74413-5

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No. 74413-5

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LORIANN HULL,

Appellant

v.

PEACEHEALTH,

Respondent.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1) The Superior Court Judge erred when entering Conclusions of Law and a Judgment that were not supported by substantial evidence when reversing the decision of the Board of Industrial Insurance Appeals (hereinafter "Board").

2) The Superior Court Judge further erred by failing to address whether surgical complications for surgery performed under a workers' compensation claim should be allowed under the claim, even if the condition surgery was to treat is later denied under the claim.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1) Whether substantial evidence existed in the record for the Superior Court Judge to reverse a determination of the Board that allowed thoracic outlet syndrome and the conditions that arose as a complication of thoracic outlet surgery, when the attending physician causally related the thoracic outlet syndrome to unique and distinctive work activities and all other medical experts agreed the other conditions were complications from the surgery?

2) Whether complications from surgery are compensable under a workers' compensation claim when the responsible Employer authorizes and pays for surgery under the claim, but the underlying condition that necessitated surgery is later found to be unrelated to the claim?

C. STATEMENT OF THE CASE

LoriAnn Hull, Defendant in the trial court action, worked for St. Joseph Hospital (PeaceHealth) for 20 years as an admitting representative/registration specialist in the emergency room. Clerk's Papers (hereinafter "CP") at 7. Her job duties included gathering patient information (from over an arm's length away), inputting patient information (both on paper and using a computer), assisting patients in wheelchairs, pulling forms and patient charts (from at or above chest level), affixing labels to documents, assembling and breaking down patient charts, sorting and stacking documents in piles (up to an arm's length away), and cleaning name badges. CP at 7-8.

An occupational disease claim was filed in 2006. CP at 8. At that time Ms. Hull's symptoms primarily related to her elbows. Id. The claim was allowed as an occupational disease by the Department of Labor & Industries on December 3, 2007, yet no specific condition was identified in the order allowing the claim. CP at 94. Ms. Hull's employer, PeaceHealth, is self-insured and thereby administers the claim themselves. Ms. Hull was later evaluated for symptoms relating to her left shoulder. See CP at 241 – 247. Surgery was performed on the left shoulder, which was authorized by and paid for by PeaceHealth. Id. Following surgery the symptoms did not abate and Ms. Hull then came under the care of Dr.

Kaj Johansen who ultimately performed two thoracic outlet surgeries on Ms. Hull, the first on April 22, 2009 and the second on December 21, 2009. Id. Both of these surgeries were authorized and paid for by PeaceHealth. Id.

Ms. Hull suffered medical complications following the second thoracic outlet surgery and required further treatment with various providers for balance problems, breathing problems, difficulty swallowing, dry heaving, as well as emotional problems which included an adjustment disorder with depressed mood. CP at 244 – 249. Treatment for these complications was again paid for and authorized by PeaceHealth. Id.

In 2013 the Department issued three orders which were appealed by PeaceHealth and form the subject matter of this litigation. CP at 6. These orders directed PeaceHealth to accept responsibility for post-surgery complications including pulmonary conditions, balance problems, dysphasia, cricopharyngeal spasms, and adjustment disorder with depressed mood as well as to authorize and pay for the psychiatric medication Cymbalta. Id. PeaceHealth disagreed with these orders and appealed them to the Board. CP at 3. Ms. Hull and the Department of

Labor and Industries are aligned in this appeal in support of the Department orders, however the Department has declined active participation thus far.

Following hearing before the Board, which included testimony from Ms. Hull, two lay witnesses and nine medical experts, the Industrial Appeals Judge issued a Proposed Decision and Order that affirmed the orders on appeal, thereby allowing the conditions that were downstream consequences of the thoracic outlet surgeries. CP at 3 – 18. PeaceHealth filed a Petition for Review with the Board that was denied October 6, 2014, and thus the Proposed Decision and Order became the final order of the Board. CP at 35 – 56, 31.

PeaceHealth appealed that final order of the Board to Superior Court, wherein following a bench trial, The Honorable Ira Uhrig reversed the Board decision. Judge Uhrig found that 1) the trial court should not have admitted evidence regarding payment of services associated with Ms. Hull's thoracic outlet syndrome and struck all references regarding such payment from the record; and 2) even had the evidence regarding payment of the thoracic outlet syndrome procedures been admissible, the Board erred in concluding the thoracic outlet surgeries and sequela were allowable and the responsibility of PeaceHealth. CP at 1-26, 823-830.

