NO. 33181-4-III

SC#93497-5

SUPREME COURT
OF THE STATE OF WASHINGTON

ALEKSANDR RUMYANTSEV

Appellant/Defendant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

PETITION FOR DISCRETIONARY REVIEW

Drew D. Dalton, WSBA No. 39306
Of Attorneys for Appellant Aleksandr Rumyantsev

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ISSUE PRESENTED FOR REVIEW

WHETHER AN INDUSTRIAL INJURY CAN ALSO BE AN OCCUPATIONAL DISEASE?

A. The Court of Appeals did not address the issue as per the Board case stating that an accident can be both and industrial injury and an occupational disease.

B. Accidents at work should be considered distinctive conditions of employment when they cause a disease like process and subject to the discovery rule.

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IDENTIFY OF PETITIONER

Mr. Rumyantsev is a Russian speaking immigrant that is seeking review of the decision in this matter.

PROCEDURAL HISTORY

The Court of Appeals, Division III decided this case NO. 320111 on June 2, 2016. A motion to publish was filed and denied on July 22, 2016.

STATEMENT OF THE CASE

Mr. Rumyantsev worked for Huntwood Industries. On March 19, 2010, he was hit on the front of the head while at work. The injury was reported to the employer, the employer filled out an onsite incident report. (Board Exhibit 2.) Mr. Rumyantsev speaks Russian and no English. The employer provided a Russian co-worker to translate and fill out the report. Mr. Rumyantsev only signed the report upon being told what it said. Mr. Rumyantsev denied any need for treatment beyond a Band-Aid. He returned to work. The employer did not offer to take him to the hospital or provide

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him with any forms to send to the Department of Labor and Industries.

On May 13, 2010, Mr. Rumyantsev was hit in the back of the head while working at Huntwood. A co-worker swung a long board around and made contact. The incident was reported to the employer and Mr. Rumyantsev was again given first aid treatment and not taken to the hospital. A translator, by the name of Aleksi, was again able to help report the accident to the employer. Mr. Rumyantsev only signed the report. (Board Exhibit 5.) Again, Mr. Rumyantsev was not given any worker's compensation forms at the time of the accident. He said he did not need a doctor and returned to work not knowing he was required to fill out an accident form.

Mr. Rumyantsev was laid off on September 12, 2011. (See. Board Exhibit 1) Prior to the May incidents Mr. Rumyantsev did not have memory, headache, confusion or dizziness issues. Mr. Rumyantsev testified these issues started several months to a year after the injuries. Mr. Rumyantsev did not seek treatment until he was laid off. With the layoff Mr. Rumyantsev sought medical treatment for

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his head, hearing loss and other conditions. He testified his first treatment was with Spokane Regional Command and they helped him file for Social Security Disability in October 2011. Mr. Rumyantsev also testified he was exposed to loud noise while working at Huntwood Industries. His last day of work and exposure to noise was September 12, 2011. Mr. Rumyantsev has not worked since September 12, 2011.

ARGUMENT

Mr. Rumyantsev had an injury that caused a disease process. Under the law Mr. Rumyantsev should have been able to file a claim when he discovered he had the occupational disease.

Work Accident as Both Injury and Occupational Disease

The Board of industrial insurance appeals has case law that supports the position that a work place injury can be both a disease and an injury. In re: Sharon Baxter, Dec. 92 5897 (1994); cited by Magee v. Rite Aid, 167 Wn. App 60, 65 (2012). Ms. Baxter was a nurse. In the case she was stuck by needles on occasion at work. The Board found that she

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suffered both an occupational disease claim and an injury claim. The injury claim arose every time she was stuck by a needle at work and it was subject to the one year statute of limitations. The disease claim arose from the hepatitis she contracted. Because the hepatitis was a disease and was not immediately discoverable it was subject to the two year statute of limitations and the discovery provisions of a disease.

A work claim can be for both an injury and/or an occupational disease. For it to be a disease related to work it must only be shown that it was related to work or in other words arose out of employment.

The Court of Appeals in denying the claim relied on Rector v. Dep't of Labor & Indus., 61 Wn. App. 385 (1991) for the proposition that Mr. Rumyantsev had an injury, did not file a claim and then symptoms later so he could not bring the claim because he did not file in time. Rector is not applicable and distinguishable in this case. The Rector case line deals with noise induced hearing loss which produces an immediate and prompt result. Mr. Rumyantsev's case deals with the slow onset of the traumatic brain injury, not immediately diagnosable, that causes the symptoms.

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This case is more like Baxter and not at all like Rector. The Court's reliance on the case is misplaced in this instance and the decision should be overturned.

Mr. Rumyantsev was injured and did not file an accident claim. However, the injury caused a disease like process that caused his brain to deteriorate. Like Baxter, this case has no immediate evidence of the disease caused by the trauma at work and the brain disease has a delayed onset with symptoms, like the hepatitis. Not like Rector.

Dr. Cox testified that one or more head injuries could cause the disease like process and that it would not be immediately detectable. No doctors contradicted her testimony. Thus, medically in this case we have an occupational disease finding.

What are "distinctive conditions of employment"?

In Dennis v. Dep't of Labor, 109 Wn.2d 467, 481 (1987) The Court Stated:

> Only in the context of an occupational disease does our Act expressly require that the disabling condition "arise out of employment." RCW 51.08.140. Therefore, in construing the term "naturally in its ordinary sense, the meaning of the term must be tied to the "arising out employment" language. We hold that a worker must establish that his or her occupational

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disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general.

"The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities." Dennis, 109 Wash.2d at 471,(citing *Wendt v. Department of Labor & Indust.,* 18 Wash.App. 674, 682-83,(1977)). Dennis also held that the conditions need not be peculiar to, or unique to, the worker's employment. 109 Wash.2d at 481.

Conditions that occur at work at distinctive conditions of employment. They need not be peculiar. The Claimant need only show that the conditions of his employment lead to his disease. The Court found that there are no distinctive conditions of employment and the superior court agreed but they both failed to address the testimony directly on point as to the brain trauma and the hearing loss conditions.

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Mr. Rumyantsev's "distinctive conditions of employment."

Mr. Rumyantsev's job duties led to the blows on the head. These are distinctive conditions of employment as they happened at work and arose out of his employment as proven during the hearing. Saying the injuries did not arise out of employment in light of the submitted accident forms does not follow the law. Mr. Rumyantsev must only show his exposure to the disease causing agent was likely at work and why. See Intalco Aluminum v. Dept. of Labor and Indus., 66 Wash. App. 644 (1992. (Likely exposure to chemical at work that causes condition is enough to establish occupational disease.) We ask the Court to reverse the Court of Appeals order as the only medical evidence shows Mr. Rumyantsev has an occupational disease as it arose out of a work place injury and like Baxter was not immediately diagnosable as a condition.

The brain is different than most parts of the body. In most cases we have an injury for which immediate damage can be seen. In the brain we often do not see damage until later as the result of a deterioration of the brain, this is a specific disease process caused by the trauma. See Cox tr. 2/10/14 p. 10 ln. 17-25. This was

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testified to by Dr. Cox and no contrary opinion was supplied. This is why the legislature has established occupational disease and injury theory claims. Occupational disease claims have the specific requirements of notification by a doctor to cover those disease processes that cannot be seen or immediately known after an initial exposure. RCW 51.28.055 provides that notice in writing must be provided by a physician for the statue of limitations to start tolling in an occupational disease claim.

Specifically this means that a Claimant cannot be expected to report a condition that they did not know they have when it comes from a disease process. Your normal brain trauma does not result in the disease process Mr. Rumyantsev had and he cannot be expected to file a claim for a disease process he does not know he has.

Mr. Rumyantsev testified that as to the specific conditions of employment that led to both head injuries. He testified that he was cleaning in an area and clamps fell off and hit him in the head the first time. Board Hr. P.10 ln 1-3. The second time he was working with gluing wood and moving it around. He states he had to continually duck to avoid being hit and then, one time he was hit. See. Board Hr. Pg. 13 ln 9-26 pg. 14 ln 1- 11. "But for" his

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employment he would not have been hit in the head or exposed to multiple head traumas at work.

An occupational disease must arise naturally and proximately out of distinctive conditions of employment. RCW 51.08.140. Dennis [v. Dep't of Labor & Indus., 109 Wash.2d 467, (1987). .

Only Dr. Cox testified. She testified she treated patients with brain trauma and was trained for it. She stated that she was aware that he hit his head multiple times while working at the cabinet shop. Cox 2/10/14 p. 8 ln 1-13; also supported by the exhibits in the Certified Appellate Board Record. Dr. Cox further testified that with a traumatic brain injury that she personally had seen the symptoms manifest as much as five years after the initial injury. Cox 2/10/14 p.10 ln 17-23. She also testified that a brain injury can be both a disease and an injury. Id. at p. 12-ln 3-5, 18-20. This makes this case very similar to the *Baxter* needle stick case mentioned above.

CONCLUSION

As a matter of law under the Baxter case this should be allowed as an occupational disease claim. The court of

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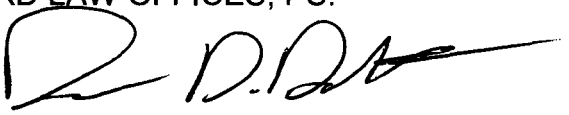
appeals reference to traumatic injury for hearing loss is not the same as traumatic hearing loss should be immediately detectable, where the slow onset of the brain disease process is not. We ask the Court to overturn the superior court order and award attorneys fee and cost as appropriate under the law.

DATED: **August 17, 2016.**

FORD LAW OFFICES, PS.



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APPENDIX

Court of Appeals Decisions A

CASES

STATUTES

OTHER AUTHORITIES

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APPENDIX A

FILED
June 2, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

ALEKSANDR S. RUMYANTSEV, et al.,	)	
	)	No. 33181-4-III
Appellant,	)	
	)	
v.	)	
	)	
LABOR AND INDUSTRIES,	)	UNPUBLISHED OPINION
	)	
Respondent(s).	)	

KORSMO, J. — Aleksandr Rumyantsev appeals from adverse rulings that determined his two prior industrial injuries did not establish that he suffers from an occupational disease. As the record supports the previous rulings, we affirm.

FACTS

Mr. Rumyantsev was employed in 2010 as a laborer at Huntwood Industries in Spokane. On March 19 and May 13 of that year he received head injuries at work. One was caused when he hit the front of his head on a gluing machine, while the second injury occurred when a co-worker hit the back of his head with a board. On each occasion he received first aid and continued working.

In September 2011, Mr. Rumyantsev stopped working at Huntwood Industries. Shortly thereafter he began seeking medical attention for his deteriorating health. On October 2, 2012, Dr. Lanya Cox saw Mr. Rumyantsev and diagnosed a traumatic brain

injury resulting from one or the other or both of the head injuries. Dr. Cox then helped Mr. Rumyantsev fill out and submit a claim form with the Department of Labor & Industries (DLI), that stated Mr. Rumyantsev suffered from migraines, eye pain, and hearing loss caused by the two head injuries in 2010.

DLI denied Mr. Rumyantsev's claim because more than one year had elapsed following the date of the injury prior to the claim being filed. Mr. Rumyantsev appealed to the Board of Industrial Insurance Appeals (BIIA), arguing that because symptoms did not reveal themselves within one year, his claim should be considered under equitable principles, and, alternatively, that the traumatic brain injury qualified as an occupational disease. He also argued that DLI should have considered excessive noise as the cause of the hearing loss and treated it as an occupational disease. The BIIA rejected these arguments, and Mr. Rumyantsev brought an appeal to the Spokane County Superior Court, maintaining only the occupational disease arguments. The superior court affirmed and he then appealed to this court. A panel considered the case without oral argument.

ANALYSIS

Mr. Rumyantsev contends that the two workplace accidents caused hearing loss and brain deterioration that should be considered an occupational disease. For different reasons, the two contentions fail.

This court on review will consider the decisions made by the BIIA as presumptively correct; the challenging party bears the burden of establishing the BIIA's

error by a preponderance of the evidence. RCW 51.52.115; *see also Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). Further appeals are limited to determinations whether substantial evidence supports the superior court's findings and whether the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

The superior court entered findings of fact and conclusions of law. Primarily, the court determined the following:

> 1.3 Aleksandr S. Rumyantsev sustained injuries to his head on March 19, 2010, and May 13, 2010, during the course of his employment with Huntwood Industries, a/k/a TRA Industries, Inc.
>
> 1.4 Mr. Rumyantsev did not file a claim with the Department of Labor and Industries for the injuries . . . until May 9, 2013.
>
> 1.5 Mr. Rumyantsev worked as a laborer for TRA industries, Inc., but there was no testimony regarding his specific job duties.
>
> 1.6 The March 19, 2010, and May 13, 2010 injuries to Mr. Rumyantsev's head do not constitute distinctive conditions of employment.
>
> 1.7 Mr. Rumyantsev's condition diagnosed as traumatic brain injury did not arise naturally and proximately out of the distinctive conditions of his employment with TRA Industries, Inc.

Clerk's Papers at 45-46. Based on these determinations, the superior court concluded that Mr. Rumyantsev's traumatic brain injury was not an occupational disease, a determination that rendered his application for benefits untimely.

Apart from finding 1.7, the superior court's findings are essentially uncontested. At no stage has Mr. Rumyantsev ever described his job duties, or detailed any conditions that might naturally give rise to repeated head injuries. Instead, he has simply described two discrete and unrelated accidents, and argues that because the accidents happened at work, they constitute distinct conditions in themselves. His argument begs the question and is without any supporting evidence. The trial court's findings—that Mr. Rumyantsev failed in his burden of establishing distinctive work conditions that gave rise naturally to the claimed disease—are well supported in the record.

On its face, Mr. Rumyantsev's claim was for an industrial injury.[1] The simple fact that symptoms may not have emerged until later cannot bring the claim within the jurisdiction of the DLI and the BIIA. *See Rector v. Dep't of Labor & Indus.*, 61 Wn. App. 385, 810 P.2d 1363 (1991) (finding that hearing loss resulting from head trauma is not an occupational disease); *see also Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 9, 201 P.3d 1011 (2009) ("Occupational hearing loss may result from either an industrial accident or continuous exposure to hazardous levels of noise. Noise induced hearing loss is classified as an occupational disease."). Unfortunately, the fact that Mr. Rumyantsev did not file a claim for an industrial injury precludes him from recovery.

---

[1] This fact distinguishes a BIIA decision appellant relies on, *In re Burr*, No. 52,023 (Wash. Bd. of Indus. Ins. Appeals Apr. 18, 1979). There the BIIA accepted the claim as one for occupational disease due to the DLI order. We have no such acceptance in this action.

With respect to the hearing loss claim, his argument is precluded by the court's findings and his failure to raise the claim to DLI. As noted above, review is limited to determinations whether factual findings are supported by substantial evidence and whether conclusions of law flow from the findings of fact. Both the BIIA and superior court determined that the claim form did not assert noise induced hearing loss. The claim form indicates hearing loss as a diagnosis, but states only the head injuries as causes. Mr. Rumyantsev cites to nothing in the record indicating a reason that DLI should have treated this as a claim for noise induced hearing loss. Instead, he argues merely that stating a claim for "hearing loss" should have initiated an investigation from DLI to determine the cause of that harm. He has not identified any support for that proposition, nor can we find any.

Additionally, the first time the issue of noise induced hearing loss was raised was on appeal before the BIIA. The BIIA can only consider issues that have already been addressed by DLI. *Leary v. Dep't of Labor & Indus.*, 18 Wn.2d 532, 540-541, 140 P.2d 292 (1943). The BIIA aptly noted that its decision would not prevent Mr. Rumyantsev from filing a separate claim for noise induced hearing loss.[2] Consequently, the superior court's decision is supported by substantial evidence and not contrary to law.

The judgment is affirmed.

---

[2] That decision was issued in May 2014. We do not know if any subsequent claim for hearing loss was ever filed.

No. 33181-4-III
Rumyantsev v. L&I

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

Renee S. Townsley
Clerk/Administrator

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CASE # 331814
Aleksandr S. Rumyantsev v. Labor & Industries
SPOKANE COUNTY SUPERIOR COURT No. 142029696

Dear Counsel:

Enclosed is your copy of this Court's Order Denying Motion to Publish Court's Opinion of June 2, 2016, which was filed today.

A petition for review, if any, is due 30 days after an order determining a timely motion to publish is filed, RAP 13.4(a). A petition for review should be filed in the Court of Appeals.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.

FILED
July 20, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ALEKSANDR S. RUMYANTSEV, et al., Appellant, v. LABOR AND INDUSTRIES, Respondent.	)	No. 33181-4-III ORDER DENYING MOTION TO PUBLISH

THE COURT has considered respondent's motion to publish opinion and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to publish opinion of this court's decision of June 2, 2016, is hereby denied.

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

George Fearing

GEORGE FEARING, Chief Judge

APPENDIX 1

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109 Wn.2d 467 (Wash. 1987)

745 P.2d 1295

Kenneth E. DENNIS, Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF the STATE of

WASHINGTON, Petitioner.

No. 53022-0.

Supreme Court of Washington, En Banc.

November 25, 1987

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Ken Eikenberry, Atty. Gen., Robert G. Swenson, Asst. Atty. Gen., Seattle, Thomas R. Chapman, Asst. Atty. Gen., Spokane, for petitioner.

Hennings, Maltman, Weber & Reed by Douglass A. North, Aaby, Knies & Robinson by Joseph A. Albo, Seattle, for respondent.

Craig R. Staples, Portland, Or., on behalf of Washington Self-Insurers Ass'n, amicus curiae for petitioner.

Michael J. Welch, Tacoma, on behalf of Washington State Labor Council, amicus curiae for respondent.

Albert R. Johnson, Jr., Seattle, on behalf of Joint Council of Teamsters and Bryan P. Harnetiaux, Michael J. Pontarolo, and Robert H. Whaley, Spokane, on behalf of Washington Trial Lawyers Ass'n, amici curiae.

BRACHTENBACH, Justice.

The Department of Labor and Industries (Department) seeks reversal of a Court of Appeals decision awarding workers' compensation to respondent Kenneth Dennis for disability resulting from an occupational disease. *Dennis v. Department of Labor & Indus.*, 44 Wash.App. 423, 722 P.2d 1317 (1986). We affirm.

Dennis, a sheet metal worker, quit working due to disabling

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osteoarthritis in his wrists. He filed a disability claim with the Department, which denied the claim on the basis that Dennis had not sustained an industrial injury and that his disease was not an occupational disease. Dennis appealed the decision to the Board of Industrial Insurance Appeals (Board). He abandoned his injury claim and pursued only his occupational disease claim. Following a hearing, the hearing examiner prepared a proposed order and decision reversing the **[745 P.2d 1297]** Department's rejection of the claim and granting Dennis' claim for disability resulting from an occupational disease. The Department sought review by the full Board, which affirmed the Department's rejection of the claim. On Dennis' appeal to Superior Court, summary judgment was granted in favor of the Department. The Court of Appeals reversed and remanded for trial. We granted the Department's petition for review.

Dennis was a sheet metal worker for 38 years. His job required him to use 9- to 18-inch bladed tin snips for 4 to 5 hours per day to cut metal. Since at least 1970 Dennis was affected by generalized, diffuse, and multi-joint osteoarthritis. At the hearing, Dennis' attending physician presented uncontroverted medical testimony that the work aggravated the osteoarthritis in Dennis' wrists and that the osteoarthritis became symptomatic and disabling as a result of repetitive metal snipping. Dennis and his doctor were the only witnesses to testify. There is no dispute that Dennis is disabled due to the condition of his wrists.

In *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916), this court explained the genesis of this state's workers' compensation scheme: The Industrial Insurance Act (Act), RCW Title 51, was the result of a compromise between employers and workers. In exchange for limited liability the employer would pay on some claims for which there had been no common law liability. The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount without having to fight for it.

