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Supreme Court No. 95252-3

Court of Appeals, Div II No. 48927-9-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

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RICHARD BOYD, Petitioner,

v.

CITY OF OLYMPIA, Respondent

DEPARTMENT OF LABOR AND INDUSTRIES, Defendant.

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AMENDED PETITION FOR REVIEW

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**APPENDIX B**

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July 1, 2011 Operative report from Dr. Green. CABR 73;

October 25, 2011 chart note of Dr. Green. CABR 75;

January 26, 2012 chart note of Dr. Green. CABR 77;

June 7, 2013 IME of Justin Sherfey, M.D. CABR 93-98;

November 15, 2013 Claim Review File Note of Carrie Fleischman. CABR 116; and

January 8, 2010 Activity Prescription Form (APF), completed by Richard Wohns, M.D. CABR 118.

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### **A. IDENTITY OF PETITIONER**

Petitioner Richard Boyd, a City of Olympia (“SIE”) firefighter injured at work, asks this court to accept review of the Court of Appeals’ decision terminating review designated in Part B of this petition.

### **B. COURT OF APPEALS DECISION**

The Court of Appeals Division II narrowly construed the Industrial Insurance Act (“IIA”)—and resolved doubts in favor of the SIE, rather than the injured worker, resulting in premature closing of his hip and back injury claim.

Firefighter Boyd’s treating physician, Dr. Rao, submitted a protest medical record to the third party administrator who was handling Mr. Boyd’s claim. This constituted a protest of a Department order of February 18, 2014 that stated that his condition was “stable.” This protest record was reasonably calculated to put the SIE on notice that Mr. Boyd was not “stable”, and that action was requested that was inconsistent with the Department’s order. The Claims Administrator Fleischman’s “belief” that it was for an unrelated condition was incorrect, and irrelevant.

Review should be accepted because: (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court interpreting the Industrial Insurance Act in favor of the occupationally injured or diseased worker.

See, *Spivey v. City of Bellevue*, 389 P.3d 504 (2017); (2) The decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals, Division I interpreting the “IIA” in favor of the occupationally injured or diseased worker. See, *Larson v. City of Bellevue*, 188 Wn.App. 857, 355 P.3d 331 (2015); (3) there is a significant due process question regarding liberal application of the IIA in favor of injured workers under the Constitution of the State of Washington; and, (4) the petition involves an issue of substantial public interest for Washington workers that should be determined by the Supreme Court.

A copy of the decision is in the Appendix at pages A-1 through A-19.

### **C. ISSUES PRESENTED FOR REVIEW**

**Issue 1:** Is the injured worker entitled to the benefits of 1) the Industrial Insurance Act, 2) case law from this court and Division I, and, 3) due process at the time of a protest on claim closure for back and hip injuries when a medical record and billing indicating the accepted conditions were not fixed and stable were timely received by the self insured employer? YES.

**Issue 2:** Is the injured worker entitled to attorney fees and costs in the Superior Court, the Court of Appeals and the Supreme Court? YES.

### **D. STATEMENT OF THE CASE**

Mr. Boyd timely filed an application for benefits for his October 22, 2009 industrial injury. The claim was allowed. CABR 81.

Mr. Boyd saw Dr. Green on September 24, 2013 and was referred for

left hip treatment, including ultrasound guided injection. CABR 85. Despite being provided with various treatment records relating to Mr. Boyd's left hip, the Board and the Court of Appeals excluded those records, even though the records were considered by the SIE in making its decision. The employer's conduct establishes it knew the care was for workplace back and hip injuries.

Richard Boyd's claim was closed on October 10, 2013. CABR 82. Through the SIE's counsel, the SIE submitted to the Claims Adjudicator Trisha Green, a September 24, 2013 **chart note** by one of Boyd's treating doctors, **Dr. Green**. CABR 84-85 A January 2, 2014 cover letter by SIE counsel that accompanied the Dr. Green chart note stated "**I understand this chart note will likely be construed as a protest to the closing order**. Please contact me if you have any questions." [bold emphasis added]. CABR 82 & 84.

In a subsequent letter from the SIE counsel to Claims Adjudicator Trisha Green and dated January 10, 2014, SIE counsel stated, "Claimant's hip surgeon, **Dr. Green, recently authored a chart note** which recommended another IME to address discrepancies in medical opinions for this claim. **That chart note served as a protest** to the October 10, 2012 closing order." [bold emphasis added]. CABR 87.

On January 13, 2014 the SIE entered a Protest and Request for



Reconsideration to the closing order. CABR 82 & 87. On January 27, 2014, the Department ordered that the October 10, 2013 order be reversed, that Mr. Boyd's claim is closed stating that his "covered medical condition/s is stable." Mr. Boyd was directed to pay the SIE for an overpayment of permanent partial disability. Mr. Boyd's claim was closed on January 27, 2014. The Department order of January 27, 2014 was affirmed on February 18, 2014. CABR 82.

On February 24, 2014, Third Party Administrator Carrie Fleischman received a chart note from Dr. Rao. CABR 353. This is within sixty days of the February 18, 2014 Department closure order. The Dr. Rao protest record provided a history of present injury, which clearly evidences that Mr. Boyd's condition related to his left hip and that his left hip was not "stable". CABR 589 & 111.

This protest record specifically identifies Mr. Boyd's chief complaint: "CC: **Ongoing** L hip, referral by Dr. Green". [bold emphasis added]. CABR 588 & 110. After the date of the visit, it states: "**Occupational** Health." [bold emphasis added]. CABR 588 & 110.

The SIE admitted on March 28, 2014, that claims manager Fleischman received his chart note *and bill* after the February 18, 2014 closing order was issued. CABR 602. The February 18, 2014 Department order should have

automatically been held in abeyance by virtue of Dr. Rao's protest record and billing.

On October 20, 2014, Richard Boyd filed an appeal to the Board of Industrial Insurance Appeals. CABR 209-221.

The Board found that it had jurisdiction, that Boyd did not file a written request for reconsideration of the Department's February 18, 2014 order with the Department within the time limitation allowed by RCW 51.52.050, Dr. Rao's chart note did not put the SIE or the Department on reasonable notice that closure of Boyd's claim was being challenged and that Mr. Boyd did not file an appeal of the Department's February 18, 2014 order within 60 days of the date when it was communicated to him and that the pleadings and evidence submitted by the parties demonstrate that there was no genuine issue as to any material fact and granted the SIE's summary judgment motion. CABR 6 & 7.

Appellant then filed a Notice of Appeal to the Thurston County Superior Court. CP 3-5. Thurston County Superior Court Judge Mary Sue Wilson issued an Order Affirming Decision and Order of the Board of Industrial Insurance Appeals on March 11, 2016, after oral argument by the parties. CP 47-49. Appellant Richard Boyd appealed to the Court of Appeals. CP 50-52. The Court of Appeals issued a published opinion on October 24, 2017. Appendix A.

### **Objective Facts Available to Claim Manager**

The Court of Appeals in its opinion stated "although a court should not delve into the **mental** processes of the Department adjudicator, it can look at what **objective facts** were available to the Department in considering the order." [bold emphasis added]. The Department, and the SIE knew that appellant had an **accepted** hip condition, which included hip surgery, and knew that there were ongoing hip issues, and ongoing care and treatment.

Exhibit F to appellant's Petition for Review of the Board's Proposed Decision and Order, is the Jurisdictional history which references the hip issue. CABR 81-82.

Exhibit G is the chart note, which references the previous hip surgery in 2011 and a letter from the employer. CABR 84-85.

Exhibit H is a letter from attorney Wallace wherein Dr. Green is referenced as claimant's hip surgeon. CABR 87-91.

Exhibit N is the 2-13-14 Rao chart note wherein he documents a 2012 arthroscopic labral debridement and a previous diagnostic hip injection, and that he had a left arthroscopic hip loose body removal, labral debridement, partial synovectomy and an osteoplasty of the femoral head neck junction on 7/1/11 and states it is an **ongoing** referral from Dr. Green. CABR 104-105.

Included within the Notice of Appeal to the Board is a section of the 9-21-11 IME by Zoltani and Kretschmer which references the 7-1-11 surgery and states the hip is an **administratively accepted condition**. CABR.215. ER 801(d)(2).

### **Judicial Notice of Claim File Documents**

ER 201 permits a court to take judicial notice of certain facts at any stage of the proceeding. In Washington the application of ER 201 on appeal is limited by RAP 9.11(a). *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n.6 14 P.3d 133 (2000).

In order to establish what the SIE's third party administrator knew in relation to the claim, Appellant requests this Court take judicial notice of the following documents included as Appendix B: Exhibits A-D, I, O and P.

Exhibit A to the Declaration of Ron Meyers is a true and correct copy of page 3 of Richard Wohns MD, May 14, 2010 chart notes. CABR 71.

Exhibit B attached to the Declaration is a true and correct copy of page 1 of the July 1, 2011 Operative report from Dr. Green. CABR 73.

Exhibit C attached to the Declaration of Ron Meyers submitted with the Petition for Review to the Board is a true and correct copy of page 1 Dr. Green's October 25, 2011 chart note. CABR 75.

Exhibit D attached to the Declaration is a true and correct copy of page 1 of the January 26, 2012 chart note of Dr. Green. CABR 77.

Exhibit I attached to the Declaration is a true and correct copy of the June 7, 2013 IME of Justin Sherfey, M.D. CABR 93-98.

Exhibit O attached to the Declaration is a true and correct copy of the November 15, 2013 Claim Review File Note of Carrie Fleischman. CABR 116.

