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73344-3

No. 73344-3

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

STERLING O. HAYDEN,

Respondent,

v.

THE BOEING COMPANY,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an appeal under the Industrial Insurance Act, Title 51 RCW. The self-insured employer, The Boeing Company, appeals from a superior court decision which reversed a determination by the Board of Industrial Appeals. The Board's decision held: (1) that Boeing was not responsible for Hayden's preexisting left shoulder glenohumeral arthritis under his workers' compensation claim; and (2) that Hayden's claim could be closed. After a bench trial the King County Superior Court reversed the Board, concluding that Hayden's preexisting left shoulder glenohumeral osteoarthritis was aggravated by his occupationally-related left shoulder strain and that he was entitled to further treatment.

Boeing requests review because certain of the trial court's findings are not supported by substantial evidence and as such, the findings overall do not support the trial court's conclusions of law. Furthermore, the trial court's conclusions of law are erroneous because there is no proximate cause establishing an aggravation of Hayden's preexisting osteoarthritis due to his left shoulder strain or work activities.

In particular, the trial court found that Hayden's work activities "accelerated" his preexisting left shoulder arthritis. However, even in the light most favorable to Hayden there is no support for such a finding in the record as in fact, Hayden's own treating physician specifically testified

that Hayden's preexisting arthritis was not accelerated by his work activities or his occupationally related left shoulder strain.

In addition, the trial court found that the onset of Hayden's left shoulder symptoms was caused by overcompensating for a prior right shoulder injury. However, Hayden's attending physician and only medical witness, Dr. Verdin, did not recall Hayden ever having any prior right shoulder problems, nor did he mention overuse of the left shoulder as the cause of Hayden's symptoms or condition.

Ultimately, Hayden did not prove proximate cause, as the medical evidence does not establish that "but for" his work activities at Boeing, he would not have had the same level of left shoulder osteoarthritis. In fact, with Dr. Verdin's admission that Hayden's work activities did not accelerate his osteoarthritis, as well as the testimony from all three medical experts that Hayden's arthritic condition was naturally progressing despite activity, there is not substantial evidence to support a finding that his workplace activities caused or aggravated his left shoulder osteoarthritis.

For the reasons outlined below, Boeing submits that the trial courts findings and conclusions are erroneous, and requests that this Court review and reverse the trial court's decision in this matter and affirm the decision of the Board of Industrial Insurance Appeals as correct.

II. ASSIGNMENTS OF ERROR

1. The trial court erroneously reversed, by decision dated March 13, 2015, the March 27, 2014 decision of the Board of Industrial Insurance Appeals which had directed the Department of Labor and Industries to close Hayden's workers' compensation claim and deny Boeing's responsibility under the claim for his preexisting left shoulder glenohumeral osteoarthritis. CP 30-31, 314-18.

2. The trial court erred in Conclusion of Law 2, which determined that Hayden's industrially-related condition was not fixed and stable as of October 29, 2012 and he was entitled to further treatment. CP 317.

3. The trial court erred in Conclusion of Law 3, which determined that Hayden's pre-existing left shoulder glenohumeral osteoarthritis was aggravated by his accepted shoulder strain condition. CP 317.

4. The trial court erred in Conclusion of Law 4, which remanded the matter to the Department of Labor and Industries to issue an order directing Boeing to accept responsibility for Hayden's preexisting left shoulder glenohumeral osteoarthritis condition. CP 318.

5. The trial court erred in Finding of Fact 6, which stated that Dr. Verdin performed surgery on September 13, 2012 after awaiting approval under the occupational disease claim. CP 314.

6. The trial court erred in Finding of Fact 11, which stated that Dr. Youngblood's conclusions are incredibly speculative. CP 314.

7. The trial court erred in Finding of Fact 13, which states that the record does not support Dr. Youngblood's conclusion that Hayden must have had symptoms, and that the evidence establishes a lack of symptoms between 1994 and 2010. CP 314.

8. The trial court erred in Finding of Fact 14, which states that there was a preexisting condition in all probability caused by an automobile accident in 1994 but that there was not enough treatment that Hayden really remembered it. CP 315.

9. The trial court erred in Finding of Fact 15, which stated that Hayden started experiencing pain in his left shoulder after using his left arm more to perform his job duties following a right shoulder injury. CP 315.

10. The trial court erred in Finding of Fact 18, which stated that Hayden's testimony about the lack of symptoms prior to the time he began to compensate for his injured right shoulder is credible. CP 315.

11. The trial court erred in Finding of Fact 19, which stated that there is no credible evidence to support that Hayden had symptoms in his left shoulder prior to 2010. CP 315.

12. The trial court erred in Finding of Fact 21, which stated that Hayden's work activities exacerbated his underlying condition. CP 315.

13. The trial court erred in Finding of Fact 22, which applied WPI 30.17 and determined that Hayden aggravated his condition after hurting his right shoulder. CP 315-16.

14. The trial court erred in Finding of Fact 23, which applied WPI 30.18 and determined that Dr. Youngblood was wrong. CP 316.

15. The trial court erred in Finding of Fact 24, which stated that Hayden's need for medical treatment was not solely the result of the natural progression of his preexisting condition. CP 316.

16. The trial court erred in Finding of Fact 25, which states that there was no credible evidence that Hayden had active symptoms at the time the occupational disease condition occurred, and that once a person reached a point where the joint is bone on bone, there will be some significant limitation. CP 317.

17. The trial court erred in Finding of Fact 26, which states that the activities of Hayden's employment lit up, made active and accelerated

his preexisting non-symptomatic condition due to his job or work related activities. CP 317.

18. The trial court erred in Finding of Fact 28, which states that because of the occupational disease, Hayden's preexisting condition was lit up or made active such that Hayden is eligible for benefits, including allowance of the glenohumeral osteoarthritis. CP 317.

19. The trial court erred in Finding of Fact 29, which states that the Board's Finding of Facts Nos. 3 and 4 are incorrect. CP 317.

20. The trial court erred in Finding of Fact 30, which states that Hayden's preexisting glenohumeral osteoarthritis was aggravated by his accepted shoulder strain condition. CP 317.

21. The trial court erred in Finding of Fact 31, which states that as of October 29, 2012, Hayden's industrially related condition was not fixed and stable. CP 317.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in reversing the Board and concluding that Hayden's preexisting left shoulder glenohumeral osteoarthritis was aggravated by his left shoulder strain where there is no medical evidence or opinion to that effect?

2. Did the trial court err in concluding that Hayden was entitled to further treatment under the claim when substantial evidence

does not support the finding that his preexisting glenohumeral osteoarthritis was aggravated by his shoulder strain and/or work activities, and when the evidence regarding the shoulder strain shows that there is no further treatment required?

3. Did the trial court err in directing that Boeing should take responsibility for Hayden's preexisting left shoulder glenohumeral osteoarthritis condition when the evidence established that Hayden's work activities did not accelerate his preexisting condition and that it would have naturally progressed to the same point regardless of activity?

4. Did the trial court err in suggesting that Dr. Verdin performed surgery only after gaining approval for the surgery under the claim when substantial evidence does not support such a finding? (Assignment of Error 5).

5. Did the trial court err in finding that Dr. Youngblood's conclusions were speculative or incorrect when his opinions were well founded and based upon evidence that Hayden had progressive arthritis that was bone on bone? (Assignments of Error 6, 7 and 14).

6. Did the trial court err in finding that there was not enough treatment for a 1994 accident such that Hayden could not really remember it when Hayden specifically denied any prior injuries to his left shoulder

and the evidence shows that he did receive substantial treatment in 1994?
(Assignment of Error 8).

6. Did the trial court err in finding that Hayden's left shoulder symptoms began only after overcompensating for a prior right shoulder injury and which subsequently aggravated his left shoulder condition when there is no medical evidence to support such a causal relationship?
(Assignments of Error 9, 10, 13).