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Industrial injuries were viewed as a cost of production.

RCW 51.04.010 embodies these principles, and declares, among other things, that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided [by the Act] regardless of questions of fault and to the exclusion of every other

remedy." To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. RCW 51.12.010; *Sacred Heart Med. Ctr. v. Carrado,* 92 Wash.2d 631, 635, 600 P.2d 1015 (1979); *Lightle v. Department of Labor & Indus.,* 68 Wash.2d 507, 510, 413 P.2d 814 (1966); *Wilber v. Department of Labor & Indus.,* 61 Wash.2d 439, 446, 378 P.2d 684 (1963); *State ex rel. Crabb v. Olinger,* 196 Wash. 308, 311, 82 P.2d 865 (1938); *Gaines v. Department of Labor & Indus.,* 1 Wash.App. 547, 552, 463 P.2d 269 (1969).

With this principle in mind, we turn to the issues raised by this case involving occupational disease coverage. Disability resulting from occupational disease coverage is compensable pursuant to RCW 51.32.180, which provides that a worker suffering disability from an occupational disease shall receive benefits under the Act:

Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title, or his or her family and dependents in case of death of the worker from such disease or infection, shall receive the same compensation benefits and medical, surgical and hospital care and treatment as would be paid and provided for a worker injured or killed in employment under this title ...

RCW 51.32.180. Occupational disease is defined in RCW 51.08.140 as "such disease or infection as arises naturally and proximately out of employment."

Focus upon these statutes alone, narrowly construed, would seem to result in exclusion from coverage of the condition

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here involved because the underlying disease did not arise from employment. The Department urges this construction, and argues that, as a threshold determination, the claimant's underlying disease must have been contracted as a result of employment conditions.

[745 P.2d 1298] Such a construction would, however, be contrary to the purpose of the Act. By expressly providing that workers suffering disability from occupational disease be accorded equal treatment with workers suffering a traumatic injury during the course of employment, RCW 51.32.180 effectuates the Act's purpose of providing sure and certain relief to all workers injured in their employment. The worker whose work acts upon a preexisting disease to produce disability where none existed Before is just as injured in his or her employment as is the worker who contracts a disease as a result of employment conditions.

Moreover, we have long recognized that benefits are not limited to those workers previously in perfect health. *Groff v. Department of Labor & Indus.,* 65 Wash.2d 35, 44, 395 P.2d 633 (1964); *Kallos v. Department of Labor & Indus.,* 46 Wash.2d 26, 30, 278 P.2d 393 (1955); *Jacobson v. Department of Labor & Indus.,* 37 Wash.2d 444, 448, 224 P.2d 338 (1950); *Miller v. Department of Labor & Indus.,* 200 Wash. 674, 682-83, 94 P.2d 764 (1939).

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

Miller, at 682-83, 94 P.2d 764. The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities. *Wendt v. Department of Labor & Indus.,* 18 Wash.App. 674, 682-83, 571 P.2d 229 (1977).

Thus, we have repeatedly recognized in a long line of

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cases that where a sudden injury "lights up" a quiescent infirmity or weakened physical condition occasioned by disease, the resulting disability is attributable to the injury and compensation is awardable. See, e.g., *Harbor Plywood Corp. v. Department of Labor & Indus.,* 48 Wash.2d 553, 295 P.2d 310 (1956); *Ray v. Department of Labor & Indus.,* 177 Wash. 687, 33 P.2d 375 (1934) (preexisting dormant arthritic condition lighted up and made active by injury). In Harbor Plywood Corp., this court held compensation was due where the evidence established that an industrial injury aggravated a preexisting nonwork-related cancer, causing acceleration of the employee's death due to cancer. It would be anomalous were we to hold on the one hand that compensation is due under the Act where a sudden injury results in aggravation of a nonwork-related disease, but is not due where disability results from the progressive effect of work activity on a nonwork-related disease. In each case disability results from employment conditions; in each instance the worker may be equally affected, in one case swiftly, in the other slowly.

The historical development of occupational disease coverage in Washington further supports our conclusion that disability resulting from work-related aggravation of a

nonwork-related disease may be compensable as an occupational disease. Washington's Industrial Insurance Act was enacted in 1911. There was then no coverage for disability resulting from occupational disease; only injuries sustained performing certain extrahazardous work were compensable. Laws of 1911, ch. 74, § 2, p. 346. Indeed, contraction of disease was expressly excluded from the Act. Laws of 1911, ch. 74, § 3, p. 346, 349. This exclusion of occupational diseases paralleled that of statutes in other states. Then, in the 1920's and 1930's a number of states developed schedules of covered diseases. 1B A. Larson, Workmen's Compensation § 41.20 (1987); see also Solomons, Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems, 41 Alb.L.Rev. 195, 197-98 (1977). In concert with this

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national trend toward expanded workers' compensation coverage, in 1937 the Legislature passed the first law providing compensation for disability resulting from **[745 P.2d 1299]** certain enumerated diseases. Laws of 1937, ch. 212, § 1, p. 1031. Included in coverage were specific conditions resulting from repetitive work activities:

(18) Disability arising from blisters or abrasions. Any process involving continuous friction, rubbing or vibration causing blisters or abrasions;

(19) Disability arising from bursitis or synovitis. Any process involving continuous rubbing, pressure or vibration of the parts affected;

Laws of 1937, ch. 212, § 1, p. 1033. By including these conditions, the Legislature early recognized that progressive physical deterioration due to work conditions could in time constitute a compensable disability.

A 1939 amendment broadened coverage by providing for diseases enumerated in the Act where a worker was exposed to disease-causing conditions in employment in another state, provided that the disease was quiescent and nondisabling for 1 year prior to injurious exposure while in the course of employment in Washington. Laws of 1939, ch. 135, § 1, p. 382.

In 1941, the Legislature again broadened coverage by eliminating the list of enumerated compensable diseases, and enacting the present definition of occupational disease (as one which "arises naturally and proximately out of" employment), although at that time compensation was awardable only in cases involving extrahazardous employment. Laws of 1941, ch. 235, § 1, p. 772. The Legislature also deleted the strict requirements for coverage of workers with prior exposure in another state. Laws of 1941, ch. 235, § 1, p. 772. Then, in 1959, the Legislature provided coverage for disability resulting from occupational disease in all employment, thus eliminating the "extrahazardous employment" requirement. Laws of 1959, ch. 308, § 4, p. 1470.

From "no coverage" to the present broad definition of occupational disease, the Legislature has repeatedly and [109 Wn.2d 474] consistently provided expanded coverage for disability resulting from occupational disease. Indeed, Washington presently has a broader statutory definition of occupational disease than do many states. Compare RCW 51.08.140 with, e.g., Neb.Rev.Stat. § 48-151(3) (1984) (including only diseases which are "due to causes and conditions which are characteristic of and peculiar to a particular" occupation; excluding "all ordinary diseases of life to which the general public are exposed") and Okla.Stat.Ann. tit. 85, § 3(10) (West Supp.1987) (occupational disease must be "due to causes and conditions characteristic of or peculiar to the particular trade, occupation, process or employment"); see generally Solomons, 41 Alb.L.Rev., at 198-200.

In summary, the purpose of the Industrial Insurance Act, the rule of liberal construction of provisions of the Act in favor of workers, analogous case law involving industrial injuries acting on preexisting nonwork-related disease, the history of occupational disease coverage in Washington, and our broad definition of occupational disease all support our holding that compensation may be due where disability results from work-related aggravation of a preexisting nonwork-related disease.

We are mindful of the caution that the Legislature did "not [intend] to provide workmen with life, health, or accident insurance at the expense of the industry in which they are employed." *Favor v. Department of Labor & Indus.*, 53 Wash.2d 698, 703, 336 P.2d 382 (1959). However, our decision has at its heart the requirement that the worker's disabled condition must be work related, and thus our decision comports with the Industrial Insurance Act. See RCW 51.04.010 (governing the remedy of workers "for injuries received in employment"); RCW 51.12.010 (declaring the policy of liberal construction "for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment"); RCW 51.32.180 and RCW 51.08.140 (requiring that compensable disability from occupational disease must arise

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out of employment).

Our decision that the underlying disease need not be work related accords with decisions recognized in 1 A. Larson,

Workmen's Compensation § 12.21, at 3-336 (1985) (reciting the basic aggravation rule:

[745 P.2d 1300] "[p]reexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought" (footnotes omitted) (quoted in *Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 556, 295 P.2d 310 (1956))) and 1B A. Larson, Workmen's Compensation § 41.63, at 7-454 (1987) (most courts hold that when distinctive employment hazards act upon preexisting weakness, disease, or susceptibility to produce a disabling disease, the result is an occupational disease).

In addition to maintaining that the underlying disease must be employment caused, a proposition we reject here, the Department also suggests that where a preexisting disease condition was symptomatic, compensation is not awardable for disability resulting from aggravation of that disease. The Department relies upon *Kallos v. Department of Labor & Indus.*, 46 Wash.2d 26, 278 P.2d 393 (1955) and *Snyder v. Department of Labor & Indus.*, 40 Wash.App. 566, 699 P.2d 256 (1985). In each of these cases a worker contracted an occupational disease while employed in another state. The condition was asymptomatic when the worker began working in Washington, and the preexisting disease was then aggravated by in-state employment which resulted in disability. Compensation was held due in each case. Dennis maintains, on the other hand, that the symptomatic-asymptomatic question is only relevant where, as in Kallos and Snyder, a worker is exposed to a disease in another state and then comes to Washington. Dennis reasons that if the worker's condition were previously symptomatic, then the burden of compensation should fall on the other state's worker's compensation fund.

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We are not convinced that Kallos and Snyder provide a dispositive answer. As noted, we have held that where an injury lights up a quiescent or latent preexisting disease or weakened condition, resulting disability is attributable to the injury. See, e.g., *Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 295 P.2d 310 (1956). We have also recognized, however, that a different rule applies where a worker is already permanently partially disabled within the meaning of the Act; in such a case RCW 51.32.080(3) applies. That section requires segregation of the preexisting disability, from whatever cause, and limits the award for any disability resulting from a later injury. *Bennett v. Department of Labor & Indus.*, 95 Wash.2d 531, 532-33, 627 P.2d 104 (1981). See also RCW 51.32.100 (setting forth segregation rule where preexisting disease delays or prevents recovery); *Allen v. Department of Labor & Indus.*, 48 Wash.2d 317, 293 P.2d 391 (1956) (in which segregation rule applied). Where a claimant establishes a disease-based disability arising naturally and proximately out of employment, we are inclined to view the "symptomatic-asymptomatic" issue in terms of whether segregation rules apply, rather than to perceive a bar to any award if a preexisting disease was symptomatic prior to work-related aggravation of that disease.

In any event, we need not resolve the "symptomatic-asymptomatic" issue in this case because the uncontroverted medical testimony established that the osteoarthritis in Dennis' wrists became symptomatic and disabling as a result of repetitive tin snipping. While the osteoarthritis manifested itself elsewhere in Dennis' body, we are here concerned only with the disabled condition of his wrists and the medical testimony respecting that condition.

Having determined that work-related aggravation of a nonwork-related disease may result in compensable disability, we turn to the meaning of the requirement that an occupational disease "[arise] naturally and proximately out of employment ..." RCW 51.08.140.

Nearly 40 years ago this court addressed the requirement

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that an occupational disease arise "proximately" out of employment:

The legislature is presumed to have been familiar with the meaning of "proximate cause" as used by the courts, and that **[745 P.2d 1301]** being so, when they defined as an occupational disease those diseases or infections as arise naturally and proximately out of extrahazardous employment, it would follow that they meant that the condition of the extrahazardous employment must be the proximate cause of the disease for which claim for compensation is made, and that the cause must be proximate in the sense that there existed no intervening independent and sufficient cause for the disease, so that the disease [1] would not have been contracted but for the condition existing in the extrahazardous employment.

Simpson Logging Co. v. Department of Labor & Indus., 32 Wash.2d 472, 479, 202 P.2d 448 (1949).

The causal connection between a claimant's physical condition and his or her employment must be established by competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment. *Ehman v. Department of Labor & Indus.*, 33 Wash.2d 584, 206 P.2d 787 (1949); *Seattle-Tacoma Shipbuilding Co. v. Department of Labor & Indus.*, 26 Wash.2d 233, 241-42, 173 P.2d 786 (1946). Here, the

Board found that the continued use of tin snips 4 or 5 hours per workday exacerbated Dennis' preexisting osteoarthritis in his wrists, which became disabling. Finding of fact 3; Clerk's Papers, at 15. This finding, not challenged by the Department, is supported by the medical testimony that, more probably than not, the osteoarthritis in Dennis' wrists was made symptomatic and disabling by 38 years of repetitive tin snipping. There is sufficient medical evidence in the record from which a trier of fact could infer the required causal connection. See *Bennett v. Department of Labor & Indus.*, 95 Wash.2d 531, 533, 627 P.2d 104 (1981); *Sacred Heart Med. Ctr. v. Carrado*, 92 Wash.2d 631, 600 P.2d 1015

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(1979).

While the "proximately" requirement is not seriously in dispute, the parties do dispute whether Dennis' disabling wrist condition arose "naturally" out of employment. The Board upheld the rejection of Dennis' claim because it found that the development and exacerbation of the osteoarthritis in his wrists was not peculiar to, nor inherent in, his occupation, nor was he exposed to a greater risk of developing or aggravating osteoarthritis than would occur in other types of employment or nonemployment life. Finding of fact 4; Clerk's Papers, at 15-16. The Board therefore concluded that Dennis' disabling wrist condition did not arise "naturally" from his employment.

The Board's formulation of the "naturally" requirement is from the decision by Division Two of the Court of Appeals in Department of Labor & Indus. v. Kinville, 35 Wash.App. 80, 664 P.2d 1311 (1983). There the court held that to satisfy the "naturally" requirement of RCW 51.08.140, "the worker has the burden of establishing that the conditions producing his disease are peculiar to, or inherent in, his particular occupation." (Footnote omitted.) Kinville, at 87, 667 P.2d 1311. The court also said that RCW 51.08.140 "requires a showing by the claimant that the job requirements of his particular occupation exposed him to a greater risk of contracting the disease than would other types of employment or nonemployment life." (Footnote omitted.) Kinville, at 88, 667 P.2d 1311.

The Board's adherence to the analysis in Kinville is understandable because that decision was, at the time of the Board's decision, the only published Washington opinion defining "naturally" as used in RCW 51.08.140. We do not, however, agree with the "peculiar to, or inherent in" construction used in Kinville. In 1941, the Legislature had Before it a definition of "occupational disease" as one "which is due to causes and conditions which are present in, characteristic of, and peculiar to a particular extrahazardous occupation." Senate Bill 190, introduced February 6, 1941. This **[745 P.2d 1302]** language was changed in committee and, when

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enacted, the present definition ("occupational disease" as one which "arises naturally and proximately out of" employment) was instead adopted. Laws of 1941, ch. 235, § 1, p. 772.

Moreover, in Simpson Logging Co. this court rejected the Department's argument that compensation was only awardable if the disease was peculiar to the claimant's occupation and all workers in a particular occupation were exposed to the harmful conditions. Thus, both this court and the Legislature have declined to employ a "peculiar to" test. [2] To the extent that the decision in Kinville suggests that a worker must show that the employment conditions causing his disease-based disability are "peculiar to" his employment, it is incorrect.

Division One of the Court of Appeals also disagreed with the decision in Kinville, and held that "naturally" means that a worker must demonstrate a "logical relationship between the disease-based disability and the work ..." *Dennis v. Department of Labor & Indus.*, 44 Wash.App. 423, 436, 722 P.2d 1317 (1986). This definition is also incorrect. There is no basis for this formulation; further, we perceive that this construction of the term "naturally" provides little guidance to a worker seeking to establish a compensable disability resulting from occupational disease.

In interpreting the "naturally" language of RCW 51.08.140, we begin with the principle that the court is required, whenever possible, to give effect to every word in a statute. *Hanson v. Tacoma*, 105 Wash.2d 864, 871, 719 P.2d 104 (1986). No word is deemed inoperative or superfluous unless it is the result of an obvious mistake or error. Hanson, at 871, 719 P.2d 104. Therefore, the term "naturally" must be given effect.

As a general rule, where a term is not defined in the

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statute, the term must be accorded its plain and ordinary meaning unless a contrary intent appears. *In re Estate of Little*, 106 Wash.2d 269, 283, 721 P.2d 950 (1986); *Island Cy. v. Dillingham Dev. Co.*, 99 Wash.2d 215, 224, 662 P.2d 32 (1983). "Naturally" is defined as "innately," "as a matter of course," Webster's New Twentieth Century Dictionary 1197 (2d ed. 1979); "as a natural result or consequence," "as might be expected from the circumstances," Webster's Third New Int'l Dictionary 1507 (1981).

"Naturally" is, of course, inextricably bound to the statutory requirement that the occupational disease, or

disability due to work-related aggravation of a nonwork-related disease, "arise out of employment." The "arising out of employment" language is found in a number of states' statutes, and is interpreted in a number of ways. See generally 1 A. Larson, Workmen's Compensation § 6.00-.60 (1985). For example, the "peculiar to" test, which we have rejected, has been used. See 1 A. Larson § 6.20, at 3-4. Another interpretation, which Professor Larson characterizes as the prevalent test today, is the "increased-risk test" which is distinguished from the "peculiar-risk test" "in that the distinctiveness of the employment risk can be contributed by the increased quantity of a risk that is qualitatively not peculiar to the employment." 1 A. Larson § 6.30, at 3-5. The "arising out of employment" requirement in most state statutes applies to all claims for worker's compensation. Washington is one of a few states which do not have the "arising out of employment" requirement in their injury statutes. 1 A. Larson § 6.10, at 3-2. Instead, our statutory scheme in general requires that the injury occurred while the worker was within the "course of employment" when injured. RCW 51.32.010. Thus, under our Act an injury need not "arise out of employment" to be compensable. *Tilly v. Department of Labor & Indus.*, 52 Wash.2d 148, 155, 324 P.2d 432 (1958). But see *MacKay v. Department of Labor & Indus.*, 181 Wash. 702, 704-05, 44 P.2d 793

[745 P.2d 1303] (1935) (discussing an injury as "arising out of employment" when there is a causal connection between the conditions under

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which the job is required to be performed and the resulting injury; also discussing injury in the "course of employment").

RCW 51.32.180, which provides equal benefits to those with a compensable disability from occupational disease as to those suffering an industrial injury, also uses the language of RCW 51.32.010: "[e]very worker who suffers disability from an occupational disease in the course of employment ..." (Italics ours.) RCW 51.32.180.

Only in the context of an occupational disease does our Act expressly require that the disabling condition "arise out of employment." RCW 51.08.140. Therefore, in construing the term "naturally" in its ordinary sense, the meaning of the term must be tied to the "arising out of employment" language. We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of employment, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.

Our analysis here does not, in any way, modify the longstanding requirement that a claimant satisfy the "proximately" requirement of RCW 51.08.140. See *Simpson Logging-*

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Co. v. Department of Labor & Indus., supra 32 Wash.2d at 479, 202 P.2d 448. We reiterate that this requirement is not at issue here.

One other aspect of this case requires our attention. As noted above, the court in Kinville said that RCW 51.08.140 "requires a showing by the claimant that the job requirements of his particular occupation exposed him to a greater risk of contracting the disease than would other types of employment or nonemployment life." (Footnote omitted.) Kinville, 35 Wash.App. at 88, 664 P.2d 1311. We have recognized a "greater risk" test, but in a somewhat different context. In *Sacred Heart Med. Ctr. v. Carrado,* 92 Wash.2d 631, 635, 600 P.2d 1015 (1979), which involved a nurse who contracted hepatitis, we recognized that in contagious disease cases "a number of courts have allowed recoveries where the evidence showed that the claimant's working environment involved an increased risk of contraction of a disease."

