No. 47483-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS A. LUNSCHEN, Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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Table of Contents

Table of Authorities

A. Table of Cases

Page(s)

Washington Cases

Other Court Cases

B. Statutes

C. Regulation and Rules

I. ASSIGNMENT OF ERRORS

Thomas Lunschen assigns error to the following rulings made by the Board of Industrial Insurance Appeals (hereinafter "Board") and the trial court:

1. The Board's Decision and Order[1] dated February 20, 2014 Findings of Fact 3, when it found that on June 9, 2005, Mr. Lunschen had no objective findings and no permanent partial disability proximately caused by the industrial injury. (CP 60)

2. The Board's Decision and Order dated February 20, 2014 Findings of Fact 4, when it found that on January 4, 2013 Mr. Lunschen had no objective findings and no permanent partial disability proximately caused by January 17, 2005 industrial injury. (CP 60)

3. The Board's Decision and Order dated February 20, 2014 Findings of Fact 5, when it found that Mr. Lunschen's condition proximately caused by the industrial injury did not objectively worsen between June 9, 2005 and January 4, 2013. (CP 60)

4. The Board's Decision and Order dated February 20, 2014 Findings of Fact 6, when it found that Mr. Lunschen's condition diagnosed

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[1] The February 20, 2014 Proposed Decision and Order was adopted by the Board on April 22, 2014.

as degenerative disc disease was not proximately caused or aggravated by the industrial injury between June 9, 2005 and January 4, 2013. (CP 60)

5. The Board's Decision and Order dated February 20, 2014, Findings of Fact 7, when it found that Mr. Lunschen sustained an intervening injury to his low back on May 29, 2012, while working in his garden. (CP 61)

6. The Board's Decision and Order dated February 20, 2014 Conclusions of Law 2, when it found that between June 9, 2005 and January 4, 2013, Mr. Lunschen's condition proximately caused by the industrial injury did not objectively worsen within the meaning of RCW 51.32.160. (CP 61)

7. The Board's Decision and Order dated February 20, 2014 Conclusions of Law 3, when it affirmed the January 4, 2013 Department order. (CP 61)

8. The Court's failure to grant Mr. Lunschen's Motion for Summary Judgment because the Board improperly applied the law. (Verbatim Report of Proceedings 14) (Hereinafter "RP")

9. The Court's failure to give Mr. Lunschen's proposed jury instruction #11 because it did not allow him to argue this theory of the case. (RP 155)

10. The Court's failure to give Mr. Lunschen's proposed jury instruction # 15 because it did not allow the plaintiff to argue his theory of the case. (RP 169)

II. STATEMENT OF ISSUES

1. Whether Mr. Lunschen had objective findings and a permanent partial disability proximately caused by January 17, 2005 industrial injury on either June 9, 2005 or on January 4, 2013. (Assignment of Error 1 and 2).

2. Whether Mr. Lunschen's condition proximately caused by the industrial injury objectively worsened between June 9, 2005 and January 4, 2013 within the meaning of RCW 51.32.160 (Assignment of Error 3 and 6).

3. Whether Mr. Lunschen's condition diagnosed as degenerative disc disease was proximately caused or aggravated by the industrial injury between June 9, 2005 and January 4, 2013. (Assignment of Error 4).

4. Whether Mr. Lunschen sustained an intervening injury on May 29, 2012, while gardening. (Assignment of Error 5).

5. Whether the Board was correct when it affirmed the Department order issued on January 4, 2013. (Assignment of Error 7).

6. Whether the trial court was correct when it denied Mr. Lunschen's Summary Judgment motion because there was no genuine issue of material fact, only a question of law in that the Board never considered the

McDougle v. Dept. of Labor & Indus., 64 Wn.2d 640, 393 P.2d 631 (1964) standard for ordinary incidents of everyday living. (Assignment of Error 8).

7. Whether the trial court erred when it failed to give Mr. Lunschen's proposed jury instruction #11 because it did not allow him to argue his theory of the case that the aggravation of his industrial injury was not a supervening injury but caused by normal incidents of everyday living as set out in *McDougle*. (Assignment of Error 9).

8. Whether the trial court erred when it failed to give Mr. Lunschen's proposed jury instruction # 15 because it did not allow him to argue his theory of the case that his 2005 injury "lit up" his degenerative disk disease which made the aggravation of his injury more likely. (Assignment of Error 10).

III. PROCEDURAL HISTORY

Mr. Thomas Lunschen filed an Application for Benefits for an industrial injury he sustained while in the course of his employment on January 17, 2005, with the Department of Labor and Industries of the State of Washington (Hereinafter "Department"). The claim was allowed on February 1, 2005 and after Mr. Lunschen received medical treatment and other benefits, the claim was closed on June 9, 2005 with no Permanent Partial Disability rating. On June 6, 2012 Mr. Lunschen applied to reopen his claim for an aggravation that occurred on May 29, 2012. On August 21,

2012 the Department denied the reopening application. On September 21, 2012 Mr. Lunschen protested the denial through his attorney. On September 28, 2012 the Department held the closing order in abeyance for reconsideration. On January 4, 2013 the Department affirmed the closure. On January 10, 2013 Mr. Lunschen's treating Chiropractor protested the closure and on February 26, 2013 Mr. Lunschen appealed the closure through his attorney. On March 12, 2013 the Board of Industrial Insurance Appeals (hereinafter "Board") granted the appeal and a hearing before the Board was held on October 16, 2013. On February 20, 2014 Industrial Appeals Judge Greg J. Duras Affirmed the Department order denying Mr. Lunschen's reopening application. Mr. Lunschen filed a Petition for Review on April 3, 2014 which was denied on April 22, 2014. Mr. Lunschen filed an appeal with Pierce County Superior Court on May 15, 2014. Mr. Lunschen filed a Motion for Summary Judgment which was heard by Judge Martin on February 20, 2015. Judge Martin denied the Motion for Summary Judgment and trial commenced on March 9, 2015. On March 11, 2015 the jury rendered a verdict in favor of the Department and final judgment from the Court was entered on March 27, 2015. This appeal follows that judgment.

IV. INTRODUCTION AND SUMMARY

The Industrial Insurance Act of the State of Washington (Hereinafter "Act") was enacted in 1911. The Act essentially did away with the common law system governing the remedy of workers against employers for injuries received in the course of their employment, "finding that due to modern industrial conditions the remedies were economically unwise and unfair." RCW 51.04.010. The Act is a compromise between employers and their workers. *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 469, 745 P.2d 1295 (1987). In exchange for limited liability, the employer pays on some claims that have no common law liability. *Id.* at 469. And in exchange for a lower rate of recovery than he or she could have received in a civil action, the worker is assured of a remedy without having to fight for it. *Id.*

This case arises out of a workplace injury and thus the Act applies by and through RCW Title 51. 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. *Dennis*, 109 Wn.2d at 470; see also RCW 51.12.010; *see also Montoya v. Greenway Aluminum Co.*, 10 Wn. App. 630, 634, 519 P.2d 22 (1974). The Act differs substantially from other administrative laws. It is the product of a compromise between employers and workers through which employers

accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572-573, 141 P.3d 1 (2006). It is important to note that, "the Act was written to provide sure and certain relief to injured workers." *Dennis*, 109 Wn.2d at 470. "All doubts are to be resolved in favor of the injured worker." *Id.*

It has been noted that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the entire statutory scheme that receives the benefits of liberal construction. Each statutory provision should be read in reference to the whole act. For instance, "We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions." *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), aff'd, 144 Wn.2d 907, 32 P.3d 250 (2001).