Exhibit P attached to the Declaration is a true and correct copy of the January 8, 2010 Activity Prescription Form (APF), completed by Richard Wohms, M.D. CABR 118.

#### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

The issue is whether the Department's February 18, 2014 closing order was met with a timely protest. The February 13, 2014 Dr. Rao protest record indicated: (a) That the 2/13/14 office visit was **Occupational** Health; (b) that the chief complaint was "**Ongoing L hip**, referral by Dr. Green"; (c) that Boyd was presenting for **follow up of left hip pain**; (d) that Boyd had arthroscopic labraldebridement, in early 2012, and **last met Dr. Rao for a diagnostic hip injection**; and that he did get several months of benefit from the surgery but that the **pain has since returned**; (e) that at this February 13, 2014 visit, Boyd received a hip injection; (f) that directed Boyd to continue home exercise physical

therapy and to follow up in four to six weeks to consider psoas vsintra-articular injection if he is not improving. CABR 588-592; 110-114. Moreover, after the Department issued its order affirming closure of Mr. Boyd's claim, Dr. Rao sent this protest record **to the third party Claims Administrator** who was handling Boyd's claim. CABR 6. This record was reasonably calculated to put the SIE on notice that Mr. Boyd was not "stable", and that action was requested that was inconsistent with the Department's closing order.

The Board found that Dr. Rao's February 13, 2014 protest record did not contain protest language – none is required – and did not put the SIE or the Department "on reasonable notice that closure of Mr. Boyd's claim was being challenged." CABR 6. The Superior Court and the Court of Appeals erroneously affirmed the Board's Decision and Order.

**A. This Division II decision conflicts with rulings of the Supreme Court and Division I of the Court of Appeals.**

The Board and Courts below decided this case in conflict with a recent decision of the Supreme Court and a recent decision of Division I interpreting the IIA liberally and in favor of the occupationally injured or diseased worker. These reaffirmations are the equivalent of property rights for injured workers under the IIA.

**1. Supreme Court.**

The Supreme Court in *Spivey v. City of Bellevue*, 389 P.3d 504 (2017), recently reaffirmed the remedial nature and liberal construction of the Industrial Insurance Act.

See also, *Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 295 P.2d 310 (1956) (evidence established that an industrial injury aggravated a preexisting nonwork-related cancer, causing acceleration of the employee's death due to cancer). 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).

The Board, Superior Court and Court of Appeals **narrowly construed** the IIA – and chose to resolve doubts in favor of the SIE – rather than the injured worker.

## **2. Court of Appeals, Division I decision conflict.**

The Board and Courts failed to consider the note and billing for continuing care as a protest, thereby denying Mr. Boyd, the benefit of the liberal interpretation of the IIA. The law requires the note and bill be taken as a protest thereby holding further action to close the claim in abeyance. The facts **at the time of the protest** determine the protest – not Monday morning quarterbacking. Sending chart notes for further care and billing is the operative basis for the

protest. Looking at the relevant facts, at the time of the protest, Mr. Boyd was not fixed and stable, he needed further treatment and he was to return to determine whether the nature of the treatment would include physical therapy or even more invasive injections.

**B. Dr. Rao's chart note and billing is inconsistent with the determination that Mr. Boyd was fixed and stable. Therefore, it is a protest under the IIA as mandated by the Supreme Court.**

Applying the law as it was interpreted by this Court and Division I, to the relevant facts at the time the SIE received the February 13, 2014 Dr. Rao medical record and billing, there was a protest.

In the present case, the Department order at issue is dated February 18, 2014. Third Party Administrator Carrie Fleischman received the Dr. Rao **protest record and bill** on February 24, 2014. CABR 353. The SIE has admitted that on March 28, 2014, claims manager Fleischman wrote a letter to Dr. Rao stating they received his bill and chart note after the February 18, 2014 closing order was issued. CABR 602. There was timely receipt of Dr. Rao's February 13, 2014 protest record and his bill. Action to close the claim should have been held in abeyance while care and treatment continued.

The Board's Proposed Decision and Order and the Superior Court's order affirming the Board's decision, did **not** find that Dr. Rao lacked authority to



protest the Department order.

Dr. Rao, a treating physician, has the lawful authority to bring a request for reconsideration of a Department's closure order. An "attending doctor" for purposes of WAC 296-20-09701 means: "a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry." See WAC 296-20-01002 *Definitions*. Moreover, this definition also states that: "An attending doctor is a treating doctor." *Id.* Dr. Rao, a medical doctor providing treatment to Mr. Boyd is an attending doctor.

The Board found, incorrectly, that Dr. Rao's chart note did not put the SIE or the Department "on reasonable notice that closure of Mr. Boyd's claim was being challenged." and that it "did not contain any protest language". CABR 6. The Board, the Superior Court and Division II, made law, rather than following it.

In the present case, the February 18, 2014 Department order affirmed the January 27, 2014 order. The January 27, 2014 order indicated claim-closure on the basis that the covered medical condition(s) is **stable**. CABR 82. Review of Dr. Rao's protest record sent to the Third Party Administrator was reasonably calculated to put the SIE on notice that action was requested that was inconsistent

with the Department order that deemed Boyd “stable.”

In its significant decision of *In Re: Mike Lambert*, the Board stated that, “It is sufficient if the Department **receives a written document, filed within the time allowed by law, which is reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the decision of the Department.** Upon receipt of the October 4, 1990 letter, June Gorsky knew, or should have known, that the claimant was disputing the Department’s right to share in his third party recovery and was thereby aggrieved by the order of September 7, 1990.” [bold emphasis added]. *In Re: Mike Lambert, BIIA number 91 0107 (1991)*.

The document for consideration is the February 13, 2014 protest record of Dr. Rao.

When the Dr. Rao protest record was presented to the Third Party Claims Administrator after the February 18, 2014 claim-closure order, it either was, or should have been, evident that Dr. Rao was requesting — and had performed — action that was inconsistent with the Department’s order. Claimant was not stable. In fact, he received an injection and the record indicates the need for further home physical therapy, and it indicates there is to be a follow up visit to consider another injection if his condition did not improve. At a minimum, this protest record **was**

**reasonably calculated** to put the SIE on notice that Dr. Rao was requesting action inconsistent with the decision of the Department.

The Board ruled that the Dr. Rao protest record did not “make any reference to an industrial injury.” CABR 6. However, in its significant decision of *In Re: Mike Lambert*, the Board stated that “The use of “magical” statutory words is **not required.**” [bold emphasis added]. *In Re: Mike Lambert, BIIA Number 91 0107 (1991)*. What is required -- and mandated by our State Supreme Court—is that the Industrial Insurance Act 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**. See *Michaels v. CH2M Hill, Inc., supra; and Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 745 P.2d 1295 (1987).

Dr. Rao’s protest record of February 13, 2014 specifically identifies Mr. Boyd’s chief complaint: “CC: **Ongoing** L hip, referral by Dr. Green”. [bold emphasis added]. CABR 588 & 110. After where the record indicates the date of the visit, it states: “**Occupational** Health.” [bold emphasis added]. CABR 588 & 110. It bears noting that the Insurer Activity Prescription Form dated January 12, 2010 (using acronyms OTJI for “on the job injury” and LBP for “low back

pain”) states in part<sup>1</sup>:

“**OTJI caused** recurrent LBP and **left hip region pain.**” [bold emphasis added]. CABR 118.

Mr. Boyd’s May 14, 2010 record from South Sound Neurosurgery states in part<sup>2</sup>:

“OTJI caused recurrent LBP and **left hip region pain.**”[bold emphasis added]. CABR 71.

Mr. Boyd had left hip surgery on July 1, 2011<sup>3</sup>:

“PREOPERATIVE DIAGNOSIS **Left CAM-type hip** impingement with degenerative labrum.” [bold emphasis added]. CABR 73.

“POSTOPERATIVE DIAGNOSIS **Left CAM-type hip** impingement with degenerative labrum, plus labral tear, synovitis, two small cartilaginous loose bodies.”[bold emphasis added]. CABR 73.

“PROCEDURE **Left hip** arthroscopic loose body removal, labral debridement, partial synovetcomy, and osteoplasty of femoral head-neck junction.” [bold emphasis added]. CABR 73.

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1 Board erred when it excluded this record. The Superior Court and Court of Appeals erred when they affirmed the Board’s Decision & Order. See Judicial Notice.

2

2 Board erred when it excluded this record. The Superior Court and Court of Appeals erred when they affirmed the Board’s Decision & Order. See Judicial Notice.

3

3 Board erred when it excluded this record. The Superior Court and Court of Appeals erred when they affirmed the Board’s Decision & Order. See Judicial Notice.

Mr. Boyd's October 25, 2011 UW Medical Center record provides in part<sup>4</sup>:

“Richard Boyd is a 60-year-old fire fighter who had **left arthroscopic loose body removal, labral debridement, partial synovectomy and arthroplasty of the femoral head neck junction on 7/1/11**. He is back for routine followup. He has not had any re-injuries but he has redeveloped low back pain with lateral thigh and leg pain. **His hip** has been more sore on the lateral side. It is 5-6/10 dull constant ache that is present during activity, rest, and at night. He has not had any catching, locking or instability. He feels like **his hip** has stiffened up.” [bold emphasis added]. CABR 75.