The precise issue in Sacred Heart was the proof required to show that the disease there was causally connected to employment. The medical testimony showed that there is generally a greater risk of contracting hepatitis in the claimant's employment as a nurse in a hospital than someone in another employment. We held that the Board and the jury were entitled to consider this evidence to infer a causal connection. Our decision in Sacred Heart does not require each claimant for occupational disease coverage to prove an increased risk of disease-based disability due to conditions of his or her particular employment, but instead eases the burden of proof requirement.

Although the "greater risk test" as stated in Kinville is

consistent with what Professor Larson concludes is the prevailing interpretation given the "arising out of employment" requirement in other states, for two reasons we are unprepared to require proof of a "greater risk" in the **[745 P.2d 1304]** worker's particular employment of contracting an occupational disease or of disability resulting from work-related aggravation of a preexisting disease. First, our Industrial Insurance Act is unique and the opinions of other state

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courts are of little assistance in interpreting our Act. iThompson v. Lewis Cy., 92 Wash.2d 204, 208-09, 595 P.2d 541 (1979); see also *Ehman v. Department of Labor & Indus.*, 33 Wash.2d 584, 601-02, 206 P.2d 787 (1949). (This principle also disposes of the extensive arguments by the parties based upon New York cases.) Second, our statute specifically contains the "naturally" requirement, and the "proximately" requirement, but does not contain any language requiring an increased risk in the worker's particular employment. We will not read such a requirement into the statute.

While we disagree with the Court of Appeals interpretation below of the "naturally" requirement, we agree that there is a sufficient factual basis for this case to go to the trier of fact. Dennis' attending physician testified that while all people are susceptible to osteoarthritis, some may be more susceptible than others for a number of reasons not all of which are understood by the medical community. He stated that the disease does not always become symptomatic. He further testified that osteoarthritis is presumably related to wear and tear phenomena. Dennis' physician testified that more probably than not Dennis' repetitive use of tin snips made the osteoarthritis in his wrists symptomatic and disabling. While Dennis had osteoarthritis elsewhere in his body, the evidence showed that it was worse in his wrists. His physician also testified that it was reasonable to assume that the localization of pain in his wrists was related to his occupation. It is reasonable to infer that the use of tin snips 4 to 5 hours per day over 38 years resulted in such wear and tear phenomena as to aggravate the osteoarthritis in Dennis' wrists to the point of disability. The evidence in the record is sufficient to support the inference that Dennis' disabling wrist condition arose naturally and proximately out of his employment. As the Court of Appeals correctly observed, the Department may argue against the inference.

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The Court of Appeals is affirmed; the summary judgment is reversed and the case remanded for trial in accord with this decision and the Industrial Insurance Act.

PEARSON, C.J., UTTER, DOLLIVER, ANDERSEN, CALLOW, GOODLOE and DURHAM, JJ., and HAMILTON, J. Pro Tem., concur.

DORE, J., did not participate in the disposition of this case.

Notes:

[1] As we have explained here, the term "occupational disease" may include disability due to aggravation of a nonwork-related disease.

[2] The court in Kinville believed, however, that language in Favor v. Department of Labor & Indus., 53 Wash.2d 698, 336 P.2d 382 (1959) overruled the decision in Simpson Logging Co., rejecting the "peculiar to" formulation. The language in Favor relied upon by Division Two is dicta, and is not inconsistent with Simpson Logging Co. in any event.

APPENDIX 2

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SHARON BAXTER	)	**DOCKET NO. 92 5897**
	)	
CLAIM NO. N-390479	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Sharon Baxter, by
Rolland, O'Malley, Williams & Wyckoff, P.S., per
Douglas P. Wyckoff, Attorney

Employer, Dolgash & Haines, by
Candy Snyder, Business Manager

Department of Labor and Industries, by
The Office of the Attorney General, per
Thomas Adkins, Assistant, and Whitney Cochran, Paralegal

This is an appeal filed by the claimant, Sharon Baxter, on November 30, 1992 from an order of the Department of Labor and Industries dated November 10, 1992 which corrected and superseded an order dated May 26, 1992, and which rejected the claim for the reason no claim has been filed by said worker within one year after the day upon which the alleged injury occurred, and that claimant's condition is not an occupational disease, and bills regarding this claim are rejected except those which are authorized for diagnosis. **REVERSED AND REMANDED.**

EVIDENTIARY AND PROCEDURAL MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant, Sharon Baxter, to a Proposed Decision and Order issued on September 24, 1993 in which the order of the Department dated November 10, 1992, rejecting the claim was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

DECISION

Based on the uncontroverted medical evidence contained in the record we believe that Ms. Baxter has a valid claim for an occupational disease. While it is doubtlessly true that the incidents which resulted in her contracting hepatitis C could also have formed the basis for an injury claim, separate claims are not mutually exclusive. Just as one incident can result in aggravation of a condition caused by a previous injury and also be the basis for a new claim, one incident can serve as

the basis for both an injury[1] and for an occupational disease[2] claim. The record supports Ms. Baxter's contention that she contracted an occupational disease as a result of exposure during the course of employment and filed an application for benefits in a timely manner. She is entitled to have her claim allowed.

The only medical evidence presented was the testimony of two physicians who had treated Ms. Baxter. Both Dr. James F. Kruidenier, a specialist in gastroenterology and hepatology, and Dr. Michael R. Boyd, a family practitioner, were of the opinion that she had contracted hepatitis C as a result of exposure to contaminated blood and tissue during the course of her employment as a dental assistant. Ms. Baxter's only exposure occurred while she was working for Dr. Dolgash and Dr. Haines, oral surgeons, during a two and one-half year period ending in June of 1982. Following termination of employment she was seen by Dr. Boyd for vague and non-specific complaints which were ultimately attributed to some form of hepatitis. As medical science had not identified hepatitis C at that time her condition was described as non-A/non-B hepatitis. Even this rather vague and preliminary diagnosis was not made until December of 1984, when Dr. Boyd discussed the issue of causation with Ms. Baxter for the first time. Ms. Baxter's condition was not definitively diagnosed until some time in 1990 when she saw a physician in Las Vegas, Nevada. Following termination of her employment with Dr.'s Dolgash and Haines, she was able to work on a fairly regular and continuous basis and was not impaired or disabled as a result of her hepatitis. She received no treatment for hepatitis C until April of 1992 when as the result of reading a magazine article she sought and was provided interferon by Dr. Kruidenier.

It is clear that Ms. Baxter suffers from a job-related condition which would entitle her to benefits if she filed an application for benefits within the period provided in the statute. If this condition is considered to have arisen out of a "sudden and tangible happening" and to constitute an industrial injury, the period for filing an application for benefits would be one year following the incident as provided in RCW 51.28.050. In light of the uncontroverted medical testimony presented this is not the conclusion we reach. While the "needle stick" incidents satisfy the definition of an injury contained in

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[1] RCW 51.08.100 "Injury." "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate prompt result, and occurring from without, and such physical conditions as result therefrom.

[2] RCW 51.08.140 "Occupational Disease." "Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

RCW 51.08.100 and could have served as the basis for separate claims, no claims for these incidents were filed within the one year period set forth in the RCW 51.28.050.

While the condition for which this claim was filed occurred as a result of on-the-job exposure and the likeliest source of this exposure were "needle sticks", there was, nevertheless nothing "immediate or prompt" about the onset of the physical conditions resulting therefrom. In light of the testimony of Dr. Kruidenier, the attending specialist, it is unlikely that the particular "needle stick" which initiated the disease process can be identified. In particular, he thought it unlikely that the disease was contracted from a hepatitis carrier identified in the early 1980's, as there was no test to identify hepatitis C until the 1990's. During the period within which Ms. Baxter could have filed an injury claim the disease had not developed to the extent that it was diagnosable and, had it developed, the medical community had no test to identify the condition.

Ms. Baxter's condition did not develop to the extent that it was disabling or required treatment until 1992. Both the manner in which the condition developed and the definition of an occupational disease convinces us that this is a condition or ailment which should be evaluated under the provisions of RCW 51.08.140. Consideration of the decisions in Nygaard v. Department of Labor & Indus., 51 Wn.2d 659 (1958) and Williams v. Department of Labor & Indus., 45 Wn.2d 574 (1954), supports our conclusion that this is precisely the type of condition which should be covered as an occupational disease. In light of the lengthy period that elapsed before the disease developed, was diagnosed, or required treatment, it would be unreasonable to require that a claim be filed within the period provided for a claim arising out of a ". . . sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result . . . .". RCW 51.08.100. (Emphasis added).

Even under the most literal and restrictive interpretation of RCW 51.28.055, as it existed prior to the 1984 amendment, the events which would initiate the period for filing a claim did not occur until December of 1984. Even then there was no positive diagnosis of the condition, as no test existed to provide this diagnosis, and the condition had not progressed to the extent that it was disabling or in need of treatment. As the 1984 amendments to RCW 51.28.055 became effective prior to that date and are clearly remedial in nature, they must be used in determining the timeliness of Ms. Baxter's application for benefits. Sharon Baxter filed an application for benefits within two years of the date on which she was notified in writing by a physician of the nature of her occupational disease.

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto on behalf of the claimant, and a careful review of the entire record before us, we are persuaded that the Department order dated November 10, 1992 is incorrect and must be reversed and the claim remanded for allowance of the condition hepatitis C as an occupational disease.

FINDINGS OF FACT

1. On May 18, 1992, claimant, Sharon Baxter, filed an application for benefits alleging that she contracted hepatitis C as a result of exposure to contaminated blood and tissue during the course of her employment by Dr.'s Dolgash & Haines. The claim was assigned Claim No. N-390479.

   The Department of Labor and Industries issued an order dated November 10, 1992, which corrected and superseded an order dated May 26, 1992, and which rejected the claim because

   > no claim has been filed by said worker within one year after the day upon which the alleged injury occurred. That the claimant's condition is not an occupational disease as contemplated by Section 51.08.140 RCW. Any and all bills for services or treatment concerning this claim are rejected, except those which are authorized by the Department for diagnosis.

   Claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals on November 30, 1992 from the Department order dated November 10, 1992. On December 21, 1992 the Board issued its order granting the appeal, and directing that further proceedings be held on the issues raised by the notice of appeal.

2. During the two and one-half years she was employed as a dental assistant by Dolgash & Haines, claimant, Sharon Baxter, was exposed on a number of occasions to contaminated blood and tissue.

3. As a direct and proximate result of her occupational exposure, claimant's developed the condition of chronic hepatitis C, and status-post interferon treatment therefore.

4. No earlier than December 1984, claimant was told by her physician that she suffered from hepatitis non-A/non-B as a result of her occupational exposure to contaminated blood and tissue.

5. Claimant's condition of hepatitis C was not definitively diagnosed until 1990 and she was not impaired or disabled by this condition until May of 1992 when she received treatment, which treatment had not previously been available or required.

6. Claimant first received written notice of her condition and its cause from her physician in February 1992.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. As a result of exposure during the course of her employment, claimant, Sharon Baxter, contracted an occupational disease within the meaning of RCW 51.08.140, when she was exposed to contaminated blood and tissue.

3. Claimant, Sharon Baxter, filed an application for benefits within the time limits set forth in RCW 51.28.055.

5. The order of the Department of Labor and Industries dated November 10, 1992, which corrected and superseded an order dated May 26, 1992 and which rejected the claim for the reasons that:

> no claim has been filed by said worker within one year after the day upon which the alleged injury occurred, and the claimant's condition is not an occupational disease as contemplated by Section 51.08.140 RCW.

is incorrect, and is reversed, and the claim is remanded with directions to allow the claim for the occupational disease of hepatitis C, and to take such further action as may be authorized or indicated by law.

It is so ORDERED.

Dated this 7th day of January, 1994.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
FRANK E. FENNERTY, JR. Member

APPENDIX 3

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66 Wn.App. 644 (Wash.App. Div. 1 1992)

833 P.2d 390

INTALCO ALUMINUM CORPORATION, Appellant,

v.

DEPARTMENT OF LABOR and INDUSTRIES of the State of

Washington, Ted Oppewall, James Snyder and Robert

Walker, Respondents.

Nos. 25923-7-I, 25945-8-I and 25946-6-I.

Court of Appeals of Washington, Division 1.

July 27, 1992

[833 P.2d 391] [Copyrighted Material Omitted]

[833 P.2d 392]

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Wayne L. Williams, Olympia, David M. Jacobi, Seattle and James L. Rolland, Olympia, for appellant.

Martha Gross, Bellingham and James D. Hailey, Seattle, for respondents.

AGID, Judge.

This appeal arises out of a claim for workers' compensation benefits by three workers who contend they became disabled as a result of long-term exposure to toxic substances at the Intalco Aluminum plant. Intalco Aluminum Corporation (Intalco), a self-insured employer, appeals the judgment in favor of the claimants, primarily contending that the medical evidence is insufficient to support the jury's finding that the claimants' injuries were proximately caused by exposures in the Intalco plant. We affirm.

I. FACTS

A. Procedural History

On August 11, 1983, James Snydar, Ted Oppewall and Robert Walker filed accident reports with the Department of Labor and Industries (DLI), alleging that they had sustained an occupational disease during the course of their employment with Intalco. In July 1984, DLI rejected their claims for benefits under the Industrial Insurance Act. The claimants subsequently appealed the order to the Board of Industrial Insurance Appeals (the Board), and the Board

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heard the three claims in a consolidated proceeding. On April 18, 1986, the Industrial Appeals Judge entered a Proposed Decision and Order recommending that all three claims be allowed. The Order concluded that the claimants sustained occupational diseases as a result of exposure to air pollution in the Intalco plant pot rooms. [1] Intalco filed a petition for review with the Board, and the Board denied the petition, adopting the recommendation of the Industrial Appeals Judge.

After the Board denied Intalco's petition for review, Intalco appealed the Board's order to superior court pursuant to RCW 51.52.110. The three cases were again consolidated for hearing. Intalco brought two motions for summary judgment, arguing that the claimants' medical evidence was insufficient as a matter of law to support the Board's award of compensation. The trial court denied both motions. The record of proceedings was presented to a jury, which returned a verdict in favor of the claimants. [2] The trial court subsequently denied Intalco's motion for judgment notwithstanding the verdict or for a new trial. Intalco's appeal followed.

B. The Claimants' Working Conditions

Each of the claimants worked for at least 12 years in the aluminum reduction "potline" at Intalco. Mr. Oppewall and Mr. Walker began working at the plant as pot operators in 1966 and 1967 respectively. Mr. Snydar, who began working at Intalco in 1966, worked above the pot room cleaning **[833 P.2d 393]** the air pollution control scrubber units. When the plant began operations in 1966, there were no primary emission controls, or "hoods," covering the pots. Prior to 1972, the only emission control system in place was a wet scrubber system located in the roof of the building. It cleaned the pot room fumes from

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the air Before they were expelled into the atmosphere, but after the workers had been exposed to the pot fumes. Mr. Oppewall testified that the working conditions were so dusty and gassy at times that he could not see 100 to 200

feet in front of him. The workers were also responsible for cleaning the work area at the end of their shifts. They were covered with carbon and ore dust by the end of their work day. In 1972, Intalco began installing hoods over the pots, which drew the effluent out of the pots directly into a dry scrubber system. However, when the pots were being worked on, the hoods were open and the workers were exposed to the same fumes they were exposed to Before the hoods were installed.

Intalco presented the testimony of Arvin Apol, an industrial hygienist for the National Institute for Occupational Safety and Health (NIOSH). In 1973, NIOSH did an air pollution survey of gasses and particulates at the Intalco plant. At that time, Intalco was in the process of retrofitting the pots with hoods. Apol testified that the air on the unhooded potline was at least twice as dirty as the air on the hooded potline. The survey, which focused primarily on fluoride emissions, found that the threshold limits for that toxin were exceeded on both the hooded and unhooded potlines. However, NIOSH did not measure all of the chemicals present in the Intalco pot room atmosphere, such as aluminum particulates. Apol testified that numerous toxins, including aluminum, benzene solubles, petroleum pitch volatiles, and carbon monoxide would also be present in the pot room atmosphere. He further testified that carbon monoxide and petroleum pitch volatiles had been associated with neurologic disease.

C. The Claimants' Medical Histories

1. James Snydar

In April 1982, James Snydar's physicians referred him to the Occupational Medicine Clinic at Harborview Hospital for an evaluation to determine whether his illness was work related. The Director of the clinic, Dr. Linda Rosenstock, conducted the initial evaluation. Mr. Snydar reported that, over the years, he had experienced increasing difficulty with [66 Wn.App. 650] his coordination, trembling in his upper extremities, and an unsteady gait. Dr. Rosenstock and her staff conducted a thorough review of Mr. Snydar's medical history and history of exposure to potential neurotoxic agents both within and outside of his work environment at Intalco. The investigation included extensive, systematic medical testing, including nervous system studies, vitamin deficiency tests, and other procedures specifically intended to identify any non-work-related causes of illness.

Dr. Rosenstock's preliminary assessment was that Mr. Snydar was suffering from an atypical neurologic disease. She diagnosed the disease as atypical on the basis that his symptoms did not meet the criteria for other types of progressive neurological illness. Upon learning that two other Intalco pot room workers were experiencing symptoms similar to Mr. Snydar's, Dr. Rosenstock became suspicious that the illnesses might be work-related.

2. Robert Walker

Robert Walker came to Dr. Rosenstock complaining of symptoms similar to those reported by his coworker, Mr. Snydar. Like Mr. Snydar, Mr. Walker complained of generalized weakness, problems with balance causing an unsteady gait, and trembling in his upper extremities. Although Mr. Walker had been seen by a number of neurologists Before Dr. Rosenstock, his prior diagnoses did not fit the usual diagnostic criteria for other suspected diseases. [3]

[833 P.2d 394] 3. Ted Oppewall

Ted Oppewall was the third Intalco pot room worker examined by Dr. Rosenstock. Although Mr. Oppewall seemed the least ill, he suffered many of the same symptoms as the other two men. Like Mr. Snydar and Mr. Walker, Mr. Oppewall

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had problems with coordination, unsteady gait, and trembling in his upper extremities.

D. Dr. Rosenstock's Consultation with Dr. Longstreth

Struck by the similarities in both work exposures and symptoms displayed by the three patients, and unable to place a definitive diagnosis on their illnesses, Dr. Rosenstock referred them to Dr. William Longstreth, Head of Neurology at the Pacific Medical Center, for a detailed neurological work up. The two physicians conducted an intensive evaluation of the three patients over a 2-year period. Under the direction of Dr. Longstreth, the three underwent a series of neurophysiological, neuropsychological, blood, and urine tests. Dr. Longstreth confirmed Dr. Rosenstock's preliminary assessment that the patients were not suffering from multiple sclerosis, ALS, or any other known neurologic disease.

Although the symptoms differed in severity from one patient to the next, the neurological symptoms exhibited by each were remarkably similar. In addition to the coordination, balance and tremor problems found by Dr. Rosenstock, Dr. Longstreth's testing revealed that the three men suffered impaired cognitive functioning, ranging from mild to severe impairment. This cognitive impairment caused them to have problems with short-term memory and visual motor speed tasks. Dr. Longstreth testified that these cognitive problems were commonly seen in patients exposed to a number of neurotoxins, especially heavy metals and solvents. Dr. Longstreth believed that the differences in severity of impairment found in the three men

could be due to the differences in the extent to which the disease had progressed in each man. The differences could also reflect individual susceptibilities to the same neurotoxin in the pot room environment.