In *Cockle v. Department of Labor & Industries* the Court observed the "overarching objective" of Title 51 is to reduce to a minimum "the suffering and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle v. Dept. of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001) (quoting RCW 51.12.010) (Emphasis added). "Also, on a practical level, this Court has recognized that the workers' compensation system should continue "serv[ing] the goal of swift and

certain relief for injured workers." *Cockle*, 142 Wn.2d at 822, 16 P.3d 583 (quoting) *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

Additionally, "where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefits of the doubt belongs to the injured worker." *Id.* at 811. *See Clauson v. Dept. of Labor & Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996); *see also McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

Mr. Thomas V. Lunschen requests that the Board of Industrial Insurance Appeals' April 22, 2014 Decision and Order be reversed and his reopening application be approved so that he can receive treatment and other benefits that accrue to him under the Act as a result of his 2005 industrial injury. Mr. Lunschen has presented a *prima facie* case of worsening of his 2005 industrial injury condition, and through liberal construction of Title 51 the Board was incorrect when it affirmed the Department of Labor and Industries' denial of Mr. Lunschen's reopening application.

Alternatively, Mr. Lunschen requests that the Washington Court of Appeals find that the Superior Court's failure to issue his proposed jury instructions numbers eleven and fifteen was error because it did not allow

him to argue his theory of the case to the jury, and consequently the case should be reversed remanded back to the Superior Court.

V. STATEMENT OF FACTS

On January 17, 2005, Mr. Lunschen, while working for RFK Construction, was shoveling concrete out of a Bobcat bucket when he felt pain and a pinch. (CP 98-99) Mr. Lunschen visited a Chiropractor shortly thereafter, Vernon Kaczmarski, D.C., who evaluated him and recorded findings that were consistent with a lumbar strain, subluxation, and accompanying muscle spasm. (CP 131)

X-rays that were taken of Mr. Lunschen's low back on January 24, 2005 showed evidence of diffuse degenerative changes in the lumbar spine. (CP 135) Mr. Lunschen's claim with the Department and Industries of the State of Washington was approved. (CP 73) Mr. Lunschen was anticipated to return to work by the end of January of 2005, but after returning for a few days he clinically worsened and Dr. Kaczmarski took him back off work. (CP 189) He was sent for an MRI that showed Mr. Lunschen had some degenerative changes, loss of joint space, instability, and bony changes, throughout the spine, specifically L1 through L3. (CP 189) He also had annular tearing at L4-L5 and at L5-S1 discs with protrusion, but the one at L5-S1 was more prominent on the left. (CP 189) Annular tearing can create leaking of hyaluronic acid out of the disc which causes the immune system

to swell at that site; and it can cause the disc to become misshapen and bulge or extrude. (CP 190) Mr. Lunschen's discs were bulging so he had encroachment as well as chemical irritation. (CP 190)

Mr. Lunschen's condition worsened so he was referred to Dr. Martin, an orthopedic surgeon, who specializes in care and treatment of disorders of the spine. (CP136) Massage therapy was continued and physical therapy was added before Mr. Lunschen slowly began to improve. (CP 136) On March 30th, 2005, more than ten weeks from the original injury, Dr. Kaczmarski noted improvement of 75 to 80 percent, although Mr. Lunschen continued to experience stiffness in his low back with limited lumbar motion and trigger point tenderness through his mid lumbar spine area. (CP 136)

On April 1, 2005, Mr. Lunschen returned to work, although he restricted himself to light duty initially, and he continued chiropractic treatment until May 7, 2005, and massage therapy until May 14, 2005. (CP 136) On June 1, 2005 Dr. Kaczmarski filed a final report noting that Mr. Lunschen had been released to return to work and that there was no permanent impairment or no obvious residual impaired function as a result of this injury. (CP 136-137)

Mr. Lunschen testified that he went back to work because he had to; he didn't want to lose his job and so he asked Dr. Kaczmarski to release him. (CP 102) Mr. Lunschen reported that his back was a little better, he was able "to move around and stuff," but he could still feel it. (CP 109) Mr. Lunschen felt that a back injury was something that never really went away without surgery; but because he'd heard different stories about surgery he stated he didn't want anyone "cutting on my back," so "I just kind of man up and took it and ate a lot of aspirins and ibuprofen." (CP 109) However, he always had pain in his lower back whenever he lifted or carried material from the time he returned to work in 2005 until he stopped working when he was laid off due to the recession in 2008. (CP 99, 125)

On May 29, 2012, Mr. Lunschen was working in his garden with a garden implement called a "claw" when he felt his back "slip out," and the pain brought him down to one knee. (CP 102, 117) The following day Mr. Lunschen was unable to get out of bed, but he delayed getting treatment because he had no health insurance and he didn't know what to do. (CP 102) Mr. Lunschen called the Department of Labor and Industries because he thought his back had been inflamed from his old injury and was informed his claim from 2005 was still open, so he called Dr. Kaczmarski who agreed to see him. (CP 102, 125)

Dr. Kaczmarski testified that Mr. Lunschen presented with complaints of low back pain radiating into the left glut (sic), and left leg pain that were very similar to his prior injury. (CP 193) Injuries to L4-L5 or L5-S1 predominantly affect the sciatic nerve, and because Mr. Lunschen's complaint was of pain down his back and the back of his leg his injury had to be in the L4-L5, L5-S1 area, which was the area of his prior injury. (CP 193-194) Dr. Kaczmarski testified that he considered his current treatment of Mr. Lunschen as a continuation of his treatment for his 2005 injury. (CP 203) Therefore, Dr. Kaczmarski took films and went through the process of reopening the previous claim. (CP 194)

Dr. Kaczmarski took repeat lumbopelvic films, both AP and lateral. (CP 194) Dr. Kaczmarski stated that the subsequent x-ray in 2012 had the same kind of end plate degenerative changes at L1 through L3 and increased sacral base angle that were found in the 2005 x-ray. (CP 194) However, the newer x-ray was different in that when Mr. Lunschen first came in for the industrial injury in 2005 he had a Grade 1 retrolisthesis of L5 on S1 (the vertebra of L5 had slipped back on the sacrum), but the 2012 x-ray had retrolisthesis of L4-L5. (CP 194-195) This was significant because of the annular tearing at L4-L5 and L5-S1 discovered on the MRI after the 2005 industrial injury which Dr. Kaczmarski stated created a predisposed weakness area. (CP 195)

Dr. Kaczmarski saw Mr. Lunschen 27 times in four months for his 2005 industrial injury and 42 times after his aggravation, for a total of 69 times for treatment. (CP 195-196) The degenerative changes that were noted in the x-ray of Mr. Lunschen in 2005 had progressed with involvement of narrowing of the disc space heights from the top of the lumbar spine, L1, through the bottom of the lumbar spine, S1. (CP 140) This area begins about two inches above belt line and extends about three inches below the belt line in the low back region. (CP 144) Mr. Lunschen continued to see Dr. Kaczmarski and the physical findings revealed absent reflexes in the left lower extremity and positive straight leg raising on the left, consistent with nerve involvement. (CP 139)

