NO. 47483-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS A. LUNSCHEN,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

Seven years after his workers' compensation claim closed, Thomas Lunschen injured his back while gardening at home. The Department of Labor and Industries denied his subsequent application to reopen his claim because his back injury from gardening was a new injury unrelated to his industrial injury. After weighing competing medical evidence, the jury agreed that Lunschen's claim should not be reopened because his industrially-related back condition had not objectively worsened since his claim had closed.

Disregarding the correct standard of review, Lunschen asks this Court to overturn the jury's verdict because the jury did not agree with his medical evidence. However, Lunschen already relied on this evidence to argue his case to the jury and this Court does not reweigh evidence under substantial evidence review. This Court should reject his overt request to second-guess the jury and give more weight to his medical experts.

Additionally, the trial court did not abuse its discretion when it rejected Lunschen's proposed instructions on the "lighting up" theory and *McDougle* aggravation theory because substantial evidence did not support giving these instructions. Furthermore, Lunschen was not prejudiced by the denial of those instructions. This Court should affirm.

II. ISSUES

1. Does substantial evidence support the jury's verdict that Lunschen's industrially-related low back condition did not objectively worsen after his industrial injury where two medical experts testified that he had a new injury and that there was no objective worsening of his industrially-related condition?

2. Lunschen proposed a jury instruction that if an injury activates a quiescent infirmity or weakened condition, then the resulting disability is to be attributed to the injury.

   Did the trial court abuse its discretion in declining to give this instruction where Lunschen had a low back condition that was symptomatic, not quiescent, before his industrial injury?

3. Lunschen proposed a jury instruction based on *McDougle v. Department of Labor & Industries*, 64 Wn.2d 640, 393 P.2d 631 (1964), stating that aggravation of a worker's preexisting industrially-related condition is compensable when caused by the "ordinary incidents of living" which a person with the worker's "disability" might be reasonably expected to be doing.

   Did the trial court abuse its discretion in declining to give this instruction where it can be given only when a worker is seeking to reopen a claim which closed with a permanent partial disability award and where Lunschen's claim closed without a permanent partial disability award?

III. COUNTERSTATEMENT OF THE CASE

A. In 1989 or 1990, Lunschen Had a Low Back Injury That Caused Recurrent Back Pain Before He Injured His Low Back at Work in January 2005

Thomas Lunschen has worked in construction and framing since the late 1970s. CP 97-98. In 1989 or early 1990, Lunschen sustained a work-related injury to his back while building a house. CP 100, 111. He

experienced low back pain and was out of work for almost seven months following that injury. CP 100, 134. He subsequently received chiropractic treatment and massage therapy for his back pain for several months. CP 134. After this injury, he developed short-lived episodes of low back pain with labor-intensive work that would typically respond to rest overnight. CP 134. Before his injury in the late 1980's, he also injured his back in a car accident when he was 19. CP 111.

In January 2005, Lunschen was at work shoveling concrete out of a bucket when he again injured his low back. CP 98-99, 188. He felt pain and pinching in the low back and numbness in his left leg down to his feet. CP 99, 101. A week after this work injury, he saw chiropractor Vernon Kaczmarski, who took x-rays of his low back. *See* CP 135. Dr. Kaczmarski diagnosed him with a lumbar strain. CP 189.

Lunschen filed a claim for workers' compensation benefits, which the Department allowed. CP 112. He received nine weeks of treatment consisting of chiropractic care from Dr. Kaczmarski, massage, and physical therapy. CP 101, 113. An MRI in 2005 revealed degenerative changes in his spine. CP 189. Dr. Kaczmarski later testified that during this period, he treated Lunschen for a lumbar strain. CP 208. He did not believe that the degenerative disc disease was related to Lunschen's 2005

injury. CP 213. Dr. Kaczmarski released Lunschen to full duty work in May 2005. CP 192.

In June 2005, the Department closed Lunschen's claim without an award for permanent partial disability. CP 16, 60, 113. Lunschen continued to work full duty at his construction job until he was laid off in 2008 due to the economic recession. CP 99.

B. Seven Years After His Claim Closed, Lunschen Injured His Low Back While Working at Home in His Garden, and His Chiropractor Applied To Reopen His Claim

On May 29, 2012, Lunschen was working in his garden using a tool that rototills dirt through a twisting mechanism when he experienced a sharp onset of back pain that brought him down to one knee. CP 116-17. He returned to Dr. Kaczmarski, who filed an application to reopen his 2005 claim. CP 194. Dr. Kaczmarski also took repeat x-rays of his low back. CP 194. Lunschen had not sought treatment for his low back between when his claim closed in June 2005, and his gardening injury in May 2012. *See* CP 163, 203.

Dr. Kaczmarski believed that Lunschen's condition following the 2012 gardening injury was a worsening of his 2005 industrial injury. *See* CP 203. As objective findings of worsening of the 2005 injury, he identified the x-rays he took in 2012 and his findings of decreased range of motion, a positive nerve stress test, a change in sensation in the left leg,

and muscle spasm. *See* CP 203. Upon comparison with the x-rays from 2005, he testified that the 2012 x-rays were "a little different at L4-L5" but "[v]ery similar to his first." CP 194.

Although Dr. Kaczmarski saw Lunschen a total of sixty-nine times, he was not aware that Lunschen had sustained any lumbar injuries before 2005. CP 208, 211. When asked about his understanding of Lunschen's injury in 2012, he stated that he believed that Lunschen injured his back while pulling weeds: "He was – I think he was pulling – reaching and pulling weeds, I believe, grass, lawn. He was mowing a lawn, and he reached and pulled and threw his back out." CP 209. Dr. Kaczmarski did not know anything else about the mechanism of the injury. CP 209. He also had no indication that Lunschen's low back pain was intensifying prior to that injury. CP 209. In his opinion, if Lunschen had not suffered the gardening injury in May 2012, he would not have required further care for his back condition. CP 210-11.

