No. 73344-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STERLING O. HAYDEN,

Respondent,

v.

THE BOEING COMPANY,

Appellant.

REPLY BRIEF OF THE APPELLANT

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I. INTRODUCTION

Entitlement to benefits under the Industrial Insurance Act requires an injured worker to prove that his or her claimed medical conditions were proximately caused or aggravated by their work or work-related conditions. Although the Act does not require a worker to be in perfect health prior to an injury or onset of an occupational disease, neither does the Act mandate that an employer be forever responsible for a worker's preexisting condition, particularly if that condition was only temporarily or symptomatically aggravated by the injury or occupational disease.

In this case, the superior court determined that Boeing should be held responsible for Hayden's preexisting left shoulder osteoarthritis in its entirety, even though Hayden's own doctor and only medical witness testified that the osteoarthritis was a naturally progressing condition which had not been accelerated or objectively aggravated by Hayden's work-related left shoulder strain or his workplace activities.

Hayden failed to establish that "but for" his work-related strain or work activities, his preexisting condition would not have continued to progress to the same point. As such, there is not substantial evidence to support the trial court's determination that Boeing is entirely responsible for Hayden's preexisting osteoarthritis. Thus, Boeing respectfully maintains that the trial court's decision must be reversed.

II. ARGUMENT

A. "Lighting Up" Is A Red Herring; There Is No "But For" Causation To Support The Trial Court's Conclusion That Hayden's Work-Related Left Shoulder Strain Or The Distinctive Conditions Of His Employment Proximately Caused An Aggravation Of His Preexisting Arthritis

Unfortunately, much of the focus in both the trial court and in the parties' Court of Appeals briefing has centered on whether a "lighting up" analysis is applicable in this case. Although Boeing addressed "lighting up" in its opening brief, it only did so to explain how the trial court's reliance on the "lighting up" doctrine was misplaced when discussing causation of a condition as opposed to the extent of permanent disability. In response, Hayden dedicates a substantial portion of his response brief defending use of the "lighting up" doctrine in this case. *See, e.g.*, Brief of Resp. at 8-13.

All of this discussion misses the point, however, as the key issue is proximate cause. Establishing proximate cause is a threshold question that must be answered before deciding whether or not a preexisting condition was "lit up" by an injury or occupational disease for the purpose of compensating a worker for any permanent impairment. As noted in Boeing's opening brief, "lighting up" applies when determining the extent of permanent disability at the end of a claim (i.e. at claim closure), but

only after the initial question of proximate cause has been answered. Brief of Appellant at 23-24. To wit:

> It is a fundamental principle which most, if not all, courts accept, that, **if the accident or injury complained of is the proximate cause of the disability for which compensation is sought**, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.

Miller v. Dep't of Labor and Indus., 200 Wn. 674, 682-83, 94 P.2d 764 (1934) (emphasis added). *See also Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 571 P.2d 229 (1977).

In *Miller*, the primary legal issue was whether, at the time his claim was closed, Miller's permanent partial disability award could be reduced because of preexisting asymptomatic conditions. *Miller v. Dep't of Labor and Indus.*, 200 Wn. 674, 94 P.2d 764 (1934). Proximate cause between his injury and an aggravation of his preexisting condition had to be established first, followed by a determination of whether any portion of Miller's permanent disability award could be reduced because of his preexisting condition, or whether all of his disability award should be attributed to the injury. *Id.* That is where "lighting up" comes in to play, as the Court held that if an injury lights up or makes active an

asymptomatic condition, then the resulting disability (i.e. permanent impairment) is attributable to the injury and not the preexisting condition. *Id.* at 682, 94 P.2d at 768.

The main case cited by Hayden in support of his position, *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 571 P.2d 229 (1977), also illustrates how the question of proximate cause must be answered before considering "lighting up." Brief of Resp. at 9-12. In *Wendt*, the worker requested a "lighting up" jury instruction which stated:

> You are instructed that if an injury lights up or makes active a latent or quiescent infirmity or weakened condition, whether congenital or developmental, then the resulting disability is to be attributed to the injury and not to the preexisting condition. Under such circumstances, **if the accident or injury complained of is a proximate cause of the disability for which compensation or benefits is sought**, then the previous physical condition of the workman is immaterial and recovery may be received for the full disability, independent of any preexisting or congenital weakness.

Id. at 676-77, 571 P.2d at 231-32 (emphasis added). Just as in *Miller*, the jury instruction sought by Wendt states that proximate cause must be established before deciding whether "lighting up" can be used to determine the extent of disability. None of that matters in this case, however, as the trial court was not asked to address, nor did it address, the extent of any disability suffered by Hayden under his claim or whether any disability award could be reduced due to lighting up of a preexisting

condition. Rather, the court decided proximate cause, concluding that Boeing must accept total responsibility for Hayden's preexisting left shoulder glenohumeral osteoarthritis because it was aggravated by his accepted left shoulder strain. CP 317-18 (Conclusions of Law 3 and 4).