Mr. Lunschen was also seen for intense low back pain with radiation on June 30, 2012 in the emergency room at Good Samaritan Hospital after he was taken there by ambulance. (CP 139) The evaluation at Good Samaritan revealed that Mr. Lunschen was suffering from low back pain with radiation and he was discharged on cyclobenzaprine (Flexeril), a medication for muscle spasms; he was also given a Medrol dose pack which is a cortisone preparation that is very strong and given over a decreasing dose basis for six days, as well as oxycodone, a strong pain medication. (CP139-140)

When examined by Dr. H. Richard Johnson, Mr. Lunschen complained of constant low back pain, radiating into his left lower extremity to the calf, with numbness and tingling into the sole of the left foot. (CP 143) The low back pain varied in severity from 5 to 10 out of ten with 10 being the most severe, and Mr. Lunschen would sometimes be awakened at night by pain radiating into the left foot. (CP 143) He sometimes had spasms in his low back and complained of stiffness in his low back that would increase at night, often awakening him an average of three times a night. (CP 143)

Upon physical exam, Dr. Johnson noted objective medical evidence that included a gait analysis of an obvious limp, palpable spasm in the muscles of the lumbar spine, limited range of motion, flattening of the normal lumbar lordosis, slight atrophy of the right calf, as well as subjective findings such as tenderness on the thigh trigger points that were consistent with L4-L5 nerve irritation. (CP149-151)

Dr. Johnson opined on a more probable than not medical basis and with objective medical certainty that with regard to the industrial injury of January 17, 2005, the records and detailed physical findings were consistent with the fact that Mr. Lunschen did sustain a lumbar strain/sprain injury; that there was also aggravation or lighting up of preexisting diffuse lumbar spondylosis, or diffuse degenerative changes in the lumbar spine; that there

was evidence of annular tears of the annulus fibrosis at L4-L5 and L5-S1 levels; and also findings consistent with left lumbar radiculopathy. (CP 155)

Dr. Johnson further opined that following the closure of Mr. Lunschen's claim, he continued to experience episodic recurrent low back pain with recent recurrence of left lumbar radiculopathy, as well as evidence of objective progression of the lumbar spondylosis, the degenerative changes in the lumbar spine that are of an asymmetric nature, the type seen post-traumatically rather than the type seen with the aging process. (CP 155-159) Furthermore, Dr. Johnson also opined that between June 9, 2005 and January 4, 2013, there was evidence of objective worsening of Mr. Lunschen's condition. (CP 156) Dr. J. Greg Zoltani, a medical examiner hired by the Department of Labor and Industries, testified that although he disagreed with Dr. Kaczmarski's final determination, he agreed with Dr. Kaczmarski's interpretation of the x-rays. (CP 235, 241) Dr. Kaczmarski diagnosed retrolisthesis of Mr. Lunschen's lumbar spine in both 2005 and 2012. (CP 194-195) However, even though Dr. Zoltani stated he agreed with Dr. Kaczmarski's interpretation of the x-rays, he stated he and Dr. Tanner had found no retrolisthesis on either x-ray. (CP 239-240) Dr. Zoltani admitted that the pain Mr. Lunschen felt in 2005 in his industrial injury was in the left leg and the pain he felt at his recurrent symptoms in 2012 was in

his left leg as well, and he stated that Mr. Lunschen suffered an acute onset of worsened symptoms in 2012. (CP 241-242)

Dr. Zoltani testified that absent reflexes in the ankles, such as Mr. Lunschen's, usually represents a peripheral neuropathy most commonly caused by diabetes. (CP 241) However, Dr. Zoltani admitted that there was no record that Mr. Lunschen had ever been diagnosed with diabetes. (CP 241) Upon further examination Dr. Zoltani testified that, although the pain Mr. Lunschen complained of could be caused by neuropathy, it could also be caused by nerve irritation at the spine. (CP 241)

Dr. Kaczmarski testified that, on a more probable than not medical basis, he was continuing to treat Mr. Lunschen for his 2005 injury of a low back strain, low back pain, and radiating left side pain. (CP 203) Dr. Kaczmarski attributed this diagnosis to objective findings of a decreased range of motion, positive nerve stress test, change in sensation on the left side of his (Plaintiff's) leg, muscle spasm, and stated that subjectively all of this correlated clinically. (CP 203) Dr. Kaczmarski also testified that objective findings, including the x-rays of June 6, 2012 and his repeated orthopedic neurologic testing, consistent with low back pain and left-sided radiating leg pain, led to his opinion, on a more probable than not medical basis that Mr. Lunschen's January 17, 2005 industrial injury objectively worsened between June 9, 2005 and January 4, 2013. (CP 203)

VI. STANDARD OF REVIEW

Normally, review by the Court of Appeals in a workers' compensation case is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review of the decision by the Board of Industrial Insurance Appeals, and whether the superior court's conclusions of law flow from the findings. *Hill v. Dept. of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430 (2011), *review denied,* 172 Wn.2d 1008, 259 P.3d 1108 (Table), (2011).

The first step in seeking review of the Department's decision is an appeal to the Board. RCW 51.52.060. Decisions of the Board may be appealed to superior court. RCW 51.52.110. In an appeal of the Board's decision, the superior court holds a de novo hearing but does not hear any evidence or testimony other than that included in the record filed by the Board. *Du Pont v. Dept. of Labor & Indus.*, 46 Wn. App. 471, 476, 730 P.2d 1345 (1986). The findings and decision of the Board are *prima facie* correct until the superior court, by a preponderance of the evidence, finds them incorrect. *Dept. of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983).

In reviewing the superior court's decision, the role of the court of appeals "is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether the conclusions

of law flow therefrom." *Du Pont*, 46 Wn. App at 476-77. Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). The Court of Appeals reviews interpretation of the Industrial Insurance Act by the Board of Industrial Insurance Appeals de novo under "error of law" standard and may substitute its judgment for that of the Board, although the court must accord substantial weight to the agency's interpretation. *Littlejohn Constr. Co. v. Dept. of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). "When reviewing a workman's compensation case, an appellate court can evaluate a written record to test conclusions that have been drawn from the facts, explore "for sufficiency of the probative evidence to support findings of fact," and analyze 'findings when the evidence is undisputed, uncontradicted, and unimpeached.'" *Gilbertson v. Dept. of Labor & Indus.*, 22 Wn.App. 813, 592 P.2d 665 (1979) (citing) *Scott Paper Co. v. Dept. of Labor & Indus.*, 73 Wn.2d 840, 844, 440 P.2d 818, 821 (1968).

> The claimant need only establish the probability of a causal connection. It is only when the "verbal gymnastics" of the claimant's medical witness leave nothing of an objective nature in the record upon which the jury could reasonably rely to find the necessary causation that the challenge to the sufficiency of the evidence should succeed.

Zipp v. Seattle Sch. Dist. No. 1, 36 Wn. App. 598, 676 P.2d 538 (1984), *review denied*, 101 Wn.2d 1023 (1984).

VII. LEGAL AUTHORITY AND ARGUMENT

A.) The Board erred when it found that on June 9, 2005 and on January 4, 2013 Mr. Lunschen had no objective findings and no permanent partial disability proximately caused by the January 17, 2005 industrial injury because the finding does not comport with the evidence presented, is a misstatement of the law, and is outside of the scope of the Board's authority.