C. Lunschen Presented the Medical Opinion of Dr. Johnson to Support His Claim That His 2005 Work Injury Had Objectively Worsened

In August 2013, Dr. H. Richard Johnson evaluated Lunschen at Lunschen's attorney's request. CP 132. Dr. Johnson is an orthopedic surgeon who has not actively practiced since October of 1999. CP 172.

Dr. Johnson understood that Lunschen had injured his low back at work in the late 1980's and subsequently experienced low back pain. CP 134. He reviewed reports containing Dr. Kaczmarski's interpretations of Lunschen's x-rays, but he never personally viewed the x-ray films. CP 159; *see also* CP 240. He concluded that Lunschen's injury in 1989 had caused an asymmetric progression of degenerative changes in Lunschen's lumbar spine. CP 170. Dr. Johnson testified that the 2005 injury caused a further asymmetric progression of degenerative changes in the lumbar spine that predisposed Lunschen to aggravation of his low back condition with less stress than if the 2005 injury had not occurred. CP 170. Although he never saw any diagnostic studies of Lunschen's back predating 2005, Dr. Johnson concluded from findings in the 2005 MRI report that Lunschen sustained acute trauma from his 2005 injury. CP 171.

D. Two Medical Experts Testified That Lunschen's Gardening Injury and Naturally Progressing Degenerative Changes Were Unrelated to His 2005 Work Injury and That His 2005 Work Injury Did Not Objectively Worsen

In December 2012, Lunschen was examined by neurologist J. Greg Zoltani, M.D., and chiropractor Allen Tanner, D.C. CP 226. Both agreed that Lunschen's industrially-related condition of lumbar strain did not

objectively worsen between June 9, 2005, and January 4, 2013. CP 236, 267.[1]

Dr. Zoltani maintains a general neurology practice and is board-certified in neurology and electrodiagnostic medicine. CP 224. He interviewed Lunschen, examined him, and reviewed his past medical records, including the x-ray studies from 2005 and 2012. CP 227-29, 240. On the day of his exam, Lunschen complained of low back pain that extended from both sides in his low back and also involved aching and numbness with tingling into the left leg. CP 227.

After a physical examination, Dr. Zoltani opined that there was no clinical evidence that Lunschen's 2005 back injury had worsened. CP 240. Dr. Zoltani diagnosed Lunschen with a lumbar strain historically related to the industrial injury in 2005. CP 234. A lumbar strain encompasses the muscles of the low back lumbar spine region and typically resolves in six to eight weeks. CP 235, 242.

Dr. Zoltani found no objective neurologic findings related to Lunschen's lumbar spine. CP 234-35. He noted from his neurologic

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[1] In determining whether a worker's condition has worsened to merit reopening, doctors compare the worker's condition between two "terminal" dates to see if there is objective worsening. The first terminal date is the date of the last previous closure or denial of an application to reopen a claim for aggravation. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The second terminal date is the date of the most recent closure or denial of an application to reopen a claim. *Id.* at 561. In this case, the first terminal date is June 9, 2005, and the second terminal date is January 4, 2013.

examination that Lunschen had absent ankle reflexes on both sides, back and hip pain during heel-to-toe walking, and decreased sensation distal to both knees. CP 232-33. He did not relate these symptoms to the 2005 injury. CP 234-35. He testified that neuropathy or nerve irritation *could* cause the findings of absent ankle reflex and leg pain. CP 241. He did not testify on a more probable than not basis that either neuropathy or nerve irritation caused the findings here. CP 241.

Dr. Zoltani concluded that the x-rays showed no evidence of worsening. CP 240. He reviewed the 2005 and 2012 low back x-ray films and found they showed similar degenerative changes. CP 233-34. He explained degenerative changes are the natural history of changes that occur in a person's spine over time. CP 234.

Dr. Zoltani diagnosed Lunschen with degenerative disc disease at multiple levels of the lumbar spine which preexisted the January 2005 industrial injury, natural progression of degenerative disc disease in absence of radicular findings on exam, and disproportionate pain behavior unrelated to the lumbar strain injury. CP 234. Dr. Zoltani concluded that Lunschen's gardening injury in May 2012 was a new injury unrelated to his 2005 industrial injury. CP 237.

Dr. Tanner is a certified chiropractic consultant who has practiced continuously since 1980. CP 250-51. When he specifically asked

Lunschen if he had suffered any trauma or injury since 2005, Lunschen reported none. CP 260. He only reported increased pain around May 29, 2012. CP 259. Dr. Tanner explained that the fact that Lunschen did not seek treatment from 2005 through the first half of 2012 indicated to him that Lunschen had not suffered ongoing pain or disability during that period. CP 266-67. Based on the reports of a sudden back pain beginning on May 29, 2012 with a specific activity of yard work, Dr. Tanner attributed Lunschen's increased symptoms after that date directly to the gardening injury. CP 267-68. Dr. Tanner opined that Lunschen's industrially-related lumbar strain condition had not objectively worsened between June 9, 2005, and January 4, 2013. CP 267.

E. The Board Found That Lunschen's Gardening Injury Was a New, Intervening Injury to His Low Back and That His 2005 Work Injury Did Not Objectively Worsen

In August 2012, the Department denied Lunschen's application to reopen his claim, and it affirmed this decision on January 4, 2013. CP 63-64. Lunschen appealed to the Board of Industrial Insurance Appeals. CP 70.

After considering the medical testimony, the industrial appeals judge concluded that Lunschen's back condition proximately caused by his 2005 injury did not objectively worsen between June 9, 2005, (the date his claim was closed) and January 4, 2013 (the date the Department denied

reopening). CP 61. The judge also found that Lunschen's May 2012 gardening injury was an intervening injury to his back. *Id.* The Board reviewed and adopted the proposed decision and order as its final decision and order. CP 16.