7. Did the trial court err in finding that Hayden's work activities exacerbated, lit up, accelerated and/or aggravated his preexisting left shoulder glenohumeral osteoarthritis when Hayden's own doctor testified that his work activities did not accelerate the condition and substantial evidence establishes that Hayden's preexisting condition was active and naturally progressing regardless of activity? (Assignments of Error 12, 15-20).

IV. STATEMENT OF THE CASE

A. Procedural History

This matter originated from a workers' compensation claim filed by Hayden in March 2010 for left shoulder symptoms. CP 20. His claim was allowed by the Department of Labor and Industries (Department) as an occupational disease. CP 47. Although it allowed the claim, the Department did not specify that the claim was allowed for a specific diagnosis or

condition. CP 47. In May 2012, the Department issued an order closing Hayden's claim. CP 33. The Department order further directed that the employer (i.e. Boeing) was not responsible for Hayden's preexisting condition diagnosed as left shoulder glenohumeral osteoarthritis. CP 33. Following a protest of that order by Hayden, the Department issued a new order on October 29, 2012 which reversed the prior closing order and directed Boeing to take responsibility for the preexisting left shoulder glenohumeral osteoarthritis. CP 40.

Boeing appealed the October 29, 2012 order to the Board and requested that the original closing order be reinstated along with denial of responsibility for the glenohumeral osteoarthritis. CP 38-39. Hearings were held in September and October 2013 before an Industrial Appeals Judge. On January 27, 2014, the IAJ issued a Proposed Decision and Order finding in favor of Boeing. CP 25-31. (Appendix B). The IAJ determined that Hayden had suffered a left shoulder strain as a result of his workplace exposure but that his preexisting left shoulder glenohumeral osteoarthritis was not proximately caused or aggravated by that strain or his work activities. CP 30-31. As such, the IAJ reversed the October 29, 2012 Department order and directed the Department to close Hayden's claim and deny Boeing's responsibility for the glenohumeral osteoarthritis. CP 31.

Hayden subsequently filed a Petition for Review of the Proposed Decision and Order to the three member Board. CP 8. On March 27, 2014, the Board issued an order denying Hayden's Petition for Review, thereby rendering the Proposed Decision and Order the final Decision and Order of the Board. CP 5.

Hayden appealed the Board's decision to King County Superior Court where a bench trial was held. On March 13, 2015, the trial court issued Findings of Fact and Conclusions of Law which reversed the Board's decision and concluded that Hayden's preexisting left shoulder glenohumeral osteoarthritis was aggravated by his occupationally-related left shoulder strain and that he was entitled to further treatment under his claim. CP 313-18.

B. Background Facts and Testimony of Witnesses

As noted above, Hayden filed the underlying workers' compensation claim in March 2010, claiming left shoulder symptoms caused by his employment with Boeing. CP 47. He began working for Boeing in January 2007. CP 79. His job as a Factory Service Attendant required him to perform janitorial duties for Boeing, such as cleaning restrooms, removing and hauling garbage, vacuuming and dusting, etc. CP 81-82. On a day-to-day basis Hayden's job duties had him performing a variety of different tasks, rather than the same activity over and over again. CP 83-84. Hayden

testified that his left shoulder symptoms first began around February 2010, when he noticed that he was having pain while reaching to wipe a mirror or something else up high. CP 87.

He was eventually seen by an orthopedic surgeon, Dr. Peter Verdin, in May 2011. CP 274. Dr. Verdin diagnosed him with left shoulder osteoarthritis and recommended a total shoulder replacement or resurfacing. CP 275. Dr. Verdin ultimately performed surgery in September 2012. CP 278.¹ With regard to whether Hayden's work activities worsened or aggravated the osteoarthritis, Dr. Verdin testified that it "probably" made the overall symptoms worse, but that Hayden's work did not accelerate the progression of his shoulder condition. CP 278-79. With respect to the symptomatic aggravation, Dr. Verdin did not recall ever reviewing a job description for Hayden's position at Boeing, nor did he reference any specific job activities or duties which contributed to the aggravation of Hayden's preexisting osteoarthritis. CP 288. Dr. Verdin further indicated that Hayden was not having problems solely at work but had increased symptoms with other activities of daily living outside of work. CP 286. In

¹ Although not necessarily germane to the final decision in this matter, Boeing does take issue with the trial court's Finding of Fact No. 6. The wording of the finding suggests that Dr. Verdin only performed the surgery after obtaining approval under the claim. However, Dr. Verdin did not testify to that nor is there evidence that surgery was approved under the claim, as in fact that is one of the central issues on appeal. Thus, Boeing raises this only to refute any implication that surgery (and by extension, his osteoarthritis) was accepted under the claim.

the end, Dr. Verdin could not identify any specific objective medical finding (e.g., x-rays or other diagnostic tests) that pointed to Hayden's work as a cause of his symptoms; rather, Dr. Verdin believed that any aggravation was symptomatic only. CP 289.

Hayden was seen by another orthopedic surgeon, Dr. Patrick Bays, for an independent medical examination on July 29, 2011. CP 204. On review of Hayden's medical records, Dr. Bays noted that during his treatment in 2010, Hayden reported that his symptoms presented primarily at night or first thing in the morning and would actually improve over the course of the workday. CP 216. Dr. Bays felt that this pattern of symptoms was very consistent with a degenerative arthritis, as opposed to a situation where work activity was making symptoms worse. CP 217. Dr. Bays also noted that Hayden's left shoulder x-rays showed degenerative arthritis while his right shoulder x-rays were completely normal. CP 225. As Dr. Bays indicated, this is significant because in a typical "wear and tear arthritis" situation the person would have arthritis in both shoulders equally. CP 225-26. Thus, due to the lack of arthritis in the right shoulder, it was Dr. Bays' belief that there must have been a prior trauma or injury to the left shoulder that would have caused the arthritis in the first place. CP 226.

Although Hayden acknowledged being involved in a motor vehicle accident in 1994, he specifically denied any injury or trauma to his left

shoulder due to that accident and denied any treatment for such a condition. CP 91-92, 129. However, Hayden's medical records from that period indicate that he did suffer an injury to his left shoulder when it hit the steering wheel or dashboard, resulting in constant and significant pain to the left shoulder for which he was treated with medications and physical therapy. CP 229. According to Dr. Bays, such a mechanism of injury would be the most likely cause for the onset of Hayden's left shoulder arthritis, resulting in a condition which progressively developed over time to the point where he was suffering from severe endstage arthritis by 2010. CP 230-31.

This opinion was echoed by another testifying expert, Dr. Scot Youngblood, who examined Hayden in January 2012. CP 153. Dr. Youngblood testified that such a history was "very typical for the natural history of glenohumeral arthritis, where you have a significant injury like that with tremendous energy that over time—and in this case almost—nearly 20 years—gave rise to the glenohumeral arthritis that he has." CP 173-74.

The testimony from Dr. Youngblood and Dr. Bays also contradicts Hayden's assertion that his left shoulder was not symptomatic prior to 2010. Dr. Youngblood testified that due to the severity of Hayden's left shoulder arthritis one would have to have symptoms. CP 174. As he put it, "you just don't see it in clinical practice where you have nearly bone-on-bone arthritis in the shoulder and the patient reports no symptoms." CP 174.

In contrast, Dr. Verdin did not testify about Hayden's pre-2010 medical history, as he seemingly had no knowledge of it. *See, e.g.*, CP 288. In particular, Dr. Verdin was not asked about nor did he mention anything about the 1994 car accident and resulting injury to Hayden's left shoulder.

Ultimately, both Dr. Youngblood and Dr. Bays concluded that Hayden's left shoulder arthritis would have progressed and developed to the same degree even if he had not worked as a janitor for Boeing. CP 175, 240. Dr. Verdin agreed that osteoarthritis is a progressive condition that can deteriorate over time regardless of activity, and that in Hayden's case his osteoarthritis had likely been forming for years. CP 283, 287.