Mr. Boyd's January 26, 2012 UW Medical Center record provides in part<sup>5</sup>:

“Richard Boyd is a 60-year-old firefighter who had **left arthroscopid hip surgery including loose body removal, labral debridement, partial synovectomy and an osteoplasty of the femoral head neck junction on 7/1/11**. He initially did pretty well but has **redeveloped pain that is a little complicated partially due to the fact that he has had a lot of overlapping back symptoms** and radicular type features to that. He has not had any repeat injuries, 5-6/10 anterior groin to the front of the knee pain with some additional pain that goes down the same area to the lateral shin and ankle. There is a separate somewhat lateral **pelvis pain that seems to come from his buttock and low back**. He has 5-6/10 dull ache. It is present with activity and rest at night. He has not had any catching, locking or instability but has noticed that his hip has had less range of motion, feels more stiff.” [bold emphasis added]. CABR 77.

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4

4 Board erred when it excluded this record. The Superior Court and Court of Appeals erred when they affirmed the Board's Decision & Order. See Judicial Notice.

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5 Board erred when it excluded this record. The Superior Court and Court of Appeals erred when they affirmed the Board's Decision & Order. See Judicial Notice.

Dr. Sherfey, MD, the SIE's independent medical examiner, issued a report providing in pertinent part<sup>6</sup>:

**“Left hip pain** due to aostabular labral tearing and exacerbation of preexisting impingement, **related to the October 22, 2009 claim, on a more probable than not basis.**” [bold emphasis added]. CABR 97.

Mr. Boyd's September 24, 2013 Dept of Orthopaedic & Sports Medicine record provides in part:

**“ASSESSMENT**

1. **Left** internal and external snapping **hip**.
2. **Status post left arthroscopic debridement and osteoplasty.**
3. Chronic low back pain with primarily right-sided lower extremity residual.

**DISPOSITION**

**I am sending Richard to see one of my partners for an ultrasound-guided injection** of both his psoas and his greater trochanteric bursa, and then, he is going to do physical therapy for stretching and strengthening of both his psoas and **hip** abductors, iliotibial band.” [bold emphasis added]. CABR 79 & 475.

The Dr. Rao February 13, 2014 protest record specifically notes that Mr.

Boyd is presenting for a follow up of left hip pain:

**“Richard Lee Boyd is a 63 year old male presenting today for f/u L hip pain.** He had arthroscopic labraldebridement in early 2012, and last met me for a diagnostic hip injection. **He did get**

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6 Board erred when it excluded this record. The Superior Court and Court of Appeals erred when they affirmed the Board's Decision & Order. See Judicial Notice.

**several months of benefit from the surgery, but the pain has since returned, maybe more severe than before.”** [bold emphasis added]. CABR 589.

Moreover, the protest record, under the section “Patient Active Problem List Diagnosis”, refers to the prior July 1, 2011 left arthroscopic hip surgery that Mr. Boyd underwent:

“Diagnosis.

1. JOINT PAIN-PELVIS
2. **left arthroscopic hip loose body removal, labral debridement, partial synovectomy and an osteoplasty of the femoral [sic] head neck junction on 7/1/11.”** [bold emphasis added]. CABR 589 & 111.

Dr. Rao sent this record to the Third Party Claims Administrator handling Mr. Boyd’s industrial injury claim. CABR 6. Even the Nurse Case Management Progress Report #15, by the Medical Case Manager – the agent for the SIE – acknowledges as an accepted condition: “permanent aggravation of **left hip** degenerative joint disease, **left hip** labral tear.”<sup>7</sup> [bold emphasis added]. See *Appendix A*. Evidence Rule 801(d)(2) provides:

**“(d) Statements Which Are Not Hearsay.** A statement is not hearsay if - -

(2) Admission by Party-Opponent. The statement is offered against a

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<sup>7</sup> This document is part of the Department’s claim file. Mr. Boyd’s Response to the SIE’s Motion for Summary Judgment specifically stated: “EVIDENCE RELIED UPON This motion is based on . . . the records of the SIE and the Department, . . .” CABR 460.

party and is (i) the party's own statement, in either an individual or a **representative capacity** or (ii) **a statement of which the party has manifested an adoption or belief in its truth**, or (iii) a statement by a **person authorized by the party to make a statement** concerning the subject, or (iv) a **statement by the party's agent** or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.” [bold emphasis added].

Clearly, if the SIE is authorizing and paying for treatment to Mr. Boyd’s left hip on this claim, those are admissions of the SIE acknowledging causation between the workplace injury and the left hip. The SIE should be held to **their own statement** set forth in their Trial Brief where, on a different issue, SIE counsel stated: “The issue of proximate cause is a legitimate issue **on the issue of the purported protest** even though it is also an issue on the underlying merits of the plaintiff’s claim.” [bold emphasis added] CP 83. If the SIE is authorizing and paying for treatment to Mr. Boyd’s left hip, that would undercut any argument by the SIE that Dr. Rao’s protest record – relating to left hip treatment – is not a covered condition. This protest record, which sought action inconsistent with the Department’s February 18, 2014 order, was a timely protest and claim is still before the Department.

The Department’s February 18, 2014 order should have been set aside based on the valid and timely protest of Dr. Rao’s protest record.

The February 18, 2014 Department order should have been held in abeyance,



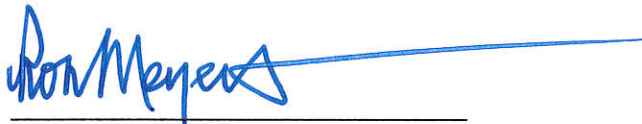
causing the IAJ and Board to lack jurisdiction. There was no appeal deadline, and Mr. Boyd's appeal was neither required nor "late." The Board, the Superior Court and Division II erred when deciding that Mr. Boyd did not timely appeal the Department's order.

#### F. CONCLUSION

This Court should accept review for the reasons indicated and reverse the decision of the Court of Appeals, Division II, filed on October 24, 2017.

DATED: December 5<sup>th</sup>, 2017

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# Appendix A

October 24, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

RICHARD BOYD,

Appellant,

v.

CITY OF OLYMPIA and DEPARTMENT OF  
LABOR & INDUSTRIES,

Respondents.

No. 48927-9-II

PUBLISHED OPINION

BJORGEN, C.J. — Richard Boyd appeals the superior court’s order affirming the decision of the Board of Industrial Insurance Appeals (Board) to grant summary judgment in favor of the City of Olympia in Boyd's appeal under the Industrial Insurance Act (IIA).

Boyd received workers’ compensation benefits for a low back injury he suffered while in the City’s employ. After several years, the Department of Labor and Industries (Department) issued a final order closing Boyd’s claim and finding his medical condition stable. Boyd did not file a timely protest to that order, but one of his health care providers, Dr. Ashwin Rao, sent a chart note and bill to the City. The City did not construe the chart note and bill as a protest.

Several months later, Boyd appealed the Department’s final order to the Board, which assigned it to an industrial appeals judge (IAJ). Boyd argued that Rao’s chart note and bill were

a protest to the closing of Boyd's claim that should have automatically put the Department's final order in abeyance. The IAJ, and later the Board and superior court, determined that Rao's chart note and bill did not put the Department on notice that he was protesting the Department's final closure order of Boyd's claim.

We agree with these rulings and hold that the chart note and bill did not reasonably put the Department on notice that Rao was protesting<sup>1</sup> the Department's final closure order of Boyd's claim. We also reject Boyd's additional arguments related to evidentiary matters, judicial estoppel, and attorney fees. Accordingly, we affirm.

#### FACTS

In October 2009, during his employment as a firefighter with the City, Boyd injured his low back. In November, he filed a claim for workers' compensation benefits for that injury, which the Department allowed.

On October 10, 2013, the Department issued an order closing Boyd's claim and directing the City to pay him a permanent partial disability award for his "Permanent Dorso-Lumbar and/or

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<sup>1</sup> The Department also argued (1) that Rao did not have authority to protest the order because he was not Boyd's attending physician and (2) even if he had authority to protest, he was not aggrieved by the Department's order. Because we resolve this appeal on other grounds, we do not address these arguments.

Lumbosacral Impairments.”<sup>2</sup> Certified Appeal Board Record (CABR) at 222.

On November 15, 2013, Carrie Fleischman of Matrix Absent Management, the City’s third party workers’ compensation administrator, received a chart note dated September 24, 2013 from Dr. John Green, providing the following details regarding Boyd’s condition:

ASSESSMENT

1. Left internal and external snapping hip.
2. Status post left arthroscopic debridement and osteoplasty.
3. Chronic low back pain with primarily right-sided lower extremity residual.

DISPOSITION

I am sending [Boyd] to see one of my partners for an ultrasound-guided injection of both his psoas and his greater trochanteric bursa, and then, he is going to do physical therapy for stretching and strengthening of both his psoas and hip abductors, iliotibial band.

He has some difficulties resolving his . . . [labor and industries’] claim as he has got 2 separate I[ndependent] M[edical] E[xamination] [IME] assessments. I recommended to him a third IME assessment to break the tie. These are some new symptoms of his hips that are unlikely to be related [to] his previously work-related problem.

CABR at 475. As a result of Green’s chart note, the October 10, 2013 closure order was held in abeyance.

On January 10, 2014, the City’s attorney sent a letter to the Department’s claims adjudicator, indicating that Green’s chart note “served as a protest to the October 10, 2013

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<sup>2</sup> The order specifically determined that Boyd’s injury was under “Category (4)” of WAC 296-20-280, which states, in part:

(4) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment, with mild but significant X-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.

This and subsequent categories include the presence or absence of a surgical fusion with normally expected residuals.

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closing order.”<sup>3</sup> CABR at 87. In this same letter, the City also protested the order closing Boyd’s low back injury claim, contending that Boyd’s permanent partial disability award overpaid him because he had received a comparable award for a similar injury several years before.