Lunschen appealed to superior court and moved for summary judgment. CP 1-2, 278. The trial judge denied the motion because there were material facts in dispute. CP 320-21.

F. The Superior Court Instructed the Jury on Multiple Proximate Cause but Declined to Give Lunschen's Proposed Instructions on the "Lighting up" and *McDougle* Aggravation Theories

The trial court gave a multiple proximate cause instruction, which stated that there may be more than one proximate cause of a condition, and that the law did not require that an industrial injury be the sole proximate cause of a condition in order for the worker to recover benefits:

> The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the condition complained of and without which such condition would not have happened.
>
> There may be one or more proximate causes of a condition. For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must be a proximate cause of the alleged condition for which benefits are sought. The law does not require that the industrial injury be the sole proximate cause of such condition.

CP 368. Lunschen proposed a "lighting up" jury instruction that if an industrial injury causes a worker's latent physical condition to become active, the resulting disability should be attributed to the industrial injury:

> You are instructed that if any 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.

CP 348. The trial court declined to give the instruction. RP (3/10/15) at 169. Lunschen took exception. RP (3/10/15) at 171.

Lunschen also proposed a "*McDougle* aggravation" instruction that invited the jury to find that his condition could have been aggravated by "incidents of ordinary living" when considering what he alleged was his preexisting disability:

> A claimant's aggravation of a pre-existing industrial injury condition is compensable when caused by the ordinary incidents of living which *a person with the claimant's disability* might reasonably be expected to be doing, since such an aggravation is attributable to the condition caused by the original injury.

CP 344 (emphasis added). Lunschen argued that this instruction was appropriate under *McDougle* based on the theory that *McDougle* applies

even in cases, such as this one, where a claim was closed without a permanent partial disability award. RP (3/10/15) at 152-53. But, the trial court disagreed, declining to give this instruction because Lunschen's claim closed with no permanent partial disability. RP (3/10/15) at 153-55. Lunschen took exception. RP (3/10/15) at 171.

In closing argument, Lunschen's counsel relied on the multiple proximate cause instruction to argue that his claim should be reopened:

> [T]he 2005 injury is a proximate cause of the damage that he has in 2012 because if not for that 2005 injury, it would not have accelerated his degenerative changes. It would not have created the weakness area where he would have reinjured himself doing something as simple as working in his garden.

RP (3/11/15) at 181-82. His counsel also relied on the multiple proximate cause instruction to argue that "the cumulative effects of the low lumbar problems from 1989 and the lumbar problems from 2005 and then the twisting motion, put it all together and it all has a part of the causal effect." RP (3/11/15) at 215.

G. A Jury Weighed the Medical Evidence and Found That Lunschen's 2005 Work Injury Did Not Objectively Worsen

The jury found that Lunschen's low back condition, proximately caused by his 2005 industrial injury, did not objectively worsen between June 9, 2005, and January 4, 2013. CP 376. Lunschen now appeals. CP 384-85.

IV. STANDARD OF REVIEW

A. This Court Reviews the Trial Court's Decision, Not the Board's Decision

The ordinary civil standard of review applies to an appeal from a superior court's decision in a workers' compensation case. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This Court reviews the decision of the trial court rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140.

Lunschen misapprehends the standard of review. He assigns error to the Board's findings, argues that those findings are incorrect, and extensively critiques the hearing judge's rationale in the proposed decision. App. Br. 1-2, 19, 26, 31, 40, 42-46. But, this Court must disregard these misplaced arguments because, on appellate review, this Court reviews the jury's verdict, not the Board's decision. *See Rogers*, 151 Wn. App. at 179-81. Similarly, Lunschen erroneously relies on a case involving the assessment of workers' compensation premiums to assert that the APA's "error of law" standard applies here. App. Br. 18 (citing *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994)). Although the APA applies to cases involving the assessment of workers' compensation premiums, it does not apply to cases

involving workers' compensation benefits. *See* RCW 34.05.030(2)(a); RCW 51.48.131; *see also Rogers*, 151 Wn. App. at 180.

B. The Ordinary Standard of Review Applies in a Workers' Compensation Case—Substantial Evidence Review of the Jury's Decision

The ordinary standard of review in a civil case—substantial evidence review—applies to review of the trial court's decision in a workers' compensation case. *Rogers*, 151 Wn. App. at 180; RCW 51.52.140. On substantial evidence review, this Court limits its review to whether substantial evidence supports the trial court's factual findings and whether the trial court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Substantial evidence exists if there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the stated premise. *Zavala v. Twin City Foods*, 185 Wn. App. 838, 859, 343 P.3d 761 (2015).

This Court does not reweigh or rebalance the competing testimony and inferences presented to the factfinder. *Zavala*, 185 Wn. App. at 859; *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis,* 149 Wn.2d 572, 574, 70 P.3d 125 (2003). The Court views the record in the light most favorable

to the party who prevailed in superior court. *Harrison Mem'l Hosp.*, 110 Wn. App. at 485. Persons seeking industrial insurance benefits are held "to strict proof of their right to receive benefits provided by the act." *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744, *review denied*, 337 P.3d 325 (2014) (internal quotation omitted).

C. The Court Reviews the Refusal To Give a Proposed Instruction for Abuse of Discretion

This Court reviews a trial court's refusal to give a proposed instruction for abuse of discretion. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). Reversal is required only if it is prejudicial, meaning it affected the trial's outcome. *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 587, 880 P.2d 539 (1994).

Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Raum v. City of Bellevue*, 171 Wn. App. 124, 142, 286 P.3d 695, *review denied*, 176 Wn.2d 1024 (2013). The trial court does not give a requested instruction unless there is substantial evidence to support it. *See Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

V. ARGUMENT

A. Substantial Evidence Supports the Jury's Verdict Because Two Medical Experts Testified That Lunschen's 2012 Gardening Injury Caused His Low Back Condition and That His 2005 Work Injury Did Not Objectively Worsen

Substantial evidence supports the jury's verdict that the Board was correct in determining there was no objective worsening of Lunschen's industrially-related condition. Following their review of Lunschen's medical records and imaging studies, and after conducting physical examinations, Dr. Zoltani and Dr. Tanner both concluded that Lunschen's industrially-related low back strain did not objectively worsen between June 9, 2005, and January 4, 2013. Both experts attributed Lunschen's low back condition to a new gardening injury in 2012. This was substantial medical evidence that the jury could have relied on to reach its verdict.