V. STANDARD OF REVIEW

Superior court review of decisions made by the Board of Industrial Insurance Appeals is governed by RCW 51.52.115, which provides that the findings and decision of the Board are prima facie correct. RCW 51.52.115. Thus, the party challenging the findings of the Board—in this case Hayden—has the burden to prove that the Board's findings are incorrect by a preponderance of competent, credible evidence. *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 903, 810 P.2d 500 (1991); *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 418-419, 3 P.3d 221, 225-226 (2000); *Belnap v. Boeing*, 64 Wn. App. 212, 217, 823 P.2d 528, 532 (1992).

While superior court review is de novo, it is solely based on the evidence and testimony received and considered by the Board. RCW 51.52.115. However, the superior court may substitute its own findings and decision only if it finds, and the appellant proves by “a fair preponderance of credible evidence, that the Board’s findings and decision are incorrect.” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999), quoting *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d. 1138 (1992).

The Court of Appeals reviews the Board’s record to determine whether substantial evidence supports the superior court’s findings and whether the court’s conclusions flow from those findings. *Ruse*, 138 Wn.2d at 5-6 (quoting *Young v. Dep’t of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). Substantial evidence is defined as a sufficient quantity of evidence in the record to convince a “fair-minded, rational person” of the truth of the declared premise. *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). That said, there must be “substantial evidence” and not just a “mere scintilla” of evidence. *Sayler v. Dep’t of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966).

The superior court’s conclusions are reviewed under the error of law standard, determining the law independently and applying it to the

facts as found by the agency. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

Ultimately, however, the burden of proof always remains with the worker to establish entitlement to benefits by a preponderance of the evidence regardless of which party brings the appeal. *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); *see also Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 286 P.2d 1038 (1955)

Finally, as in any appeal seeking medical benefits under the Act, Hayden has the burden of establishing, through medical testimony, a causal relationship between his work activities and claimed condition. *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 342, 725 P.2d 463 (1986).

VI. ARGUMENT

A. Substantial Evidence Does Not Support The Trial Court's Conclusion That Hayden's Accepted Left Shoulder Strain Aggravated His Preexisting Osteoarthritis

At the outset it should be noted that this case is solely about aggravation, as there is no testimony or findings that Hayden's left

shoulder strain or work activities at Boeing caused his left shoulder glenohumeral osteoarthritis.

The trial court's Conclusion of Law No. 3 states that Hayden's preexisting left shoulder glenohumeral osteoarthritis was aggravated by his accepted left shoulder strain. CP 317. This was presumably based in part on a finding made by both the trial court and the Board that Hayden developed an occupational disease described as left shoulder strain under the claim. CP 30, 314. However, there is no medical evidence in the record that the strain itself required any further treatment or resulted in any permanent impairment. Thus, the question is whether the strain itself aggravated Hayden's preexisting osteoarthritis.

With regard to that question, Boeing respectfully submits that there is no evidence, let alone substantial evidence, which supports Conclusion of Law No. 3. Dr. Verdin did not diagnose or otherwise mention a left shoulder strain anywhere in his testimony, 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.

The law does not require the occupational disease to be the sole proximate cause of his or her condition, but for a worker to recover benefits it must be a proximate cause of the condition for which benefits

are sought. *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 683-84, 571 P.2d 229 (1977); WPI 155.06. In this case, given the complete absence of any testimony, medical or otherwise, establishing that Hayden's left shoulder strain aggravated the preexisting osteoarthritis, Boeing maintains that the trial court's Conclusion of Law No. 3 is not supported by the record.

B. Hayden's Own Expert Testified That His Work Activities Did Not Accelerate His Preexisting Osteoarthritis

Although the trial court's conclusion was that Hayden's left shoulder strain aggravated his preexisting glenohumeral osteoarthritis, the trial court's findings suggest that the court was really looking at whether Hayden's work activities aggravated the preexisting osteoarthritis, as opposed to the strain itself causing the aggravation. To reference this aggravation the trial court used a number of terms in its findings, stating at various points that Hayden's preexisting osteoarthritis was "lit up," "accelerated," "exacerbated" and "aggravated" by his work activities. CP 315-17 (Findings of Fact 20, 21, 22, 23, 26, 28, 30). Regardless of the language used by the trial court, the question is simply whether or not Hayden's workplace activities were a proximate cause of an aggravation of his preexisting osteoarthritis.

Under Washington law, a worker is entitled to benefits if the employment either causes a disabling disease, or aggravates a preexisting disease so as to result in a new disability. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 474, 745 P.2d 1295 (1987) (“[C]ompensation may be due where disability results from work-related aggravation of a preexisting non-work-related disease.”). In cases of aggravation, the employment does not cause the condition per se, but instead causes the disability because the employment conditions **accelerate the preexisting disease to result in the disability**. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d at 7, 977 P.2d 570 (1999) (emphasis added).

That standard was not met in this case, as Hayden’s own expert, Dr. Verdin, specifically testified that Hayden’s work activities did not accelerate the progression of his left shoulder arthritis. CP 278-79.

Indeed, the medical evidence makes it clear that Hayden’s preexisting left shoulder osteoarthritis would have continued to worsen even in the absence of his work for Boeing, a fact that both Dr. Bays and Dr. Youngblood confirmed. CP 175, 240. Dr. Verdin also agreed that osteoarthritis naturally progresses over a period of years regardless of a person’s activities. CP 283, 287.

If Hayden’s workplace activities did not accelerate his shoulder condition as Dr. Verdin stated, then it necessarily follows that his

condition would be in the exact same state even if he had not worked for Boeing (assuming all other non-occupational factors remained the same). To use the pattern instruction cited by the trial court, WPI 30.18, “there may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.” CP 316 (Finding of Fact 23).

In sum, based on Dr. Verdin’s own testimony that Hayden’s work activities did not accelerate his preexisting condition, Hayden has not proven that his employment conditions accelerated his preexisting osteoarthritis to result in disability and as such, he is not entitled to have that condition accepted under his claim. *Ruse*, 138 Wn.2d at 7. Thus, even if the trial court had concluded that Hayden’s work activities (as opposed to the strain) had aggravated his preexisting left shoulder glenohumeral arthritis, the evidence does not support such a conclusion.

C. There Is No Medical Support For The Finding That Hayden’s Left Shoulder Symptoms Were Caused By Overcompensating For A Prior Right Shoulder Injury

The trial court also made several findings based on its belief that Hayden’s left shoulder symptoms were caused by compensating for a prior right shoulder injury. CP 315-16 (Finding of Fact Nos. 15, 18 and 22). Specifically, the trial court found that because of his prior right shoulder

injury, Hayden put more pressure on his left shoulder, thereby aggravating his left shoulder condition. CP 315-16 (Finding of Fact No. 22).

The problem is that there is no medical evidence in the record to support this finding. No doctor testified that Hayden's prior right shoulder problem, or overcompensating for that condition, had any impact on his left shoulder condition. The sum total of testimony regarding the right shoulder from Dr. Verdin, Hayden's only medical witness, was to state that he did not recall Hayden having any real problem with his right shoulder. CP 283-84. He also did not recall whether Hayden had any prior symptoms or injuries to his right shoulder. CP 285. Likewise, while Drs. Youngblood and Bays noted a history of right shoulder problems, they did not testify about any correlation between those problems and the onset of Hayden's left shoulder symptoms.

The only testimony at all about compensating for the right shoulder came from Hayden himself, who testified that even though he had no problems with his right shoulder after receiving treatment in 2009, he started using his left hand more because he did not want to hurt his right arm again. CP 89-90, 125.

While Boeing disagrees with the trial court's findings and believes that Hayden's testimony is not credible, Boeing also understands that this Court will not reweigh the evidence or address the credibility

determination made by the trial court. That being said, Boeing respectfully submits that the record does not support a causal relationship between Hayden's right shoulder problems and the onset of his left shoulder symptoms. Even if Hayden used his left arm more to compensate for his right, there is no medical testimony which establishes that such overuse aggravated his preexisting osteoarthritis. In order to support entitlement to benefits under the Industrial Insurance Act, the causal connection between the worker's physical condition and his or her employment must be established by medical testimony. *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979). Such evidence is not present in this case; thus, the trial court's findings and conclusions are not supported.