B. Neither The Accepted Occupational Disease Left Shoulder Strain Nor Hayden's Work Activities Caused An Aggravation Of His Osteoarthritis

All of this leads us back to the sole issue in this case: whether Hayden's occupationally-related left shoulder strain caused the aggravation of his left shoulder glenohumeral osteoarthritis or whether the distinctive conditions of Hayden's employment with Boeing caused the aggravation.[1,2]

Simply arguing that a preexisting condition was asymptomatic prior to an injury or occupational disease and was symptomatic afterwards is not sufficient to establish proximate cause, nor is that what *Miller* and

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[1] *In re Nicholas Defio*, BIIA Dec., 13 13370 (2014) (holding that in an appeal of an order segregating a condition in an otherwise allowed occupational disease claim, the issue is whether the segregated condition was caused by the same distinctive conditions of employment for the allowed occupational disease condition, or whether the allowed occupational disease condition caused (or aggravated) the segregated condition).

[2] RCW 51.52.160 requires the Board to designate and publish its "significant decisions." The Board publishes these decisions in several forms, including providing access on its website at www.biia.wa.gov. Board decisions, significant and non-significant, are also accessible on Westlaw in the database WAWC-ADMIN. The convention for citing a significant decision is "BIIA Dec., __" and provides only the year of the decision, while the docket number for a decision not designated as significant is cited "Dckt. No. __" and provides the full date of the decision. While not binding, significant decisions published by the Board are persuasive authority. *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

its progeny stand for with regard to "lighting up." Instead, the sole focus for this Court, as it was with the Department of Labor and Industries, Board of Industrial Insurance Appeals and superior court before it, is to determine whether the occupational disease (left shoulder strain) and/or Hayden's distinctive work conditions at Boeing were a proximate cause of the current state of his left shoulder glenohumeral osteoarthritis. In other words, whether Hayden's preexisting osteoarthritis would have continued to progress and require treatment "but for" his distinctive work activities and/or work-related left shoulder strain.

The answer to that question is that Hayden's preexisting osteoarthritis would have progressed to the same degree in spite of his employment with Boeing. As Dr. Verdin clearly stated, there was no acceleration of the condition, meaning that it would be in the exact same state even if he had not worked for Boeing. CP 278-79. Further, all the doctors agreed that Hayden's osteoarthritis was a naturally progressing condition regardless of activity. CP 175, 240, 283, 287.

In addition, there was no testimony tying Hayden's left shoulder strain to an aggravation of his preexisting osteoarthritis. Dr. Verdin did not diagnose or even testify about a left shoulder strain, nor did he state that a left shoulder strain aggravated Hayden's preexisting osteoarthritis. Likewise, neither Dr. Bays nor Dr. Youngblood stated anywhere in their

testimony that a left shoulder strain aggravated Hayden's preexisting osteoarthritis.

Finally, there is nothing in the record establishing that the distinctive conditions of Hayden's employment proximately caused a permanent aggravation of his preexisting osteoarthritis. Other than to note Dr. Verdin's unsupported statement that Hayden was doing "heavy janitorial work," the trial court did not make any findings about specific job duties Hayden was performing or how those work activities caused an aggravation of his preexisting osteoarthritis. CP 313-18. Furthermore, Dr. Verdin did not testify about specific job duties nor could he recall whether he had ever reviewed Hayden's job description or discussed his job duties with him. CP 288.

In contrast, Dr. Youngblood and Dr. Bays testified that Hayden's job activities were not of the type to aggravate or activate osteoarthritis, citing specific activities such as cleaning mirrors or walls as well as the lack of evidence in medical literature supporting such a connection. CP 172-73, 227, 232-33, 235, 238.

Again, the ultimate burden is on Hayden to establish, through medical testimony, a causal relationship between his work activities (or left shoulder strain) and a permanent aggravation of his preexisting left shoulder osteoarthritis. *Olympia Brewing Co. v. Dep't of Labor & Indus.*,

34 Wn.2d 498, 505, 208 P.2d 1181 (1949) (persons claiming benefits under the Industrial Insurance Act held to "strict proof" of their right to receive benefits), *overruled on other grounds by Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958); *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 342, 725 P.2d 463 (1986).

Hayden did not meet this burden, as substantial evidence does not support a determination that his employment with Boeing proximately caused or aggravated his preexisting osteoarthritis. As the evidence shows, Hayden's condition would have continued to naturally progress and require treatment regardless of his work for Boeing.