The Court of Appeals in Washington has set out the required elements to reopen an industrial injury claim on the basis of aggravation.

> RCW 51.32.160(1) (a) allows a claim to be reopened for aggravation of a condition proximately caused by an industrial injury or of an occupationally-related condition. Workers seeking to reopen their claims under this provision must establish the following elements:
>
> (1) The causal relationship between the injury and the subsequent disability must be established by medical testimony.
> (2) The claimant must prove by medical testimony, some of it based upon objective symptoms that an aggravation of the injury resulted in increased disability.
> (3) The medical testimony must show that the increased aggravation occurred between the terminal dates of the aggravation period.
> (4) A claimant must prove by medical testimony, some of it based upon objective symptoms which existed on or prior to the closing date, that his disability on the date of the closing order was greater than the supervisor found it to be.

Eastwood v. Department of Labor and Industries, 152 Wn.App. 652, 219 P.3d 711 (2009) citing *Phillips v. Dept. of Labor & Indus.*, 49 Wn.2d 195, 298 P.2d 1117 (1956).

"The phrase 'medical testimony' means testimony by medical experts." *Loushin v. ITT Rayonier*, 84 Wn.App. 113, 118, 924 P.2d 953 (1996).

Mr. Lunschen called two medical experts to testify on his behalf, Dr. H. Richard Johnson, a board certified orthopedic surgeon, and Dr. Kaczmarski, a chiropractor. Dr. Kaczmarski was Mr. Lunschen's treating doctor and saw him 69 times in total both after the original injury in 2005, and again after the aggravation of that injury in 2012. Dr. Kaczmarski was the only treating doctor that testified, as well as the only doctor that treated Mr. Lunschen's symptoms after both incidents.

Both Dr. Johnson and Dr. Kaczmarski provided testimony of objective medical evidence. Dr. Johnson testified that on the 2012 X-ray there was evidence of progression of degenerative changes. Mr. Lunschen had moderate to severe bone spurring anteriorly between L1 and L3 and, to a lesser extent at the L3-4 level. He also had some anterior wedging at the L1 vertebral body that had been present on both the 2005 and the 2012 X-rays. Dr. Johnson testified that unlike degeneration due to the aging process

which would be symmetrical changes, these changes were asymmetrical, and, therefore, consistent with Mr. Lunschen's work and **previous trauma.**

Dr. Johnson also testified that there was 3+ spasm of the paravertebral muscles on both sides of the spine from T8-T12, and that muscle spasm of 3+ continued throughout the entire lumbar region. Dr. Johnson further explained that muscle spasms are graded from 0-4+, with 4+ being a spasm "so great that you could literally bounce a dime off of it." (CP 151)

Mr. Lunschen had slight atrophy of the right calf when one would expect a right handed person to have a larger right side than left, but his right calf was nine millimeters smaller. He also had a decrease in sensation over the medial aspect of the left foot and his deep tendon reflexes were asymmetrical, being 2+ on the right and only 1+ on the left. Dr. Johnson explained that the medial aspect of the foot is where there is inervation from L4 and S1, and the asymmetric reflexes also indicate that there is irritation of the L4 nerve root, which would cause the depressed left ankle jerk.

Dr. Johnson testified that the records and the detailed physical findings are consistent with the fact that Mr. Lunschen did sustain a lumbar strain/sprain injury January 17, 2005 and that there was also aggravation or lighting up of preexisting diffuse lumbar spondylosis. There was also evidence of annular tears of the annulus fibrosis at L4-L5 and L5-S1 levels

and that Mr. Lunschen had findings consistent with left lumbar radiculopathy.

With regard to the May 2012 aggravation Dr. Johnson testified that there was a recurrence of the left lumbar radiculopathy as well as evidence of objective progression of the lumbar spondylosis, the degenerative changes in the lumbar spine that are of an asymmetric nature, the type seen post-traumatically rather than the type seen with the aging process.

Dr. Kaczmarski testified that an MRI in 2005 showed end plate degenerative changes at L1 through L3 and annular tearing at L4-L5 and at L5-S1 disks with protrusion, with the one at L5-S1 being more prominent on the left. Dr. Kaczmarski explained that the disk is a specialized ligament and it houses the nucleus pulposis which is sequestered from the rest of the body when the immune system is formed. When there is a tear in the nucleus pulposis, the hyaluronic acid inside leaks out, and because the immune system has not come into contact with it before, it reacts to it and creates swelling and then the disk begins to bulge. So this creates not only a mechanical displacement in the area, but also a chemical irritation which creates an "area of weakness." He also took lumbopelvic x-rays in both 2005 and 2012. These x-rays showed those same end plate degenerative changes and an increased sacral base angle. However, in 2005 he had a

retrolisthesis of L5 on S1, or the vertebra of L5 had slipped back on the sacrum, in 2012 he had a retrolisthesis of L4-L5.

Dr. Kaczmarski also testified to muscle spasms and positive nerve stretch tests and neurological changes such as loss of sensation. All of these results and the findings on the MRI and x-rays are objective evidence of the damage done to Mr. Lunschen as a result of his 2005 industrial injury as well as the aggravation of that injury in 2012.

In contrast, Dr. Zoltani testified that he agreed with Dr. Kaczmarski's interpretation of the x-rays, however, neither he nor Dr. Tanner reported any retrolisthesis despite the fact that Dr. Kaczmarski diagnosed retrolisthesis both in 2005 and in 2012. Dr. Zoltani stated that based on the review of the records, his neurological exam, and the diagnostic studies Mr. Lunschen had a lumbar strain as a result of the 2005 industrial injury. Dr. Zoltani testified that Mr. Lunschen had absent ankle reflexes on both sides and decrease in sensation distal to both knees on both sides, but attributed this to neuropathy that one might find in someone with diabetes. There is no evidence that Mr. Lunschen has or has ever had diabetes. Dr. Zoltani stated this "neuropathy" was unassociated with the spine, but later he admitted under cross examination that the pain in Mr. Lunschen's legs could be caused by neuropathy, but it could also be caused by **nerve irritation at the spine** which is exactly what Dr. Johnson testified

was causing Mr. Lunschen's radiculopathy. He further testified that Mr. Lunschen had that pain in the left leg after the 2005 injury. He went on to say that the pain in the 2012 aggravation was in Mr. Lunschen's left leg as well.

Dr. Tanner testified that there were diffuse degenerative changes in the lumbar spine in 2005, both in the upper, middle and lower lumbar spine, and anterior body spurring at L1-2 and L2-3. He stated that the 2012 x-rays showed significant anterior body spurring, moderate to severe, at L2-3 and L1-2 that was not present in 2005. He also reported sensory changes from the knees to the feet right and left.

Throughout the testimony Dr. Johnson and Dr. Kaczmarski both gave evidence that Mr. Lunschen had objective findings for his industrial injury of 2005. They not only cited the objective evidence, but explained why they had drawn the conclusions they had drawn. Dr. Johnson cited the same degenerative changes that Dr. Zoltani and Dr. Tanner cited. However, Dr. Johnson was able to explain why he was able to differentiate between the degeneration brought on by Mr. Lunschen's industrial injuries, and the degeneration that was simply a result of the natural aging process. Changes that are a result of a trauma are asymmetrical and Mr. Lunschen's changes are asymmetrical. Dr. Zoltani and Dr. Tanner never addressed this, they

merely stated the changes were a natural progression and didn't explain why they came to that conclusion.