D. A Lighting Up Analysis Is Not Applicable

The trial court also relied heavily on its findings that Hayden's work activities "lit up" his preexisting left shoulder osteoarthritis, which the trial court determined to be non-symptomatic. CP 316-17 (Findings of Fact 23, 25, 26, 28). The trial court based this on its findings that Hayden's self-reported lack of symptoms prior to 2010 was credible, and that Dr. Youngblood's conclusion that Hayden had to have been symptomatic was not credible. CP 314-16 (Findings of Fact 11, 13, 14, 18, 19, 23, 25). Although Boeing again recognizes that this Court will not

address questions of credibility, it would point out that Dr. Youngblood's conclusions were well founded and based not only on the severity of Hayden's condition, but also on his clinical experience with other patients. CP 174-75. Boeing would also point out that while the trial court found Hayden to be credible, it also believed that Hayden could not really remember treatment for his 1994 shoulder injury because the prior treatment was so minimal. CP 315 (Finding of Fact 14). However, the trial court's finding mischaracterizes Hayden's testimony, as this was not just a situation where Hayden could not remember, he in fact explicitly denied that he injured his left shoulder at the time. CP 91-92, 129. Regardless, we know from the testimony of Dr. Bays that Hayden did in fact injure his left shoulder and underwent treatment for that injury including physical therapy and medications. CP 229. Thus, beyond the credibility issue, substantial evidence does not support the trial court's findings on that issue.

In support of its lighting up determination the trial court also cited two pattern instructions, WPI 30.17 and 30.18. CP 316 (Finding of Fact 22 and 23). It should first be pointed out that WPI 30.17 and 30.18 are inapplicable in this setting, as those pattern instructions apply to tort cases and not industrial insurance cases. Regardless, a lighting up analysis in the workers' compensation arena, as articulated in *Miller v. Dep't of Labor*

and Indus., 200 Wn. 674, 94 P.2d 764 (1934) is only applicable in determining the extent of permanent partial disability and is irrelevant when determining proximate cause for allowance of a preexisting condition. Under *Miller*, if an injury or occupational disease lights up or makes active a latent or inactive condition, then the resulting disability (but not the preexisting condition itself) is attributable to the occupational injury or disease. *Miller*, 200 Wn.2d at 682; *Austin v. Dep't of Labor & Indus.*, 6 Wn. App. 394, 398, 492 P.2d 1382 (1971).

Ultimately, the question presented here is strictly one of proximate cause, not whether Hayden was symptomatic or asymptomatic prior to the onset of his left shoulder symptoms in February 2010 and whether his preexisting condition was “lit up” by his work activities. However, even if one addresses whether Hayden’s preexisting osteoarthritis was “lit up” by his work, substantial evidence does not support the trial court’s findings.

“A preexisting condition is not lit up if the weight of the evidence reveals that the condition was a naturally progressing condition that would have progressed to the same symptoms without the injury.” *Zavala v. Twin City Foods*, 185 Wn. App. 838, 861, 343 P.3d 761 (2015). Here, the overwhelming weight of the evidence established that Hayden’s glenohumeral osteoarthritis was a naturally progressing condition and that it would have progressed regardless of his work at Boeing. CP 175, 240.

If in fact, as Dr. Verdin stated, Hayden's work did not accelerate his osteoarthritis, then the only other explanation in the record for how his arthritis got to the point it did is that it was a naturally progressing condition.

In *Austin v. Dep't of Labor & Indus.* the evidence presented showed that the claimant's preexisting arthritis of the spine was not symptomatic before the occurrence of the work injury. 6 Wn. App. 394, 396-97, 492 P.2d 1382 (1971). However, the claimant's medical expert agreed that the arthritis was a chronic condition that would have progressed naturally without the injury. *Id.* Accordingly, the court found that a "lighting up" analysis was not applicable, as the medical testimony "negatives the conclusion claimant's preexisting condition was latent or dormant before the injury." *Id.* at 397-98.

In this case, there can be no dispute that Hayden's osteoarthritis was preexisting and had been progressing for a number of years prior to 2010, whether or not he complained of pain to his doctors. As the testimony of all three doctors made clear, osteoarthritis does not simply develop immediately and then remain stagnant until lit up again. Rather, it is a condition that will steadily get worse over time. Thus, whether or not Hayden was reporting pain complaints prior to 2010 is different than saying that his condition was inactive or latent as is required for a lighting

up analysis. We know from the entirety of the testimony that Hayden had a progressive shoulder condition that was essentially bone-on-bone, and that this condition was not caused or accelerated by his work exposure/activities. *See generally* CP 174, 236, 278-79.

Rather, it was an active and progressive condition that was getting worse over the years independent of activity, including his activities working for Boeing. Even the trial court recognized this when it found that “according to all medical testimony his joint was in really bad shape.” CP 317 (Finding of Fact 26). The court went on to find that “once a person reaches the point where the joint is purely bone on bone, there will be some significant limitation.” CP 317 (Finding of Fact 25). Significant limitation due to an ongoing progressive condition does not indicate that a condition is latent or inactive. Rather, it indicates just the opposite.

Simply put, lighting up is not applicable here, but even if considered there is not substantial evidence to support the trial court’s findings in that regard.

E. Hayden’s Work Activities Did Not Aggravate His Preexisting Osteoarthritis

In the end, Hayden did not prove proximate cause. A condition is “proximately” caused by employment when there is no intervening independent and sufficient cause for the condition, such that it would not

have been contracted “but for” the conditions existing in the worker’s employment. *See, e.g., Simpson Logging Co. v. Dep’t of Labor & Indus.*, 32 Wn.2d 472, 202 P.2d 448 (1949); *Wendt v. Dep’t of Labor & Indus.*, 18 Wn. App. 674, 683-84, 571 P.2d 229 (1977); WPI 155.06.

In other words, the worker must prove that their job activities caused the disability on a more probable than not basis, which requires the worker to establish that but for the aggravating condition of the job, the disability would not have arisen. *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987).

Here, substantial evidence does not establish that but for Hayden’s work activities at Boeing, his glenohumeral osteoarthritis would not have continued to progress to the same place.

1. The type of work activities Hayden was doing would not cause or aggravate osteoarthritis

The trial court did not make any detailed or specific findings about Hayden’s job activities other than to note Dr. Verdin’s testimony, in which he said that Hayden was doing “heavy janitorial work.” CP 315 (Finding of Fact 20). However, the trial court’s findings provided no details about the specific job activities Hayden was doing nor how those activities would directly impact or aggravate Hayden’s preexisting osteoarthritis. The most likely reason for this is that Dr. Verdin himself did not testify

about any specific workplace activities undertaken by Hayden which could have caused or aggravated his preexisting osteoarthritis. Indeed, Dr. Verdin could not recall whether he had ever reviewed a job description for Hayden's position at Boeing, nor did he indicate whether he had ever discussed Hayden's job duties with him. CP 288. Rather, Dr. Verdin simply referred to it as "heavy janitorial work" and agreed that these nonspecific work activities "were a factor" and "probably" contributed to his left shoulder symptoms. CP 279.

The problem is that Dr. Verdin's testimony requires us to infer or assume that he was aware of Hayden's specific job duties and that he connected those specific tasks and mechanism involved to the supposed aggravation (but not acceleration) of Hayden's preexisting osteoarthritis. However, Boeing respectfully submits that a simple conclusory opinion without specific factual foundation does not constitute substantial evidence to support the trial court's finding that Hayden's work activities lit up or aggravated his preexisting osteoarthritis. Again, it is the worker's burden at all times to support entitlement to benefits, a burden that Hayden did not meet in this case.