Contrary to Lunschen's assertion, liberal construction of RCW Title 51 does not affect the correctness of the Board's decision to affirm the Department's denial of his reopening application even if he presented a prima facie case. *See* App. Br. 8. That is because the rule of "liberal construction" does not apply to questions of fact. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). Instead, Lunschen had the burden to prove the Board's order was incorrect. RCW 51.52.115; *Zavala*, 185 Wn. App. at 858.

A worker may reopen a workers' compensation claim by establishing "aggravation" of his industrial injury. *See* RCW 51.32.160(1)(a). To succeed in a reopening claim such as Lunschen's, the claimant has to prove, by objective medical testimony, that (1) his or her condition was worse after the original injury, (2) the worsening was caused by the original injury, (3) his or her condition worsened between the terminal dates, and (4) the worsening warranted more treatment or disability beyond what the Department had provided. *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189 (2015); *Eastwood v. Dep't of Labor and Indus.*, 152 Wn. App. 652, 657-58, 219 P.3d 711 (2009).[2]

In this case, Dr. Zoltani's and Dr. Tanner's testimony provide substantial evidence that there was no causal relationship between Lunschen's 2005 industrial injury and his back condition following his 2012 gardening injury. Both experts testified that the only condition proximately caused by his 2005 industrial injury was a lumbar strain. CP 234, 262-63. After examining Lunschen and reviewing his medical

[2] As noted above, the first terminal date is the date of the last previous closure or denial of an application to reopen a claim for aggravation. *Grimes*, 78 Wn. App. at 561. The second terminal date is the date of the most recent closure or denial of an application to reopen a claim. *Id.* at 561. In this case, the first terminal date is June 9, 2005, and the second terminal date is January 4, 2013.

records, including imaging studies, they determined that his lumbar strain had resolved by the time they examined him over seven years later. CP 235, 263. According to Dr. Zoltani, it typically takes six to eight weeks for a strain to resolve, and Dr. Tanner testified that Lunschen's lumbar strain had resolved by April 2005 when he returned to work. CP 235, 265.

Dr. Zoltani and Dr. Tanner both offered the ultimate opinion that Lunschen's industrial injury did not objectively worsen between June 9, 2005, and January 4, 2013. CP 236, 267. Objective findings include what can be seen on physical examination and imaging studies, such as x-rays. *See* CP 148. When Dr. Zoltani compared the x-rays of Lunschen's low back from 2005 and 2012, he did not see any evidence of worsening of Lunschen's condition. CP 239-40.[3] Dr. Zoltani also found no evidence from his physical examination to support worsening of Lunschen's lumbar strain between the relevant dates. CP 240.

Instead, substantial evidence supports that Lunschen sustained a new injury while gardening in May 2012 that was unrelated to his 2005 industrial injury. Lunschen testified that on that date, he experienced a sudden onset of pain in his low back while using a rototilling tool in his

[3] Contrary to Lunschen's implications, the fact that Dr. Zoltani stated he did not disagree with Dr. Kaczmarski's reports of the 2005 and 2012 low back x-rays is immaterial. *See* App. Br. 15, 39. Dr. Zoltani's diagnoses demonstrate that he did not rely on Dr. Kaczmarski's interpretations of the x-rays and, in any case, he relied on the x-rays to ultimately opine that there was no objective worsening of Lunschen's low back condition. *See* CP 241.

garden. CP 116-17. Consistent with that testimony, he reported to Dr. Tanner that his back had worsened when he was using a garden tool that involved twisting a bar and pulling out weeds and dirt. CP 266. Contrary to Lunschen's assertion in his brief that all of the experts testified he did not have an intervening injury, Dr. Tanner specifically testified that he related Lunschen's increased symptoms after May 29, 2012, directly to his gardening injury. *See* App. Br. 30; CP 267-68. Likewise, Dr. Zoltani agreed that the injury Lunschen sustained while working in his garden was a new injury unrelated to his 2005 industrial injury. CP 237.

Lunschen had the burden to establish the causal relationship between his 2005 industrial injury and subsequent disability. RCW 51.52.115; *Phillips*, 49 Wn.2d at 197; *Eastwood*, 152 Wn. App. at 657-58. Viewed in the light most favorable to the Department, the jury could have concluded from the medical evidence that the 2012 gardening injury, rather than an objective worsening of his 2005 lumbar strain, caused his back condition.

While Lunschen presented medical testimony to support his theory that his 2005 industrial injury had objectively worsened, the jury considered and rejected this testimony. This Court should reject Lunschen's repeated invitations to act as factfinder and reweigh the evidence in his favor. *See* App. Br. 2, 31-32. He makes numerous such

arguments. For example, he argues that Dr. Zoltani and Dr. Tanner did not address his claim of asymmetrical changes on x-ray and did not explain why they concluded that his changes were the natural progression of his preexisting condition, that Dr. Johnson's "diagnosis makes more sense" than Dr. Tanner's, and that Dr. Johnson was better able to distinguish between age-related degeneration and degeneration related to Lunschen's industrial injuries. App. Br. 24-26, 29-30; *see also* App. Br. 19-24.

All of these arguments are improper because, on appeal, this Court cannot reweigh the evidence, rebalance the testimony, or substitute its own judgment for that of the jury. *Zavala*, 185 Wn. App. at 859; *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 28, 277 P.3d 685 (2012); *Harrison Mem'l Hosp.*, 110 Wn. App. at 485.