Counsel for Intalco questioned Dr. Longstreth about whether other events in the patients' medical histories might be the cause of or explain their symptoms of neurologic disease. For example, in 1977, Mr. Oppewall suffered an episode of aseptic meningitis, which is the inflammation

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of the lining around the brain. He recovered from the meningitis, but his problems with balance and loss of memory worsened. Because his neurologic symptoms pre-dated the episode of meningitis and progressed after his recovery from that illness, Dr. Longstreth did not believe the illness was the cause of Mr. Oppewall's medical problems. [4]

At the age of 13, Mr. Walker was diagnosed as having a neurologic condition called St. Vitus' Dance. This episode was characterized by left-sided weakness, followed by uncontrolled movements. After Mr. Walker underwent chiropractic treatment for a 6-month period, the symptoms associated with the childhood illness disappeared. Dr. Longstreth could not tie that episode in with Mr. Walker's other adult-onset neurologic problems.

With respect to Mr. Snydar's medical history, Intalco's counsel observed that his I.Q. was significantly lower than the I.Q.'s of the other two men. In Dr. Longstreth's opinion, however, the I.Q. testing was inconclusive as a cause of his neurologic symptoms. He testified that Mr. Snydar's difficulties with problem solving, poor memory and deficiencies in completing visual spatial tasks could not be explained solely on the basis of a low I.Q.

[833 P.2d 395] Drs. Longstreth and Rosenstock determined that the patients' neuropathological process affected their central, rather than peripheral, nervous systems. On the basis of this determination, the physicians eliminated from consideration numerous non-work-related causes. [5] Drs. Longstreth and Rosenstock concluded that the three patients' illnesses were more probably than not caused by work-related exposures to neurotoxins. They based theirconclusion on the similarity of the patients' symptoms, which were

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characteristic of a neurologic disease, and their exposure histories. Especially in the early years of their employment, all three had intense exposures to a number of toxic substances, including solvents, fluorides, aluminum, and coal tar pitch, and all three were exposed to the same work environment for at least 12 years. The physicians observed that the patients' symptoms revealed a neurologic disease that could not be explained as any other known disease or by commonly accepted disease criteria. Finally, they agreed that, as a central nervous system phenomenon, the disease looked like other models of toxin-induced disease known as "central distal axonopathy."

II. DISCUSSION

A. Sufficiency of the Evidence

Intalco first contends that the evidence was insufficient as a matter of law to send the case to the jury on the issue of whether the claimants' medical conditions were proximately caused by exposure to toxic substances in their work environment. [6] In challenging the sufficiency of the evidence, Intalco must admit the truth of the claimants' evidence and all inferences that can reasonably be drawn therefrom. *Spino v. Department of Labor & Indus.*, 1 Wash.App. 730, 731, 463 P.2d 256 (1969), review denied, 77 Wash.2d 962 (1970); see also *Sepich v. Department of Labor & Indus.*, 75 Wash.2d 312, 321, 450 P.2d 940 (1969). In applying this standard, the trial and appellate courts must interpret the evidence in favor of the claimants and against the defendant. Spino, 1 Wash.App. at 731, 463 P.2d 256. Further, the findings and decisions of the Board are deemed to be prima facie correct. RCW 51.52.115; *Department of Labor & Indus. v. Estate of MacMillan*, 117 Wash.2d 222, 227, 814 P.2d 194 (1991). The jury's verdict upholding the Board's findings and decision must also be presumed correct. Sacred

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Heart Med. Ctr. v. Carrado, 92 Wash.2d 631, 635, 600 P.2d 1015 (1979).

The Industrial Insurance Act (the Act) was intended to provide relief "for workers, injured in their work, and their families and dependents ... regardless of questions of fault and to the exclusion of every other remedy". RCW 51.04.010; *Dennis v. Department of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987). To serve this goal of providing compensation to all covered workers injured in their employment, the Act should be liberally construed, with all doubts resolved in favor of the worker. Dennis, 109 Wash.2d at 470, 745 P.2d 1295; Estate of MacMillan, 117 Wash.2d at 232, 814 P.2d 194.

A worker suffering a disability from an occupational disease is entitled to receive compensation benefits under the Act. RCW 51.32.180. "Occupational disease" is defined as "such disease or infection as arises naturally and proximately out of employment". RCW 51.08.140. A disease is "proximately" caused by conditions of

employment when "there [is] no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the ... employment." *Simpson Logging Co. v. Department of Labor & Indus.*, 32 Wash.2d 472, 479, 202 P.2d 448 (1949). To show that his or her medical **[833 P.2d 396]** condition arose "naturally" out of employment:

[t]he worker ... must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment.

Dennis, 109 Wash.2d at 481, 745 P.2d 1295.

In workers' compensation cases, the court must give special consideration to the opinion of the attending physician. *Hamilton v. Department of Labor & Indus.*, 111 Wash.2d 569, 571, 761 P.2d 618 (1988). This is because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case. A physician'sopinion as to the cause of the claimant's disease is sufficient

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when it is based on reasonable medical certainty even though the doctor cannot rule out all other possible causes without resort to delicate brain surgery. *Halder v. Department of Labor & Indus.*, 44 Wash.2d 537, 543-45, 268 P.2d 1020 (1954). The evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists. *Douglas v. Freeman*, 117 Wash.2d 242, 252, 814 P.2d 1160 (1991); Carrado, 92 Wash.2d at 636-37, 600 P.2d 1015.

In arguing that the claimants' medical evidence was insufficient to support the jury's finding of proximate cause, Intalco first asserts that Drs. Longstreth and Rosenstock failed to make a diagnosis of the claimants' illnesses. After reviewing the physicians' testimony, however, we conclude that they did make a definitive diagnosis. The physicians studied the claimants over a period of 2 years, conducting numerous neurological tests during that time. Based on their findings, the physicians concluded that the claimants' symptoms did not fit the commonly accepted criteria of any known, neurologic disease. However, their findings established that the symptoms displayed by all three patients, including difficulty with coordination, tremors, balance and gait problems, and cognitive impairment, indicated a disorder of the central nervous system. The physicians diagnosed this disease as "central distal axonopathy."

Intalco also believes the medical testimony was insufficient because the physicians could not identify the specific toxic agent or agents that proximately caused the claimants' disease. Intalco's witness, Mr. Apol of NIOSH, identified several toxins in the pot room, some of which have been associated with neurologic disease. While the physicians could only hypothesize that aluminum could be the specific agent responsible for the claimants' disease, they firmly concluded that a toxin or a combination of toxins present in the atmosphere of the Intalco pot room more probably than not caused the claimants' neurologic disease. This conclusion was based on several factors. First, although the clinical findings indicated that the patients suffered from [66 Wn.App. 656] a neurologic disease, their symptoms did not fit the diagnostic criteria of any known disease. Second, the claimants all had similar exposures to known neurotoxins: they had all worked in the pot room for at least 12 years. Third, the physicians' extensive investigations of the claimants' medical and work histories revealed no other likely cause of their disease. Finally, while studies of the effects of pot room exposures on the human neurologic system had never been done, animal studies revealed that aluminum exposure could cause symptoms similar to those exhibited by the claimants. This medical testimony establishes a sufficient basis for the physicians' conclusion that exposure to a toxin or a combination of toxins in the Intalco pot room more probably than not caused the claimants' disease.

Intalco cites no authority for the proposition that the claimants must identify the specific causative agent responsible for their occupational disease. Under the Act, the claimant need only show that his or her disability or disease arose from distinctive conditions of his or her employment.

[833 P.2d 397] Dennis, 109 Wash.2d at 481, 745 P.2d 1295. These claimants' exposure to a variety of known neurotoxins in the pot room is a distinctive condition of their employment. The evidence demonstrates that exposure to neurotoxins in the pot room more probably caused the claimants' disease-based disabilities than conditions in everyday life or all employments in general. *Id.* In light of the Legislature's mandate to construe the Act liberally in favor of the worker seeking compensation, we decline to read into the workers' compensation statute a requirement that the claimant identify the specific toxic agent responsible for his or her disease or disability. See *Lightle v. Department of Labor & Indus.*, 68 Wash.2d 507, 413 P.2d 814 (1966) (courts should refrain from narrowly construing provisions of the Act where such an interpretation results in the denial of benefits and statutory language does not suggest that the Legislature intended

such a narrow interpretation).

We note that courts in other jurisdictions have declined to require the injured plaintiff in toxic tort products liability

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cases to prove the precise chemical that caused his or her injury. *Earl v. Cryovac,* 115 Idaho 1087, 772 P.2d 725 (Ct.App.1989); *In re Robinson,* 78 Or.App. 581, 717 P.2d 1202 (1986). In Earl, the Court of Appeals of Idaho reversed a summary judgment in favor of the manufacturer, holding that the plaintiff presented sufficient evidence to allow a jury to conclude that his lungs were injured as a result of exposure to vapors emitted from a plastic film used in the meat-packing room where he worked. The plaintiff's attending physician suspected that polyvinyl chloride, a chemical commonly found in plastic films, was a "significant" factor in the plaintiff's disease. However, rather than resting his opinion on the existence of that particular chemical, the physician believed that it was likely that a combination of chemicals caused the plaintiff's disease. Earl, 115 Idaho at 1092, 772 P.2d at 730. The manufacturer challenged the attending physician's opinion, arguing in part that the doctor failed to specify the particular component(s) of the plastic vapors which caused the plaintiff's disease. The court rejected this argument, stating:

We do not consider it fatal to the plaintiff's case that the etiology of his disease has not been traced to a discrete component or set of components within the heated plastic vapor. As explained by our Supreme Court in Farmer v. International Harvester Co., supra, [97 Idaho 742, 772, 553 P.2d 1306, 1336,] the plaintiff need only show that the product is unsafe; he need not identify and prove the specific defects which render it unsafe. The same approach is reflected in the cases cited at footnote 2, where victims of "meatwrapper's asthma" have been allowed to recover despite scientific uncertainty as to the precise etiological link between their disease and specific chemical(s) in the heated plastic vapors.

Earl, 115 Idaho at 1095, 772 P.2d at 733.

In Robinson, a furniture store employee sought workers' compensation benefits, claiming that exposure to toxic chemicals in the furniture store where she worked caused her to suffer from headaches, fatigue and dizziness. The claimant testified that the store continually received new furniture which was uncrated weekly in the furniture showroom. The evidence also showed that new furniture goes through a "gassing out" process whereby it releases quantities

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of formaldehyde, phenol and hydrocarbons over a period of time. The claimant also testified that the showroom in which she began working was hot, poorly ventilated and had low ceilings. When she worked in another warehouse with adequate ventilation and higher ceilings, her symptoms abated. Robinson, 717 P.2d at 1203. The employer's insurer argued that the claimant could not show that her work conditions caused her symptoms because living in a mobile home and having new carpet installed had exposed her to formaldehyde. The Court of Appeals of Oregon found, however, that the claimant met her burden of proving that chemical exposure at work was the major contributing cause of her disease. The court further ruled that the claimant was not required to pinpoint **[833 P.2d 398]** the precise chemical that caused her sensitivity:

To recover, a claimant must prove that the conditions at work were the major contributing cause of the disability. Although the specific chemical cause of claimant's sensitivity is not conclusively established, she has shown by a preponderance of the evidence that the major contributing cause was her work environment at Struthers, which exposed her to concentrations of chemicals much greater than she was ordinarily exposed to outside the course of employment.

(Citations omitted.) Robinson, 717 P.2d at 1206.

We agree with the Earl court that the plaintiff should not be denied recovery simply because the precise etiological link between the plaintiff's disease and a specific toxin or toxins in the work place has not yet been made. Further, we find the reasoning in Robinson persuasive. Because the claimant is only required to demonstrate that conditions in the work place more probably than not caused his or her disease or disability and because we are to construe the Act liberally in favor of the claimant, we hold that the workers' compensation statute does not require the claimant to identify the precise chemical in the work place that caused his or her disease. [7]

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Finally, Intalco argues that the claimants' medical evidence is insufficient as a matter of law because no other studies of neurologic disease and aluminum plant workers exist to substantiate the medical experts' theory that aluminum was the causative agent involved in the claimants' disease. [8] Thus, Intalco contends, the physicians' causation conclusion was based on a purely speculative theory. This argument ignores the fact that, in making their determination that the claimants' disease was more probably than not due to workplace exposures, Drs. Longstreth and Rosenstock did not rely solely on their theory that aluminum may have been the causative agent involved. While the physicians relied in part on animal studies showing a directconnection

between aluminum exposure and neurologic disease, they also testified that Before they could be medically certain that aluminum was the causative agent, further studies would have to be done. The crucial point here is that the physicians did not conclude that aluminum probably

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caused the claimants' disease. Rather, they concluded that some exposure to toxic substances in the Intalco pot room, one of which could be aluminum, resulted in their disabilities. As we held above, the physicians were not required to pinpoint a specific toxin as the basis for their conclusion that pot room exposures **[833 P.2d 399]** were more probably than not the cause of the claimants' disease.

The absence of studies linking aluminum plant pot room exposure to neurologic disease does not compel the conclusion that the claimants failed to make a showing of proximate cause. Apol acknowledged that every year the medical profession discovers that "new" diseases, which were previously thought to have unknown or non-work-related causes, are in fact occupationally-related. Further, Dr. Rosenstock, an expert in the field of occupational medicine, testified that the lack of reported cases of neurologic disease among aluminum plant workers does not mean that they do not exist. She noted that there are many examples in occupational medicine where an association between a patient's work conditions and disease has gone unnoticed for years, often because the patient's illness has been misdiagnosed. If this court were to accept Intalco's argument, the first victims of any newly-recognized occupational disease would always go uncompensated. The claimants should not be denied benefits simply because Drs. Longstreth and Rosenstock were the first physicians to systematically study the effects of toxic pot room exposures on the central nervous system of humans.

In *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C.Cir.), cert. denied, 469 U.S. 1062, 105 S.Ct. 545, 83 L.Ed.2d 432 (1984), Chevron argued that the expert medical opinion testimony was insufficient to support the jury's verdict in favor of the plaintiff on the ground that the expert's theory of causation was too novel to be admissible. Ferebee was an agricultural worker who allegedly contracted pulmonary fibrosis as a result of long-term exposure to the herbicide paraquat. The plaintiffs sued Chevron, the sole distributor of paraquat in the U.S

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., on the theory that it had failed to adequately warn against the possibility that chronic skin exposure could lead to lung disease and death, and that this failure proximately caused Ferebee's illness and death. Ferebee, 736 F.2d at 1531-32.

Ferebee's treating physicians concluded that his pulmonary fibrosis was caused by paraquat poisoning. They based their opinions on their observation of him, medical tests, and on medical studies which they believed suggested that dermal absorption of paraquat can lead to chronic lung abnormalities of the type from which Ferebee suffered. Chevron's medical experts attacked plaintiff's theory, contending that there was no medical evidence to show that paraquat could lead to chronic lung disease. Ferebee, 736 F.2d at 1535. In response to Chevron's argument that the novelty of the plaintiff's theory rendered the medical testimony inadmissible, the court first distinguished between novel scientific techniques or methodologies, and controversial, scientific opinion testimony based on well-founded methodologies. The court continued:

Thus, a cause-effect relationship need not be clearly established by animal or epidemiological studies Before a doctor can testify that, in his opinion, such a relationship exists. As long as the basic methodology employed to reach such a conclusion is sound, such as use of tissue samples, standard tests, and patient examination, products liability law does not preclude recovery until a "statistically significant" number of people have been injured or until science has had the time and resources to complete sophisticated laboratory studies of the chemical. In a courtroom, the test for allowing a plaintiff to recover in a tort suit of this type is not scientific certainty but legal sufficiency; if reasonable jurors could conclude from the expert testimony that paraquat more likely than not caused Ferebee's injury, the fact that another jury might reach the opposite conclusion or that science would require more evidence Before conclusively considering the causation question resolved is irrelevant. That Ferebee's case may have been the first of its exact type, or that his doctors may have been the first alert enough to recognize such a case, does not mean that the testimony of those doctors, who are concededly well qualified in their fields, should not have been admitted.

Ferebee, 736 F.2d at 1535-36.

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We agree with the Ferebee court that the requirement that expert medical **[833 P.2d 400]** testimony be based on methods generally accepted in the scientific community pertains to the methods used by, not the conclusions of, the expert witness. See also ER 703; *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 914-15 (5th Cir.1987), cert. denied, 485 U.S. 1009, 108 S.Ct. 1476, 99 L.Ed.2d 705 (1988) (an expert physician's opinion on causation need not be generally accepted in the scientific community; it is the methods upon which the expert relies in forming his or

her opinion that must be generally accepted).

As in Ferebee, the techniques and methodologies used by the attending physicians in this case are not challenged. Nor could they be successfully attacked. Drs. Longstreth and Rosenstock did extensive neurologic testing on these patients over a 2-year period. In systematically ruling out all other non-work-related possible causes for the patients' conditions, the physicians used only methods and techniques that are generally accepted in the scientific community. Further, their ultimate conclusion was completely consistent with the toxin-induced model of neurologic disease. In addition, Intalco had the opportunity to, and did, present its own expert medical testimony to challenge the theories on which the attending physicians based their conclusion. That a physician presented a controversial theory possibly linking aluminum exposure to the workers' disabilities did not render the testimony inadmissible. As in Ferebee, this was "a classic battle of the experts, a battle in which the jury must decide the victor." Ferebee, 736 F.2d at 1535. [9]

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B. Challenge to Jury Instructions

Intalco contends that the trial court erred in refusing to give the following jury instruction:

You are instructed that the opinion of an expert is not entitled to any weight unless it is or reflects a scientific point of view generally accepted within the community of experts to which the witness belongs.

The trial court properly refused to give this instruction, which directed the jury to evaluate the foundation for the medical experts' testimony and rule on its admissibility. It is the function of the court, not the jury, to rule on the admissibility of evidence. Admissibility of expert opinions is left to the sound discretion of the trial court. *State v. Ortiz*, 119 Wash.2d 294, 310, 831 P.2d 1060 (1992); *Fraser v. Beutel*, 56 Wash.App. 725, 734, 785 P.2d 470, review denied, 114 Wash.2d 1025, 794 P.2d 508 (1990). Further, Intalco did not object below to the foundation for the medical experts' opinion testimony. Only objections to evidence on the specific grounds made Before the Board can be considered on appeal. *Sepich v. Department of Labor & Indus.*, 75 Wash.2d 312, 316, 450 P.2d 940 (1969). The trial court properly refused to allow Intalco to object to the admissibility of the claimants' expert witness testimony by means of a jury instruction.

Intalco also challenges the following instruction:

You are to be concerned only with the effects of exposure in the pot room on these particular workers. If you determine that their medical conditions are occupational diseases, it does not matter if it was allegedly safe exposure for an average worker.

Intalco argues that this instruction was prejudicial and misleading because it suggested that the jury need not find that a specific condition in the work place caused **[833 P.2d 401]** the claimants' disease. In determining whether an instruction could have confused or misled the jury, the court examines the instructions in their entirety. *Hamilton v. Department of Labor & Indus.*, 111 Wash.2d 569, 573, 761 P.2d 618 (1988). Here, the court's instructions clearly apprised the jury that it must find that conditions in the claimants' work place proximately caused their medical conditions.

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Further, in an effort to discredit the opinions of claimants' physicians, Intalco presented testimony from an expert that the NIOSH "threshold limit values" for airborne pollutants at the Intalco plant were arrived at by determining the maximum exposure that an average worker can endure without contracting an occupational disease. Based on this testimony, the jury could have concluded that the claimants' disease was not occupationally-related because the plant was "safe" for the average worker.

In addition, the claimants' attending physicians testified that their individual susceptibilities may have been responsible for their varying degrees of impairment and the differences in the way their disease manifested itself. In light of this testimony, the trial court properly instructed the jury that the standard for determining causation is the individual claimant, not the "average worker". See *Groff v. Department of Labor & Indus.*, 65 Wash.2d 35, 43-44, 395 P.2d 633 (1964).