C. Symptomatic Aggravation Only Is Not Enough To Make An Employer Forever Responsible For A Preexisting Condition

Hayden also claims that based upon some Board decisions, an aggravation of symptoms rather than aggravation of the underlying pathology is sufficient to allow a claim as an occupational disease. Brief of Resp. at 16.[3] In making that argument, Hayden concedes that Dr. Verdin admitted that Hayden's work activities aggravated Hayden's symptoms only, and did not objectively aggravate his underlying condition (i.e. the preexisting glenohumeral osteoarthritis). *Id.*

[3] It should be noted that the Board decisions cited by Hayden are not those designated by the Board as significant decisions.

Boeing respectfully submits that a symptomatic aggravation alone is insufficient to place responsibility for that preexisting condition on the employer forever more, which is in effect what the trial court's ruling did in this case. Although the superior court did not use language indicating whether the aggravation it found was temporary or permanent, the practical effect of its conclusion that Boeing was totally responsible for the preexisting osteoarthritis was to determine that any such aggravation was permanent. CP 318.

However, it is entirely inappropriate to hold Boeing responsible for a permanent aggravation of a condition that was not even altered or accelerated by his work activities or work-related strain. Although the Board cases cited by Hayden in his response brief do in fact stand for the proposition that a claim may be allowed for a symptomatic aggravation of a preexisting condition, allowance of a claim (as opposed to a specific condition) is a different determination than finding an employer forever responsible for a condition. In fact, the Board recognized that distinction in one of its significant decisions, stating that:

> The relevant legal holdings in *Miller* and *Fochtman* clarify that the workers' compensation insurer is responsible for disability caused by an industrial injury even if the disability is the product of the industrial injury acting upon a preexisting infirmity. In other words, the insurer is responsible for the lighting up of a preexisting condition caused by the industrial injury. However, **we are not**

> **aware of any law which requires the insurer to assume responsibility for the preexisting condition in and of itself.** The spondylolisthesis was a preexisting physical condition. Such a preexisting condition may be made symptomatic by subsequent work conditions or injury, but a work related injury may only have a limited or finite effect on the preexisting condition. The effects of a work related injury may not contribute to a further deterioration of the part of body involved. **The workers' compensation insurer, here the self-insured employer, is responsible only for the effects of the industrial injury.** Factually, it is proper to inquire whether the industrial injury [or occupational disease] continues to be a cause of a future need for treatment or a cause of further disability. Neither the holdings in *Miller* or *Fochtman*, or any other law of which we are aware, would hold the self-insured employer forever responsible for Mr. Long's preexisting spondylolisthesis simply because Mr. Long's entitlement to particular benefits was once premised upon a lighting up theory.

In re Arlen Long, BIIA Dec., 94 2539 (1996) (emphasis added). As the Board went on to note in a later case affirming the holding in *Long*, "[i]t may be that the pre-existing condition has progressed on its own unrelated to the industrial injury or occupational disease. If that is the case, then the Department [or self-insured employer] is not responsible for that progression. *In re Tae-Hee Kang*, Dckt. No. 11 18176 (November 15, 2012).

In the instant case, the factual evidence overwhelmingly supports the fact that Hayden's preexisting osteoarthritis progressed on its own unrelated to the occupational disease or the

distinctive conditions of his employment. Again, Dr. Verdin explicitly stated that Hayden's osteoarthritis was not accelerated by his work and all three doctors agreed that osteoarthritis is a naturally progressing condition regardless of activity. While, as Hayden argues, Dr. Verdin used the word "aggravation" in his testimony, the fact remains that using a magic word alone does not prove proximate cause nor does it constitute substantial evidence sufficient to support the superior court's findings and conclusions.

As such, there is not substantial evidence to support the trial court's findings and conclusion that Boeing is responsible for the preexisting osteoarthritis in and of itself. The fact is, Boeing accepted responsibility and provided benefits for the occupationally-related left shoulder strain. However, once that condition became fixed and stable and in the absence of any direct medical evidence that the strain itself continued to cause an aggravation of Hayden's osteoarthritis, Boeing should not be held forever responsible for Hayden's preexisting osteoarthritis and the natural progression of that condition.

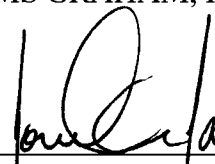
III. CONCLUSION

Based on the foregoing points and authorities, The Boeing Company respectfully requests that the Court reverse the trial court's

decision, affirm the Decision and Order of the Board of Industrial Insurance Appeals, and deny Hayden's request for attorney fees.

RESPECTFULLY SUBMITTED this 28 th day of August, 2015.

EIMS GRAHAM, P.S.



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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STERLING O. HAYDEN, Respondent, v. THE BOEING COMPANY, Appellant.	DECLARATION OF SERVICE King County Superior Court Cause No. 14-2-11670-5 KNT

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served the Reply Brief of the Appellant and this Declaration of Service to the parties on record in the below described manner:

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