Lunschen also argues that Dr. Kaczmarski "was very familiar" with his pain and is entitled to special consideration as his treating provider. App. Br. 30-31. While the jury should give special consideration in the form of careful thought to an attending provider's testimony, it is not required to believe or disbelieve the testimony. *See Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988). The jury was not required to give Dr. Kaczmarski's testimony more weight or credibility than that of any other witness simply because he was Lunschen's attending provider. *See id.*

Lunschen has fundamentally misconstrued the standard of review. He argues that the medical evidence "[t]aken as a whole" shows that he should prevail. App. Br. 31. Throughout his brief, he points out testimony that, if believed, would allow a jury to rule for him. *E.g.*, App. Br. 19-26, 29-30, 32-33. But, on substantial evidence review, the court views the evidence in the light most favorable to the Department as the prevailing party, not Lunschen. *See Zavala*, 185 Wn. App. at 858 ("We must review the record in the light most favorable to the party who prevailed in superior court."). The jury had an opportunity to view the record as a whole to determine whether Lunschen's aggravation claim should succeed and rejected it. Now, on appeal, the court looks to the record as a whole only to evaluate whether substantial evidence supports the jury's findings. *See Harrison Mem'l Hosp.*, 110 Wn. App. at 485.

Applying the proper standard of review, Dr. Zoltani's and Dr. Tanner's testimony constitutes substantial evidence that Lunschen's industrially-related low back condition did not objectively worsen between June 9, 2005, and January 4, 2013. This Court should affirm the jury's verdict based on this substantial evidence.

B. The Trial Court Did Not Abuse Its Discretion in Rejecting the "Lighting up" Instruction Because No Evidence Supports It and Lunschen Could Use the Multiple Proximate Cause Instruction To Argue His Theory

The trial court properly exercised its discretion when it declined to give Lunschen's proposed "lighting up" instruction to the jury because no evidence supported its use. Such an instruction is appropriate only when a condition is "latent or quiescent" before an industrial injury, and the industrial injury operates on the latent condition to make it disabling. But here, Lunschen's back condition was not latent or quiescent before his 2005 industrial injury; it was symptomatic, recurring at least since his prior back injury in 1989. Therefore, substantial evidence did not support the "lighting up" instruction.

According to the "lighting up" theory, if "an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition." *Miller v. Dep't of Labor & Indus.*, 200 Wn. 674, 682, 94 P.2d 764 (1939). An instruction on the "lighting up" theory is only given where there is substantial evidence to support it. *Cooper*, 188 Wn. App. at 647; *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 676, 571 P.2d 229 (1977). A claimant is entitled to a "lighting up" jury

instruction where the evidence supports that (1) the preexisting condition was latent, not symptomatic, and (2) the industrial injury proximately caused the current disability, regardless of a preexisting condition. *Miller*, 200 Wn. at 682; *Cooper*, 188 Wn. App. at 648. Because Lunschen did not present evidence that his low back was not symptomatic before his 2005 industrial injury, the trial court properly declined to give the instruction.

Further, "whether a condition is naturally progressing informs whether that condition was latent or quiescent before the industrial injury." *Zavala*, 185 Wn. App. at 864. Consequently, a preexisting condition is not "lit up" if the weight of the evidence reveals that the condition was either (1) symptomatic before the workplace event or (2) "a naturally progressing condition that would have progressed to symptoms without the injury." *Zavala*, 185 Wn. App. at 862; *Austin v. Dep't of Labor & Indus.*, 6 Wn. App. 394, 398, 492 P.2d 1382 (1971). Both criteria are met in this case, providing substantial evidence that Lunschen's preexisting degenerative disc disease was not "lit up" by his work injury.

1. The Trial Court Properly Declined To Give the "Lighting up" Instruction Because Lunschen Had Symptoms of Recurring Back Pain Before His 2005 Work Injury From His 1989 Low Back Injury

Lunschen was not entitled to a "lighting up" instruction because his low back was symptomatic before his 2005 industrial injury. Just like

the worker in *Cooper*, he is not entitled to the instruction. In *Cooper*, the worker did not present evidence that his condition was asymptomatic before his work injury; instead, the evidence was that his condition was symptomatic. *Cooper*, 188 Wn. App. at 649. Thus, the Court held that substantial evidence did not support giving the instruction. *Id.*

Here Lunschen presented no evidence that his low back condition was asymptomatic before his 2005 injury. Instead, as Lunschen notes, he had a "relatively severe back injury" in 1989. App. Br. 29. This injury to his low back was severe enough to prevent him from working for almost seven months. CP 100. He received chiropractic treatment and massage therapy for low back pain following that injury. *See* CP 134. Lunschen also told Dr. Johnson that following his 1980's injury, he developed short-lived episodes of low back pain with labor-intensive work that would typically respond to rest overnight. CP 134. Against this evidence of recurring back pain, Lunschen did not present any evidence that his back was asymptomatic before the 2005 injury. As he testified regarding his 2005 injury, "[a] back injury is something that just, to me, just doesn't really just go away . . . ." CP 109. It was Lunschen's burden to show substantial evidence to support his proposed "lighting up" instruction, which he failed to do. *See Stiley*, 130 Wn.2d at 498; *Cooper*, 188 Wn. App. at 647-48. Thus, he was not entitled to the instruction.

2. Lunschen's Degenerative Disc Disease Was Not "Lit up" Because Medical Testimony Supports That It Progressed Independently of His 2005 Work Injury

Even if he had presented testimony that his low back was completely asymptomatic before his 2005 work injury, Lunschen would not be entitled to the instruction because he had a naturally progressing preexisting condition that would have progressed as it did even if he had not sustained that injury. In *Austin*, the worker testified that a previous arthritic condition in his back was latent before his work injury. *Austin*, 6 Wn. App. at 396. But, he also admitted that he had "occasional stiffness in his back and muscles" for a number of years before his work injury that he would recover from after a couple of days rest. *Id.* The court held that the worker was not entitled to the "lighting up" instruction because he admitted to occasional symptoms in his back and because there was medical testimony that his preexisting condition "was a naturally progressing condition and would have progressed naturally without the injury." *Id.* at 398-99. The court found that this medical testimony "negative[d] the conclusion claimant's preexisting condition was latent or dormant before the injury." *Id.* at 398.