Pursuant to RCW 51.52.140 this appeal was timely taken by Ms. Hull. CP at 831-840.

D. STANDARD OF REVIEW

The standard of review on appeal remains the same as that for the Superior Court, which acted as an appellate court in reviewing the administrative decision. Chemithon Corp. v. Puget Sound Air Pollution Control Agency, 19 Wn. App. 689, 577 P.2d 606 (1978). This Court is limited to determining if there is substantial evidence to support the trial court's Findings of Fact and Conclusions of Law. RCW 51.52.140, Ferencak v. Dep't of Labor & Indus., 142 Wn.App 713, 175 P.3d 1109 (2008). Issues of law, or mixed questions of law and fact are reviewed *de novo*. Devine v. Employment Sec. Dept., 26 Wn. App. 778, 614 P.2d 231 (1980).

E. ARGUMENT

1) Thoracic Outlet Syndrome Was Proximately Caused by Ms. Hull's Employment at PeaceHealth

RCW 51.08.140 defines an occupational disease as a disease or infection that arises naturally and proximately out of employment. The Supreme Court has required that occupational disease claims "come about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment." Dennis v. Department of

Labor & Industries, 109 Wn.2d 467, 745 P.2d 1295 (1987). A physician's opinion as to the cause of an occupational disease is sufficient when based on reasonable medical certainty and if from the facts and circumstances, as well as medical testimony, a reasonable person can infer a causal connection exists. Intalco Aluminum Corp. v. Department of Labor & Industries, 66 Wn. App. 644, 833 P.2d 390 (1992). The test for whether an occupational disease has occurred is not whether most workers would suffer the same diagnosis under the conditions, rather each worker is taken as they are, with all pre-existing issues. Simpson Timber Co. v. Wentworth, 96 Wn. App. 731, 981 P.2d 878 (1999). Along the same lines if a particular job accelerated the need for treatment or aggravated an underlying condition, the claim is allowable. Id.

a. Attending Physician Rule

It has long been held that in a workers' compensation dispute, special consideration should be given to the opinion of a worker's attending physician. Hamilton v. Department of Labor & Industries, 111 Wn.2d 569, 761 P.2d 618 (1988).

In support of its appeal to the Board, PeaceHealth presented the testimony of Dr. Richard Kremer, a vascular surgeon who is Board Certified in general surgery. Dr. Kremer has been retired from active

practice for the last 14 years, and testified that while he was in practice, thoracic outlet syndrome did not involve a great deal of his practice. CP at 466. Dr. Kremer performed a one-time evaluation of Ms. Hull three years following her second thoracic outlet surgery and was unable to perform much of a physical exam due to her condition at the time he saw her. CP at 482, 466. The only information Dr. Kremer had about Ms. Hull's work activities was provided in the form of a short hypothetical by PeaceHealth's counsel. CP at 478.

On cross-examination, Dr. Kremer could offer no additional information about Ms. Hull's work activities and agreed that it would be important in a causation analysis to fully understand Ms. Hull's specific work activities. CP at 489 – 490. Dr. Kremer later testified that he had reviewed a job analysis among records provided by PeaceHealth's counsel, however no testimony was ever presented to demonstrate that the job analysis was accurate, nor was it admitted into evidence.

Dr. Kremer's opinions boil down to the following: he does not believe Ms. Hull ever had thoracic outlet syndrome, if she did have it he felt it would not have been work-related, but he could offer no alternative explanation for why she would develop the condition.

PeaceHealth also offered the testimony of Dr. Dhanvant Madhani, a retired orthopedic surgeon who testified that he has not treated individuals with thoracic outlet syndrome, and was "not an expert in that particular causation area of thoracic outlet syndrome." CP at 378. As a result, his testimony concerning thoracic outlet syndrome is of little value.

Ms. Hull and the Department of Labor and Industries presented the testimony of Ms. Hull's attending physician and surgeon, Dr. Kaj Johansen in defense of the appeal. Dr. Johansen is the former Chief vascular surgeon at Harborview Medical Center and the current Chief vascular surgeon at Swedish Medical Center. CP at 686 – 693. He previously was full-time faculty at the University Of Washington Medical School and performs approximately 400 to 450 surgeries per year, 20 to 25% of which involve thoracic outlet syndrome. Id. He is Board Certified by the American Board of Vascular Surgeons and recently authored several chapters in a textbook regarding thoracic outlet syndrome. Id.