On approximately January 15, 2014, Fleischman received a concurrence report from Green, which clarified his September 24, 2013 chart note. Among other things, Green confirmed that “Mr. Boyd had new hip symptoms [that] . . . were probably unrelated to his industrial injury under this claim.” CABR at 234.

On January 27, 2014, the Department issued a new order, which addressed the City’s protest and reversed the October 10, 2013 order. It states, in part:

The order and notice dated 10/10/13 is reversed.

Labor and Industries is closing this claim [SC770117] [for Boyd’s 2009 low back injury] because the covered medical condition . . . is stable. No additional permanent partial disability will be paid over and above that paid under claim number SC 74311 [Boyd’s comparable award raised by the City].

[Boyd is] directed to pay the [City] for the overpayment of permanent partial disability.

CABR at 244.

The January 27, 2014 order was sent to Boyd’s attorney and to Michael Lee, who was identified as Boyd’s attending physician. On January 29 Boyd protested the Department’s January 27 order. On February 18 the Department issued an order affirming its January 27 order.

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<sup>3</sup> The Board’s jurisdictional history states that the City’s attorney sent a letter earlier on January 2, 2014, which indicated that Green’s September 24 chart note might be considered a protest. It is unclear whether the Board’s jurisdictional history was referring to the January 10, 2014 letter or a separate letter authored on January 2. In any event, whether there were one or two letters, the City’s attorney construed Green’s chart note as a protest.

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On February 24, 2014, Fleishmann received a chart note and bill from Rao, to whom Green had referred Boyd for his hip injection, as noted in Green's chart note. Although these documents were received on February 24, 2014, Rao's chart note reflected treatment provided to Boyd on February 13, five days before the Department's February 18 order affirming the closing of Boyd's claim. In pertinent part, the chart note states:

Office Visit

2/13/2014 Occupational Health

Richard Lee Boyd . . .

....

Reason for Visit

Procedure hip injection

....

Progress Notes

....

CC: Ongoing L hip, referral by Dr. Green

HPI: Richard Lee Boyd is a 63 year old male[ ]presenting today for f/u L hip pain. He had arthroscopic labral[ ]debridement in early 2012, and last met me for a diagnostic hip[ ]injection. He did get several months of benefit from the surgery, but the pain has since returned, maybe more severe than before. . . . [H]istory is complicated somewhat by back pain and suspected lumbar[ ]radiculopathy, affecting the calf, causing atrophy, for which he's[ ]seen Dr. Michael Lee. Richard reports pain along the anterolateral[ ]hip, particularly with sleeping at night, which causes pain to[ ]linger t[hr]ough the night, challenging his sleep. He has some added[ ]lateral groin pain, and initially Dr[.] Green has suggested injections[ ]to the trochanter and psoas. He remains active, and hopes that he[ ]can make progress with injections, as he's been doing home[ ]PT.

....

Diagnoses

Hip[ ]pain – Primary

Trochanteric bursitis of left[ ]hip

....

Patient Instructions

....

1. S/p U/S guided trochanteric[ ]injections
2. Continue Home PT
3. F/u in 4-6 weeks to consider psoas vsintra-articular injection if not improving

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CABR at 332-35. While Fleischman apparently also received a bill for Rao's treatment, the actual bill does not appear to be in the record.

Although Green had referred Boyd to Rao for this hip injection, Fleischman believed that Boyd's hip condition was unrelated to his low back injury. She also noticed that the chart note provided no workers' compensation claim or claim number. Fleischman did not construe Rao's chart note and bill as a protest to the Department's February 18 order closing Boyd's claim.

However, on March 28, 2014, in an attempt to clarify Rao's intention, Fleischman sent the following letter to Rao:

Dear Dr. Rao:

We received your bill for services performed on February 13, 2014, consisting of a medical visit and hip injection for Mr. Boyd. Your chart note indicates that Mr. Boyd was referred to you by Dr. Green for the injection.

....

The Department closed this claim on February 18, 2014, indicating that no further treatment is necessary for the October 22, 2009 industrial injury. The self-insurer received your bill and chart note after the closing order was issued. It is unclear whether there was simply miscommunication regarding the billing party, or whether you intended to protest/appeal the closing order. If you do wish to protest/appeal the closing order, please send in a written protest to either the Department of Labor [and] Industries or to my office. The protest/appeal must be received within sixty days of the February 18, 2014 order.

CABR at 330. Rao did not respond to this letter.

After 60 days, with no protest or appeal, the Department's February 18, 2014 order became final. Former RCW 51.52.050(1) (2008). On June 18 Boyd's counsel at the time paid the City the overpayment for permanent partial disability benefits as required under the January 27 and February 18 orders. On October 20 Boyd filed a notice of appeal of the Department's February 18 order with the Board.



On February 2, 2015, Boyd moved for summary judgment, arguing that Fleischman should have construed Rao's chart note and bill as a protest to the February 18 order and that Fleischman was obligated to put the order in abeyance. The City also moved for summary judgment on the theory that Rao's chart note and bill were not a protest. Attached to the City's summary judgment motion was a declaration from Rao,<sup>4</sup> indicating that he did not intend the February 13 chart note and bill that he sent to Fleischman to be construed as a protest to the February 18 closure order.

In resolving these motions for summary judgment, the IAJ held that the chart note was not "reasonably calculated to put the Department/[City] on notice that Mr. Boyd disagreed with the Department's . . . closing order." CABR at 190. The IAJ further noted that the chart note "contains no claim number, contains no reference to the alleged industrial injury, contains no reference to the employer of injury, no protest language, and no specific recommendation of further treatment, just a follow up." CABR at 190.

Boyd petitioned the Board for review of the IAJ's decision. BR at 119. Boyd attached several new documents to his petition for review to the Board that were not before the IAJ, including:

- Exhibit A . . . page 3 of Richard Wohns M.D. May 14, 2010 chart notes;
- Exhibit B . . . page 1 of the July 1, 2011 Operative report from Dr. Green;
- Exhibit C . . . page 1 of the October 25, 2011 chart note of Dr. Green;
- Exhibit D . . . page 1 of the January 26, 2012 chart note of Dr. Green;
- ....
- Exhibit I . . . June 7, 2013 IME of Justin Sherfey, M.D.;
- ....

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<sup>4</sup> In addition, the City's motion had a declaration from Green. Green's declaration stated that he believed Boyd's hip symptoms were unrelated to his low back injury on a more probable than not basis and that he intended the referral to Rao to be made outside the coverage of Boyd's industrial claim.

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Exhibit O . . . November 15, 2013 Claim Review file note of Carrie Fleischman;  
Exhibit P . . . January 8, 2010 Activity Prescription Form (APF), completed by  
Richard Wohns, M.D.

See CABR at 4, 135-37. The City moved to exclude these exhibits because they were not part of the record at the time the IAJ issued his order.

The Board agreed with the City and excluded Boyd's new evidence because he could have, in the exercise of reasonable diligence, discovered all the proposed evidence and presented it to the IAJ. The Board also agreed with the IAJ and affirmed the ruling that Rao's chart note and bill did not put the City or Department on notice that he was protesting the Department's February 18 order.

Boyd appealed the Board's order to the superior court. The superior court affirmed the Board's order granting the City's motion for summary judgment.

Boyd appeals.

## ANALYSIS

### I. STANDARD OF REVIEW

A superior court reviews the Board's actions de novo, but relies on the certified Board record and decides only those matters that the administrative tribunals previously determined. *Nelson v. Dep't of Labor & Indus.*, 198 Wn. App. 101, 108, 392 P.3d 1138 (2017). On review of summary judgment, we review de novo whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* at 109. We note also that the Board "publishes its significant decisions and makes them available to the public." *O'Keefe v. State, Dep't of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005). "These decisions are nonbinding, but persuasive authority for this court." *Id.*

## II. PROTEST

The parties dispute whether Rao's chart note and bill should have reasonably put the Department on notice that Rao was protesting the Department's February 18 order. We hold that the documents did not reasonably put the Department on notice. Therefore, no genuine issue of material fact exists and the City was entitled to judgment as a matter of law.

### A. Industrial Insurance Act, Title 51 RCW, General Principles

The IIA "is based on a compromise between workers and employers, under which workers become entitled to speedy and sure relief, while employers are immunized from common law responsibility." *Nelson*, 198 Wn. App. at 110 (quoting *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 422, 869 P.2d 14 (1994)). When a worker entitled to compensation under the IIA is injured, "he or she shall receive proper and necessary medical and surgical services." Former RCW 51.36.010(2)(a) (2007). Once maximum medical improvement has been reached, the Department may deem the injured worker's condition "fixed and stable" and close the claim. *See* former WAC 296-20-01002(3) (2008). At that point, the worker may be eligible for an award of permanent disability, among other benefits. RCW 51.32.055.

The Department's order closing an injured worker's claim becomes final 60 days after the Department communicates the order to the required parties, unless a written request for reconsideration (protest) or appeal is filed. Former RCW 51.52.050(1). If the Department receives a protest or request for reconsideration of its decision, this action "automatically operates to set aside the Department's order and hold in abeyance the final adjudication of the matter until the Department officially acts to issue its final decision by a 'further appealable order.'" *Santos Alonzo*, 56,833 and 56,833A, 1981 WL 375946, at \*3 (Wash. Bd. of Indus. Ins.

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Appeals Dec. 9, 1981) (quoting RCW 51.52.060). The Department may receive a protest through agents, which include self-insured employers and their representatives. *See In Re: Harry D. Pittis*, 88 3651, 1989 WL 168610, at \*4 (Wash. Bd. of Indus. Ins. Appeals Dec. 13, 1989).