C. Admissibility of Co-Workers' Testimony

In its last assignment of error, Intalco contends that the claimants should not have been permitted to present the testimony of their coworkers, Richard Hall and Walter Buechler, who testified that they had experienced and observed in other workers at Intalco symptoms similar to those displayed by the claimants. Intalco argues that this evidence was irrelevant under ER 401, [10] and that, even if marginally relevant, the prejudicial effect of the testimony outweighs its probative value under ER 403. [11]

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However, the claimants offered this testimony in direct rebuttal to the testimony of Intalco's expert witness, Dr. James Hughes. Dr. Hughes testified that, as medical director for Kaiser Aluminum, he had never observed the neurologic symptoms exhibited by the claimants among the 3,000 pot room workers in his company. This testimony

invited the jury to conclude that, because Dr. Hughes, in all his years of experience with aluminum workers, had never seen neurologic problems in his patients, the claimants' disease must not be work-related. Thus, the coworkers' testimony was directly relevant to rebut the inferences raised by Dr. Hughes' testimony.

Further, the trial court gave the following limiting instruction:

You are instructed that the testimony of Mr. Hall and Mr. Buechler is not offered to prove that they have the same or a similar medical condition as any of the defendants. You are to consider their testimony only on the question of whether there are other persons working in the aluminum industry who have symptoms similar to those described by the defendants.

Any potential prejudice engendered by the testimony was cured by this limiting instruction. See *State v. Barber*, 38 Wash.App. 758, 771, 689 P.2d 1099 (1984), review denied, 103 Wash.2d 1013 (1985).

The judgment is affirmed.

PEKELIS and KENNEDY, JJ., concur.

Notes:

[1] Within the Intalco plant, there are six buildings that each contain two pot rooms. The pot rooms house electrolytic cells, or pots, connected in series. Each pot is a fabricated steel shell 15 feet wide, 25 feet long, and 4 feet deep, and produces about a ton of aluminum per day.

[2] See RCW 51.52.115. Under the statute, the transcript of proceedings Before the Board is read by the trial court or to a jury. The fact-finder thus has no opportunity to judge the demeanor and credibility of the witnesses.

[3] Mr. Walker had been diagnosed as suffering from amyotrophic lateral sclerosis, also known as ALS or Lou Gehrig's disease. However, Dr. Rosenstock believed this was an unlikely diagnosis given that the disease usually progresses to death within 7 years of diagnosis. Not only had Mr. Walker long outlived this period, but his medical history showed that his symptoms had stabilized and were not progressing toward the fatal outcome associated with ALS. Dr. Rosenstock also ruled out the diagnosis of multiple sclerosis. She saw no evidence of lesions and other symptoms associated with MS.

[4] Further, the symptoms associated with Mr. Oppewall's meningitis included headaches, a stiff neck, body aches and other viral symptoms. The neurologic problems detected by Dr. Longstreth manifested themselves in very different symptoms.

[5] For example, they ruled out other neurotoxins unrelated to occupational exposure such as lead poisoning and insecticides.

[6] Intalco's challenge to the sufficiency of the evidence encompasses three assignments of error, arguing that the trial court erred in: (1) denying its motions for summary judgment; (2) denying its motion for directed verdict; and (3) denying its motion for judgment notwithstanding the verdict or a new trial.

[7] Intalco's reliance on Tonkovich v. Department of Labor & Indus., 31 Wash.2d 220, 195 P.2d 638 (1948), and Boyer v. Department of Labor & Indus., 160 Wash. 557, 295 P. 737 (1931), is misplaced. In Tonkovich, the claimant alleged that his abdominal cancer was caused by a work-related foot injury. The court ruled that the evidence was insufficient to prove causation on the ground that the physician gave no basis for his tentative conclusion that the cancer was caused by an aggravation of the foot injury. 31 Wash.2d at 225-27, 195 P.2d 638. Similarly, in Boyer, the claimant was diagnosed with chronic lymphatic leukemia, which he contended was caused by an aggravation of a foot injury sustained at work. Four of the physicians who testified concluded that the disease was not caused by the foot injury. Further, the physician whose opinion the claimant relied on most heavily admitted that the leukemia could have preceded the injury. Examining this testimony in light of the fact that the cause of leukemia was unknown, the court concluded that the claimant had not sustained his burden of proving that the foot injury caused the leukemia. Boyer, 160 Wash. at 561-62, 295 P. 737. Neither Tonkovich nor Boyer stands for the proposition that the claimant must prove the precise chemical in the work place that caused his or her medical condition. Rather, these cases hold that, in order to support a finding of proximate cause, the testifying physician must conclude that the claimant's illness was more probably than not caused by a work-related condition and provide a sufficient basis for that opinion.

[8] Intalco concedes that the methods used by Drs. Longstreth and Rosenstock in diagnosing the claimants' disease were methods of clinical examination and laboratory testing generally accepted in the scientific community. Nevertheless, the claimants view Intalco's argument as a challenge to the admissibility of the medical testimony based on lack of foundation. See ER 702 and 703. In view of Intalco's recognition that the foundation was proper, we will not address the claimants' argument on this ground.

[9] We also reject Intalco's argument that the trial court

should have instructed the jury that, as a matter of law, aluminum could not have caused the claimants' medical conditions. This is simply another way of arguing that the evidence was insufficient to support the jury's verdict. The issue of proximate cause was an issue of fact for the jury to decide. Manson v. Foutch-Miller, 38 Wash.App. 898, 691 P.2d 236 (1984). Const. art. 4, § 16 provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Had the trial court given Intalco's proposed instruction, it would have invaded the jury's province and constituted an improper comment on the evidence. See Egede-Nissen v. Crystal Mt., Inc., 93 Wash.2d 127, 139, 606 P.2d 1214 (1980); State v. Jacobsen, 78 Wash.2d 491, 495, 477 P.2d 1 (1970).

[10] ER 401 provides:

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[11] ER 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

APPENDIX 4

167 Wn.App. 60 (Wash.App. Div. 1 2012)

277 P.3d 1

Marcia R. MAGEE, Appellant,

v.

RITE AID, Respondent.

No. 65861-1-I.

Court of Appeals of Washington, Division 1.

January 17, 2012

Publication Ordered April 23, 2012.

Kylee MacIntyre Redman, The Walthew Law Firm, Seattle, WA, for Appellant.

Anastasia R. Sandstrom, Attorney General's Office, Seattle, WA, for Dept. of L & I.

Philip Albert Talmadge, Talmadge/Fitzpatrick, Tukwila, WA, for Rite Aid.

[277 P.3d 2]

Mary E. Shima, Reeve Shima PC, Seattle, WA, for LAM.

UNPUBLISHED OPINION

SCHINDLER, J.

[167 Wn.App. 62] ¶ 1 Marcia R. Magee appeals from a 2010 decision and order of the Board of Industrial Insurance Appeals (Board) and the order denying her motion to vacate. The Board ruled that even if it erroneously exceeded the scope of review in previously deciding that Magee's claim did not constitute an occupational disease, because Magee did not challenge that determination in her appeal of the 2006 Decision and Order, that decision was valid and binding. We affirm the Board's decision and order and the order denying Magee's motion to vacate the conclusion in the Board's 2006 Decision and Order that the claim did not constitute an occupational disease.

FACTS

2004 Workers' Compensation Claim

¶ 2 Marcia Magee began working at Rite Aid in 1987. According to Magee, she suffers from autism, dyslexia, and dysgraphia. In May 2001, Magee quit her job.

¶ 3 In September 2001, Magee filed a petition for an anti-harassment order against her former supervisor at Rite Aid, Alan Woolford. Magee also filed a sexual harassment complaint in 2001 with the Equal Employment Opportunity Commission.[1]

[167 Wn.App. 63] ¶ 4 On January 23, 2004, Magee filed an application for workers' compensation benefits. An industrial injury claim must be filed " within one year after the day upon which the injury occurred." RCW 51.28.050. An occupational disease claim must be filed " within two years following the date the worker had written notice from a physician or a licensed advanced registered nurse practitioner." RCW 51.28.055.

¶ 5 Magee asserted she was entitled to benefits for sexual assaults that occurred in 2000 and 2001. The Department of Labor and Industries (Department) denied the claim because it was not filed " within one year after the day upon which the alleged injury occurred."

Appeal to the Board

¶ 6 Magee appealed the Department's denial of her claim for benefits to the Board. The Industrial Appeals Judge (IAJ) conducted a telephone conference with the parties to identify the issues. The IAJ entered an order identifying the issues as follows: (1) " Did the claimant file the application for benefits within one year of the date of injury?" and (2) " Did the self-insured employer fail to file the claim and/or report an on-the-job injury?"

¶ 7 A number of witnesses testified at the hearing about when Magee notified Rite Aid about her claim for workers' compensation benefits. Rite Aid witnesses testified that Magee did not mention the alleged sexual assaults by Woolford in her resignation letter and that Rite Aid did not receive notice of any job-related injury until Magee filed the workers' compensation claim in 2004.

¶ 8 During Magee's testimony, Rite Aid objected to any testimony about the alleged sexual assaults because the question of occupational disease was not an issue before the IAJ, and the testimony was not relevant to the question of whether the industrial injury claim was timely filed. Magee's attorney argued that the testimony was relevant and admissible because Magee was entitled to benefits for

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both an industrial injury and an occupational disease. Magee's attorney argued, in pertinent part:

We're not claiming just industrial injury. It also can be found to be an occupational disease for the mental disability that she suffered in this matter.

... And what we're trying to establish in our record is that there was a repeated **[277 P.3d 3]** physical abuse of this woman from October up until June, and then she filed a claim. And our argument is that those assaults either rose to the level of an occupational disease or an industrial injury and that the Department needs to pass on both of those issues. We're not just precluding one.

The IAJ overruled Rite Aid's objection and allowed Magee to testify at length about the sexual assaults.

¶ 9 Following the hearing, the IAJ issued a proposed decision and order affirming denial of the workers' compensation claim. The IAJ concluded that the sexual assaults constituted an industrial injury, but Magee did not file a claim for an industrial injury within the one-year statutory deadline. The IAJ also concluded that as a matter of law, the sexual assaults did not constitute an occupational disease under RCW 51.08.140.

¶ 10 The proposed decision and order addresses Magee's claim that she was entitled to benefits as an occupational disease. The IAJ identifies one of the issues as follows:

Did the sexual assaults on Ms. Magee by her supervisor at her place of employment over a period of months arise naturally and proximately out of distinctive conditions of her employment so as to constitute an occupational disease within the meaning of RCW 51.08.140?

¶ 11 The proposed decision and order then addresses the authority of the Board to decide the question of whether the sexual assaults constitute an occupational disease.

II. OCCUPATIONAL DISEASE

A. AUTHORITY OF BOARD TO DETERMINE ISSUE

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The Board has ruled that the issue of occupational disease properly is before the Board even though the Department's only stated reason for rejecting the claim was that it did not constitute an industrial injury. *In re Susanne Ryan,* BIIA Dec., 46,094 (1977). Where the Department has allowed a claim as an industrial injury and the employer has appealed, the Board has the authority to determine whether the claim should have been allowed as an occupational disease. *In re Joe Callender, Sr.*, BIIA Dec., 89 0823 (1990)....

... Ms. Magee suffered a series of assaults, approximately 15 during her employment and at her workplace. These occurred over a period of three months. The self-insured employer ultimately had sufficient knowledge of the multiple assaults, and so did the Department. The self-insured employer was not correct in referring to the first assault in October, 2000 as the date " the" industrial injury occurred.

Too, Ms. Magee has not repetitively insisted that all of her mental and physical conditions stemmed from that one assault. She has alleged a series of assaults over a three-month period. That is sufficiently similar to a repetitive injury over time to require consideration of the issue. It was the self-insured employer which attempted to narrow the issue in its initial request to deny the claim as not timely filed as an industrial injury. The [*In re Roy*] *Benson* [, BIIA Dec., 53,294 (1980)] facts do not apply to deprive the Board of jurisdiction.

B. REQUIREMENTS FOR AN OCCUPATIONAL DISEASE

An occupational disease must arise naturally and proximately out of distinctive conditions of employment. RCW 51.08.140. *Dennis* [*v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 745 P.2d 1295 (1987)], above. Sometimes, a claim could be filed for each of a series of events or as an occupational disease. Sharon Baxter suffered a series of needle pricks while employed as a dental assistant. The Board held that the condition had not developed to the extent that it was disabling or required treatment until later, and the need for such treatment after this series of events allowed the condition to be considered an occupational disease. Ms. Baxter worked in a profession in which the use of needles was a factor of her employment distinctive from the exposure to needles in the general workplace

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and the exposure of the general public, so her exposure to needles constituted a distinctive condition of **[277 P.3d 4]** her employment. *In re Sharon Baxter,* BIIA Dec., 92 5897 (1994).

Ms. Magee's exposure to sexual assault at Rite Aid does not meet the test for being a distinctive condition of employment. There was nothing in her workplace that distinguished her vulnerability to sexual assault there from the vulnerability of workers to such assaults in all employments in general or in everyday life. Thereby, Mr. Woolford's series of sexual assaults on Ms. Magee from October, 2000 through January, 2001 cannot constitute an occupational disease. *Dennis.*

¶ 12 The conclusions of law in the IAJ proposed decision and order state, in pertinent part:

5. The series of Mr. Woolford's physical and sexual assaults on Marcia R. Magee at the downtown Bellevue, Washington Rite Aid Store between October, 2000 and January, 2001 did not constitute " distinctive conditions of employment" within the meaning of *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467 [, 745 P.2d 1295] (1987).

6. The series of Mr. Woolford's physical and sexual assaults on Marcia R. Magee at the downtown Bellevue, Washington Rite Aid Store between October, 2000 and January, 2001 did not constitute an occupational disease within the meaning of RCW 51.04.140.

¶ 13 Magee filed a petition for review of the proposed decision and order with the Board. In the petition for review, Magee states that the issue is whether she " put her employer, Rite Aid, on notice that she had suffered an injury or occupational disease."

¶ 14 After filing the petition for review, Magee and Rite Aid later entered into a stipulation " regarding the scope of the Board's review." The stipulation states that the issue on appeal is limited to timeliness and " any determinations regarding whether the alleged events constituted an industrial injury or occupational disease were left, by the Department, for its consideration at a later date and time, but would not be considered as part of these appeals."

[167 Wn.App. 67] ¶ 15 On August 1, 2006, the Board issued a decision and order. The Board denied Magee's claim for benefits as an industrial injury because the claim was not filed within the statutory deadline. The Board also concluded that her claim did not constitute an occupational disease under RCW 51.08. 140. The findings in the 2006 Decision and Order state, in pertinent part:

Insofar as the contact with Mr. Woolford was the basis for Ms. Magee's claim, her filing is not timely. The time allowed for filing and the consequences of an untimely filing are codified in RCW 51.28.050 which states:

No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued, except as provided in RCW 51.28.055.

" The timely filing of the worker's claim is a statutorily imposed jurisdictional limitation upon his right to receive compensation and upon the Department's authority to accept the worker's claim for benefits." *Wilbur v. Department of Labor & Indus.*, 38 Wash.App. 553[, 556, 686 P.2d 509] (1984), *Rev. denied*, 103 Wash.2d 1016[, 1985 WL 320859] (1985), [citing] *Wheaton v. Department of Labor Indus.*, 40 Wash.2d 56[, 240 P.2d 567] (1952).

....

Finally, we turn to the claimant's argument that she may have a claim for an occupational disease. An occupational disease is defined in RCW 51.08.140 as a disease or infection that arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title. A series of assaults inflicted upon a worker does not constitute an occupational disease.

The conclusions of law in the Decision and Order state, in pertinent part:

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. The claimant's application for benefits alleging an industrial injury as a result of sexual contact with her immediate

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[277 P.3d 5]

supervisor that occurred between October 2000 and June 2001, filed on January 23, 2004, was not timely within the meaning of RCW 51.28.055.

3. The sexual contact that the claimant had with her immediate supervisor between October 2000 and June 2001, does not constitute an occupational disease within the meaning of RCW 51.08.140.

4. The self-insured employer, Rite Aid, did not violate the terms of RCW 51.25.025 [51.28.025] by failing to report an injury or occupational disease to the Department prior to January 23, 2004.

5. The Department order dated June 3, 2004, in which the Department denied the claimant's request for a penalty against the self-insured employer, is correct and is affirmed. (Docket No. 04 20029).

6. The Department order dated July 9, 2004, in which the Department denied the claim because it was not timely filed, is correct and is affirmed. (Docket No. 04 19326).

Appeal of 2006 Decision and Order

¶ 16 Magee appealed the 2006 Decision and Order of the Board to superior court and challenged " the whole and each and every part of" the Board's decision. However, in her motion for summary judgment, Magee only argued that the Board erred in denying her claim for benefits for an industrial injury as untimely. The superior court affirmed

the Department's decision. On appeal, we affirmed the Decision and Order of the Board denying Magee's claim for benefits. *Magee v. Rite Aid,* 144 Wash.App. 1, 182 P.3d 429 (2008). The supreme court denied the petition for review. *Magee v. Rite Aid,* 164 Wash.2d 1036, 197 P.3d 1185 (2008).

2010 Decision and Order and Order Denying Motion to Vacate

¶ 17 On December 9, 2008, Magee asked the Department to determine whether she was entitled to benefits as an [167 Wn.App. 69] occupational disease for sexual assaults in 2000 and 2001. Magee claimed that because the parties entered into a stipulation limiting the issues in the previous administrative appeal, the Board did not have the authority to conclude that the sexual assaults did not constitute an occupational disease.

¶ 18 On February 6, 2009, the Department denied Magee's request, stating that because the Board's conclusion in the 2006 Decision and Order was " not reversed or vacated by any later court decision, it is now a final and binding conclusion that the department must follow."

¶ 19 Magee appealed the decision to the Board. Magee also filed a motion to vacate the conclusion of law in the 2006 Decision and Order that the sexual assaults do not constitute an occupational disease under the statute. Magee argued that the conclusion of law was void because the Board did not have jurisdiction to decide the question of occupational disease.

¶ 20 On November 9, 2009, the IAJ issued a proposed decision and order. In the proposed order and decision, the IAJ concluded the Board's 2006 Decision and Order was a final and binding decision, and affirmed the Department's decision.

The Conclusion of Law No. 3 as contained in the Board's Decision and Order dated August 1, 2006 is final and binding and becomes res judicata as to the parties to this appeal, pursuant to the provisions of *Marley v. Department of Labor & Indus.,* 125 Wash.2d 533[, 886 P.2d 189] (1994) and *In re Orena A. Houle,* BIIA Dec., 00 11628 (2001).

¶ 21 Magee appealed to the Board. In an order denying petition for review, entered on December 29, 2009, the Board denied Magee's appeal and adopted the proposed decision and order of the IAJ as the Decision and Order of the Board. In an order dated January 20, 2010, the Board denied Magee's motion to vacate the conclusion of law in the 2006 Decision and Order rejecting her claim as an occupational

disease. Assuming the conclusion of law exceeded the scope of review, the Board ruled that the 2006 Decision and Order was final and binding because Magee did not " address the scope of review error in the court of appeals." The Order **[277 P.3d 6]** Denying Motion to Vacate states, in pertinent part:

The claimant argues that the Board exceeded its scope of review in entering this conclusion of law denying the claim as an occupational disease, when the issue before the Board was whether the worker filed a timely application for an industrial injury claim. Accepting that the conclusion of law exceeded our scope of review, the consideration becomes whether such an error is correctable at this stage of proceedings. It clearly is not. When the Board exceeds its scope of review, it has committed an error of law. *In re Orena Houle,* BIIA Dec., 00 11628 (2001). Entering a conclusion of law beyond our scope of review is not a jurisdictional error making the conclusion void. *Marley v. Department of Labor & Indus.,* 125 Wash.2d 533[, 886 P.2d 189] (1994). An error of law must be addressed in an appeal, it may not be corrected through a motion filed under CR 60. *Burlingame v. Consolidated Mines and Smelting Co.* [, *Ltd.*], 106 Wash.2d 328[, 722 P.2d 67] (1986). The erroneous conclusion should have been addressed in the subsequent court appeals. The failure to adequately address the scope of review error in the court appeals is dispositive of the issue. CR 60 does not provide an avenue for relief from the offending conclusion of law after the appellate remedies have been exhausted.

