in *McDonald* showed "neglect"); Pet. 19 (saying the worker in *McDonald* did not "timely request[] Department testimony"). He uses these purported differences to assert that "*McDonald* does not preclude Department testimony as specific to my case." Pet. 9. But Collins has to show a conflict with

McDonald, not just that his case is different. RAP 13.4(b)(2). As noted, he can show no conflict.[6]

C. None of Collins's Remaining Arguments Offer a Basis for Review Under RAP 13.4

Collins raises a plethora of other arguments about how L&I handled his claim. The Court of Appeals "refuse[d] to address" many of these arguments because they "were not fully briefed and lacked citations to the record or legal authority." *Collins*, 2022 WL 168101, at *2 n.1. This Court should do the same. Unclear and unsupported arguments are not a basis for

[6] *McDonald* explained that "[L&I's] deliberative processes were irrelevant" to the factfinder's decision. *McDonald*, 104 Wn. App. at 623. Despite this, Collins says *McDonald*'s "deliberative process privilege" does not protect an L&I claims manager because a "claims manager is not a policy-maker." Pet. 16. But *McDonald* says all deliberative processes are irrelevant, not just those of "policy-makers." *See McDonald*, 104 Wn. App. at 623. A Board case that Collins cites also does not support his arguments as they involve statutes that applied an abuse of discretion standard to the decisions at issue, unlike here. Pet. 16 (citing *In re Pablo Garcia*, No. 05 15329, 2006 WL 1979310 (Wash. Bd. Indus. Ins. App. Mar. 28, 2006)).

review. To the extent that these arguments are discernable, they are incorrect and offer no reason for review under RAP 13.4.

Collins disputes the testimony and credibility of his own medical witness, but that is an argument for a factfinder. For example, he disputes the basis for Dr. Sullivan's testimony about his pre-existing neck conditions, arguing that she could not know whether his condition was "active" and "pre-existing." Pet. 6. That goes to what weight a factfinder should give her testimony. He argues that Dr. Sullivan's testimony "was all the medical testimony [he] . . . needed" (Pet. 4), but this is incorrect as she did not support his theory on causation.

Collins cites RAP 13.4(b)(3) as a basis for review. Pet. 10-11, 13-15. But as the Court of Appeals noted, his constitutional arguments on property and due process rights are unsupported. *Collins*, 2022 WL 168101, at *2 n.1. Collins argues that he possessed "as fact *de jure*" a "protected property interest" under the state constitution in his workers' compensation claim and that once L&I approves a claim "it

cannot be altered, or statutorily perverted" by segregating a condition without "a 'pre-deprivation' process." Pet. 15; *see also* Pet. 11. But he does not address the case law on pre-deprivation versus post-deprivation process, he cites *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) without applying its factors, and his argument ignores that he had two Board hearings where he could present any medical witnesses he wished to prove causation. Pet. 15. He had a full opportunity to assail L&I's order. "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *Crystal Ridge Homeowners Ass'n v. City of Bothell*, 182 Wn.2d 665, 679, 343 P.3d 746 (2015) (alteration in original) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

Collins argues that L&I did not fulfill its statutory mandate in RCW 51.32.080(3)(a) and (5). Both those statutes address how L&I should calculate a permanent partial disability (PPD) award when the worker has a previous disability in the

same body part. Collins's case does not involve a PPD award, which is only awarded when a claim is closed because the worker's medical condition is fixed and stable. *See* RCW 51.32.055(1), .080. The issue in Collins's appeals is causation of his degenerative disc disease, so the PPD statutes do not apply.

V. CONCLUSION

This Court should deny review.

This document contains 3368 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 30th day of June, 2022.

ROBERT W. FERGUSON
Attorney General

Paul Weideman, WSBA No. 42254
Assistant Attorney General
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-3820

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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Supreme Court No. 100890-2

SUPREME COURT
STATE OF WASHINGTON

MICHAEL J. COLLINS, Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Answer To Petition For Review and this Certificate of Service in the below described manner:

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Michael J. Collins
P.O. Box 111483
Tacoma, WA 98411
michael.collins29@comcast.net

DATED this 30th day of June, 2022, at Seattle, Washington.

ERLYN R. GAMAD
Legal Assistant

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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