Dr. Kaczmarski and Dr. Johnson both diagnosed radiculopathy as a cause of the chronic left leg pain felt by Mr. Lunschen. Dr. Johnson testified that the asymmetric reflexes indicate that there is irritation of the L4 nerve root, which is the area where the MRI showed annular tearing. Dr. Kaczmarski also pointed out that the protrusion at the L5-S1 disk was more prominent on the left, which is the side where Mr. Lunschen had pain radiating down his leg. He also explained that L4-L5 and L5-S1 predominantly make up the sciatic nerve. Injuries higher up the spine would go down the front of the leg, but Mr. Lunschen's pain was down the back of his leg so it had to be in that L4-L5, L5-S1 area.

Dr. Zoltani testified that the leg pain was probably neuropathy but never explained the reasoning behind that diagnosis except to say that it could be from diabetes, although he admitted that he had no evidence that Mr. Lunschen has diabetes. And on cross examination he admitted that it could also be caused by nerve irritation at the spine.

Dr. Tanner and Dr. Zoltani reached the conclusion that Mr. Lunschen's condition was related to the arthritis in his low back. However, Dr. Kaczmarski explained that the symptoms, both objective and subjective, that Mr. Lunschen was experiencing were not a typical presentation of

arthritic problems. Once again, there was no explanation from either Dr. Tanner or Zoltani as to why they had reached the conclusions they had, they merely stated that was their conclusion.

The Board's determination that Mr. Lunschen had no objective findings in his 2005 industrial injury is incorrect in the face of all of the above evidence. The finding that Mr. Lunschen had no permanent partial disability as a result of the 2005 industrial injury is also incorrect in that a person can have a permanent partial disability without being given a Permanent Partial Disability award because ratable permanent partial disability awards begin at 5%. Therefore, a person can have a permanent partial disability of less than 5% without it ever being codified at the closure of his claim. And the fact that a person is not showing a permanent impairment at the time of claim closure does not mean that he has not sustained some sort of permanent weakening of predisposition to re-injury. If this were so, there would never be an aggravation of an injury where the claimant did not receive a permanent partial disability award at claim closure. Case law bears this out. "The rule is that an order of the supervisor from which no appeal is taken is res judicata as to any issue before the department at the time it was entered, but is not res judicata as to any aggravation occurring subsequent to that date." *Collins v. Dept. of Labor & Indus.*, 42 Wn.2d 903, 259 P.2d 643 (1953).

Additionally, whether or not Mr. Lunschen had permanent partial disability in January of 2013 was not at issue before the Board. "The Board's scope of review is limited to those issues which the Department previously decided." *Hanquet v. Dept. of Labor & Indus.*, 75 Wn.App. 657 661, 879 P.2d 326 (1994) citing *Lenk v. Dept of Labor & Indus.*, 3 Wn.App. 977, 982, 478 P.2d 761(1970). ("[I]f a question is not passed upon by the department, it cannot be reviewed either by the board or the superior court."). "[W]e find no warrant in the statutory enumeration of the board's powers, past or present, for the contention that the board can, on its own motion, change the issues brought before it by a notice of appeal and enlarge the scope of the proceedings." *Hanquet* at 662 citing *Brakus v. Dept. of Labor & Indus.*, 48 Wash.2d 218, 223, 292 P.2d 865 (1956).

Mr. Lunschen appealed the denial of his aggravation application. If the Board had determined that Mr. Lunschen had a worsening of his industrial injury and he received treatment and his claim was then closed once again, it would be appropriate to determine if, at the time of that closure, Mr. Lunschen had a permanent partial disability. It is inappropriate for the Board to determine, in the light of res judicata effect of closures, that Mr. Lunschen did not have an increase in permanent partial disability when he merely alleged a worsening of his condition and requested treatment.

B.) Mr. Lunschen presented a prima facie case that his condition proximately caused by the industrial injury objectively worsened between June 9, 2005 and January 4, 2013 within the meaning of RCW 51.32.160.

As stated above, Mr. Lunschen provided objective medical testimony to show that the condition caused by his 2005 industrial injury had worsened. Dr. Kaczmarski testified that there was an increase in the symptoms that Mr. Lunschen had presented with in the aftermath of his 2005 industrial injury. He testified that he felt from the onset of his treatment of Mr. Lunschen in 2012, that he was treating him for a continuation of his 2005 injury.

The X-rays that Dr. Kaczmarski took in 2005 and 2012 were very similar except that the 2012 x-rays showed a marked increase in the degeneration of Mr. Lunschen's back condition, but that degeneration was all in the same areas as shown in the 2005 x-rays. Also, there was a new retrolisthesis in the area of the spine where Dr. Kaczmarski testified that the annular tearing from the first industrial injury would have caused a weakening and predisposition to re-injury.

Dr. Johnson testified that the increased degeneration of Mr. Lunschen's lumbar spine was asymmetrical, indicating that the changes were a result of a trauma rather than the natural degeneration that most people experience with age which presents symmetrically. He also testified

that Mr. Lunschen had not experienced the intensity or radiculopathy after the 2005 incident that he experienced after the 2012 incident in his garden that led to the worsening of his condition.

Additionally, Dr. Johnson testified that the first industrial injury in the late 1980s resulted in Mr. Lunschen developing posttraumatic changes in his lumbar spine of an asymmetric nature, consistent with trauma, and then his labor-intensive activities predisposed him to an injury such as the one he had in January of 2005. Then the traumatic injury of 2005 caused an even greater asymmetric progression of degenerative changes in his lumbar spine, predisposing him to an aggravation with less stress than if the 2005 injury had not occurred. Dr. Johnson testified that the progression in degenerative changes in Mr. Lunschen's back went from mild changes prior to the 2005 injury to moderate-severe changes on the 2012 x-ray.

Both Dr. Tanner and Dr. Johnson agree that the degeneration of Mr. Lunschen's spine increased from mild to moderate-severe between the 2005 injury and the 2012 aggravation of that injury. Dr. Johnson attributes the increase in degeneration to the 2005 injury, Dr. Tanner attributes it to naturally occurring degenerative changes. Further consideration shows that Dr. Johnson's diagnosis makes more sense.

Mr. Lunschen suffered a relatively severe back injury in 1989 which kept him out of work for seven months. Yet fifteen years later when he had

an x-ray for his new industrial injury in 2005 the degenerative changes that were attributed to the trauma of that 1989 injury were defined as mild. However, in contrast, the 2005 injury was defined as a "sprain/strain" yet his degenerative changes went from mild to moderate-severe in half the time. And as testified to by all of the experts, Mr. Lunschen did not have an intervening injury. In light of this significant increase in the degenerative changes of Mr. Lunschen's spine over a much shorter time span, Dr. Johnson's interpretation of the causation for that increase is the most logical interpretation.