In contrast, both Dr. Youngblood and Dr. Bays clearly stated that the types of activities performed by Hayden were not of the type to aggravate osteoarthritis. Dr. Bays testified that activities such as cleaning

mirrors or walls (activities related by Hayden himself as causing the onset of his symptoms) would not be of the type of activate or light up an arthritic process. CP 227, *see also* CP 87 (Hayden relating that he was wiping a mirror up high when he first noticed symptoms). Dr. Bays further explained that the types of activities Hayden was doing were not the types that would cause an aggravation to the ball and socket joint (i.e. the glenohumeral joint) or activate a traumatic arthritic process. CP 232-33. Dr. Youngblood echoed this opinion, stating that there was nothing about Hayden's work activities that would be expected to make his osteoarthritis worse. CP 172. Both Dr. Bays and Dr. Youngblood also referenced the lack of supporting evidence in the medical literature, including the AMA Guides to the Evaluation of Disease and Causation, for the proposition that Hayden's job activities could have led to the development or worsening of his glenohumeral arthritis. CP 235, 238 (Bays), CP 172-73 (Youngblood).

2. Hayden's pattern of symptoms illustrates that the progression or worsening of his osteoarthritis is not work related

In fact, Hayden's pattern of symptoms actually makes it more likely that his work activities were not the cause of any aggravation. As explained by Dr. Bays, Hayden's medical records indicated that if anything, his work activities actually improved his symptoms, with the

activity making his shoulder less stiff and less painful. CP 239. Hayden also reported that his symptoms were worse at night and upon waking in the morning, a fact which Dr. Bays pointed out “has nothing to do with an occupational exposure or lighting up.” CP 239. Even Dr. Verdin acknowledged that Hayden was not having problems solely at work but had increased symptoms with other activities of daily living outside of work. CP 286.

Certainly if Hayden’s work was causing or contributing to an aggravation of his osteoarthritis his symptoms would actually get worse while working, not improve. Ultimately, however, Dr. Bays explained that Hayden’s arthritis was progressing and worsening regardless of the activities he was doing throughout the day, whether at work or at home, and that it was not related to anything specific at Boeing. CP 240.

3. Hayden’s symptoms should have been uniform between both shoulders if his work was a cause

Not only is there no evidence that Hayden’s work activities at Boeing accelerated his preexisting osteoarthritis, there is also no evidence that his condition was objectively worsened by his work activities in any way. This was confirmed by Dr. Verdin, who conceded that any aggravation suffered by Hayden was only symptomatic. CP 288-89.

Instead, as Dr. Bays explained, Hayden's pattern of symptoms was very consistent with a degenerative arthritis, as opposed to a situation where activity (such as work) was making his symptoms worse. CP 217. Dr. Bays also noted that Hayden's left shoulder x-rays showed degenerative arthritis while his right shoulder x-rays were completely normal. CP 225. *See also* CP 163 (Dr. Youngblood confirming the lack of arthritis in the right shoulder). As Dr. Bays indicated, this is significant because in a typical "wear and tear arthritis" situation the person would have arthritis in both shoulders equally because both joints would wear out at the same time. CP 225. Thus, this confirmed to Dr. Bays that the arthritis must have started with a traumatic incident such as the car accident in 1994. CP 226.

Dr. Youngblood echoed that assessment, stating that because the osteoarthritis was only on one side that would lend more credence to it being caused by trauma. CP 171. Dr. Verdin did not comment at all on trauma being the cause, as he was seemingly unaware of the prior accident in 1994. That being said, Dr. Verdin did agree that the osteoarthritis was preexisting and had likely been present for years. CP 283.

Because the evidence established that Hayden's osteoarthritis would have progressed independent of specific activities, work related or otherwise, Hayden has not proven that his work activities were a proximate cause of any aggravation, particularly when his preexisting

condition was not accelerated by his work. The evidence is conclusive that his preexisting osteoarthritis progressed and would have been in the same place despite his employment with Boeing. Thus, as the Supreme Court said, “the risk of the failure of proof must rest with the claimant.” *Olympia Brewing Co. v. Dep’t of Labor & Indus.*, 34 Wn.2d 498, 506, 208 P.2d 1181 (1949)

In the end, the trial court’s findings and Conclusion of Law No. 3—that Hayden’s preexisting left shoulder glenohumeral osteoarthritis was aggravated by his shoulder strain (or work activities)—are not supported by substantial evidence and are not in accord with the law. As all of the trial court’s conclusions rely on such a determination, the entirety of the trial court’s decision is incorrect and should be reversed in favor of the Board’s final decision. This includes Conclusion of Law No. 2, which, assuming the osteoarthritis is not related to the claim, is still incorrect as Hayden presented no evidence that his accepted shoulder strain required further treatment as of October 29, 2012.

Finally, Boeing requests that this Court affirm the Board’s final Decision and Order. As noted in the Board’s decision and as evidenced by the trial court’s findings and conclusions, Hayden presented no evidence that his left shoulder strain condition required further treatment or permanent impairment, that he was not obligated to repay Boeing for an

overpayment of benefits between September 27, 2011 and October 10, 2011, or that he was entitled to any further benefits under his claim. CP 30-31. Thus, the Board's decision should be affirmed in full.

VII. CONCLUSION

Based on the foregoing points and authorities, The Boeing Company respectfully requests that the Court reverse the trial court's decision and affirm the Decision and Order of the Board of Industrial Insurance Appeals.

RESPECTFULLY SUBMITTED this 24th day of June, 2015.

EIMS GRAHAM, P.S.



KATHRYN I. EIMS, #17426
JONATHAN JAMES, #38285
Attorneys for Appellant,
The Boeing Company

APPENDIX A

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The Honorable Richard McDermott

FILED
KING COUNTY, WASHINGTON
MAR 13 2015
SUPERIOR COURT CLERK
BY GINGER BARBER
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

STERLING O. HAYDEN,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

NO. 14-2-11670-5KNT

RAM
~~PROPOSED~~
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND ORDER

This matter came on for trial on November 24, 2014, before the Honorable Richard F. McDermott upon Plaintiff Sterling Hayden's appeal from the March 27, 2014, final order of the Board of Industrial Insurance Appeals. Plaintiff was represented by his attorney, Patrick C. Cook; Defendant Boeing was represented by its attorney, Jonathan James, Eims Graham, P.S. The Department of Labor and Industries, through the Office of the Attorney General of the State of Washington, chose not to participate in these proceedings. The evidence in the form of the Certified Appeal Board Record herein was presented, and the Court reviewed the briefs submitted by counsel and heard argument by counsel. Therefore, being fully informed, now hereby makes the following:

//

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER
[proposed] - 1

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FINDINGS OF FACT

1. Plaintiff Sterling Hayden filed a claim for workers' compensation benefits on March 27, 2010 after he sustained a left shoulder strain while working as a janitor for The Boeing Company.
2. The claim was filed and allowed without dispute as an occupational disease effective March 5, 2010.
3. Mr. Hayden treated with cortisone injections with some relief, but thereafter continued to have more pain in the left shoulder.
4. Mr. Hayden was referred to orthopedic surgeon, Peter Verdin, Jr. M.D.
5. Dr. Verdin made the diagnosis of glenohumeral osteoarthritis of the left shoulder. Dr. Verdin determined that Mr. Hayden would benefit from a resurfacing of his shoulder or total shoulder replacement.
6. After awaiting approval under the occupational disease claim, Dr. Verdin performed the resurfacing procedure on September 13, 2012.
7. The Department of Labor and Industries issued an order on October 29, 2012 holding the self-insured employer responsible for the pre-existing condition diagnosed as left shoulder glenohumeral osteoarthritis.
8. The Boeing Co appealed that decision to the Board of Industrial Insurance Appeals requesting denial of responsibility for the glenohumeral osteoarthritis.
9. Following hearings, the Board judge issued a proposed decision and order that reversed the Department's allowance of the aggravation of the glenohumeral osteoarthritis and the Board affirmed that decision on March 27, 2014.
10. The Plaintiff, timely appealed the Board's March 27, 2014 order to this court.
11. This Court having read and reread the testimony of both Dr. Youngblood and Dr. Bays, along with the testimony of treating surgeon Dr. Verdin, finds that the conclusions reached by Dr. Youngblood are incredibly speculative.
12. According to the testimony of Dr. Youngblood: "The pictures are so bad, therefore, he had to have symptoms. Therefore, the janitorial job didn't make any difference at all."
13. The record does not support Dr. Youngblood's conclusion that Mr. Hayden must have had symptoms. There is no medical evidence of any symptoms between 1994 and 2010. The preponderance of the evidence establishes a lack of a history of symptoms on the part of Mr. Hayden for 16 years.