B. Standard for Determining a Protest

No published appellate court opinion has addressed the appropriate standard to determine whether a document serves as a protest to a Department order. However, the parties argue that the standard articulated in the significant Board decision of *In Re: Mike Lambert*, 91 0107, 1991 WL 11008451, at \*1 (Wash. Bd. of Indus. Ins. Appeals Jan. 29, 1991) should govern.

In *Lambert*, the Board examined whether an attorney's letter could be construed as a protest of the Department's order distributing a worker's third party recovery. *Id.* The Board held that:

It is true that the attorney's letter of October 4, 1990 does not use the words "protest" or "request for reconsideration." It is also true that the attorney's letter does not specifically refer to the order of September 7, 1990. On the other hand, we have never imposed any strict requirements on what may constitute a "protest" or "request for reconsideration". . . . The use of "magical" statutory words is not required. *It is sufficient if the Department receives a written document, filed within the time allowed by law, which is reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the decision of the Department.* Upon receipt of the October 4, 1990 letter June Gorsky knew, or should have known, that the claimant was disputing the Department's right to share in his third party recovery and was thereby aggrieved by the order of September 7, 1990.

*Id.* (emphasis added) (citation omitted).

To be deemed a protest, the *Lambert* standard requires that the communication reasonably put the Department on notice that the worker is taking issue with some Department decision, which is the essence of a protest. The *Lambert* standard, however, does not require specific words or other effective spells to unlock the doors of relief. As such, subject to the

modifications set out below, it serves well the purposes of the IIA. For these reasons, and finding no authority to the contrary, we generally adopt the *Lambert* standard.

The parties argue, though, about the nuances of the *Lambert* standard. Boyd contends that a court examines the written document only to determine whether it reasonably puts the Department on notice of a protest. In other words, other than knowing that the Department has issued an adverse decision against the injured worker, a court can look only at the four corners of the document to ascertain whether the Department was reasonably put on notice.

The Department and the City argue that a broader analysis should apply. That is, although a court should not delve into the mental processes of the Department adjudicator, it can look at what objective facts were available to the Department in considering the order.

We generally agree with the Department's and City's approach. As quoted earlier, *Lambert* states that "if the Department receives a written document, . . . which is reasonably calculated to put the Department on notice that the party . . . is requesting action inconsistent with the decision of the Department," then a protest of its action has occurred. *Lambert*, 1991 WL 11008451, at \*1. *Lambert*'s articulation of the protest standard suggests that a court examines the document from the perspective of the Department or its agent. In that posture, a court examines information relevant to the protest that was in the possession of the Department employees or agents involved in handling the worker's claim.

We do take issue, however, with *Lambert*'s determination that a document needs to be reasonably "calculated" to put the Department on notice. "Calculated" suggests that somehow an individual's intent in sending a document, apart from the document itself or other evidence, could be taken into consideration in deciding whether a Department order was protested. To

ensure fair notice to the Department and to stay temptations to abuse, the standards for a protest should be objective ones and not rely on statements by the sender about his or her intentions. Thus, contrary to the City's position, this standard does not allow a court to examine Rao's later declaration indicating that he did not intend to protest the order.<sup>5</sup>

To conclude, to be a protest the communication must reasonably put the Department on notice that the worker is taking issue with some Department decision. In making this determination, we consider the content of the communication itself and information relevant to it that was in the possession of the Department employees or agents involved in handling the claim at the time of the communication. The use of any specific words or terminology is not required in a protest, and Rao's statement about his intentions does not play a role in deciding whether the communication should be treated as a protest.

C. Application of the Protest Standard to Rao's Chart Note and Bill

Consistently with these rules, we turn to whether Rao's chart note and bill should have reasonably put the Department on notice that he was protesting the Department's February 18 order affirming its January 27 order. Those orders determined that Boyd's low back injury was stable, that his associated claim would be closed, and that he must reimburse the City for overpayment.

Boyd argues that the documents possess the following features that show Rao was protesting the February 18 order: (1) the chart note states "Occupational Health" next to the date, (2) in the progress notes, Rao discusses Boyd's history with back pain, (3) in the patient

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<sup>5</sup> We do not express an opinion whether we would examine Rao's declaration of his intent if it had been filed during the 60-day period for protests or appeals under former RCW 51.52.050.

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instructions, Rao recommends that Boyd follow up in four to six weeks “to consider psoas vsintra-articular injection if . . . not improving,” and (4) a bill for the medical treatment accompanied the chart note. CABR at 333-35.

Despite these features, we find that the documents would not reasonably put the Department on notice that Rao was protesting the February 18 order closing Boyd’s claim for a low back injury. The thrust of Rao’s chart note concerns a hip-related injury and hip-related treatment. The accompanying bill sent to the Department was for treatment of Boyd’s hip. The requested action that was purportedly inconsistent with the Department’s decision was “to consider psoas vsintra-articular injection if . . . not improving.” However, Boyd has not shown how this type of injection was somehow related to his low back injury. Similarly, a bill requesting the Department to pay for treatment not covered by his low-back injury claim does not transform Rao’s chart note into a protest of that claim.

As to the chart note’s reference to occupational health, the January 27 order also refers to a different claim number than the one for his low back, suggesting that Boyd had multiple injury claims with the Department. Thus, the mere reference to occupational health did not reasonably put the Department on notice that the chart note was a protest of the decision closing his low back injury claim.

The only aspect of Rao’s chart note weighing in favor of a protest is that it states that Boyd’s “[h]istory is complicated somewhat by back pain.” CABR at 333-35. But as already noted, the chart note did not involve treatment or request follow up for any low back related injury. A bald statement that Boyd’s history is complicated by back pain does not transform the

chart note, which is related to his hip maladies, into one that would reasonably put the Department on notice of a protest of a decision related to a low back injury. Further, Rao's note does not reference a claim number, any of the Department's orders, or his employer. Although a protest does not need to contain these terms, their absence makes it more difficult to see how the Department could have reasonably been put on notice of a protest of an order relating to Boyd's low back injury.

In addition, the Department was aware that Green did not refer Boyd to Rao for low back claim related injuries. Green's concurrence report made that unequivocal.<sup>6</sup> Consideration of this report is consistent with the revised *Lambert* standard, where we consider what the Department knew at the time it received the document.

Under the standard adopted above, Rao's chart note, even accompanied by a bill, was not inconsistent with the February 18 order affirming the January 27 determination. These documents would not have reasonably put the Department on notice of a protest. Thus, the superior court did not err in determining that these documents were not a protest of the February 18 order.

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<sup>6</sup> The parties dispute the chronological significance of the creation of Rao's chart note on February 13, the issuance of the closure order on February 18, and the Department's receipt on February 24 of Rao's chart note and accompanying bill. This sequence does not favor either party. On one hand, the Department and City have a valid argument that Boyd was treated *before* the February 18 closure order and thus Rao could not be responding to that decision. On the other hand, it could be that even though Rao treated Boyd before the February 18 order, he sent the chart note and bill *after* the order, which could support his sending those documents in response to that order. Thus, without more evidence in the record, we do not speculate what the chronology suggests. *See also In Re: Jerry D. Bartlett*, 08 11051, 08 11052 & 08 12758 (Wash. Bd. of Indus. Ins. Appeals Feb 19, 2009) (coming to the same conclusion with similar facts).



IV. EVIDENTIARY MATTERS

Next, Boyd contends that (1) the Board abused its discretion in failing to consider new exhibits attached to his notice of appeal, (2) we should consider an appendix attached to his opening brief, and (3) we should determine that the City admitted several statements contained in a request for admissions sent to it.

A. Exhibits Attached to Notice of Appeal

In determining whether Rao's chart note and bill were a protest, Boyd argues that the superior court and Board should have considered numerous documents that were not offered before the IAJ. We disagree.

Boyd attached exhibits A, B, C, D, I, O, and P to his petition for review to the Board. He did not move to admit these documents at the hearing before the IAJ. In declining to consider them, the Board acted consistently with its decision in *In Re: Eileen P. Cleary*, 92 1119, 92 1119A, 1993 WL 308686, at \*2 (Wash. Bd. Indus. Ins. Appeals Apr. 12, 1993). *Cleary*, as did the Board here, in essence used the standard for reconsideration under CR 59. CR 59(a)(4) permits a trial court to reconsider its decision if a party shows that it has:

Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial.

Boyd contends that because the Board reviews an appeal of an IAJ's decision de novo, it was required to consider the new evidence presented to it. We agree that the Board functions in

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an appellate capacity to the IAJ and that its review is de novo. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997); RCW 51.52.100. We do not agree, though, that this posture compels the Board to accept new evidence that could have been offered before the IAJ.

Neither rule nor statute rises to heights of clarity in describing the Board's process. Its rules do disclose, though, that the IAJ is the functional equivalent of a trial court, where the bulk of testimony, exhibits, and evidence are admitted. *See* WAC 263-12-045; former WAC 263-12-115 (2008); WAC 263-12-135; WAC 263-12-140. The IAJ makes a proposed decision, which may be appealed to the Board. RCW 51.52.104. In making its decision on appeal, the Board may consider the proposed decision of the IAJ, the petition or petitions for review and "the record or any part thereof deemed necessary." *Accord*, former WAC 263-12-145(5) (2000).

Thus, to the extent the Board may consider new evidence not presented to the IAJ, *see Cleary*, 1993 WL 308686, at \*1-2, that opportunity is roughly analogous to the opportunity to present new evidence on reconsideration under CR 59(a). With that, the Board's use of CR 59(a)(4) to restrict the submission of new evidence before it is reasonable and consistent with standards of fair practice.