Dr. Kaczmarski was the only doctor to see Mr. Lunschen and treat his symptoms consistently after both incidents. He testified that Mr. Lunschen's symptoms were similar after both incidents although he was more debilitated after the 2012 aggravation. Dr. Kaczmarksi was very familiar with the type of pain from which Mr. Lunschen was suffering because he saw him 27 times after his 2005 injury and 42 times after the aggravation in 2012. He testified that Mr. Lunschen was not suffering from "stiffness" that one usually finds with arthritic issues that the Department's medical examiners doctors had opined were the basis behind Mr. Lunschen's complaints. Rather, Mr. Lunschen was suffering from "muscle spasms, neurological changes ... changes in sensation, and positive nerve stretch tests." (CP 203)

Moreover, The Washington Administrative Code, Chapter 296-20-01002 defines an attending (or "treating") provider as "one who actively treats an injured or ill worker." Almost seventy years ago the Washington Supreme Court stated, "it is our opinion that an attending physician, assuming of course that he shows himself to be qualified, who has attended a patient for a considerable period of time of the purpose of treatment, and who has treated the patient, is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once." *Spalding v. Dept. of Labor & Indus.*, 29 Wn.2d 115, 128 – 139, 186 P.2d 76 (1947). Four decades later the Washington Supreme Court upheld that long-standing provision in the case law that the opinion of the attending physician in Industrial Insurance Act cases is to be given special consideration. *See Hamilton v. Dept. Of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988). Therefore, as the attending physician, Dr. Kaczmarski's testimony is to be given special consideration.

Taken as a whole, the medical evidence provided by Mr. Lunschen shows that his industrial injury of 2005 was aggravated by the incident on May 29, 2012, and, therefore, the Board was incorrect in its Findings of Fact 5 and Conclusions of Law 2, when it found that Mr. Lunschen's condition proximately caused by the industrial injury did not objectively worsen

between June 9, 2005 and January 4, 2013 within the meaning of RCW 51.32.160.

C.) Mr. Lunschen's condition diagnosed as degenerative disc disease was proximately caused or aggravated by the industrial injury between June 9, 2005 and January 4, 2013, and as a result the Court's failure to give Mr. Lunschen's proposed jury instruction # 15 was an error because it did not allow the plaintiff to argue his theory of the case that his 2005 injury "lit up" his degenerative disk disease which made the aggravation of his injury more likely.

Dr. Johnson testified that as a result of the 2005 industrial injury, Mr. Lunschen sustained a lumbar strain/sprain which also resulted in an aggravation, or lighting up of preexisting diffuse lumbar spondylosis, or diffuse degenerative changes in the lumbar spine. Dr. Johnson explained that the 1989 injury to Mr. Lunschen's back had created some degenerative changes in the lumbar area. He was able to determine this because the x-ray taken of Mr. Lunschen's back after the 2005 industrial injury indicated that there had been some degenerative changes that predated the 2005 injury. Those degenerative changes were asymmetrical, rather than symmetrical in nature and that is an indication that the changes were a result of trauma rather than natural age-related degeneration.

Dr. Johnson went on to explain that, although there will normally be a progression of degenerative changes over a period of time absent any new trauma, the MRI done in 2005 after Mr. Lunschen's industrial injury

showed evidence of acute trauma in the form of annular tears at L4-L5 and L5-S1. As Dr. Kaczmarski explained, this type of tearing creates a leaking of hyaluronic acid which creates swelling, bulging, and encroachment in the area where the tears are located.

Dr. Johnson testified that the injury in 2005 caused an asymmetric progression of degenerative changes in Mr. Lunschen's lumbar spine. Both Dr. Kaczmarski and Dr. Johnson testified that the 2005 injury created a weakened area that was more predisposed to re-injury. Dr. Johnson further stated that the 2005 injury predisposed Mr. Lunschen to an aggravation of his low back condition with less stress than if that injury had not occurred. Finally, Dr. Johnson stated that he can attribute some of the changes in Mr. Lunschen's pre-existing degenerative disc disease to the 2005 industrial injury because of the progression from **mild** traumatic degenerative changes in the 15 years following the 1989 industrial injury to **moderate to severe traumatic** degenerative changes in half that time following the 2005 industrial injury.

Dr. Kaczmarski testified that after the incident in the garden in 2012 Mr. Lunschen "presented to me with what appeared to be very similar kind of complaints of low back pain radiating into the left glut, left leg pain, which is very similar to what he had prior ... L4-L5, L5-S1, they predominantly make up the sciatic nerve ... his pain complaints weren't in

the front; it was down the back and down the back of his leg. So, it had to be in that L4-L5, L5-S1 area, which was a prior area of injury." (CP 193-194) Dr. Johnson also testified that there was flattening of the normal lumbar lordosis.

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

Wendt v. Dept. of Labor & Indus., 18 Wn.App. 674, 571 P.2d 229 (1977).

The *Wendt* case is particularly on point with regard to Mr. Lunschen. Mr. Wendt suffered an industrial injury in 1968, and after his claim closed in 1970 he applied to reopen his claim due to an aggravation in 1972. The reopening was denied and Mr. Wendt provided the testimony of a doctor who said that his arthritic 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." *Id* at 677. The Department's doctors attributed the changes to Mr. Wendt's chronic progressive arthritis, and other issues unrelated to the injury. Mr. Wendt's case was appealed to Superior Court where the Court refused to issue an

instruction on the "lighting up" theory which had previously been approved by Washington courts in cases such as *Harbor Plywood Corp. v. Dept. of Labor & Indus.*, 48 Wash.2d 553, 295 P.2d 310 (1956); *Jacobson v. Dept. of Labor & Indus.*, 37 Wash.2d 444, 224 P.2d 338 (1950); *Miller v. Dept. of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939) and the many cases cited therein. Division Two of the Washington Court of Appeals stated that "These cases have consistently held that such an instruction should be given where there is substantial evidence to support it." *Id* at 676. The Court went on to find that despite the fact that there were other instructions given on proximate cause, it was reversible error to deny the lighting up instruction because:

> ... 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.

Wendt at 679.

In the instant case there has been testimony at length on whether or not Mr. Lunschen's degenerative condition was caused or aggravated by the industrial injury of 2005, as well as the alleged aggravation of that injury in

2012. Dr. Johnson has not only testified as to the objective evidence of the "lighting up" of Mr. Lunschen's degenerative disc disease, he has given reasoning why it should be attributed to the injury rather than the natural progression that the Department's examiners have opined is to blame. Mr. Lunschen argues that his aggravation is not only a worsening brought on by a weakening of his lumbar spine due to his industrial injury of 2005, but is also a result of his degenerative disc disease which had been accelerated and aggravated by his previous traumatic industrial injuries. It is all of these issues in the aggregate that contributed to an aggravation of his injury through "normal incidents of everyday living" (as argued in Subsection D below), incidents that Mr. Lunschen had completed many times in the past, and that would not have led to an injury had his previous industrial injury not weakened his lumbar spine and accelerated his degenerative condition.

Just as in *Wendt*, this esoteric "lighting up" theory cannot be adequately communicated to the jury absent Mr. Lunschen's proposed jury instruction number fifteen. Even more on point is the fact that Mr. Lunschen's "lighting up" argument was not merely a "fringe or subordinate" argument, but one leg of a three-legged stool theory of the case which consisted of a "proximate cause" leg, a "lighting up" leg, and "normal incidents of everyday living" leg. And just like a three legged stool, Mr. Lunschen's theory of the case cannot stand with one of the legs removed.

D.) Mr. Lunschen sustained an aggravation of his industrial injury due to "ordinary incidents of everyday living" rather than an intervening injury on May 29, 2012, and as a result the Court erred when it failed to give Mr. Lunschen's proposed jury instruction #11 because it did not allow Mr. Lunschen to argue his theory of the case.