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14. The record does establish that there was a pre-existing condition that was likely caused by some type of traumatic event. In all probability it was caused by the automobile accident of 1994 for which apparently there was some treatment. But there wasn't enough treatment that Mr. Hayden really remembered it. According to the testimony of Mr. Hayden, at least 15-years passed without any significant symptoms for which he sought medical treatment.
 15. When Mr. Hayden hurt his right shoulder and then begin using his left arm more to perform the duties of his job, he started experiencing pain in his left shoulder.
 16. When asked if he did in fact go in for some left shoulder discomfort Mr. Hayden related it to arthritis in his neck, basically, and he indicated that that went away.
 17. Mr. Hayden's left shoulder pain was much different because it didn't go away, it just kept getting worse. Mr. Hayden ended up having to have shoulder surgery to resurface the shoulder because of the damage that has been done by the years of traumatic arthritis.
 18. Mr. Hayden's testimony with respect to a lack of symptoms or problems with his left shoulder up and until the time he began to compensate for his injured right shoulder is credible.
 19. Mr. Hayden clearly had significant diagnostic findings relating to the osteoarthritis in his left shoulder but according to his testimony and his wife's the left shoulder pain complaints started in 2010. There is no credible evidence to the contrary.
 20. Dr. Verdin, on page 10 of his deposition stated the following: "Well I recorded that I felt that he had degenerative joint disease of the shoulder, secondary to osteoarthritis. And that the activities that he was doing on the job were exacerbating the underlying condition." Dr. Verdin further stated that "while the assessment was pretty much the same as I had stated before: that he was having pain that started while he was doing heavy janitorial work. It was what brought him to us. And he was continuing to have discomfort." Further, Dr. Verdin was asked whether Mr. Hayden's work activities as a janitor aggravated or worsened his shoulder condition on a more probable than not basis. The doctor answered in the affirmative stating, "I feel that it probably did make his overall symptomology in his shoulder worse with time, yes."
 21. Exacerbation of the underlying pre-existing condition is what the plaintiff has to prove in this case. The testimony of Dr. Verdin establishes that Mr. Hayden's work activities did exacerbate the underlying condition.
 22. Under the law of the State of Washington, the Plaintiff does not need to show that the work activities created a whole new condition. We are not perfect as human

1 beings. Every single one of us has something wrong with us at one time or
2 another. Some of us have permanent injuries. Applying the relevant Washington
3 Pattern Jury Instructions, this court is struck by WPI 30.17 and 30.18. WPI 30.17
4 says:

5 "Aggravation of a pre-existing condition: if your verdict is in favor
6 of the plaintiff, and if you find that before this occurrence the
7 plaintiff had a pre-existing bodily condition that was causing pain or
8 disability; and because of this occurrence the condition or the pain
9 or the disability was aggravated, then you should consider the
10 degree to which the condition or the pain or disability was
11 aggravated by this occurrence."

12 "However, you should not consider any condition or disability that
13 may have existed prior to this occurrence, or from which the
14 plaintiff may now be suffering, that is not caused or contributed to
15 this occurrence."

16 If this Court were to take Dr. Youngblood's testimony that he did have pain, even
17 though it's not reported and there's no medical evidence to suggest that that's true,
18 then 30.17 still applies. The record establishes that Mr. Hayden sought medical
19 attention for new pain in his left shoulder after he aggravated his condition by
20 work, because he had hurt his right shoulder, so he's putting more pressure on his
21 left.

- 22 23. If Dr. Youngblood is wrong, which this Court finds that he probably is wrong,
23 then 30.18 applies. And it reads as follows:

24 "If your verdict is for the plaintiff, and if you find that before this
25 occurrence the plaintiff had a pre-existing condition that was not
26 causing pain or disability; and because of this occurrence the pre-
existing condition was lightened up or made active, then you should
consider that lighting up and any other injuries that were
proximately caused by the occurrence, even though these injuries,
due to the pre-existing condition, may have been greater than those
that would've been incurred under the same circumstances by a
person without that condition. There may be no recovery, however,
for any injuries or disabilities that would have resulted from natural
progression of the pre-existing condition."

- 27 24. While there was some medical testimony with respect to natural progression of
28 osteoarthritis, the record does not establish that Mr. Hayden's need for medical
29 treatment was solely the result of the natural progression of his pre-existing
30 condition.

- 1 25. This court finds that there is no credible evidence to suggest that there were
2 ongoing active symptoms at the time that the accepted occupational disease
3 condition occurred. *ONCE A person reaches the point where the*
4 *joint is purely bone on bone, there will be some significant limitation.*
5 26. The activities of Mr. Hayden's employment did light up the otherwise non-
6 symptomatic condition. Whether that condition would always permanently remain
7 non-symptomatic we don't know. Most likely, at some point in his life Mr.
8 Hayden would have experienced a deterioration of the shoulder. According to all
9 the medical testimony his joint was in really bad shape. It would have, at some
10 point in his life, been a problem. But the condition was lit up or made active due
11 to his job or work related activities. *and accelerated*
12 *RTM*
13 27. This court does not assume that it would have never been a problem. I think just
14 the opposite. It clearly would, at some time during the normal course of his life
15 expectancy, been a problem for him. Whether it would have required surgery is
16 unknown, it depends upon what activities he would have been doing at the time.
17 28. Because of the occupational disease, the pre-existing condition was lit up or made
18 active. For this reason Mr. Hayden is eligible for benefits, including allowance of
19 the glenohumeral osteoarthritis of the left shoulder.
20 29. This Court finds that the Finding of Facts Nos. 3 and 4 contained within the final
21 Decision and Order of the Board of Industrial Insurance Appeals are incorrect.
22 30. Finding of Fact No. 3 is incorrect. Mr. Hayden's pre-existing left shoulder
23 glenohumeral osteoarthritis was aggravated by his accepted shoulder strain
24 condition.
25 31. Finding of Fact No. 4 is incorrect. As of October 29, 2012, Mr. Hayden's
26 industrially related condition was not fixed and stable.

Based upon the foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this appeal.
2. The Board of Industrial Insurance Appeals Conclusion of Law No. 2 is reversed. Mr. Hayden's industrially related condition was not fixed and stable as of October 29, 2012, and he was entitled to further treatment.
3. The Board of Industrial Insurance Appeals Conclusion of Law No. 3 is reversed. The record establishes that Mr. Hayden's pre-existing left shoulder glenohumeral osteoarthritis was aggravated by his accepted shoulder strain condition.

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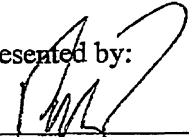
4. The Department of Labor and Industries order dated October 29, 2012, is correct. This matter should be remanded to the Department to issue an order directing the self-insured employer to accept responsibility for the pre-existing left shoulder glenohumeral osteoarthritis condition.

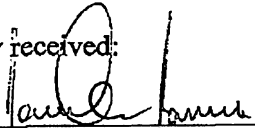
ORDER

Now, it is hereby ORDERED, ADJUDGED AND DECREED that the order of the Board of Industrial Insurance Appeals dated March 27, 2014, is reversed. This claim is remanded to the Department of Labor and Industries with direction to enter an order consistent with the Findings of Fact and Conclusions of Law as entered by this Court.