In applying this standard, the Board determined that the dates on the exhibits suggested that, with reasonable diligence, they all could have been produced for consideration by the IAJ. The Board also noted that Boyd did not present any evidence to the contrary. On this record, neither the Board nor the superior court abused its discretion in excluding this evidence.

Boyd also points out that his response to the City's summary judgment motion before the IAJ stated that "[t]his motion is based on . . . the records of the [City] and the Department." CABR at 460. This, he argues, shows that the exhibits in question should have been considered.

However, WAC 263-12-135 clearly states:

No part of the department's record or other documents shall be made part of the record of the board *unless offered in evidence*.

(Emphasis added.) Boyd's mere reference to the Department's and City's records does not save his failure to offer the exhibits he wished the IAJ to examine.

Accordingly, this claim fails.

B. Appendix Attached to Opening Brief

Boyd also attached an appendix to his opening brief to this court. It appears to be a nurse management report dated August 15, 2011. Under RAP 9.11, we may take additional evidence, if among other bases, it is equitable to excuse a party's failure to present the evidence to the trial court. RAP 9.11. Boyd fails to show how any of the criteria of RAP 9.11 are satisfied, which would justifiably allow us to consider this evidence. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 593-94, 849 P.2d 669 (1993). Accordingly, we do not consider this appendix.

C. Request for Admissions

In his response to the City's summary judgment motion before the IAJ, Boyd attached a request for admissions that was propounded to the City. The City objected to several of the questions contained in the request, and Boyd now asks this court to rule against the City on those objections and deem Boyd's questions to be statements of admission by the City.

The practice in civil cases applies to appeals under the IIA. RCW 51.52.140. Under CR 36 Boyd was required to request that the IAJ determine the sufficiency of the City's objections to his requests for admissions. *See* CR 36(a). Boyd has not shown that he ever requested rulings on the City's objections to his questions. Accordingly, we reject Boyd's request to deem them to be admissions by the City.

#### V. JUDICIAL ESTOPPEL

Boyd argues that because the City construed Green's chart note as a protest to the Department's October 10 order, it should be judicially estopped from construing Rao's chart note as *not* a protest to the February 18 order since the two chart notes possess similar features. We disagree.

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in *a court proceeding* and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (emphasis added) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). “[J]udicial estoppel may be applied only in the event that a litigant's prior inconsistent position benefited the litigant or was accepted by the court.” *Taylor v. Bell*, 185 Wn. App. 270, 282, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012 (2015).

Even assuming that Green's and Rao's chart notes were substantially similar, the City's interpretation of Green's chart note as a protest was not a position taken in a court proceeding

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that would later bind it through judicial estoppel. Accordingly, this claim fails.

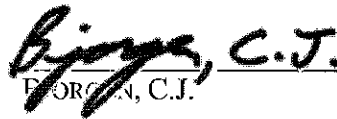
VI. ATTORNEY FEES

Boyd requests an award of attorney fees and costs incurred at all levels of appeal under former RCW 51.52.120(2) (2007); RCW 51.52.130(1). Because Boyd does not prevail, we decline to award him attorney fees and costs.

CONCLUSION

Under the appropriate standard for determining whether a document is a protest of a Department decision, Rao's chart note, even accompanied by a bill, was not a protest.

We affirm the superior court decision affirming the Board and decline to award attorney fees.

  
FORGAN, C.J.

We concur:

  
WORSWICK, J.

  
LEE, J.

# Appendix B

<b>Richard L. Boyd</b>	Home: (360) 943-5803
Male DOB: 12/23/1950	15016 Ins: MATRIX

**Social & Employment History**  
Married Firefighter

**Risk Factors**

Tobacco use: denies  
Amount & years used:  
Alcohol use: denies  
Drug use: denies  
Exercise type & frequency:  
Caffeine use per day: 3  
Past History reviewed with patient and no changes reported

**Vital Signs**

Height: 68 inches  
Weight: 175 pounds

Pain scale (0-10): 6

**Calculations**

Body Mass Index: 25.94  
Body Surface Area (m<sup>2</sup>): 1.95

**Assessment and Plan**

LUMBAR/THORACIC RADICULITIS/NEURITIS NOS (ICD-724.4)  
ARTHRODESIS STATUS (ICD-V46.4)  
LOW BACK PAIN (ICD-724.2)

**Problems added or changed:**

Added new problem of LUMBAR DEGENERATIVE DISC DISEASE (ICD-722.52)  
Added new problem of LUMBAR STENOSIS (ICD-724.02)

**ASSESSMENT:**

1. OT/1 caused recurrent LBP and left hip region pain  
2. Lumbar CT/myelo showed: Lower lumbar fusion from L3 through S1. Orthopedic hardware in place. Accelerated lumbar intervertebral disc degenerative changes at the L2-L3 level immediately above the fusion. The degenerative changes are more severe on the left side which has resulted in a scoliotic curve convex to the right at this level. L2-L5 laminectomy. There is no central stenosis. 4.5 millimeters of anterolisthesis of L3 relative to both L2 and L4. There is a moderate foraminal stenosis related to this at the L2-L3 level.

**PLAN:**

1. Left L2-3 facet injections  
2. Left L2-3 transforaminal ESI  
3. PT for heat, US, massage (10 sessions)

**Operative Report**

BOYD, RICHARD L - U3060543

nal Report \*

Result Type: Operative Report  
Service Date: July 01, 2011 00:00  
Result Status: Authenticated  
Result Title: 2858488  
Performed By: Green III, MD, John Robert on July 01, 2011 10:38  
Verified By: Green III, MD, John Robert on July 02, 2011 07:09  
Encounter info: 1735203385, UWMC, Limited Stay, 07/01/2011 - 07/01/2011

**\* Final Report \***

**OPERATIVE REPORT**

**PREOPERATIVE DIAGNOSIS**

Left CAM-type hip impingement with degenerative labrum.

**POSTOPERATIVE DIAGNOSIS**

Left CAM-type hip impingement with degenerative labrum, plus labral tear, synovitis, two small cartilaginous loose bodies.

**PROCEDURE**

Left hip arthroscopic loose body removal, labral debridement, partial synovectomy, and osteoplasty of femoral head-neck junction.

**ATTENDING SURGEON**

John R. Green, MD

**ASSISTANT**

Nicole Patrick, PA. Nicole's assistance was required since a suitably-trained resident was unavailable for the case.

**SECOND ASSISTANT**

Printed by: Martin, Roxanne  
Printed on: 07/07/2011 09:31

Page 1 of 4  
(Continued)

**RECEIVED**

JUL 18 2011

**MATRIX**



Sports Medicine - Outpt Record

BOYD, RICHARD L - U3060543

\* Final Report \*

Result Type: Sports Medicine - Outpt Record  
 Service Date: October 26, 2011 00:00  
 Result Status: Authenticated  
 Result Title: -ORTHO SPORTS MED CLINIC  
 Performed By: Green III, MD, John Robert on October 26, 2011 00:00  
 Verified By: Green III, MD, John Robert on October 29, 2011 11:02  
 Encounter info: 1738820162, UWMC, Outpatient, 10/25/2011 - 10/25/2011

\* Final Report \*

SUBJECTIVE

Richard Boyd is a 60-year-old fire fighter who had left arthroscopic loose body removal, labral debridement, partial synovectomy and arthroplasty of the femoral head neck junction on 7/1/11. He is back for routine followup. He has not had any re-injuries but he has redeveloped low back pain with lateral thigh and leg pain. His hip has been more sore on the lateral side. It is 5-6/10 dull constant ache that is present during activity, rest, and at night. He has not had any catching, locking or instability. He feels like his hip has stiffened up. He has had no swelling, worse strength, no changes in his sensation but increased pain and stiffness, which is different from his preoperative pain in a different location and different character. He has had no other health changes. He has been re-evaluated by Dr. Lee who did not think there was anything surgical to do for his back problem and radicular symptoms.

HIP PHYSICAL EXAMINATION      LEFT-RIGHT

Standing

Gait Trendelenburg

Toe Touch low back pain

Single Leg Standing Extension labral pain

Sitting

Passive Straight Leg Raise leg pain and back pain

Skin Healed incision

Resisted Flexion                      L                      R

Printed by: Maghalot, Aurea H  
 Printed on: 11/03/2011 09:31

Page 1 of 4  
 (Continued)

BOYD, RICHARD U3060543  
Sports Medicine - Outpt Record Authenticated  
Service Date: Jan-26-2012  
Dictated by Green III, MD, John Robert on Jan-26-2012

**-ORTHO SPORTS MED CLINIC**

SUBJECTIVE

Richard Boyd is a 60-year-old fire fighter who had left arthroscopic hip surgery including loose body removal, labral debridement, partial synovectomy and an osteoplasty of the femoral head neck junction on 7/1/11. He initially did pretty well but has redeveloped pain that is a little complicated partially due to the fact that he has had a lot of overlapping back symptoms and radicular type features to that. He has not had any repeat injuries, 5-6/10 anterior groin to the front of the knee pain with some additional pain that goes down the same area to the lateral shin and ankle. There is a separate somewhat lateral pelvis pain that seems to come from his buttock and low back. He has 5-6/10 dull ache. It is present with activity and rest and at night. He has not had any catching, locking or instability but has noticed that his hip has had less range of motion, feels more stiff. He has had no swelling and feels like his strength might be a little worse. He has had no change in his sensation, which he has had long-standing sensory changes with decrease sensation over his anterior thigh, lateral leg, and the sole of his foot. He does not believe any of that has changed. He has not had any bowel or bladder changes. No new problems or health changes since I saw him last.