"Aggravation of the claimant's condition caused by the ordinary incidents of living--by work which he could be expected to do; by sports or activities in which he could be expected to participate--is compensable because it is attributable to the condition caused by the original injury." *McDougle v. Dept. of Labor & Indus.*, 64 Wn.2d 640, 393 P.2d 631 (1964).

"The test to be applied...is whether the activity that caused the aggravation is something that the claimant might reasonably be expected to be doing, or whether it is something that one with his disability would not reasonably be expected to be doing." *Id.* at 645. An injured worker who, by using medical and lay testimony, is able to establish a causal relationship between an industrial injury and a new complaint that arises out of that original injury is held to have made a prima facie case for aggravation as well. *See Knowles v. Dept, of Labor & Indus.*, 28 Wn.2d 970, 184 P.2d 591 (1947).

It is Mr. Lunschen's contention that his industrial injury fits neatly into the existing case law regarding when an injured worker aggravates his industrial injury through the ordinary incidents of living. In Mr. Lunschen's

case, the T-1 date is June 9, 2005, when his medical record showed that treatment was no longer necessary for his 2005 industrial injury. The T-2 date is January 4, 2013, when the Department of Labor and Industries affirmed the denial of Mr. Lunschen's request to reopen his 2005 industrial injury claim. On May 29, 2012, a date within the two terminal dates, Mr. Lunschen experienced a recurrence of lower back pain while participating in an activity of daily living, namely working in his garden.

When Mr. Lunschen was gardening, it was not an unreasonable activity for this claimant under the circumstances. He testified that he loved to take care of his yard. Mr. Lunschen continued to experience pain and other symptoms after his industrial injury and continued to do so even up to his testimony in this case. It was when participating in the activity of daily living of gardening that Mr. Lunschen's already established industrially related conditions worsened.

Additionally, the occurrence of a new injury and an aggravation of a preexisting condition are not mutually exclusive. Whether a worker's worsened condition is a result of a new incident or constitutes an aggravation of the original injury depends upon whether the new incident is a supervening cause, independent of the original injury. The real question is one of proximate cause, i.e., whether "but for" the original injury the worker would not have sustained the subsequent condition. "A new injury

and an aggravation of a preexisting condition are not necessarily mutually exclusive... we certainly do not read the Court's decision in *McDougle* as making any hard and fast distinction between the two...In other words, "but for the original industrial injury, would the worker have sustained the subsequent condition?" *In re Robert Tracy*, BIIA Dec., 88 1695 (1990).

Mr. Lunschen argues that, but for his previous industrial injury, this injury would not have occurred while participating in his normal activities of daily living. Mr. Lunschen's previous industrial accident was a contributory element, i.e., proximate cause of later-occurring symptoms, as his symptoms were generally of the same nature.

Although Dr. Zoltani, who saw the Claimant once, believes the symptoms that Mr. Lunschen is experiencing are the result of an as-yet unknown, undiagnosed disease that may have caused neuropathy, he agrees with Dr. Kaczmarski's interpretation of the X-rays. Dr. Kaczmarski compared the two sets of x-rays that he took, one in 2005 and one in 2012, and found that the symptoms and character of the injuries were very similar.

Dr. Kaczmarski has testified that he considered his treatment of Mr. Lunschen as a continuation of the treatment he had already provided Mr. Lunschen for his 2005 industrial injury. Dr. Kaczmarski also testified that the pain that the Mr. Lunschen complained of was in the same side of his body, pointing to an aggravation of the original injury. And, as previously

stated, because he is the attending physician, Dr. Kaczmarski's testimony should be given special consideration.

Therefore, despite the fact that the Department has argued that this would be a wholly independent "new" accident, rather than an aggravation, Mr. Lunschen has shown through his doctor's testimony, a new traumatic event was not wholly and independently responsible for the production of symptoms. There is no suggestion in the record that Mr. Lunschen exceeded his restrictions or acted unreasonably. The fact that Mr. Lunschen's symptoms increased as a result of the ordinary incidents of living (almost 7 years of dealing with industrial injury residuals and gardening) is not a barrier to the reopening of his claim.

The evidence showed that Mr. Lunschen either had an aggravation of his previously accepted condition(s) and/or any of the findings that demonstrated objective worsening were related to the originally allowed condition. But for the original industrial injury, Mr. Lunschen would not have had a worsening of said conditions.

It is Mr. Lunschen's contention that the Board erred because it never considered his argument that his aggravation was due to the "ordinary incidents of everyday living" as held in *McDougle*. Then this error was compounded when the Court refused to give his jury instruction eleven. In the second line of the McDougle decision the Washington Supreme Court

states, "This case points up a misunderstanding shared by the Department of Labor and Industries, the Board of Industrial Insurance Appeals, and the trial court as to the type of incident that may precipitate an aggravation." *McDougle*, 64 Wn.2d 640 at 641.

Mr. Lunschen contends that this misunderstanding still exists. Evidence of this is in the Court's explanation for the refusal to give Mr. Lunschen's jury instruction number eleven. The Court's interpretation of McDougle in the instant case is that in order to apply the "ordinary incidents of everyday living" test, a claimant must first have a ratable impairment. (RP 6) It is Mr. Lunschen's contention that the Supreme Court did not intend for the term "disability" to be interpreted in this way.

Throughout workers compensation law the term "disability" often has a dual meaning. It is used to mean a ratable impairment in that the claimant has received a monetary award because his disability has reached a level that may impact his ability to work. But it also can mean the residual effect of an injury that may impact the claimant's life, but does not rise to the level of impairment that requires an award for permanent partial disability. The Supreme Court has held that permanent partial disability is not required for a finding of aggravation. "It is the essence of a claim for aggravation that claimant's condition is different from and worse than it was at the time of the prior closing of his claim. It is not necessary that there

shall have been any previous permanent partial disability or time loss." *Collins* 42 Wn.2d 903 at 905.

As stated above with reference to claimant's request for a *Wendt* jury instruction, the *McDougle* jury instruction is the second leg of the three legged stool argument, and just as esoteric and difficult for the jury to grasp without explication of that theory of aggravation. Add to that the fact that this case is a melding of both esoteric, difficult to grasp theories of aggravation and it becomes even more necessary to give each instruction.

E.) Because the Board did not address *McDougle* and improperly applied the law with regard to claim closure's res judicata effect, it erred when it affirmed the January 4, 2013 Department order, and as a result, the Court should have granted Mr. Lunschen's summary judgment motion and remanded the case back to the Board to reconsider Mr. Lunschen's claim in light of that finding.

As stated above, in *McDougle* the Supreme Court pointed out a misunderstanding that was shared by the Department of Labor and Industries, the Board of Industrial Insurance Appeals, and the trial court as to what types of incidents may precipitate an aggravation. This misunderstanding appears to persist because more than fifty years after *McDougle* was decided there is still confusion as to what it means.

Mr. Lunschen argued before the Board that the aggravation that occurred in his garden in May of 2012, was an ordinary incident of everyday

living as was held in *McDougle*. He presented a prima facie case with objective medical evidence from two providers, one of which was his attending physician who had seen him after both incidents in question. The Board's decision shows a misunderstanding of both the *Wendt* and the *McDougle* cases and a misapplication of the law.