¶ 22 Magee filed an appeal in superior court. Rite Aid and Magee filed cross motions for summary judgment. Magee argued the Board did not have jurisdiction to determine whether sexual assaults meet the statutory definition for an occupational disease. The Department argued that because Magee did not appeal the determination that her claim did not constitute an occupational disease, the 2006 Decision and Order is a final and binding decision.

¶ 23 The superior court affirmed the Decision and Order denying Magee's request to determine whether her claim constitutes an occupational disease, and the order denying her motion to vacate the conclusion of law in the 2006 Decision and Order. The order states, in pertinent part:

This Order is based upon the decisions in *Marley,* 125 Wash.2d 533[, 886 P.2d 189] (1994) and *In re Houle,* 2001 WL 395827 (BIIA). The Board's decision in August 2006 may well have exceeded the scope of review as to Conclusion of Law [(COL)] # 3 but the Board had subject matter jurisdiction to decide/reach conclusions on the issue of occupational disease. When Magee failed to appeal COL

3, it became final.

ANALYSIS

¶ 24 Magee challenges the conclusion in the 2006 Decision and Order that her claim constitutes an occupational disease. Magee asserts that because the Board did not have subject matter jurisdiction, that determination is void. Magee contends the Board only had the authority to address whether her industrial injury claim was untimely.

¶ 25 Subject matter jurisdiction is a question of law that we review de novo. *Dougherty v. Dep't of Labor & Indus.*, 150 Wash.2d 310, 314, 76 P.3d 1183 (2003). The court in *Marley v. Department of Labor & Industries*, 125 Wash.2d 533, 886 P.2d 189 (1994) held that the doctrine of claim preclusion applies to a final judgment by the Department, and in order to prove the final decision is void, " a party must show that the Department lacked either personal or subject matter jurisdiction." *Marley*, 125 Wash.2d at 537, 886 P.2d 189.

¶ 26 In *Marley*, the Department concluded that Marley was not entitled to benefits because she and her husband were separated at the time of his death. *Marley*, 125 Wash.2d at 536, 886 P.2d 189. The Board affirmed the Department's decision. Nearly seven years later, Marley appealed. Marley argued that the Board did not have subject matter jurisdiction to decide whether she was entitled to benefits and, therefore, the Decision and Order was void. *Marley*, 125 Wash.2d at 536, 886 P.2d 189. The supreme court concluded that although the Department may have made an erroneous decision, because the Department " has subject matter jurisdiction to adjudicate all claims for workers'

[277 P.3d 7] compensation," and Marley did not appeal, the Decision and Order was valid and binding. *Marley*, 125 Wash.2d at 542-43, 886 P.2d 189.

[167 Wn.App. 72] ¶ 27 The court held that a tribunal lacks subject matter jurisdiction only when it attempts to decide a type of controversy over which it has no authority to adjudicate. *Marley*, 125 Wash.2d at 539, 886 P.2d 189.

A judgment may properly be rendered against a party only if the court has authority to adjudicate the *type of controversy* involved in the action. (Italics ours.) We italicize the phrase " type of controversy" to emphasize its importance. A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.

The term " subject matter jurisdiction" is often confused with a court's " authority" to rule in a particular manner. This has led to improvident and inconsistent use of the term.

....

... Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously. If the phrase is to maintain its rightfully sweeping definition, it must not be reduced to signifying that a court has acted without error.

Marley, 125 Wash.2d at 539, 886 P.2d 189[2] (quoting *Restatement (Second) of Judgments* § 11 (1982); *In re Marriage of Major*, 71 Wash.App. 531, 534-35, 859 P.2d 1262 (1993)).

¶ 28 The critical question is whether the type of controversy is within the subject matter jurisdiction of the Board. *Marley*, 125 Wash.2d at 539, 886 P.2d 189; *see alsoCole v. Harveyland LLC*, 163 Wash.App. 199, 258 P.3d 70 (2011). " Type of controversy" means the general category without regard to the particular facts of the case, and refers to the nature of a case or the relief sought. *Marley*, 125 Wash.2d at 539, 886 P.2d 189; *Dougherty*, 150 Wash.2d at 317, 76 P.3d 1183. If the type of controversy is within the subject matter jurisdiction of the Department, " ' then all other defects or errors go to something other than subject matter jurisdiction.' " *Marley*, 125 Wash.2d at 539, 886 P.2d 189 (quoting Robert J. Martineau,

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Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse, 1988 B.Y.U. L.Rev. 1, 28). Where the Department has both personal and subject matter jurisdiction over the claim, even an error in the Department's unappealed order does not render it void. *Kingery v. Dep't of Labor & Indus.*, 132 Wash.2d 162, 170, 937 P.2d 565 (1997).[3]

¶ 29 Under the Industrial Insurance Act (IIA), chapter 51 RCW, the Department has broad authority to decide claims for workers' compensation, including claims for industrial injuries and occupational disease. RCW 51.04.020; *Marley*, 125 Wash.2d at 542, 886 P.2d 189. When a claimant appeals the Department's order denying a claim for benefits, the IAJ issues a proposed order and decision that includes findings and conclusions based on the record. RCW 51.52.104. A party can file a petition for review of the proposed order and decision to the Board. RCW 51.52.104. The appealing party " shall be deemed to have waived all objections or irregularities not specifically set forth" in the petition for review to the Board. RCW 51.52.104.

¶ 30 The Board has the authority to review the record, enter findings of fact and conclusions of law as to each contested issue of fact and law, and issue a final order. RCW 51.52.106. A party may appeal the final order of the Board to superior court. RCW 51.52.110.[4] *Marley*, 125 Wash.2d at 538, 886 P.2d 189. But where, as here, a claimant does

not appeal an adverse ruling, the ruling is treated as the final decision of the Department. RCW 51.52.110; *Marley,* 125 Wash.2d at 537, n. 2, 886 P.2d 189.

¶ 31 Magee relies on *Hanquet v. Department of Labor & Industries,* 75 Wash.App. 657, 879 P.2d 326 (1994) to argue that the **[277 P.3d 8]** Board did not have subject matter jurisdiction to decide whether her claim qualified as an occupational disease. But in *Hanquet,* we were not asked to decide subject [167 Wn.App. 74] matter jurisdiction, and the opinion does not address either subject matter jurisdiction or type of controversy.[5]

¶ 32 In *Hanquet,* the Department denied Hanquet's claim for workers' compensation on the ground that he was a sole proprietor. *Hanquet,* 75 Wash.App. at 660, 879 P.2d 326. Hanquet appealed. The sole issue addressed at the hearing before the IAJ was whether Hanquet was a " worker" under RCW 51.08.180 or qualified as a " sole proprietor" under RCW 51.12.020(5). *Hanquet,* 75 Wash.App. at 660, 879 P.2d 326. Nonetheless, in the appeal from the IAJ decision, the Board denied Hanquet's claim based on a different ground— the " private home" exemption, a " highly fact-specific" issue neither party had raised or addressed. *Hanquet,* 75 Wash.App. at 660-63, 879 P.2d 326.

¶ 33 On appeal, Hanquet argued that the Board's decision exceeded the scope of review. *Hanquet,* 75 Wash.App. at 661, 879 P.2d 326. We concluded that if Hanquet had notice that a different statutory exclusion would be considered as a ground for denying coverage, " he might have been able to present additional evidence or argument bearing on the question and the outcome may well have been different." *Hanquet,* 75 Wash.App. at 662-63, 879 P.2d 326. We held that the superior court decision affirming the Board " on an issue not properly before the Board ... exceeded the proper scope of review." *Hanquet,* 75 Wash.App. at 663, 879 P.2d 326.

¶ 34 Here, unlike *Hanquet,* the notice of appeal of the proposed decision and order that Magee filed with the Board states that the issue is whether she " put her employer, Rite Aid, on notice that she had suffered an injury or occupational disease." Although Magee and Rite Aid entered into a stipulation seeking to limit the scope of review in the appeal to the Board, parties cannot stipulate to jurisdiction or create limitations on review. *Barnett v. Hicks,* 119 Wash.2d 151, 161, 829 P.2d 1087 (1992) (citing

Folsom v. County of Spokane, 111 Wash.2d 256, 261-62, 759 P.2d 1196 (1988)). Subject matter jurisdiction does not turn on an agreement or stipulation, either the court has subject matter jurisdiction or it does not. *Williams v. Leone & Keeble, Inc.,* 171 Wash.2d 726, 730, 254 P.3d 818 (2011).

¶ 35 Magee also claims that the superior court erred in relying on a significant decision published by the Board, *In re Orena A. Houle,* BIIA Dec. 00 11628 (2001). We disagree. While not binding, significant decisions published by the Board are persuasive authority. *O'Keefe v. Dep't of Labor & Indus.,* 126 Wash.App. 760, 766, 109 P.3d 484 (2005).

¶ 36 In *Houle,* the Board followed the decision in *Marley.* The Board concluded that it exceeded the scope of review in deciding an issue that was not addressed by the Department. *Houle,* BIIA Dec. 00 11628, at 3.[6] However, because the decision was affirmed in an appeal to superior court, the Board ruled that the decision was a final and binding order and the claimant could not, years later, challenge the order denying the claim. *Houle,* BIIA Dec. 00 11628, at 2, 7.

¶ 37 Here, as in *Marley,* we hold that the question of whether Magee was entitled to workers' compensation benefits for an occupational disease is the type of controversy the Board is authorized to decide under the IIA. Assuming the Board exceeded the scope of review by addressing whether Magee's claim constituted an occupational disease, because Magee did not challenge that conclusion of law in the appeal of the 2006 Decision and Order, that decision is final and binding.

[277 P.3d 9] [167 Wn.App. 76] ¶ 38 We affirm the Board's Order Denying Petition for Review and the Order Denying Motion to Vacate.[7]

WE CONCUR: LEACH, A.C.J., and BECKER, J.

Notes:

[1] In addition, in August 2001, Magee filed a complaint with the Bellevue Police Department. Following an investigation, the police concluded Magee " never physically attempted to stop the sex acts from occurring and she never verbalized her unwillingness except to tell him that the sex was not good and that he had caused medical problems with his rough ways." No charges were filed.

[2] (Internal quotation marks omitted) (italics in original).

[3] Magee does not contend the Board did not have personal jurisdiction.

[4] Likewise, the superior court reviews the record before the Board. RCW 51.52.115.

[5] Likewise, *Lenk v. Dep't of Labor & Indus.,* 3

Wash.App. 977, 978-81, 478 P.2d 761 (1970) is a direct appeal challenging the Board's scope of review.

[6] Scope of review serves to limit the issues the Board has authority to consider, restricting the Board to those matters already passed upon by the Department of Labor and Industries. However, we believe *Marley* supports the conclusion that the scope of review is not jurisdictional, per se.

When the Board exceeds the scope of its review, it commits an error of law by passing on an issue or issues not properly before it. *Houle*, BIIA Dec. 00 11628, at 5-6.

[7] We reject Rite Aid's request to impose sanctions for filing a frivolous appeal. *Streater v. White*, 26 Wash.App. 430, 434-35, 613 P.2d 187 (1980).

APPENDIX 5

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61 Wn.App. 385 (Wash.App. Div. 1 1991)

810 P.2d 1363

Herbert L. RECTOR, Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF the STATE OF

WASHINGTON, Appellant.

No. 26457-5-I.

Court of Appeals of Washington, Division 1.

April 22, 1991

Publication Ordered May 21, 1991.

Review Denied July 2, 1991.

Kenneth Eikenberry, Atty. Gen., A. Craig McDonald, Asst., Yakima, for appellant.

Donald G. Ryan, Auburn, for respondent.

COLEMAN, Presiding Chief Judge.

The Department of Labor and Industries ("the Department") appeals (1) from the superior court's decision to hear Herbert Rector's motion for reconsideration of the order of summary judgment originally entered in favor of the Department and (2) from the superior court's subsequent order for summary judgment in Rector's favor. We reverse.

In 1969 Herbert Rector worked as an ironworker who, in the course of his employment, fell four stories and struck

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the back of his head. Rector was unaware of any hearing loss resulting from that fall until early 1986, when he was told by Gordon Thomas, M.D., that he had a complete loss of hearing in his right ear. [1] If he were to testify, Dr. Thomas would state that the 100 percent hearing loss in Rector's right ear was more likely than not due to the trauma from his fall in 1969.

On April 22, 1986, Rector filed his initial claim with the Department for occupational hearing loss. The Department granted Rector an award for a 15 percent loss of hearing in the left ear resulting from occupational disease, but denied any responsibility for the 100 percent hearing loss in the right ear because it was a preexisting condition caused by the 1969 trauma. The Department filed its order on February 17, 1987, and closed the case.

[810 P.2d 1364] Rector appealed the Department's decision to the Board of Industrial Insurance Appeals ("the Board") which affirmed the Department, concluding in its October 18, 1989, decision that Rector's 1986 claim was not timely filed pursuant to RCW 51.28.050. That statute reads as follows:

Time limitation for filing application or enforcing claim for injury. No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued, except as provided in RCW 51.28.055 [which specifies the time for filing claims for occupational disease].

RCW 51.28.050.

Thereafter, Rector appealed the Board's decision to the superior court, which granted the Department's motion for summary judgment. The court found that Rector did not comply with the 1 year filing requirement for industrial injuries. In so holding, the court considered the definition of "injury" under the act: " 'Injury' means a sudden and tangible happening, of a traumatic nature, producing an

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immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100.

After granting Rector's motion for reconsideration, the trial court considered affidavits presented by Rector, [2] his attorney, and Dr. Thomas, along with Rector's emergency room medical record from the day of the accident, and granted Rector's motion for summary judgment. Contrary to its initial findings, the court concluded that the facts of Rector's case could not be distinguished from those in *Crabb v. Department of Labor & Indus.*, 186 Wash. 505, 58 P.2d 1025 (1936) (involving the reopening of an earlier, timely claim); *Nelson v. Department of Labor & Indus.*, 9 Wash.2d 621, 115 P.2d 1014 (1941) (involving the reopening of an earlier, timely claim and an inability of the claimant to have detected the loss sooner); and Leingang v. Department of Labor & Indus., King County Cause No. 86-2-01045-9 (a superior court case, previously heard by the same trial judge, in which the worker failed to file a

timely claim but recovered from the Department because he could not have discovered the injury sooner). The Department appeals the court's decision to grant Rector's motion for reconsideration and his motion for summary judgment. [3]

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The crux of this appeal is whether the statute of limitation for filing a claim for a work-related injury under the Workers Compensation Act begins to run on the day of the accident or on the day that the worker discovered, or reasonably should have discovered, the injury.

The Department appeals the trial court's decision to adopt the discovery rule for purposes of tolling the 1 year statute of limitation for industrial injuries. Rector concedes that the law does not authorize the use of the discovery rule in worker's compensation injury claims. Nevertheless, he takes the position that the discovery rule should apply for such claims just as it does for various causes of action derived from the common law. He argues that to hold otherwise would deny him any recovery, which would be contrary to the Legislature's intent when it created the Workers Compensation Act.

[810 P.2d 1365] Prior to the 1927 amendments to the Workers Compensation Act, Rector would have been correct. At that time, *Stolp v. Department of Labor and Indus.*, 138 Wash. 685, 245 P. 20 (1926), was the prevailing law. Stolp involved a worker who filed a claim for a work-related eye injury within 4 months after he lost sight in the eye but not within 1 year after the accident that caused him the injury. Stolp, 138 Wash. at 686, 245 P. 20. The act then in effect defined "injury" as "an injury resulting from some fortuitous event as distinguished from the contraction of disease." Rem.Rev.Stat. § 7675. In addition, the act provided that

[n]o application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued.

Rem.Rev.Stat. § 7686. The Stolp court construed the act to mean that a worker "has one year within which to file a claim after the injury has developed which was the result of the fortuitous event." Stolp, 138 Wash. at 689, 245 P. 20.

Within a year, the Legislature amended the act so that an injury was defined as "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt

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result, and occurring from without, and such physical condition as results therefrom." Former RCW 51.08.100, Laws of 1927, ch. 310, § 2. In addition, the time limitation for filing a claim for a work-related injury was amended to read:

No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued.

Former RCW 51.28.050, Laws of 1927, ch. 310, § 6.

Interpreting those legislative changes, *Sandahl v. Department of Labor and Indus.*, 170 Wash. 380, 16 P.2d 623 (1932), held that the claimant's "injury" occurred and the statute of limitation began to run when the claimant fell and injured his shin--the time of the accident--rather than when the physical disability resulted from the accident. Sandahl, 170 Wash. at 384, 16 P.2d 623.

Similarly, in Ferguson v. Department of Labor and Indus., 168 Wash. 677, 13 P.2d 39 (1932), a worker suffered an eye injury from a gas explosion. His first claim to the Department was timely made, although he received no compensation and lost no time from work for the injury diagnosed as "photophobia and running eyes." Ferguson, 168 Wash. at 678, 13 P.2d 39. Five and 1/2 years later, Ferguson filed a second claim because one of his eyes had to be surgically removed due to the original accident. The Department denied the second claim as untimely and the appellate court agreed, concluding that Stolp was no longer viable and that a claimant "must present [a] claim within one year after the day upon which the accident occurred." [4] Ferguson, 168 Wash. at 681, 13 P.2d 39. In sum, an "injury" is not to be distinguished from the accident or event that actually caused it. *Johnson v. Department of Labor and Indus.*, 33 Wash.2d 399, 406, 205 P.2d 896 (1949).

Following Ferguson and Sandahl, the Supreme Court decided *Crabb v. Department of Labor & Indus.*, 186 Wash. 505, 58 P.2d 1025 (1936), and Nelson v.

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Department of Labor & Indus., 9 Wash.2d 621, 115 P.2d 1014 (1941). In Crabb, a claimant whose initial, timely claim listed a sprained ankle later sought compensation for a neck injury that resulted from the same accident. The Department rejected the later claim as untimely because the claimant filed it more than 1 year after the accident. The trial court affirmed the Department's ruling but the Supreme Court ultimately reversed, emphasizing that the Legislature specifically enacted the Workers Compensation Act to ensure that injured workers were adequately compensated. Crabb, 186 Wash. at 512, 58 P.2d 1025.

[810 P.2d 1366] In Nelson, the court relied upon Crabb to hold that a worker, who had originally filed a timely claim

for a fractured ankle, could file a second claim more than 1 year after the accident when he did not discover the accident's disabling effect upon his back until more than 1 year elapsed from the date of the accident. Nelson, 9 Wash.2d at 633, 636, 115 P.2d 1014.

A key fact in the present case distinguishes it from Crabb and Nelson: Rector failed to file a claim within 1 year after his accident, whereas both Crabb and Nelson did. Immediately after his fall, Rector received medical treatment for his head injury and consequently had a duty to report that accident within 1 year if he wanted to seek compensation from the Department. He did not do so.

In addition, Rector argues that under the common law of torts his cause of action could not accrue until his injury became apparent, citing *Gazija v. Nicholas Jerns Co.*, 86 Wash.2d 215, 543 P.2d 338 (1975), and *Haslund v. Seattle*, 86 Wash.2d 607, 547 P.2d 1221 (1976). An industrial insurance claim, however, is governed by explicit statutory directives and not by the common law. The Industrial Insurance Act does not require that a worker have evidence of a compensable injury for purposes of filing a claim under the act and, in fact, provides for the reopening of a settled claim if subsequent injuries arise stemming from the original accident if application is "made within seven years from the date the first closing order becomes final[.]" RCW [61 Wn.App. 391] 51.32.160 Hence, the statute of limitation for filing the initial claim for an occupational injury begins to run when the accident occurs and not when the worker discovers an injury.