Here, Lunschen, unlike the worker in *Austin*, never testified that his back condition was latent or that he had no back trouble before the 2005 industrial injury. And, similar to the worker in *Austin*, he admitted

that he developed short-lived episodes of low back pain before his 2005 industrial injury (as a result of his 1989 back injury) with labor-intensive work that would typically respond to rest overnight. CP 134. This evidence contradicts the requirement under *Cooper* and *Austin* that the area of his body that Lunschen asserts was "lit up" was latent before his 2005 industrial injury.

Further, like in *Austin*, the medical testimony establishes that Lunschen's preexisting degenerative disc disease was a naturally progressing condition that would have progressed as it did despite the 2005 industrial injury. Dr. Zoltani explained that degenerative changes are "the natural history of changes given age and time that occur to an individual's spine" and Dr. Tanner testified that all spines degenerate over time at different frequencies and levels. CP 234, 263. Specific to Lunschen, Dr. Tanner opined that his preexisting degenerative changes accelerated between 2005 and 2012 but that this was not related to the 2005 injury. *See* CP 263-64. Ultimately, Dr. Zoltani and Dr. Tanner diagnosed Lunschen with "natural progression of degenerative disc disease." CP 234, 263. Substantial evidence supports that, even without the 2005 injury, Lunschen's condition from his degenerative disc disease would have naturally progressed as it did due to the passage of time alone.

Wendt does not support the giving of a "lighting up" instruction in this case. *See* App. Br. 34-36. Lunschen ignores that the worker's condition in *Wendt* was completely asymptomatic before the industrial injury. In *Wendt*, the court found that substantial evidence supported a "lighting up" instruction because the worker's medical expert directly tied his symptoms to his preexisting, asymptomatic arthritis:

> The injury to the posterior chest however was one which created not only rib fractures but also the initiation of symptoms which have created spasms and pain since that time. I believe that these symptoms refer to the hypertrophic osteoarthritis which is seen in the mid and low back and that this was not caused by the industrial injury. *These changes pre-existed the industrial injury but have come into symptomatic being through the trauma which the industrial injury visited upon these pre-existing but asymptomatic areas.*

18 Wn. App. at 677 (emphasis added). But, as explained above, Lunschen did not present any such evidence, and the record supports that he had recurrent back pain after his 1989 injury. Therefore, he was not entitled to a "lighting up" instruction under *Wendt*.

Wendt is also distinguishable because, unlike Lunschen, the only medical evidence of worsening that Wendt presented to the jury related to worsening of his preexisting arthritis condition. *See Wendt*, 18 Wn. App. at 677-78. Wendt's claim could only be reopened if the preexisting arthritis condition became part of the claim under the "lighting up" theory.

In contrast, Lunschen presented evidence from Dr. Kaczmarski of objective worsening of several other conditions, including low back strain, low back pain, and radiating left-sided leg pain. *See* CP 203. Similarly, Dr. Johnson testified to worsening of not just degenerative changes, but worsening of Lunschen's low back pain and left lumbar radiculopathy. CP 155-56. Whereas in *Wendt*, the worker's preexisting arthritis condition was the only condition that he claimed had worsened, Lunschen presented evidence of objective worsening of conditions other than his preexisting degenerative disc disease. Compared to *Wendt,* the "lighting up" instruction did not embody the "gist or substance" of Lunschen's claim and it was properly denied. *See Wendt*, 18 Wn. App. at 679.

3. Lunschen Was Not Prejudiced by the Denial of the "Lighting up" Instruction Because the Multiple Proximate Cause Instruction Adequately Addressed His Theory of Aggravation

Even if the "lighting up" instruction should have been given, Lunschen was not prejudiced by the failure to give it because he was able to argue his theory using the multiple proximate cause instruction. He did not argue to the jury that his preexisting degenerative changes should be considered part of his claim because it was lit up by his 2005 work injury. Rather, he argued that those degenerative changes were a factor that predisposed his low back to injury in 2012. Contrary to his assertion, his

degenerative condition did not need to become part of his claim for this theory to be explained to the jury. *See* App. Br. 36.

When asked to explain how Lunschen's current condition was related to his industrial injury, Dr. Johnson testified that the 2005 injury "caused an asymmetric progression of degenerative changes in his lumbar spine, predisposing him, then, to aggravation of his *low back condition* with less stress than if the injury hadn't occurred." CP 170 (emphasis added). Lunschen relied on that testimony in his closing argument:

> [Dr. Johnson] says there is acute trauma to the L4 and L5 area, and he ties it together this way: He says that the 1989 injury resulted in him developing posttraumatic changes in his lumbar spine of an asymmetric nature, and that was consistent with trauma. And then you add in his labor-intensive life-style after that period, and it predisposed him to an injury such as the one he sustained in 2005.
>
> So then in 2005, caused further asymmetric progression of degenerative changes in his lumbar spine and it predisposed him then to aggravation of his low back with less stress than if the 2005 injury had not occurred.

RP (3/11/15) at 181.

If a party can argue its theory under the instructions given as a whole, the trial court's refusal to give a requested instruction is not reversible error. *See Raum*, 171 Wn. App. at 142. In this case, the trial court's multiple proximate cause instruction allowed Lunschen to argue that his 2012 gardening injury was a cause of the degenerative changes in his lumbar spine. Specifically, the instruction provided that "[t]here may

be one or more proximate causes of a condition" and "[t]he law does not require that the industrial injury be the sole proximate cause of such condition." CP 368. Lunschen could adequately present and argue his predisposition theory using that instruction.