The Board first states that Mr. Lunschen has to show that his back condition proximately caused by the 2005 industrial injury worsened between 2005 and 2013. The Board then goes on to state "it would be almost impossible to make such a determination because he had injuries before and after the injury that is the subject of this appeal that were at least as significant as the industrial injury."(CP 59) Mr. Lunschen contends that this statement alone shows a misunderstanding of the case law spawned by *Wendt* and *McDougle*.

First, in accordance with *Wendt*, Mr. Lunschen would not have to point to the exact injury on the spine that he believed had been caused by his industrial injury. Rather he can show that a new industrial injury caused a specific disability, or he can show that the industrial injury aggravated or "lit up" a previous disability "whether congenital or developmental." *Wendt*, 18 Wn.App. 674 (1977). Mr. Lunschen has provided a great deal of testimony from both Dr. Johnson and Dr. Kaczmarski in this regard. Dr. Johnson explained in detail how he apportioned what was damage from

traumatic injury as opposed to normal degeneration, as well as explaining how he could determine which damage occurred from which incident.

Second, the fact that the Board states that Mr. Lunschen had an injury that was "at least as significant" as the industrial injury after the industrial injury shows a misunderstanding of *McDougle*. In *McDougle* the Court stated that if a person is doing a normal incident of everyday living that one with his disability can be expected to be doing, then it is be attributed to the industrial injury. The fact that the Board refers to the incident in the garden as a separate injury without ever applying the question of whether Mr. Lunschen could have reasonably been expected to be participating in that activity with his level of disability shows that it did not consider *McDougle*.

The Board of Industrial Insurance Appeals further defined the *McDougle* rule in a 1980 case *In re: Alfred Swindell*. The Board found that, although the activity in which Mr. Swindell was involved (hunting) was a reasonable activity, it was not the activity that caused the intervening injury, but rather an accident that occurred while hunting. The Board stated that activities such as walking while carrying a gun would be considered normal activities, but Mr. Swindell fell through a rotted log and the injury to his back resulted from the fall. It was the accident during the hunting that caused the injury, not the activity itself. *In re Alfred Swindell*, BIIA Dec.,

53,792 (1980). Here, not only was there no accident that led to Mr. Lunschen's injury in the garden, but there was no consideration of whether the activity in which he was engaged was a reasonable activity at all.

The Board then goes on to state that, "the fact that the claim was closed without an award for permanent partial disability in 2005 makes it res judicata that any objective findings existing at that time were not proximately caused or aggravated by the industrial injury."(CP 60) This is a misstatement of the law in two ways.

First, as stated earlier, a person can have an impairment or disability related to an industrial injury without getting a monetary award for permanent partial disability because those awards don't start until a person is at least 5% impaired. A Category 1 impairment of the spine is from 0-4% impairment, but a claimant will not get a monetary award. Second, closing an industrial injury claim without segregating a condition means that condition can still be later attributed to the industrial injury. Mr. Lunschen's degenerative disk disease was never segregated from his 2005 industrial injury claim as not being caused or aggravated by his industrial injury, therefore it is not res judicata as to subsequent worsening or aggravation as held in *Collins*. The Board's statement that "if his preexisting low back degenerative conditions was worse seven years later when the claimant requested that his claim be reopened, it is difficult to associate that with the

2005 straining injury that left him with no ratable impairment," (CP 60) shows a misunderstanding of the rule as set out in *Collins*.

Mr. Lunschen brought these contentions forth in his Motion for Summary Judgment, requesting that the Court remand the case back to the Board for consideration of McDougle and to reconsider its application of the law to his case when talking about the res judicata effect of the original closure of Mr. Lunschen's case. Under Title 51, RCW 51.52.115, the Superior Court has the authority to determine if the Board acted within its power and correctly construed the law. Because of the above misapplications of the law the Court erred in denying Mr. Lunschen's request for Summary Judgment and remand back to the Board for reconsideration of Mr. Lunschen's claim with an explication of the proper law.

VIII. CONCLUSION

For the reasons stated above, Mr. Lunschen respectfully requests that the Court reverse the trial court's March 27, 2015 order and rule that Mr. Lunschen made a *prima facie* case that the incident in his garden in May of 2012 was an aggravation of his 2005 industrial injury and that his claim be reopened for treatment and all other related benefits under Title 51 and to reverse and remand for the Department of Labor and Industries to

take all proper and necessary actions consistent with the Court's findings and conclusions..

In the alternative, Mr. Lunschen respectfully requests that the court find that the trial court erred when it failed to give Mr. Lunschen's jury instructions number 11 and 15 and that this case should be reversed and remanded to the trial court to hear his case consistent with the Court's findings and conclusions.

Mr. Lunschen also respectfully asks this Court to grant him an award for attorney's fees for the work done before this Court under the provisions of RAP 18.1 and RCW 51.52.130.

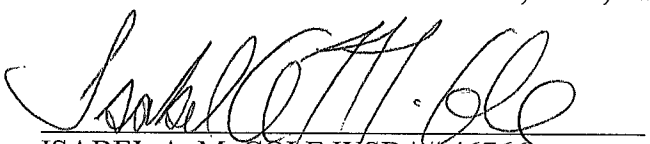
Rule 18.1 of the Rules of Appellate Procedure provides that if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP18.1

RCW 51.52.130 provides that in worker's compensation cases, if the worker appeals from a decision and order of the Board and the order is reversed or modified and additional relief is granted to the worker, the worker is entitled to attorney's fees for the work done before that court.
Mr. Thomas Lunschen's attorneys therefore request that this Court overturn the decision of the Superior Court which affirmed the decision of the Board,

and that they be awarded reasonable fees for the work done on this appeal before the Court.

Respectfully submitted this 31st day of August, 2015.

TACOMA INJURY LAW GROUP, INC., P.S.



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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS A. LUNSCHEN, Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

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) ss.
COUNTY OF PIERCE)

DOUGLAS W. LOPEZ, being first duly sworn on oath, deposes and says: That he is a Paralegal employed by TACOMA INJURY LAW GROUP, INC., P.S., Attorneys for Appellant/Plaintiff in the above-entitled matter, and that on the 31st day of August, he caused to be served, by E-File, Email, Legal Messenger, Certified Mail, or First Class Mail, as indicated, Reply Brief of Appellant to the following:

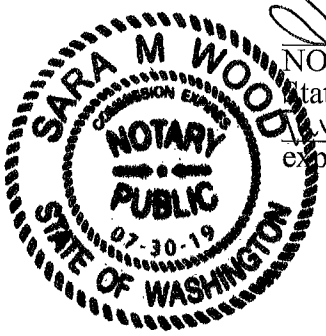
Rebecca Kim Echols, AAG

Office of the Attorney General (via Regular U.S. Mail & Email)
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
RebeccaK1@ATG.WA.GOV

DATED this 31st day of August, 2015.

Douglas W. Lopez Paralegal of Tacoma
Injury Law Group, Inc., P.S.

SUBSCRIBED AND SWORN to before me this 31st day of August, 2015.



NOTARY PUBLIC in and for the State of Washington, residing at Tacoma WA. My Commission expires 7/30/19.

TACOMA INJURY LAW GROUP INC PS

August 31, 2015 - 4:59 PM

Transmittal Letter

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Court of Appeals Case Number: 47483-2

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No Comments were entered.

Sender Name: Doug W Lopez - Email: doug@tacomainjurylawgroup.com

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