We reverse the trial court's order of summary judgment and remand with instructions that a judgment of dismissal be entered in favor of the Department.

BAKER and FORREST, JJ., concur.

Notes:

[1] During the same medical examination, Dr. Thomas also told Rector that he had a 15 percent hearing loss in his left ear not attributable to the 1969 fall, but resulting from occupational disease.

[2] Rector mistakenly asserts that the existence of his 1969 medical records indicates that a claim had been filed with the Department. See Wilbur v. Department of Labor and Indus., 38 Wash.App. 553, 556-57, 686 P.2d 509 (1984), review denied, 103 Wash.2d 1016 (1985) (a claimant's mistaken reliance upon a hospital or a physician to file a claim did not excuse the claimant from fulfilling his own duty to file a claim under the act).

[3] We note that the trial court erred by considering the three affidavits and the medical report presented by Rector with his motion for reconsideration because those documents were not part of the certified record of the Board as required by RCW 51.52.115. See also Lunz v. Department of Labor & Indus., 50 Wash.2d 273, 275, 310 P.2d 880 (1957) (the jurisdiction of the superior court is limited to issues of law and facts decided by the board). However, even if those documents were properly considered, they were irrelevant to the key issue of this appeal (whether the discovery rule applies to worker's compensation injury claims) and thus are not addressed herein.

[4] Ferguson's claim was also denied as an application to reopen the earlier claim because the statute of limitation for such an application was 3 years (now 7 years pursuant to RCW 51.32.160).

APPENDIX 6

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18 Wn.App. 674 (Wash.App. Div. 2 1977)

571 P.2d 229

Edwin W. WENDT, Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES of the State of

Washington, Respondent.

No. 2653-II.

Court of Appeals of Washington, Division 2.

November 9, 1977

[571 P.2d 230]

[18 Wn.App. 675]

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Eugene Arron, Seattle, for appellant.

James S. Kallmer, Asst. Atty. Gen., Seattle, for respondent.

Oliver Malm, Tacoma, for respondent, Weyerhaeuser.

REED, Judge.

Edwin W. Wendt sustained an industrial injury on April 28, 1968, while in the course of his employment with Weyerhaeuser Company. His claim to the Department of Labor and Industries was closed on April 22, 1970 with a finding of permanent partial disability rated at 40 percent loss of function of the right arm and 25 percent of the maximum allowable for unspecified disabilities. On April 13, 1972 he applied to reopen his claim, urging that he was now permanently and totally disabled as a result of an aggravation of his condition. The Department's refusal to reopen his claim was sustained by the Board of Industrial Insurance Appeals on November 27, 1972 and, after a de novo review, a superior court jury affirmed the Board. Wendt appeals and we reverse and remand.

The assignments of error are all directed either to the giving or refusing to give certain instructions to the jury. Several of these assignments are well taken and we will discuss them in the order of their importance.

Following trial the jury was furnished with a verdict form containing two special interrogatories, the first reading as follows:

INTERROGATORY NO. 1:

Was the Board of Industrial Insurance Appeals correct in finding that between April 22, 1970 and November 27, [18 Wn.App. 676] 1972, the plaintiff's physical conditions due to his industrial injury of April 26, 1968, did not worsen and become more disabling in any degree?

The jury answered this interrogatory in the affirmative; it was therefore unnecessary for them to answer the second interrogatory, which asked if the claimant's present disability was total and permanent.

Wendt's major contention on appeal is that he was entitled to an instruction based upon the so-called "lighting up" theory, which has been approved by our Washington courts. *Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 295 P.2d 310 (1956); *Jacobson v. Department of Labor & Indus.*, 37 Wash.2d 444, 224 P.2d 338 (1950); *Miller v. Department of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939) and the many cases cited therein. These cases have consistently held that such an instruction should be given where there is substantial evidence to support it. To this end Wendt proposed and was refused the following instruction.

You are instructed that if an injury lights up or makes active a latent or quiescent infirmity or weakened condition, whether congenital or developmental, then the resulting disability is to be attributed to the injury and not to the preexisting condition. Under such circumstances, if the accident or injury complained of is a proximate cause of the disability for which compensation or benefits is sought, then the previous physical condition of the workman is immaterial **[571 P.2d 232]** and recovery may be received for the full disability, independent of any preexisting or congenital weakness.

Our review of the record leads us to conclude there was substantial evidence to support the giving of such an instruction in this case and that it was prejudicial error not to do so. Mr. Wendt, his wife and a family friend all testified that the claimant suffered increased pain, muscle spasms and limitation of motion between the terminal dates; in addition, he had medical support for his position. Dr. J. Harold Brown, a general practitioner specializing in

the care and treatment of industrial injuries and conditions, stated:

The problems directly referable to the industrial injury in the majority affect the right upper extremity and right chest and spine. He did have pre-existing disability involving the left shoulder, and of course, I cannot evaluate what role the industrial injury had upon this left shoulder except by his history of increased symptoms. One must recognize that this pre-existed the industrial injury with which we are concerned today. However, he did have an injury to the right upper extremity which included a rupture presumptively of the long head of the biceps or of the biceps muscle and an injury also to the right elbow. The residual effects of this injury to the right upper extremity have been described in physical findings. Presumptively, too, he had either a rib fracture or several rib fractures. At any rate, those rib fractures have healed without offset and without demonstrable bony change insofar as alignment is concerned. The injury to the posterior chest however was one which created not only rib fractures but also the initiation of symptoms which have created spasms and pain since that time. I believe that these symptoms refer to the hypertrophic osteoarthritis which is seen in the mid and low back and that this was not caused by the industrial injury. These changes pre-existed the industrial injury but have come into symptomatic being through the trauma which the industrial injury visited upon these pre-existing but asymptomatic areas. Additionally and not related to the industrial injury, there is demonstrated either a mental or cerebral vascular problem. He could not classify it in either way as being symptomatic by virtue of irritability, forgetfulness, confusion; this again by emphasis does not seem to have relationship to the industrial injury and would seem to have been in its beginning at least prior to the industrial injury. Additionally, there is a pulmonary problem of chronic intensity which would not seem to be related to the industrial injury. The diagnosis of his pulmonary area problem is in doubt as far as I am concerned. The pulmonary area problem either represents a bronchiatic palpatic, a chronic estasis, or chronic bronchitis. [18 Wn.App. 678] As a result of the injury to the right upper extremity and right posterior chest, mid and low back, in the 1968 injury superimposed upon prior unrelated disabilities involving the left shoulder, the lungs, the mid and low back at least radiographically and perhaps mentally or in a cerebral vascular sense, I feel that he is totally and permanently disabled and unable to return to his occupation.

(Emphasis added.)

Dr. Brown's findings and conclusions were based upon 2 physical examinations of the claimant conducted by him on April 11, 1970 and August 10, 1972, and upon x-rays taken in 1969 by Dr. Chambers, the Department's witness. In addition, both Drs. Brown and Chambers found objective evidence of a flattened lumbar curve in 1972, a condition which was not present when Dr. Chambers examined the claimant in 1969. Dr. Chambers also agreed that the claimant exhibited a stiffer back in 1972 than he did in 1969, and that current x-rays displayed marked arthritic changes in his lower back, possibly accounting for the increased stiffness as well as his complaints of disabling pain. Although the Department's doctors sharply disputed Dr. Brown's findings, and attributed the claimant's disability solely to his chronic progressive arthritis, his left **[571 P.2d 233]** arm problems, his cerebral vascular problems, his pulmonary difficulties and other conditions completely unrelated to the injury, these differences of opinion merely served to create issues of fact for ultimate resolution by the jury. Jacobson v. Department of Labor & Indus., supra.

Based upon this evidence, the jury could have found the 1968 injury lighted up or made symptomatic the preexisting and previously quiescent or asymptomatic arthritic condition. They could then further have found that this condition rendered the claimant more disabled than he had been when his claim was closed in April 1970. The jury would then have answered interrogatory No. 1 in the negative and, upon proper instructions, could have assessed the extent of that disability, i. e., whether or not it was total

and permanent, when considered in combination with the claimant's other infirmities.

The Department argues, however, that the error did not prejudice Wendt because the court's other instructions (7, 9 and 10) [1] permitted him to adequately present and argue his theory to the jury. *Nelson v. Mueller,* 85 Wash.2d 234, 533 P.2d 383 (1975). We disagree. Such general stock instructions might suffice were a less technical proposition involved. Here, however, a jury of lay persons might well consider the "lighting up" theory esoteric, to say the least. In such a case the law should be explicated by the judge in particular terms to insure that the jury grasps its subtleties. Finally, far from involving a mere fringe or subordinate issue, the requested instruction embodied the gist or substance of Wendt's claim. When such a key issue is involved, a correctly worded and particularized instruction should be given, and general instructions such as the court gave here will not suffice. *Kiemele v. Bryan,* 3 Wash.App. 449, 476 P.2d 141 (1970); *Lidel v. Kelly,* 52 Wash.2d 238, 324 P.2d 817 (1958); *DeKoning v. Williams,* 47 Wash.2d 139, 286 [18 Wn.App. 680] P.2d 694 (1955). We think this is particularly true in workmen's compensation cases where the court is required to give a liberal interpretation of the act in favor of the workman. *Gaines v. Department of Labor*

and Indus., 1 Wash.App. 547, 463 P.2d 269 (1969); *Wilber v. Department of Labor & Indus.*, 61 Wash.2d 439, 378 P.2d 684 (1963); *Hastings v. Department of Labor & Indus.*, 24 Wash.2d 1, 163 P.2d 142 (1945). [2]

Having determined that a new trial is necessary, we will nevertheless discuss Wendt's other assignments of error, with a view to avoiding instructional errors upon a retrial. Wendt's next contention is that the court's instruction No. 8 defining "permanent total disability" [3] was improper because **[571 P.2d 234]** it did not encompass the "special work" or "odd job" doctrine. See *Allen v. Department of Labor & Indus.*, 16 Wash.App. 692, 559 P.2d 572 (1977); *Buell v. Aetna Cas. & Sur. Co.*, 14 Wash.App. 742, 544 P.2d 759 (1976); *Fochtman v. Department of Labor & Indus.*, 7 Wash.App. 286, 499 P.2d 255 (1972); *Kuhnle v. Department of Labor & Indus.*, 12 Wash.2d 191, 120 P.2d 1003 (1942). We agree because, from the medical opinions presented, a jury might believe that on November 27, 1972 Wendt "could perform light sedentary work" or "could engage in light activity," even though he may be unable to return to his

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former employment as a carpenter-millwright. Without a "special work" instruction the jury might further believe such work is available to him on a regular basis, thus rendering him less than totally disabled, even though the Department does not carry its burden of showing the availability of such work. Fochtman v. Department of Labor & Indus.,supra. Upon a retrial of this matter, the court's instruction on total disability should include the following:

If, as a result of an industrial injury, a workman is able to perform only special work not generally available, then he is totally disabled, unless you find that some special kind of work which he can perform is, nevertheless, available to him on a reasonably continuous basis.

Allen v. Department of Labor & Indus., supra, 16 Wash.App. at 693, 559 P.2d at 573.

The claimant next assigns error to the trial court's refusal to give the following instructions:

Proposed instruction No. 12:

When a workman is unable to perform reasonably obtainable work suitable to his qualifications and training he is said to be totally disabled. When a significantly contributing cause of that inability is an industrial injury, the workman is entitled to receive total disability benefits under the Workmen's Compensation Act regardless of the fact that other circumstances and conditions may also be considered contributing causes of that inability.

(Emphasis added.)

Proposed instruction No. 14:

The fact that a workman may be considered totally disabled due to conditions unrelated to his industrial injury will not deny him total disability benefits under the Workmen's Compensation Act as long as the industrial injury is a proximate cause of his total disability.

(Emphasis added.)

Wendt argues that he was entitled to these instructions under the rule enunciated in *Shea v. Department of Labor & Indus.*, 12 Wash.App. 410, 529 P.2d 1131 (1974). In

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Shea it was held that if a workman's industrial injury, considered separate and apart from his other bodily conditions, renders him totally disabled, then he is entitled to total disability compensation, even though he may also be totally disabled solely as a result of a condition not related to his injury. We do not agree that the Shea decision supports the giving of these instructions. Proposed instruction No. 12 simply lifts language from the Shea opinion at page 415, 529 P.2d 1131; this language was intended only as an explanation for the holding therein and not for use as an instruction; to employ it in such a manner would only tend to confuse the jury on the terms "proximate cause" and "contributing cause." Proposed instruction No. 14 was also inappropriate because, while there was evidence from the Department's doctors that Wendt was totally disabled solely because of conditions not causally related to his industrial injury (left arm injury, cerebral vascular, and pulmonary deficiencies), there was no **[571 P.2d 235]** evidence whatsoever that he was totally disabled because of his industrial injury alone. On the contrary, as Wendt has so vigorously urged, his own medical evidence was designed to prove that his total disability was caused by his lighted-up preexisting arthritic condition superimposed on his noninjury-caused conditions. Therefore, the Shea doctrine was not applicable and the trial court correctly refused the proposed instructions.

We do think, however, that Wendt was entitled to an appropriate instruction on the theory he may have been attempting to present in his proposed instructions No. 12 and 14, supra, i. e., that his total permanent disability is compensable as such even though it results from the combined effects of his industrial injury (lighted-up arthritis) and other, completely unrelated disabling conditions. *Hurwitz v. Department of Labor & Indus.*, 38 Wash.2d 332, 229 P.2d 505 (1951); *Clayton v. Department of Labor & Indus.*,36 Wash.2d 325, 217 P.2d 783 (1950). In

actuality, the "multiple proximate cause" theory is but another way of stating the fundamental principle that, for disability assessment purposes, a workman is to be taken as he is,

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with all his preexisting frailties and bodily infirmities. Shea v. Department of Labor & Indus., supra; Fochtman v. Department of Labor & Indus., supra. If, in fact, an industrial injury is a proximate cause of a disability, it matters not that such an injury would not have disabled another workman in the same degree because the latter previously enjoyed perfect health. In the instant case, in addition to the testimony of Dr. Brown which we have already alluded to, Wendt offered his attending physician, Dr. Whiteneck, who testified as follows regarding causation:

Q. What is your opinion, Doctor, based upon your overall experience with this man as to whether say, between January 1970, when you had seen him, and November of 1972, when you saw him, whether this man's condition from his industrial injury had gotten worse or not?

A. I felt he had gotten worse, yes.

Q. In your opinion, Doctor, say, in November of 1972, was this man able to work?

A. No.

Q. Was this injury he had in 1968 a factor or a cause of his being unable to work?

A. Yes.

Q. What other factors were involved in your opinion in his inability to work?

A. Really, there were two that were most important: the first was the left arm, which had been injured many years Before . The left shoulder which had been injured many years Before . And the second thing was this increasing amount of dependence, the chronic brain syndrome developing, which I call it, which isn't very specific; and I think that means most of the time this thing means cerebral vascular insufficiency. So I have stated it that way.

Despite the faults we have found with Wendt's proposed instructions 12 and 14, supra, we think his theory of multiple proximate cause could have been adequately argued to the jury if the trial court had accepted his proposed instruction No. 7 which reads as follows:

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent

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cause, produces the disability complained of and without which such disability would not have happened.

There may be one or more proximate causes of a disability.

A workman is entitled to benefits under the Industrial Insurance Act if his injury is a proximate cause of the alleged disability for which benefits are sought. The law does not require that the injury be the sole proximate cause of such disability.

We hold it was error not to give the requested instruction; the error was compounded by the giving of court's instruction No. 7, to which Wendt also assigns error, and which reads as follows:

[571 P.2d 236] The plaintiff is entitled to compensation only for disability proximately caused by the industrial injury of April 26, 1968.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the disability complained of and without which such disability would not have happened. There may be one or more proximate causes of a disability.

(Emphasis added.)

This instruction should not have been given because the first sentence could have led the jury to believe that the industrial injury must be the sole proximate cause of disability. Even with the addition of its second paragraph (WPI 155.06) the instruction fails to explain adequately the law of multiple proximate causes. On a retrial an appropriate instruction on this theory should be given, such as Wendt's proposed instruction No. 7. Hurwitz v. Department of Labor & Indus., supra; Clayton v. Department of Labor & Indus., supra.

Wendt has next assigned error to court's instruction No. 12 reading as follows:

The questions regarding whether plaintiff's condition became aggravated, regarding the extent of permanent disability, if any, and proximate cause, must be established by medical testimony.

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To prove any of these facts a physician cannot rely solely on what the plaintiff tells him, in other words, subjective complaints. The physician must base his opinion regarding these questions, at least in part, on objective medical

findings.

Statements of complaints by the workman made to a physician are called subjective complaints. Findings of disability which can be seen, felt, or measured by an examining physician are called objective findings.

This instruction appears to have been adopted without substantial change from *Parks v. Department of Labor & Indus.*, 46 Wash.2d 895, 286 P.2d 104 (1955) where it is strongly criticized as not being a clear statement of the law. The instruction is misleading in its use of the words "if any" when referring to Wendt's permanent partial disability because that fact had been finally determined in 1968 and was therefore res judicata. *Dinnis v. Department of Labor & Indus.*, 67 Wash.2d 654, 409 P.2d 477 (1965). In addition, the instruction appears to confuse burdens of proof by suggesting that the burden is upon the physician rather than the claimant. Even though we do not find the giving of this instruction to have been error when it is considered with other instructions given by the trial court, upon a retrial a more appropriate instruction should be given. See WPI 155.09 and 155.12.

Finally, the claimant contends the trial court erred when it rephrased Board finding No. 4 in apparent contravention of RCW 51.52.115, which provides in part:

Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue Before the court.

We find no prejudicial error because the trial judge's rewording did not change the ultimate fact finding; he merely excised evidentiary commentary. Such a procedure is proper under *Stratton v. Department of Labor & Indus.*, 1 Wash.App. 77, 459 P.2d 651 (1969) and Gaines v. Department of Labor & Indus., supra.

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Reversed and remanded.

PEARSON, C. J., and PETRIE, J., concur.

Notes:

[1] These instructions read as follows:

Instruction No. 7:

"The plaintiff is entitled to compensation only for disability proximately caused by the industrial injury of April 26, 1968.

"The term 'proximate cause' means a cause which in a direct sequence, unbroken by any new independent cause, produces the disability complained of and without which such disability would not have happened. There may be one or more proximate causes of disability."

Instruction No. 9:

"You are instructed that where a workman is injured by an industrial accident protected by the Workmen's Compensation Act of this state, he is entitled to be compensated for all of the disability which proximately results, either directly or indirectly, from his industrial injury either to the same part or some other part of the body."

Instruction No. 10:

"The Workmen's Compensation Act of this state applies to all persons engaged in extrahazardous employment, regardless of their age or the previous condition of their health.

"In determining the effect of an industrial accident upon a workman, such effect must always be determined with reference to the particular workman involved, rather than what effect, if any, such an accident would have had, if any, upon some other person."

[2] While we believe Wendt's proposed instruction No. 5 was sufficient to call the court's attention to his theory of the case, we do not necessarily approve of the precise wording of that instruction. Upon a retrial, instructions on the "lighting up" theory should be drawn so as to clearly and concisely present the law and Wendt's theory of the case to the jury. See Jacobson v. Department of Labor & Indus., 37 Wash.2d 444, 224 P.2d 338 (1950) and cases cited therein.

[3] Instruction No. 8 (WPI 155.07) reads as follows:

"Permanent total disability is an impairment of mind or body which renders a workman unable to perform a gainful occupation.

"Total disability is the loss of all reasonable wage earning capacity. A workman is not totally disabled solely because he cannot return to his former occupation, but is totally disabled if he cannot perform regular employment within the range of his capacities, training and educational experience with a reasonable degree of success and continuity.

"Total disability is permanent when it is reasonably certain to continue without a lessening of the disability."