Dr. Johansen is the only medical expert who testified based on an accurate hypothetical question that fully captured Ms. Hull's work activities. CP at 725 – 728. The hypothetical posed about her job duties included sufficient specificity to demonstrate distinctive conditions that Dr. Johansen could reasonably rely upon. Each of the other experts had

sparse information regarding Ms. Hull's job duties, which significantly undermines their testimony.

Further, Dr. Johansen had multiple occasions to evaluate Ms. Hull, including performing two surgeries. His well thought out opinions support a causal relationship between the particular job duties performed by Ms. Hull and the development of her shoulder and later thoracic outlet symptoms, on a more probable than not basis. CP 751 – 753. Specifically, Ms. Hull's body habitus and height, as well as other demographic factors, made her more susceptible to her less than favorable work conditions, including repetitive use of her upper extremities and overhead work. Id. Dr. Johansen went on to testify that the same work activities that caused the initial symptomology regarding the elbow problems, caused the thoracic outlet syndrome. CP at 753.

No evidence was presented that would demonstrate that Ms. Hull's work activities were not "unique and distinctive" from activities of regular daily life, nor was any evidence presented that she participated in other repetitive activities which would have caused her condition. Based on the weight of the medical opinions, including the attending physician rule as laid out in Hamilton, the weight of the evidence points to allowing thoracic outlet syndrome under the claim.

If thoracic outlet syndrome is allowed, PeaceHealth did not present a prima facie case that balance problems, pulmonary condition, dysphagia, cricopharyngeal spasms, and adjustment disorder with depressed mood should not be allowed under the claim. The medical experts called by both parties appear to agree, that each of these subsequent conditions was a complication of the thoracic outlet surgeries.

b. **Liberal Construction of Title 51**

RCW Title 51 (The Industrial Insurance Act), is designed to allow "sure and certain relief for workers, injured in their work." RCW 51.04.010. It is to be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries ... occurring in the course of employment." RCW 51.12.010. "All doubts as to the meaning of the Act are to be resolved in favor of the injured worker." Clauson v. Dep't of Labor & Indus., 130 Wash.2d 580, 584, 925 P.2d 624 (1996). When a worker is injured on the job, the worker must file a claim for benefits. The claim may be administered either by the State or by the self-insured Employer. RCW 51.14.020 and 51.14.030. Department oversight helps ensure that self-insurers handle the claims in a "fair and prompt" manner. RCW 51.32.190(6).

Certainly the Superior Court trial Judge did not subscribe to this interpretation when reversing the Board's decision. No explanation was given for the reasons behind finding the medical experts called by PeaceHealth as more persuasive, nor any reason for rejecting the opinions of Dr. Johansen. Thus, there is not substantial evidence to support overturning the Board's decision.

Additionally, the trial Judge entered a Conclusion of Law that Ms. Hull's thoracic outlet syndrome was not proximately related to her bilateral medial epicondylitis. CP at 828. This appears to miss the point, if the evidence demonstrates that both medical epicondylitis and thoracic outlet syndrome were caused by Ms. Hull's work activities, then the Department orders are correct and should be affirmed.

2) Complications From Surgery Are the Responsibility of PeaceHealth Even if Thoracic Outlet is Later Found to be Unrelated to the Claim.

If thoracic outlet syndrome is not found to be proximately caused by Ms. Hull's work activities, the remaining surgical complications should still be allowed under the "compensable injury doctrine" as subsequent conditions traceable to the original injury.

a. Payment of Surgery Admissible

The trial Judge ruled that evidence that PeaceHealth paid for two thoracic outlet surgeries should be barred by Evidence Rule 409. Evidence Rule 409 states "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." ER 409, emphasis added. This rule simply bars evidence of payments for medical expenses to prove liability for an injury. Here we are dealing within the confines of a no-fault administrative system. RCW 51.04.010. Issues of liability and remedial measures are irrelevant within this system. The rule does not bar evidence when it is relevant to some issue other than liability, such as is the case here, dealing simply with acceptance of a condition administratively.