Lunschen was also not prejudiced by the omission of the "lighting up" instruction because it is likely the jury would have reached the same result even if the "lighting up" instruction had been given. *See Harker-Lott*, 93 Wn. App. at 188. The instruction would not likely have changed the trial's outcome because the ultimate issue in this case was not whether Lunschen's 2005 industrial injury lit up his preexisting degenerative disc disease. The ultimate issue was whether his industrially-related condition objectively worsened or whether he sustained a new, unrelated injury from his gardening activities in 2012. Including the instruction would not have changed the argument Lunschen made to the jury that the 2005 injury accelerated his degenerative changes and made his back more susceptible to injury. RP (3/11/15) at 181-82.

For those reasons, the evidence was insufficient to justify the giving of a "lighting up" instruction and it was properly refused.

C. The Trial Court Did Not Abuse Its Discretion in Rejecting the *McDougle* Aggravation Instruction Because *McDougle* Applies Only When a Claim Is Closed With a Permanent Partial Disability Award, Which Did Not Occur Here

The trial court correctly rejected Lunschen's request for an aggravation instruction based on *McDougle*, 64 Wn.2d 640, because it would have been erroneous to give that instruction. Under *McDougle,* the aggravation of a claimant's disability caused by the ordinary incidents of living that he or she could reasonably be expected to do is compensable as attributable to a condition caused by the original injury; however, aggravation caused by conduct in which the claimant could not, because of an existing disability, reasonably expect to engage in without injury is not compensable. *Id.* at 644. Well-established case law, including the recent decision in *Department of Labor & Industries v. Shirley*, 171 Wn. App. 870, 883, 288 P.3d 390 (2012), makes clear that *McDougle*'s "reasonably expected conduct" test applies only when the Department closed the worker's claim with a permanent partial disability award. Because Lunschen's claim closed without any such disability award, the trial court properly rejected his instruction.

In the context of reopening a workers' compensation claim, *McDougle* applies only when the Department closed the claim with a finding of permanent partial disability, which results in a monetary

disability award. In *McDougle*, the worker's claim closed with a 30 percent permanent partial disability award for his back. *McDougle*, 64 Wn.2d at 641. He applied to reopen his claim, alleging that his industrially-related low back condition had worsened as a result of lifting sacks of ground feed while assisting his brother-in-law outside of work. *Id.* at 641-42.

The *McDougle* Court concluded that the worker could reopen his claim even though the lifting incident occurred outside of work because the worker's permanent disability from his original injury was a cause of his back condition after lifting the feed. *See id.* at 644. The Court held that when "incidents of ordinary living" aggravate a worker's industrially-related disability, the proper test to determine if those incidents were an independent intervening cause is "whether the activity which caused the aggravation is something that the claimant might reasonably be expected to be doing, or whether it is something that *one with his disability* would not reasonably be expected to be doing." *Id.* at 645 (emphasis added).

Thus, *McDougle* establishes that there must be a preexisting permanent disability established at claim closure before this "reasonably expected conduct" test applies. The Court remanded the case for the Department to consider whether the worker's activities were reasonable in

light of his previously-established 30 percent permanent partial disability. *Id.* at 645-46.

After remand and further appeal, the Supreme Court held that McDougle's claim should be reopened because his conduct moving the feed was reasonable in light of his 30 percent disability. *See Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 848, 440 P.2d 818 (1968). As the Court explained, "*when subjected to the proper criteria*, the claimant's conduct was such as could reasonably be expected of a man *with his disability*." *Id.* (emphases added). The Court explicitly analyzed McDougle's grain lifting activity "within the scope of the prior award" he received, and it explained that the "reasonably expected conduct test" applies to the Department-established disability of 30 percent permanent partial disability, not to the "claimant's subjective personally known condition." *Id.* at 847-48.

A recent death benefits case further affirmed that *McDougle*'s "reasonably expected conduct" test applies only when there is a prior permanent partial disability award. *See Shirley*, 171 Wn. App. at 883. The court specifically noted that the test in *Scott Paper* referred to the "Department-established disability." *Id.* The presence of this disability is critical because *McDougle* provides an exception to common-sense reasoning that where an everyday, non-work-related activity worsens a

worker's condition, that activity breaks the causal chain between the work injury and the worsened condition. Where the worker has a prior disability related to his or her claim, a causal connection between the worker's worsened condition and the work injury is retained as long as the everyday activity was reasonable in light of that disability. The existence of a permanent partial disability is the linchpin that makes it possible to attribute a worker's everyday activities to his or her work injury. If not, then there would be strict liability for the Department every time the worker reinjures his or her back doing an everyday activity, even though it is res judicata that the back condition healed with no disability. *See White v. Dep't of Labor & Indus.*, 48 Wn.2d 413, 414, 293 P.2d 764 (1956) (holding closing order indicating that claimant had suffered no permanent disability was res judicata as to claimant's condition or disability as of that date).

In this case, therefore, it would have been error for the trial court to instruct the jury on the *McDougle* "reasonably expected conduct" test because Lunschen's claim closed without a permanent partial disability award. CP 16, 60. The trial court is not obligated to instruct regarding a party's theory of the case unless there is substantial evidence to support the theory. *Stiley*, 130 Wn.2d at 498. Because Lunschen did not appeal the June 2005 order closing Lunschen's claim with no permanent partial

disability, it is res judicata that he had no disability or impairment at that time causally related to his January 2005 industrial injury. CP 16, 60; *see White*, 48 Wn.2d at 414 (order finding no permanent partial disability is res judicata as to no disability proximately caused by the injury on that date). Therefore, *McDougle*'s "reasonably expected conduct" test does not apply here because substantial evidence does not support giving the instruction.