APPENDIX 7

RCW 51.28.055

Time limitation for filing claim for occupational disease—Notice—Hearing loss claims—Rules.

(1) Except as provided in subsection (2) of this section for claims filed for occupational hearing loss, claims for occupational disease or infection to be valid and compensable must be filed within two years following the date the worker had written notice from a physician or a licensed advanced registered nurse practitioner: (a) Of the existence of his or her occupational disease, and (b) that a claim for disability benefits may be filed. The notice shall also contain a statement that the worker has two years from the date of the notice to file a claim. The physician or licensed advanced registered nurse practitioner shall file the notice with the department. The department shall send a copy to the worker and to the self-insurer if the worker's employer is self-insured. However, a claim is valid if it is filed within two years from the date of death of the worker suffering from an occupational disease.

(2)(a) Except as provided in (b) of this subsection, to be valid and compensable, claims for hearing loss due to occupational noise exposure must be filed within two years of the date of the worker's last injurious exposure to occupational noise in employment covered under this title or within one year of September 10, 2003, whichever is later.

(b) A claim for hearing loss due to occupational noise exposure that is not timely filed under (a) of this subsection can only be allowed for medical aid benefits under chapter **51.36** RCW.

(3) The department may adopt rules to implement this section.

[**2004 c 65 § 7; 2003 2nd sp.s. c 2 § 1; 1984 c 159 § 2; 1977 ex.s. c 350 § 34; 1961 c 23 § 51.28.055.** Prior: **1959 c 308 § 18**; prior: 1957 c 70 § 16, part; 1951 c 236 § 1, part.]

NOTES:

Report to legislature—Effective date—Severability—2004 c 65: See notes following RCW **51.04.030**.

APPENDIX 8

Supervisor's Report of Accident for Bodily Injury/Illness

TOC SERVICES — The One Choice for All Solutions

SECTION 1*

Company Name:	City/Location:	Case #	Claim #
Hoogendorn	Burlington	2010-22	
Worker Name: First: Eddy Middle: Noel Last: Noble		Date of Birth: (mm/dd/yyyy) 1/9/207	☒ Male ☐ Female
Worker Home Address: Street, not PO Box	City, State, Zip	Hire Date: (mm/dd/yyyy)	Home/Message Phone ( ) -

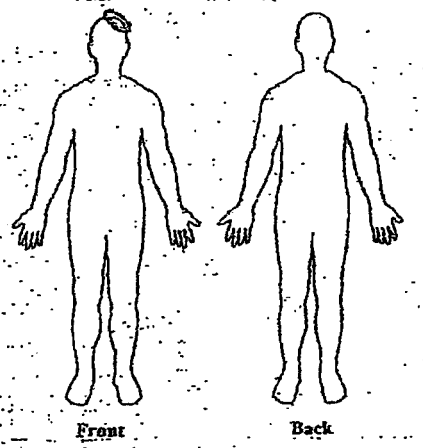
INJURY/ILLNESS INFORMATION

- ☐ This was a SUDDEN injury. It occurred on (date) 5-13-10 at (time) 1530 ☐ am ☒ pm (check one)
- ☐ Worker has had ONGOING WORSENING SYMPTOMS that began about _____ ☐ days ago ☐ months ago ☐ years ago (check one)
- ☐ Worker has/is going to get medical care. First treatment date _____ Physician name _____
  Clinic name & address _____
  Hospitalized as an In-Patient? ☐ Yes ☐ No Emergency Room? ☐ Yes ☐ No
- ☐ If the employee died, when did death occur? Date of Death ____/____/____

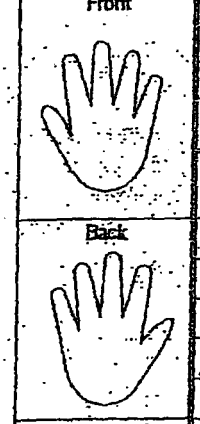
SECTION 2**

WHAT WAS THE INJURY OR ILLNESS

☐ Strain, sudden	☐ Puncture/Sliver
☐ Strain, gradual	☐ Eye Irritation (Foreign Body)
☐ Sprain	☐ Skin Irritation
☐ Fracture	☐ Throat/Lung Irritation
☐ Amputation	☐ Burn
☐ Cut/Laceration	☐ Loss of Consciousness
☐ Scrape/Abrasion	☐ Hernia
☒ Bruise/Contusion	☐ Chemical Burn
☐ Pinch/Crush	☐ _____



Shade in the areas of the body that were affected



Right ____
Left ____

DESCRIPTION OF WHAT HAPPENED

Describe the activity as well as the tools, equipment, or material the employee was using; tell us how the injury occurred, and what object or substance directly harmed the employee. Be specific. *Example: Employee was carrying tools while climbing ladder when the ladder slipped; employee fell 20 feet to concrete floor.*

SUPERVISOR: Was reported to me by Alex Rubenko that Alex Rumayor was struck by a board in the glove area.

Supervisor's Signature _____ Date 5-13-10

WORKER: While offloading the glove Dennis Meeks Picked a 10 inch long piece of Alex's hand and did not have the board high enough and struck Alex in the hand.

Worker's Signature _____ Date 5/13/10

SECTION 3

WORK ASSIGNMENT INFORMATION

1. Worker's usual job title? Yes — How long in this job? 3 months
2. Worker's job title at injury (if different from usual job) _____ — How long in this job? _____
3. If the worker was performing the usual job at time of injury, were the work speed and/or physical demands unusual when the medical condition started?
   ☒ Yes ☐ No If yes, explain: Alex says the operator was rushing

SECTION 4

RETURN TO WORK INFORMATION

Worker was: (check one)
- ☐ Released to regular work on (date): _____
- ☒ Released to light/modified work on (date): _____
- ☐ Returned to work (date): _____
- ☐ Returned to work (date): _____

Worker was absent due to the industrial injury/illness on (dates): _____

* Section 1 and any other employee identifier (i.e. employee's signature) must be omitted when sharing "privacy concern cases"
** If an authorized collective bargaining agent of employees asks to see this report, you should share only Section 2 (no other sections).

6003 23rd Drive West, Suite 200
Everett, WA 98203

PLEASE COMPLETE OPPOSITE SIDE

TOC 3699WA/ Rev. 2/6/08

Board of Industrial Insurance Appeals
In re: Rumayor, Alex
Docket No. 13 10484
Exhibit No. 5
☐ ADMITTED ☐ REFUSED
DATE 7/17/14

APPENDIX 9

NI 5/9/2013 10:20:09 AM [Pacific Daylight Time]

Report of Industrial Injury or Occupational Disease

Language preference (check one): ☒ English ☐ Spanish ☒ Russian ☐ Korean ☐ Chinese ☐ Vietnamese ☐ Laotian ☐ Cambodian ☐ Other: ____

Claim No. AQ 03220

Worker Information

1. Name (First-Middle-Last): Aleksande S. Rumyantsev
2. ☒ Male ☐ Female
3. Social Security Number: [redacted]
4. Home phone: (509) 226-3515
5. Birthdate: 11/21/58
6. Home address: 5904 N Canal RD
City: Newman Lake State: WA ZIP Code: 99025
7. Height (Ft-In): 5-08
8. Weight: 247 lb
9. Mailing address or different from home address: the same as above
10. Family status: ☒ Married ☐ Widowed ☐ Separated ☐ Single ☐ Divorced ☐ Registered Domestic Partner

Dependent Information

Family and dependent eligibility: You may be required to show proof of marriage, domestic partnership registration, or dependent eligibility.

11. Dependent children (include unborn; estimate birth date. Benefits will be based in part on number of legally dependent children. If you don't have legal custody, complete Box 13.)
12. Name of Spouse or Registered Domestic Partner: wife Vera A. Rumyantsev

Name	Relationship	Living with you	Birthdate
Pavel A. Rumyantsev	son	☒ YES ☐ NO	08/04/89
Pete A. Rumyantsev	son	☒ YES ☐ NO	06/26/91
Natalya A. Rumyantsev	daughter	☒ YES ☐ NO	05/27/93
Sergey A Rumyantsev	son	☒ YES ☐ NO	08/20/94
		☐ YES ☐ NO	/ /

13. Name & address of children's legal guardian: at home, with parent
Address: 5904 N Canal RD, Newman Lake, WA 99025

Injury Information

14. Date of injury or last occupational exposure: 03/19/10 05/13/10
15. Time of injury: PM 7:30 ☐ AM ☒ PM
16. Shift (check one): ☒ Day ☐ Swing ☐ Night
17. Have you ever been treated for the same or similar condition? ☐ YES ☒ NO
18. Is this condition due to a specific incident? ☒ YES ☐ NO have tools hitted him on head twice
19a. Body parts injured or exposed: Loss vision, Hearing, NH problems
19b. Describe in detail how your injury or exposure occurred: very have tools/equipments hitted him head – approved by act pages in results at disable with NH problems Loss vision, hearing, bonds muscules
20. Were you doing your regular job? ☐ YES ☒ NO
21. Where did the injury or exposure occur? ☐ Employer Premises ☐ Jobsite ☐ Other: home
22. Where did the injury/exposure occur? Name of business: Huntwood 23800E Appleway Avenue
Address: Liberty Lake, WA 99019 tel (509) 924-5858
23. Was the injury caused by a faulty machine or product – or another employer's worker? ☒ YES ☐ NO ☐ POSSIBLY
24. List any witnesses: see on documents – accident Reported sighne by supervisor
25. When will you return to work? disable / N/A
26. When did you last work? 09/12/11
27. Did you report the incident to your employer? ☒ YES ☐ NO If "yes" write name and title:
28. Date you reported it: 03/19/10 05/13/10
29. Did you have employer-paid health care benefits on day injured? ☐ YES ☒ NO

Employer Information

30. Business name of your employer: Huntwood Custom Cabinets
31. Type of business: to glue of wood
32. How long have you worked there? from 03/08 to 09/12/2011 — 3 Years 5 Months __ Weeks __ Days
33. Employer's phone: ( )
34. Your employer's address: 23800 E Appleway AVE, Liberty LK WA 99019
35. List your job title and describe your job duties: Labor, did any job, as needed by supervisor agreements
36. Rate of pay at this job: $ 10.50 ☒ Hour ☐ Week ☐ Day ☐ Month ☐ More than 1 rate of pay
37. Hours per day: 8
38. Days per week: 5
39. Additional earnings (check all that apply): for overtime ☐ Piecework ☐ Tips ☐ Regular overtime ☐ Shift diff. ☐ Commission ☐ Bonuses in the last 12 months — $ differ
40. How many paying jobs do you have? one
41. I am a: Labor ☐ Owner ☐ Partner ☐ Corp. Officer ☐ Corp. Shareholder ☐ Corp. Director ☐ Optional Coverage ☐ Does not apply to me
42. Signature — Note: READ LEGAL NOTICES ON THE WORKER'S COPY OF THIS FORM
I declare these statements are true to the best of my knowledge and belief. In signing this form, I permit health care providers, hospitals, or clinics to release relevant medical reports, which they or others produce, to the Dept. of Labor & Industries.
X [signature] / A. Rumyantsev / Today's date 08/09/12

Health Care Provider Information

1. Diagnosis: Loses hearing for both ears, needs also to have aid of hearing
2. ICD Dx Codes: ____
3. Date you first saw patient for this condition: 08/09/12
Patient's ID number, if available: Lic # Rumyaa S426QA
Claim No. AQ 03220
4. Is the condition due to a specific incident? ☒ YES ☐ NO growing too many problems of Health
5. Objective findings supporting your diagnosis (include physical, lab and X-ray findings): Exam notes from 2008 reveal healthy male without problems, now with migraines, eye pain, HTN DM
6. Treatment and diagnostic testing recommendations: Medications
7. Was the diagnosed condition caused by this injury or exposure? Check one. ☐ YES ☐ PROBABLY (51% or more) ☐ NO ☐ POSSIBLY (Less than 50%)
8. Will the condition cause the patient to miss work? ☒ YES ☐ NO
If YES: This patient may return to work in N/A days. as disable
9. Is there any pre-existing impairment of the injured area? ☐ YES ☐ NO If YES, describe briefly or attach report.
10. Has patient ever been treated for the same or similar condition? If YES, provider name, city & year. only first aid ☒ YES ☐ NO
Name: Huntwood LbL WA due job time
11. Are there any conditions that will prevent or slow recovery? If YES, describe briefly or attach report. ☐ YES ☒ NO he needs to protect him, his health
12. Did you refer the patient to another health care provider for follow-up? If YES, referred to: ☐ YES ☐ NO
Name: Phone ( )
13. Name of attending health care provider (Please print): Lylanya Cox Phone (509) 3264343
14. IMPORTANT: L&I Provider Number or NPI of provider listed in Box 13.
15. Name of hospital or clinic where patient was treated: SFF
Name: SFFC Phone (509) 326-4343
Address: 120 W Mission
City: Spokane State: WA ZIP: 99201
16. Signature (NOTE: Licensed health care provider must sign report)
X [signature] MD Today's date 5/9/13

Board of Industrial Insurance Appeal
In re: Rumyantsev
Docket No. 13 10689
Exhibit No. 1
☑ ADM 2/18/14 Date

APPENDIX 10

Q Now, when you saw Mr. Rumyantsev on May 9, 2013, did he describe any industrial injuries to you or events?
A Yes.
Q What events did he describe to you?
A Good question. (Reading) I believe he told me that he had hit his head, only I believe it was more than one time over a period of time while he was working at the cabinet shop.
Q The cabinet shop, would that be Huntwood?
A Yes.
Q So he reported multiple injuries to his head --
A I believe that's right. I believe it was more than one time he hit his head.

MR. DALTON: Just for purposes of the record just so you have the dates, we've stipulated I believe -- did we stipulate to both of these?

Q (BY MR. DALTON) We've at least stipulated to March 19, 2010, ER904 Exhibit B.

So he had one head injury on March 19, 2010, with Huntwood Services and, then according to the report, he also had one on May 13, 2010, looking at the Exhibit A.

Now, in your practice do you treat patients for brain injuries --
A Yes.
Q -- and trauma? Is that a common part of your practice?

Q (BY MR. DALTON) Go ahead and answer.
A No. Sometimes you don't see the effects of a brain injury until later.
Q And how do you know this?
A Because I've seen it with other patients.
Q Is it part of your medical training and experience?
A Yes.
Q And how much later can these symptoms show up?
MS. MOUNSEY: Objection; lack of foundation. Counsel, if you would just allow me to have a continuing objection when it comes to symptoms and brain injury, the timeliness.
MR. DALTON: I'll respond to that timeliness question I'll go to timeliness but I will let you have your continuing objection.
MS. MOUNSEY: Maybe it will go smoother.
A So usually it can be, I believe it's within about a year, but I've seen it five years after the fact. Sometimes probably evenly later. I think some of it depends on the age of the person when they have the brain injury and how well their brain recovers and then some of it also is concussions that have added up and don't show until the become adults -- or become older adults (Gesturing).
Q So when you say concussions that have added up or symptoms -- let me back up.

started by the initial injury.
Q (BY MR. DALTON) Go ahead and answer.
A Probably both. That I think there was the initial injury which caused the head trauma and then as time has gone on the brain injury disease has progressed.
MS. MOUNSEY: Also, I move to strike Dr. Cox's last statement. I don't believe she is testifying as a brain injury expert.
MR. DALTON: Again, it goes to her experience in the field having dealt with the multiple patients with brain trauma.
Q (BY MR. DALTON) So I'll ask a follow-up question. In your experience, Dr. Cox, dealing with these types of cases and you've partly testified to this, but can we determine specifically Mr. Rumyantsev's symptoms are related to a specific event or to the repetitive nature of his injuries or both, do we know?
A I don't think we know for sure whether it's from one thing or from a chronic continuing problem. It's probably both.
Q Now, I guess we haven't specifically clarified. Is this what they are calling a post-concussive syndrome or a repetitive head injury syndrome, how would you diagnose Mr. Rumyantsev's head injury from your experience?
A I would actually just call it a traumatic brain injury.

APPENDIX 11

the top clean. So I started cleaning from the top. And I was cleaning. And there was like clamps there, which went off and hit me in the head. That's it.

I was supposed to be cleaning from the bottom. But to him, to him it was seeming that it was an easy something. But I don't know how it happened. It simply what happened was that -- it was before break. Everybody went there on a break, and I started working. That's all.

Q. Now, you said you were hit on the head. Where were you hit on the head, do you recall?

A. Well, I don't remember on, on which side of the head. But I started, the blood started pouring in. And I went up to my manager. And we went with him like to an office or whatever it was. And they put the sticker somewhere on me. And then they sent me back to work.

Q. And --

JUDGE EMMINGHAM: By sticker does he mean bandage?

THE WITNESS: Well, yes, something like, like a bandage. But I just don't remember what it was.

Q. (By Mr. Dalton) And on the report it shows that you hit the front of your head. Do you have any reason to dispute that?

A. Well, yes, the front.

MS. MOUNSEY: Objection. He's already testified that he didn't recall where he hit his head.

JUDGE EMMINGHAM: Overruled.

MR. DALTON: Exhibit No. 1, yes.

Q. (By Mr. Dalton) In the top box, No. 14, it gives the date of May 13th, 2010. Do you recall that in, is that the right date for the injury?

A. I don't remember that. I -- the dates, I simply don't notice them.

Q. And what happened on that date for your injury?

A. Well, on that day we've always been working together, the two of us. As usually, he was gluing until lunch. And I was handing him the wood planks. And after that I was gluing them, and he was handing them to me. And now they gave us three, three of us. And planks of wood were long. I don't know why they gave us a third person.

And we were supposed to be -- well, short to say, there were 11 pieces of those planks of wood. We had to take four to five, four to five planks, and there were like 12 or whatever it's called. So we were supposed to take them and then turn around and rotate 180 degrees like this at once (Indicating). And I don't know why they needed us to do that. But simply we were supposed to duck all the time from those planks of wood. Because it was not, it was just impossible to work with three of us.

So I was ducking and ducking. And after that I kind of delayed it. I don't know why. And he was working so fast. Well, he was trying. And with all the force with all the planks, 2 by 4s, it was like I don't know how, it

was like a pack of those planks of wood. And over where the whole, with the whole turn force, he gave me the blow on the back of my head here.

And right away I had the blood running down the back of my head. And it dropped me from side to side. I mean, I got dizzy. And I don't remember. Then lots of people, too many people, the whole crowd came up, gathered. And they were asking me can you continue working. I don't know, I also just in the hurry of things, in the heat of things I said yeah, I can. So I worked until the end.

MS. MOUNSEY: Objection to the hearsay.

JUDGE EMMINGHAM: Overruled.

Q. (By Mr. Dalton) And so you worked to the end of the day. Did you file an incident report that day?

A. There were no reports or anything. Simply in the office. Again, this Alexey just filled on the piece of paper and gave me for signature. Then on the next day this main manager came up and asked me, Are you hurting? I said, I'm hurting a little bit. But I just don't know. I just simply said that. I just know this one word, little.

And after that I started having these problems. But I never even ever, ever had any problems with health, and here I started. I just walk, walk at work. And it just drops me. But that's already in the process. So simply I kept working and working. And I felt like over-fatigued, like I had this knocking in my head. Like knocking, knock,

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I mailed this day an original and true copies of the document referenced below to the following; postage prepaid, first class mail in Spokane Valley, WA to:

Docket No. : 33181-4-III
Claimant : Aleksandr Rumyantsev

Document : **PETITION FOR DISCRETIONARY REVIEW**

ORIGINAL TO: Court of Appeals Division III
500 N Cedar ST
Spokane, WA 99201
FAX 509-456-4288

COPY TO:

Paul Michael Crisalli
Office of the Attorney General
800 Fifth Ave Ste 2000
Seattle, WA 98104-3188

DATED: 17th August 2016

Drew D. Dalton

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