HIP PHYSICAL EXAMINATION      LEFT-RIGHT

**Standing**

Gait Antalgic

Toe Touch to knee with mild lateral thigh

Single Leg Standing Extension Pain Free

**Sitting**

Passive Straight Leg Raise pain down the lateral thigh

Skin Healed incision

Resisted Flexion		L	R
Strength	5-		5
Pain	1+		None
Resisted Adduction			
Strength	5-		5
Pain	1+		None
Resisted Ankle Abduction			

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FEB 14 2012

**MATRIX**

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FEB 10 2012  
**MATRIX**



Justin Sherfey, D.O.  
Orthopedic Surgeon

Date: June 7, 2013

Claimant: Rich Boyd  
Date of Incident: October 22, 2009  
MES File #: 21713008242  
Date of Birth: December 23, 1950

Referring Party: Putnam & Lieb  
Referred by: Wayne Lieb  
Claim #: SC77017

Dear Mr. Lieb:

Justin Sherfey, D.O., completed an independent evaluation on Rich Boyd on June 7, 2013, for the above-referenced claim. The opinions expressed in this report are those of the examiner.

Mr. Boyd was informed that this examination was at the request of Putnam & Lieb, and that a written report would be sent to Putnam & Lieb. A copy of the report will be sent to the attending doctor if requested by Putnam & Lieb.

Mr. Boyd was also informed that the examination was for evaluative purposes only, intended to address specific injuries or conditions as outlined by Putnam & Lieb, and was not intended as a general examination.

Mr. Boyd was asked at the time of the examination not to engage in any physical maneuvers beyond personal limits, or those which could cause harm or injury.

#### History of Present Injury

The examinee is a 62-year-old male, who is here for evaluation of low back pain and left hip discomfort from a work-related injury in 2009. He stated this stemmed from an incident on October 22, 2009, when he was pulling a charged hose line when working as a firefighter. It fell out a window and he pulled it back up the stairs. He had pain, particularly in his lumbar region and left hip.

#### Current Symptoms

Currently at this point, his symptoms include some fasciculations or muscle twitches in the bilateral extremities. These seemed to be his most annoying problem. At night, he has particular left hip pain, and he has difficulty finding a position of comfort. As he changes position, he will then aggravate either his back or his hip. He finds that this is a constant pain. He is continuing to do therapeutic exercises on his own, but remains symptomatic.

He does have pain that starts in his low back and radiates down his right leg, and is associated with some numbness. He also complains of some numbness, tingling and dysesthesias in the left

Ref: Rich Boyd  
Claim #: SC77017

MBS #: 217130082S2  
Date of Exam: June 7, 2013

anterolateral thigh. It was stated these started after his left hip surgery. This can be some sharp and some aching type pain. Occasionally, it will radiate down into the left calf.

He continues to have bilateral leg cramps, calves, hamstrings and feet, worse with different changes of position. He has two areas of the lower lumbar spine in the sacroiliac region that continues to be tender to touch.

He has some concerns about his prior Physical Capacity Examination which was performed, and if he can actually perform these duties due to his ongoing pain.

Past Medical History

Injuries: Past medical history includes prior low back injuries in 1996, 2006 and 2009.

Surgeries: Surgeries include back surgeries in 1997, 2007 and 2010, and a hip surgery in 2010.

Current Medications: Medications currently include Vicodin, tramadol and clonazepam.

Allergies: No known drug allergies.

Family History: Non-contributory.

Review of Systems: Positive for some hearing loss, shaking or twitching of the limbs, and difficulty sleeping, as well as loss of motion in his joints. All other systems are negative.

Socioeconomic History

Marital Status/Dependents: He is married and has two dependents.

Education: Highest level of education is grade 14.

Primary Occupation: He was employed by the City of Olympia as a firefighter for 27 years.

Work Status: Currently he is not working.

Military Service: He had military service in the United States Marine Corps for approximately two years, with an honorable discharge.

Habits: He denies smoking, admits to alcohol, about one to two beers per week, and denies illegal drug use.

Exercise: He does continue with an elliptical-type exercise and therapeutic exercises at the gym, which he was taught for his low back.



RR: Rich Boyd  
Claim #: SC77017

MBS #: 21713008252  
Date of Exam: June 7, 2013

Record Review

I have an Independent Medical Evaluation dated September 21, 2011, from Dr. Zohani and Dr. Kretschmer. This is my only form of documentation, so I will review some of the history they have provided in this Independent Medical Evaluation. I have no other medical records. They state that he was status post L3-S1 decompression and fusion, dated October 27, 2007. He had a chronic right footdrop and left L3 radiculopathy. They mention a CT scan of his spine on December 4, 2009, which showed fusion at L3 to S1 and disc degeneration at L2 and L3, with some anterolisthesis at L3, 2 and 4. Show a myelogram of December 14, 2009, showing some anterolisthesis of L3 to both L2 and L4. Epidural steroid injections, February 9, 2010, and Dr. Walls on March 10, 2010, feels remaining extension of his fusion. The examinee was noted to see Dr. Heppenstall for left hip pain. He notes mild arthritis, paralabral cyst, and acetabular impingement. He has a discogram with Dr. Woo, April 30, 2010. Conclusion is L1-L2 levels, no discogenic pain; L2-L3 positive concordant pain. He returned to Dr. Wolms on May 14, 2010; has severe low back pain, two to three discopathy. CT scan of his lumbar spine, June 2, 2010; bilateral two and three pars defects could be acquired or post-surgical. There is then an operative note from Dr. Lee from July 3, 2010, which states removal of instrumentation L5-S1, exploration of fusion mass, posterior fusion L2-L3, and instrumentation of L2-L3.

There is a follow-up note from Keith May, October 12, 2010, for left hip pain. He states from the last impingement, which is predominantly cam in nature; probably has long activity, early stage, secondary arthrosis, based on joint narrowing. He feels this is an exacerbation of an underlying condition. A left hip steroid injection, October 14, 2010. Next MR arthrogram, left hip, October 28, 2010, showing insufficient offset of the anterolateral and lateral aspect of the left femoral head and neck junction, femoral acetabular impingement cam-type, extensive complex tear of the anterior superior and superior left acetabular labrum, moderate chondrosis.

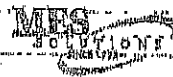
A consultation for left hip pain, Dr. Manner at the University of Washington. At this point, he does not feel he needs surgery. He thinks he may need a hip replacement in the future.

We have an operative report by Dr. Green, or they state an operative report by Dr. Green from July 2011. He performs a loose body removal, labral debridement, partial synovectomy, and osteoplasty of the femoral head and neck junction.

Physical Examination

He is a 5'9", 170 pound, right hand dominant male, who appears in no acute distress at this time.

Examination of his lumbar spine shows a well-healed midline incision. There is some surrounding muscle spasm. He has tenderness over the midline portion, as well as in the left sacroiliac and buttock region; mild tenderness on the right.



RE: Rich Boyd  
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Date of Exam: June 7, 2013

Range of motion in the lumbar spine shows flexion to 30 degrees, limited by discomfort; extension to 10 degrees; rotation to 30 degrees on the right and 30 degrees on the left; side bending 30 degrees right and 30 degrees left.

His hip on the left shows well-healed incisions. There is no tenderness to palpation over the hip. His range of motion in the hip: Flexion on the left to 110 degrees; on the right to 130 degrees. Internal rotation is 90 degrees on the left, with some lateral pain, and 40 degrees on the right. External rotation is 50 degrees on the left and 60 degrees on the right. Abduction is 30 degrees on the left and 40 degrees on the right. Extension is 20 degrees on the left and 30 degrees on the right.

His muscle strength shows 5/5 hip flexion on the right, 4/5 on the left. Knee extension shows 4/5 on the left, 5/5 on the right. The remaining muscle testing including abduction, adduction, and knee flexion is 5/5 and symmetric at 5/5. His right ankle shows weakness of the extensor hallucis longus, and dorsiflexion of 3+/5 and inversion of 4/5. The remaining motions are 5/5. The left shows 5/5 in all planes.

Deep tendon reflexes are 2/4 on the left patella and Achilles; 1/4 on the right patella and Achilles. Negative clonus on the left and mild on the right, two to three beats.

He has some paresthesias with light touch on the left thigh in the anterolateral thigh region, and decreased vibratory sense on the left lateral anterior thigh, with some dysesthesia. Sensation is intact in the right lower extremity.

Leg lengths appear to be equal. He has negative straight leg raises, both seated and supine, causing just some right-sided hamstring cramping. He is able to do a squat. This is limited in the depth he can do it, and does cause some left hip pain. He has negative FABERE testing. Internal abduction and flexion testing of the bilateral hips shows a slight clunk on the left, with mild pain.

He can toe raise. He is unable to heel raise, due to the footdrop on the right. He does walk with a slight limp. Negative Trendelenburg sign.

### Conclusions

#### Diagnoses

1. Preexisting lumbar degenerative disc disease, with prior L3 through S1 fusion, with chronic right footdrop and left L3 radiculopathy, unrelated to the industrial injury on a more probable than not basis.
2. Status post L2 to L3 fusion, with removal of L3 to S1 instrumentation, exploration of fusion mass, due to claim from October 22, 2009, on a more probable than not basis.



RE: Rich Boyd  
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3. Left hip femoral acetabular impingement, with mild degenerative changes, preexisting and not related to the industrial injury, on a more probable than not basis.
4. Left hip pain due to acetabular labral tearing and exacerbation of preexisting impingement, related to the October 22, 2009 claim, on a more probable than not basis.

Answers to specific questions from the claim manager:

Please conduct a disability rating exam in terms of the left lower extremity.