DONE IN OPEN COURT this 13th day of MARCH, 2015.


The Honorable Richard F. McDermott

Presented by: 
Patrick C. Cook, WSBA#28478
OF WALTHER, THOMPSON, KINDRED,
COSTELLO & WINEMILLER, P.S.
Attorney(s) for Plaintiff
Email: pcook@walthew.com

Copy received: 
Jonathan James, WSBA #38285
Eims Graham, P.S.
Attorneys for The Boeing Company

APPENDIX B

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: STERLING O. HAYDEN) DOCKET NO. 12 25352
2)
3 CLAIM NO. SF-03221) PROPOSED DECISION AND ORDER
4

5 INDUSTRIAL APPEALS JUDGE: Dominique L. Jinhong
6

7 APPEARANCES:
8

9 Claimant, Sterling O. Hayden, by
10 Walthew Thompson Kindred Costello & Winemiller PS, per
11 Patrick C. Cook
12

13 Self-Insured Employer, The Boeing Company, by
14 Eims Graham, P.S., per
15 Kathryn I. Eims
16

17 Department of Labor and Industries, by
18 The Office of the Attorney General, per
19 Elliott S. Furst, Assistant (not participating)
20
21

22 The employer, The Boeing Company, filed an appeal with the Board of Industrial Insurance
23 Appeals on December 24, 2012, from an order of the Department of Labor and Industries dated
24 October 29, 2012. In this order, the Department reversed its order dated July 30, 2012, held the
25 self-insured employer responsible for the pre-existing condition diagnosed as left shoulder
26 glenohumeral osteoarthritis, and directed the worker to repay the self-insured employer for
27 overpayment of benefits for the period of September 27, 2011, through October 10, 2011, in the
28 amount of \$814.38. The Department order is **REVERSED AND REMANDED**.
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32 **PROCEDURAL AND EVIDENTIARY MATTERS**
33

34 On September 24, 2013, the parties agreed to include the Jurisdictional History, as
35 amended, in the Board's record. That history establishes the Board's jurisdiction in this appeal.
36

37 The deposition of Scot Alan Youngblood, M.D., taken on September 17, 2013, is published
38 in accordance with WAC 263-12-117(2). All objections are overruled and all motions are denied
39 except the objection at page 42, lines 3-4, which is sustained. The testimony on page 42, lines 1-7
40 is stricken.
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43 The deposition of Patrick Bays, D.O., taken on September 23, 2013, is published in
44 accordance with WAC 263-12-117(2). All objections are overruled and all motions are denied
45 except the objection at page 70, lines 13-16, which is sustained. The testimony on page 70,
46 lines 10-25 is stricken.

1 The deposition of Peter J. Verdin, Jr., M.D., taken on October 28, 2013, is published in
2 accordance with WAC 263-12-117(2). There were no objections or motions upon which to rule.
3

4 **ISSUES**

- 5
6 1. This is an employer's appeal of the Department's order dated October
7 29, 2012, in which it was ordered to accept the pre-existing condition
8 described as glenohumeral osteoarthritis. Was this pre-existing
9 condition proximately caused or aggravated by the allowed left shoulder
10 occupational disease on February 22, 2010.
11
12 2. Is Mr. Hayden's industrially related condition(s) fixed and stable, such
13 that the claim should be closed?
14

15 **EVIDENCE PRESENTED**

16 I have considered testimony from following: the claimant, Sterling Hayden; his wife,
17 Nancy Hayden; Mr. Hayden's supervisor at Boeing, Wayne Kelly; his treating orthopedic surgeon,
18 Peter Verdin, M.D., Boeing's examining orthopedic surgeon, Patrick Bays, D.O.; and Boeing's
19 second examining orthopedic surgeon, Scot Youngblood, M.D.
20

21 **DECISION**

22
23 Claimant, Sterling O. Hayden, was 50 years old at the time of the hearing, having been born
24 on December 13, 1962. He was 5 feet 9 inches, 200 pounds, ambidextrous, and presently
25 employed as a concierge driver for Microsoft. He had a high school degree and past relevant work
26 as a commercial truck driver, warehouse worker, delivery driver, loader, limousine driver, concrete
27 worker, maintenance worker, janitor for Boeing, and ramp agent. He was married to Nancy Hayden
28 and had two children.
29

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31 He started working for Boeing in January 2007 as a factory service attendant performing
32 full-time janitorial work. After a short two-week period of on-the-job training, he was assigned his
33 own job card on a rotating basis that essentially identified his job assignment for the next several
34 months and the items that needed to be cleaned. He filed a claim for benefits on March 27, 2010.
35 The Department accepted his claim as an occupational disease involving his left shoulder with an
36 onset date of February 22, 2010.
37

38
39 The Department initially ended time-loss compensation benefits as paid through
40 September 26, 2011, segregated the condition diagnosed as pre-existing left shoulder
41 glenohumeral osteoarthritis, assessed an overpayment for benefits paid from September 27, 2011,
42 through October 10, 2011, in the amount of \$814.38, and closed the claim without further treatment
43 or permanent partial disability award. On October 29, 2012, the Department reversed itself, kept
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1 the claim open for treatment, directed Boeing to take responsibility for the claimant's pre-existing
2 left shoulder glenohumeral osteoarthritis, and affirmed its overpayment assessment against
3 Mr. Hayden for the period of September 27, 2011, through October 10, 2011. Boeing now appeals
4 the October 29, 2012 order, disputing responsibility for Mr. Hayden's pre-existing left shoulder
5 osteoarthritis, the need for further necessary and proper treatment related to the allowed left
6 shoulder strain condition, and asks the Board to close Mr. Hayden's claim. Neither party is
7 appealing the overpayment assessed against Mr. Hayden.

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12 **A. Burden of Proof**

13 RCW 51.52.050 charges the employer appellant with "the burden of proceeding with the
14 evidence to establish a prima facie case for the relief sought in such appeal." Pursuant to the
15 provisions of this statute, the Board has adopted WAC 263-12-115(2)(a) and (c). The employer
16 must present a prima facie case. Upon that happening, the burden of persuasion shifts to the
17 Department or claimant to establish the correctness of the Department order by a preponderance of
18 the evidence.¹ Here, Boeing asserts that the Department erred when it assessed responsibility for
19 Mr. Hayden's pre-existing glenohumeral osteoarthritis and subsequent resurfacing surgery to the
20 self-insured employer.

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26 **B. Acceptance of Mr. Hayden's Pre-existing Glenohumeral Osteoarthritis**

27 The law does not require the insurer to assume responsibility for a preexisting condition
28 unless it is proximately caused or aggravated by the industrial injury or occupational disease.
29 Mr. Hayden's left shoulder osteoarthritis was a preexisting physical condition. Such a preexisting
30 condition may be made symptomatic by subsequent work conditions or injury, but a work related
31 injury may only have a limited or finite effect on the preexisting condition. The effects of a work
32 related injury may not contribute to a further deterioration of the part of body involved. The workers'
33 compensation insurer, here the self-insured employer, is responsible only for the effects of the
34 industrial injury or disease.

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40 In Mr. Hayden's case, the preponderance of the evidence does not support a finding that his
41 allowed occupational disease described as left shoulder strain, aggravated his otherwise allegedly
42 quiescent pre-existing glenohumeral osteoarthritis in his left shoulder. While Mr. Hayden reported to
43 Drs. Verdin, Bays, and Youngblood that he had no previous injuries or symptoms in his left shoulder,
44 the record belies this assertion. Medical records dating back to 1994 indicate that Mr. Hayden was
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¹ *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949).