Lunschen's reliance on *Collins v. Department of Labor & Industries*, 42 Wn.2d 903, 905, 259 P.2d 643 (1953), is misplaced. *See* App. Br. 26, 41-42. *Collins* merely states that a previous permanent partial disability award is not necessary for a claimant to make a claim for aggravation of his condition. 42 Wn.2d at 905. That rule allows Lunschen to seek reopening of his claim in this case (since he had no previous permanent partial disability award), but it does not follow that he is entitled to a *McDougle* aggravation instruction, which *McDougle*, *Scott Paper*, and *Shirley* show applies only to claimants, unlike Lunschen, who have a Department-established disability when they apply to reopen their claim.

As *McDougle*, *Scott Paper*, and *Shirley* make clear, the "disability" in the *McDougle* aggravation context is Department-established disability at the time the claim is closed. Lunschen proposes that "disability" has a

"dual meaning," but cites no authority to support his proposition that the term "in the *McDougle* aggravation context "also can mean the residual effect of an injury that may impact the claimant's life." *See* App. Br. 41; *see also DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court . . . may assume that counsel, after diligent search, has found none."). Lunschen also cites no authority for his argument that a person who does not receive a permanent partial disability award may still have a permanent partial disability of less than five percent at the time his or her claim is closed. *See* App. Br. 26. To the contrary, WAC 296-20-680(3) specifies that a category one permanent impairment of the low back is equivalent to zero percent total body impairment, not "from 0-4% impairment" as Lunschen asserts. *See* App. Br. 45. This Court should reject these unsupported arguments.

In summary, at the time of claim closure, Lunschen's industrially-related condition had resolved and he did not have any disability related to that condition. Therefore, the facts of his case do not support an argument under *McDougle* that aggravation of his industrial injury from his gardening injury was compensable under his claim. This Court should affirm the trial court's refusal to give the *McDougle* aggravation instruction because it would have been legally erroneous.

Even if this Court determines that the *McDougle* instruction should have been given, the failure to give it did not materially affect the trial's outcome. As with the "lighting up" instruction, Lunschen was able to argue his theory of the case using the multiple proximate cause instruction. Indeed, he appears to concede that *McDougle* simply applies basic proximate cause principles as to "whether 'but for' the original injury the worker would not have sustained the subsequent condition." App. Br. 38. Using the multiple proximate cause instruction, Lunschen was able to argue that he would not have suffered the injury he did while working in his garden if he had not previously injured himself at work in 2005. RP (3/11/15) at 182. Such an argument is not "esoteric and difficult for the jury to grasp." App. Br. 42. It is a routine causation argument that Lunschen made to the jury, and which the jury rejected. *See* RP (3/11/15) at 182. Lunschen suffered no prejudice from the court's decision not to give this instruction.

D. This Court Cannot Review the Trial Court's Denial of Lunschen's Motion for Summary Judgment Because It Was Based on the Existence of Material Facts in Dispute

This Court should decline to address Lunschen's request to review the trial court's denial of his motion for summary judgment. *See* App. Br. 42-46. Denial of a motion for summary judgment generally is not an appealable order. RAP 2.2(a); *see Sea-Pac Co. v. United Food & Comm'l*

Workers Local Union 44, 103 Wn.2d 800, 801-02, 699 P.2d 217 (1985). A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder. *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 799, 65 P.3d 16 (2003).

The trial court denied Lunschen's motion for summary judgment because there were material facts in dispute. CP 321. Medical experts in this case offered differing opinions on causation. Those disputed facts were presented to the jury, which resolved them in the Department's favor. CP 376. A final judgment was entered following the jury's verdict. CP 381-83. Therefore, Lunschen is limited to appeal from the final judgment. RAP 2.2(a). This Court should decline to review the trial court's denial of summary judgment.

E. Lunschen Is Not Entitled to Attorney Fees

This Court should deny Lunschen's request for attorney fees. *See* App. Br. 47. First, Lunschen did not include his fee request in a separate section as required by RAP 18.1(b) and, therefore, this Court need not consider the request. *See* App. Br. 47; *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013). Second, under the plain terms of RCW 51.52.130, Lunschen is not entitled to fees. Under this statute, attorney fees may be awarded to a worker who prevails in court

only if (1) the Board decision is "reversed or modified" and "additional relief is granted" and (2) the litigation's result affected the Department's "accident fund or medical aid fund." RCW 51.52.130(1); *Tobin v. Dep't Labor & Indus.*, 169 Wn.2d 396, 405-06, 239 P.3d 544 (2010).[4]

Because Lunschen should not prevail in this appeal, this Court should deny his attorney fee request. Even if he does prevail, remand for a new trial would not support a fee award because there would be no "additional relief" and such an order would not affect the accident fund or medical aid fund. *See Dep't of Labor & Indus. v. Rowley*, 185 Wn. App. 154, 170, 340 P.3d 929 (2014), *review granted on other grounds*, 183 Wn.2d 1007 (2015) (denying worker's fee request where relief was remand to trial court); *see also Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 29, 288 P.3d 675 (2012) (finding the prevailing party's attorney was not entitled to fees where only relief was remand to director).

VI. CONCLUSION

This Court should not disturb the jury's verdict. The jury heard substantial evidence that Lunschen's condition following his 2012

[4] To support his claim of attorney fees, Lunschen references language from the first sentence of RCW 51.52.130. App. Br. 29. However, that sentence addresses only the fixing of attorney fees. It is the fourth sentence of RCW 51.52.130 that addresses when attorney fees are payable. The fourth sentence makes clear that an award of fees requires both that the worker prevail in the action and that the accident fund or medical aid fund be affected. RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011).

gardening injury was a new injury not caused by his industrial injury. Therefore, this Court should uphold the jury's verdict that his industrially-related condition did not worsen. The trial court also did not abuse its discretion when it declined to give instructions on the "lighting up" theory and *McDougle* aggravation theory when they were not supported by substantial evidence.

RESPECTFULLY SUBMITTED this 30th day of October, 2015.

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No. 47483-2-II

COURT OF APPEALS. DIVISION II
OF THE STATE OF WASHINGTON

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