By way of analogy, in Kubista v. Romaine, 87 Wn.2d 62, 549 P.2d 491 (1976) an insurer's advance payment of medical expenses was admissible to show good faith reliance upon a promise of payment, and to rebut an inference that the plaintiff purposefully remained unemployed after his injuries. In this case, the payment of surgery under the workers' claim is merely being used to show that complications from the surgery remain the responsibility of the Employer who covered the surgery. Evidence Rule 409 does not apply.

b. Compensable Injury Doctrine

The courts have held in numerous cases that consequences or complications of treatment for a workers' compensation injury are considered part and parcel of the injury itself, absent an intervening and superseding cause. Anderson v. Allison, 12 Wn.2d 487, 122 P.2d 484 (1942); Ross v. Erickson Construction Co., 89 Wash. 634, 155 Pac. 153 (1916). Thus it is well settled law that surgical complications also become covered conditions under a claim when the underlying condition is related to the initial industrial injury or occupational disease.

By analogy, the Board has found that injuries sustained in an automobile accident while a claimant was returning from a meeting with a vocational rehabilitation counselor, as requested by the Department, are compensable under the claim under the "compensable injury doctrine." In Re: Iris Vandorn, BIIA Significant Decision, Docket No. 02 11466, (2003). The Board relies heavily on 1 Larson's Workers' Compensation Law, subsection 10.07 (2002) in applying the doctrine that subsequent injuries which are sufficiently causally connected to the original injury are compensable consequences of the initial injury. Id. To analogize to the current case, what if three years later in Vandorn the Department realized that it was an error to ask her to attend the vocational meeting, could they then deny the injuries sustained in the auto accident?

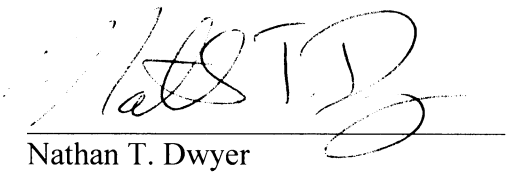
What is unsettled, and may be a question of first impression, is whether surgical complications from an authorized and covered surgery become the responsibility of the Employer if the underlying condition is later found to be unrelated. What if the Employer mistakenly authorizes the surgery and does not realize that mistake until years later? The damage has already been done. If the trial court decision stands, then who takes responsibility for the surgical conditions? These are questions the trial Judge failed to address.

It would logically follow, that even if PeaceHealth (three years later) realizes that they should not have authorized or paid for the two thoracic outlet surgeries, this does not absolve them from covering the complications that arose from surgeries. Here the analysis must focus on what set in motion the series of events that led to the surgical complications. Absent an initial allowed and compensable occupational disease claim (epicondylitis,) Ms. Hull would not have been referred to specialists who diagnosed thoracic outlet syndrome, which led PeaceHealth to authorize and pay for the surgeries. Thus, "but for" her initial filing of the claim due to repetitive work activities, Ms. Hull would not have had the surgical complications. There is no evidence of an intervening or superseding event. The "compensable injury doctrine" should thus apply.

F. CONCLUSION

Ms. Hull requests this Court set aside the order of the Superior Court in this matter and enter an Order finding that her thoracic outlet syndrome, adjustment disorder with depressed mood, diaphragmatic dysfunction, balance problems, dysphagia, and cricopharyngeal spasms are the responsibility of PeaceHealth under her workers' compensation claim, and that the matter be remanded to the Department of Labor and Industries to affirm their prior orders allowing the conditions under her claim.

Respectfully submitted this 17th day of February, 2016.



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHATCOM

In Re:

LORIANN HULL,

Appellant

Vs.

,
PEACEHEALTH

Respondent

Cause No.: 15-2-00002-7

Court of Appeals No. 74413-5

CERTIFICATE OF SERVICE

I certify that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be to be served the foregoing **APPELLANT'S OPENING BRIEF TO DIVISION I COURT OF APPEALS** to all parties listed below:

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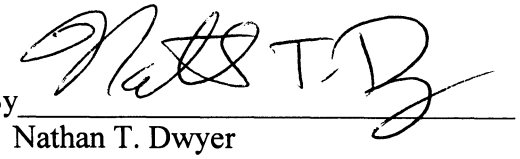
By 
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