1 involved in a serious motor vehicle accident where he struck another vehicle at high speed. He was
2 unrestrained inside the vehicle and as a result, he was thrown into the windshield and suffered a deep
3 contusion to his left shoulder. According to Drs. Bays and Youngblood, this original injury
4 degenerated into end-stage glenohumeral osteoarthritis.
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7 In industrial insurance cases the opinions of attending physicians are given special
8 consideration.² This legal principle does not require the trier of fact to give more weight or
9 credibility to the attending physician's testimony but to give it careful thought.³ In *Groff v.*
10 *Department of Labor & Industries*,⁴ the Court of Appeals wrote, "We are not saying that the trier of
11 the facts should believe the testimony of the treating physician; the trier of the fact determines
12 whom it will believe; but it should, in its findings, indicate that it recognizes that we have, in several
13 cases, emphasized the fact that special consideration should be given to the opinion of the
14 attending physician."
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20 Dr. Verdin testified that the claimant's work activity gave rise to his allowed left shoulder
21 strain that subsequently aggravated his allegedly quiescent, asymptomatic pre-existing left shoulder
22 osteoarthritis. Dr. Verdin assumed that because Mr. Hayden went for approximately 10 years
23 without medical treatment for his left shoulder, the claimant must have been accurately reporting an
24 absence of left shoulder symptoms. He also reasoned that with more activity, any arthritic condition
25 might become symptomatic, and that is assumedly what happened in Mr. Hayden's case. The
26 preponderance of the evidence does not support these assumptions. Recall, Mr. Hayden reported
27 to all three orthopedic surgeons and later testified at his hearing that he suffered no previous
28 injuries whatsoever to his left shoulder. Accordingly, Dr. Verdin's opinion has been carefully
29 considered as the claimant's attending orthopedic surgeon.
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35 The preponderance of the evidence, however, favors the opinions iterated by Drs. Bays and
36 Youngblood. Dr. Youngblood put it best when he stated "on a more-probable-than-not basis, if you
37 have that amount of arthritis in your shoulder, you're going to have symptoms. I just — you just
38 don't see it in clinical practice where you have nearly bone-on-bone arthritis in the shoulder and the
39 patient reports no symptoms."⁵ The preponderance of the evidence does not support a finding that
40 Mr. Hayden's pre-existing left shoulder osteoarthritis was asymptomatic or proximately caused by
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46 ² *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569 (1988).

47 ³ *Hamilton* at 572.

48 ⁴ *Groff v. Department of Labor & Indus.*, 65 Wn.2d 35, 45 (1988).

49 ⁵ Youngblood Dep. at 34.

1 his allowed left shoulder strain. All three doctors agreed that Mr. Hayden's left shoulder condition
2 was degenerative. It was not something that suddenly arose as the result of an industrial injury. It
3 was clearly a disease that needed time, perhaps decades to develop. There are two types of
4 osteoarthritis of the glenohumeral joint, rheumatic and traumatic. In the case of rheumatic
5 osteoarthritis, the presence of an autoimmune disease, such as rheumatoid arthritis, would affect
6 both of Mr. Hayden's joints by accelerating their degeneration. If this were the case, all three
7 orthopedic surgeons would expect to see significant arthritis in Mr. Hayden's shoulder joints
8 bilaterally, equally, if not slightly worse in his dominant shoulder. In traumatic cases of
9 osteoarthritis, it is the presence of an initial, early historical injury to the affected area. With time,
10 scarring and healing of the original injury accelerates the arthritic degenerative process. In these
11 cases, the orthopedic specialists would expect to see severe arthritis in one shoulder, but not the
12 other. As confirmed by MRI and x-ray, Mr. Hayden's left shoulder showed objective evidence of
13 severe osteoarthritis. His right shoulder was pristine. The only causal explanation for this disparity,
14 according to Drs. Bays and Youngblood, was the claimant's 1994 motor vehicle accident.
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23 All three doctors agreed that Mr. Hayden's allowed condition described as left shoulder strain
24 incurred while working as a janitor at Boeing did not temporarily or permanently accelerate his
25 pre-existing arthritic condition. Dr. Verdin in particular, testified that arthritis generally impacted all
26 activities, work-related and not. Osteoarthritis was simply a degenerative process that worsened
27 over time regardless of activity. Without being able to distinguish Mr. Hayden's work activity from
28 any other activity of daily living, there is no evidence in the case showing the claimant's industrially
29 related condition either proximately caused or aggravated the worker's pre-existing left shoulder
30 osteoarthritis. This is consistent with Drs. Bays' and Youngblood' testimony that no matter what
31 type of work the claimant performed, he would have developed arthritis in his left shoulder to the
32 same degree as if he performed no work at all. In this scenario, there is also no evidence that the
33 claimant's pre-existing osteoarthritis made him more susceptible to an industrial injury or
34 occupational disease either. Because his condition was degenerative, the fact that Mr. Hayden had
35 stiffness and pain upon waking from sleep that later resolved with use of his left shoulder
36 throughout the day, only reinforces Drs. Bays' and Youngblood's testimony that Mr. Hayden's
37 allowed condition diagnosed as left shoulder strain did not proximately cause or aggravate the
38 claimant's pre-existing left shoulder glenohumeral osteoarthritis.
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1 The Department order dated October 29, 2012, is incorrect and is REVERSED AND
2 REMANDED. The Boeing Company is not responsible for Mr. Hayden's pre-existing left shoulder
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4 glenohumeral osteoarthritis.

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6 **C. Medical Fixity and Claim Closure**

7 Drs. Bays and Youngblood testified that Mr. Hayden's allowed condition of left shoulder
8 strain was fixed and stable and not in need of further proper and necessary treatment. Dr. Verdin
9 did not give an opinion on the issue. In response to Boeing's presentation of a *prima facie* case
10 establishing a lack of proximate causation and claim closure, Mr. Hayden could have litigated the
11 issues customarily associated with claim closure, such as time loss, treatment, permanent partial
12 disability, claim closure, and potentially pension.⁶ Instead, the claimant chose only to defend the
13 Department order on proximate causation grounds and chose not to address the other issues, such
14 as treatment and claim closure. The preponderance of the evidence supports a finding that
15 Mr. Hayden's industrially related condition was fixed and stable and not in need of further treatment.
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17 The Department order dated October 29, 2012, holding the claim open for further necessary
18 and proper treatment is incorrect and is REVERSED AND REMANDED with instructions to the
19 Department to issue an order directing the self-insured employer to close Mr. Hayden's claim.
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22 **FINDINGS OF FACT**

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- 25 1. On September 24, 2013, an industrial appeals judge certified that the
 - 26 2. Mr. Hayden developed an occupational disease described as left
 - 27 3. Mr. Hayden's pre-existing left shoulder glenohumeral osteoarthritis was
 - 28 4. As of October 29, 2012, Mr. Hayden's industrially related condition was
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⁶ *In re Susan King*, BIIA Dec., 98 10527 (2000).

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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.
2. Mr. Hayden's industrially related condition was fixed and stable as of October 29, 2012, and he was not entitled to further treatment. RCW 51.36.010.
3. The Department order dated October 29, 2012, is incorrect and is reversed. This matter is remanded to the Department to issue an order directing the self-insured employer to close Mr. Hayden's claim effective October 29, 2012, deny responsibility for the pre-existing condition described as left shoulder glenohumeral osteoarthritis, and direct the worker to repay the self-insured employer for overpayment of benefits for the period of September 27, 2011, through October 10, 2011, in the amount of \$814.38.

DATED: JAN 27 2014



DOMINIQUE L. JINHONG
Industrial Appeals Judge
Board of Industrial Insurance Appeals

No. 73344-3

**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 Brief of the Appellant and this Declaration of Service to the parties on record in the below described manner:

ORIGINAL AND ONE COPY VIA ABC LEGAL MESSENGERS TO:

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

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c/o Patrick Cook, Attorney
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c/o Anastasia Sandstrom, AAG
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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

DATED this 24th day of June, 2015, at Seattle, Washington.

EIMS GRAHAM, P.S.

By: 
Brandon McGraw, Paralegal