The examinee was given a primary impairment rating for his lumbar spine of a Category 5. Based on his previous Independent Medical Evaluation, he was given a Category 4 impairment rating in regard to the lumbar spine. I see no indication on today's exam that this impairment would change. Therefore, he will remain Category 5 impairment in regard to the lumbar spine.

In regard to the hip, he was awarded a 5% permanent partial impairment of the left lower extremity, due to loss of hip flexion, at his last Independent Medical Evaluation. At this point, I see an improved range of motion and do not have any impairment, based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition for motion.

In regard to his loss of muscle strength, he has decreased hip flexion strength on the left, as well as knee extension strength on the left. This is related to the claim. Based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, using both Table 17.7, grading this at a grade 4, as well as Table 17.8 on page 592, combining both the muscle, the grade 4 hip flexion weakness, as well as the grade 4 knee extension weakness. This gives us a lower extremity impairment of 17%.

Also reviewing his sensory loss and dysesthesias, using Table 17.37 on 552, involving the lateral femoral cutaneous nerve, which he has dysesthesia and paresthesias, this would give us a total impairment possible of 9% for the lower extremity.

Combining this with Table 16.10, on page 42, he would have a grade 4 sensory loss, giving us a percentage between 1 and 25%. I feel he is closer to 20%. Therefore, multiplying the full impairment of 9% times his 20% for the sensory deficit, this gives him a total of 29% impairment for sensory loss in the left lower extremity.

Since the sensory cannot be combined with a loss of strength, I would go with his highest number of loss, as this likely represents his true disability in regard to the left hip. Therefore, this would be 17% lower extremity impairment.

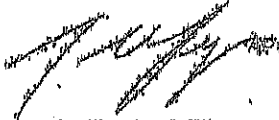
Page 6 of 6

RE: Rich Boyd  
Claim #: SC77017

MES #: 21713008252  
Date of Exam: June 7, 2018

Thank you for the opportunity to assist you in the evaluation of this case. If you have any questions or concerns, please feel free to contact MES.

Sincerely,



Justin Sherfey, M.D.  
Orthopedic Surgeon

D dictated, reviewed, and opinion verified.

JSmu-em





notes30278967.txt

Indemnity Medical Expense Total Recovery  
Incurred: 300,000.00 81,571.00 75,288.59 456,859.59 2,974.59  
Paid: 261,955.06 68,269.28 57,785.40 388,009.74 2,974.59  
Remaining: 38,044.94 13,301.72 17,503.19 68,849.85 0.00

Holding: 0.00 0.00 0.00 0.00 0.00

---

Date : 11/15/2013 Type: Plan of Action  
By : Carrie Fleischman  
Subject: Claim Review - Plan To Conclude

My plan of action is to pay PPD, await to see if claimant and his attorney file a protest/appeal to the closing order on this claim. They have until 12/8/2013

---

Date : 11/15/2013 Type: Claim Review  
By : Carrie Fleischman  
Subject: Claim Review - Summary Of Facts

SIVRF was approved by DLI on 4/2/2013. WE have submitted the claim for closure with Category 4 PPD on 4/9/2013. VDRO has received a protest. Sky's office sent over a letter asking that the employability be affirmed based on clear medical preponderance and sign off by his own physicians. VDRO upheld the employability decision on 5/30/2013.

This claim was submitted to DLI for closure on 4/9/2013. Now that employability is resolved await closing order. His atty will file a protest to closure of the claim and that he is employable. Wayne Lieb, claimant attorney has sent over a PPD rating exam by Dr. Sherfey. Joe at the City has given sky authority to offer Mr. Boyd up to \$12,000.00 (hopefully less) in exchange for a complete release, withdrawal of all claims, etc. If they are not willing to accept this negotiated settlement, then you should proceed with interviewing his Dr. and freshening our Dr. and preparing to fight it out. There will not be additional settlement offers (a million for defense, not one more dime for settlement). Still in negotiations for settlement, last offer was \$9250.70, this was presented to clmts attorney on 9/17/2013. He was seen by Dr. Green and the chart note does not support further treatment as related to this claim.

DLI issued claim closure with cat 4 PPD of \$27207.93. We have begun to pay the PPD in payments. Await to see if they protest or file an appeal. We anticipate a protest/appeal.

---

Date : 11/15/2013 Type: Subrogation  
By : Carrie Fleischman  
Subject: Claim Review - Subrogation and SIF

There is no third party, he was pulling a charged hose out of a window and hurt his lower back.

There is no excess or recovery.

---

Date : 11/15/2013 Type: Reserves  
By : Carrie Fleischman  
Subject: Claim Review - Exposure Evaluation

2010/01/08 16:35

(FAX)

P.002/003

use return to:

X: (503) 977-3670

Matrix Absence Management, Inc.

PO Box 1468

San Jose CA 95109-1468

DR 12-21-09 Richard L Boyd



INSURER ACTIVITY PRESCRIPTION FORM (APF)

Billing Code: 1073M (Guidance on back)

Reminder: Send chart notes and reports to L&I or to SERTPA as usual

W875568

**General Info**

Worker's Name: Richard Boyd Visit Date: 18. 2010 Claim Number: SC 97017 - 2347922

Health-care Provider's Name (printed): Richard Johns, MD Date of Injury: 10/22/2009 Diagnosis: Lumbar Stenosis, Lumbar DDD

**Required: Released for work? Check at least one**

Worker is released to the job of injury without restrictions as of (date): 1/1/10 *SRP to "Plans" section below.*

Worker may perform modified duty, if available, from (date): 1/1/10 to 1/1/10

Worker may work limited hours: 1 hours/day from (date): 1/1/10 to 1/1/10

Worker is working modified duty or limited hours  
Please estimate capacities below and provide key objective findings at right.

Worker not released to any work from (date): 10/22/09 to 03/10/10

Prognosis poor for return to work at the job of injury at any date

May need assistance returning to work  
Capacities apply 24/7, please estimate capacities below and provide key objective findings at right.

**Required: Key Objective Finding(s)**  
OTSI caused recurrent LBP and left hip region pain. Changed at L2-L3 level immediately above the fusion.

**Required: Estimate what the worker can do (Unless released to 100%)**

Capacity duration (estimate days):  1-10  11-20  21-30  30+  permanent

Worker can: (Related to work injury.) Blank space = Not restricted	Never	Seldom 1-10% 2-4 hours	Occasional 11-20% 4-8 hours	Frequent 21-50% 2-8 hours	Constant 51-100% Not restricted
Sit					
Stand / Walk					
Climb (ladder / stairs)					
Twist					
Bend / Sloop					
Squat / Kneel					
Crawl					
Reach Left, Right, Both					
Work above shoulders L, R, B					
Keyboard L, R, B					
Wrist (flexion/extension) L, R, B					
Grasp (forearm) L, R, B					
Fine manipulation L, R, B					
Operate foot controls L, R, B					
Vibratory tasks; high impact					
Vibratory tasks; low impact					
Lifting / Pushing	Never	Seldom	Occas.	Frequent	Constant
Carry	L, R, B lbs	lbs	lbs	lbs	lbs
Push / Pull	L, R, B lbs	lbs	lbs	lbs	lbs

**Other Restrictions / Instructions:**  
He is to be off until PT is completed as well as injections completed

Employer Notified of Capacities?  Yes  No  
Modified duty available?  Yes  No  
Date of contact: 1/1/10  
Name of contact: \_\_\_\_\_  
Notes: \_\_\_\_\_

Note to Claim Manager: \_\_\_\_\_

New diagnosis: Lumbar Stenosis

Opicoids prescribed for:  Acute pain or  Chronic pain

**Required: Plans**

Worker progress:  As expected / better than expected.  Slower than expected. Address in chart notes

Current rehab:  PT  OT  Home exercise  Other Facet injections and EST's

Surgery:  Not indicated  Possible  Planned

Comments: \_\_\_\_\_

Next scheduled visit in: on days 3-10-10 weeks

Treatment concluded, Max. Medical Improvement (MMI)  
Any permanent partial impairment?  Yes  No  Possibly  
If you are qualified, please rate impairment for your patient.  
 Will rate  Will refer  Request IIME

Care transferred to: Kathy Wang, DO  
 Consultation needed with: for injections  
 Study pending: \_\_\_\_\_

**Sign**

Signature (Required): \_\_\_\_\_ Date: 1/12/10

Doctor  ARNP  PA/MD  N/A

Phone number: 553-41-8939

Copy of APF given to worker  Talking points (on back) discussed with worker

State Fund Claims Fax to claim file. Choose any number: 360-892-4202 360-892-4605 360-892-4606 360-892-4657 360-892-6260 360-892-6261 360-892-6262 360-892-6430

\*Self-insured Claimant: Form list of SERTPAs, go to: [www.lni.wa.gov/Claimsline/Insurance/SelfInsured/EMPList/FinalDefault.asp](http://www.lni.wa.gov/Claimsline/Insurance/SelfInsured/EMPList/FinalDefault.asp)

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**RON MEYERS & ASSOCIATES PLLC**

**December 05, 2017 - 9:08 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95252-3  
**Appellate Court Case Title:** Richard Boyd v. City of Olympia and Department of Labor & Industries  
**Superior Court Case Number:** 15-2-01415-1

**The following documents have been uploaded:**

- 952523\_Other\_20171205090756SC761533\_0926.pdf  
This File Contains:  
Other - Amended Petition for Review  
*The Original File Name was Amended Petition for Rev.pdf*

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- PaulC1@atg.wa.gov
- bmasters@wallaceklormann.com
- jamesm7@atg.wa.gov
- matt.j@rm-law.us
- swallace@wallaceklormann.com
- tim.f@rm-law.us

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