

62516-1

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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

Don Herron, Appellant
v.
Community Transit, Respondent

Case No. 62516-1-I

OPENING BRIEF OF APPELLANT

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 24 PM 12:06

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INTRODUCTION

This appeal was filed by Don Herron, a worker covered under the prevue of the Industrial Insurance Laws of the State of Washington. Mr. Herron asks this Court to review two issues:

1. DID THE TRIAL COURT HAVE JURISDICTION TO HEAR THE EMPLOYER'S APPEAL?

If this Court does find that the trial court did in fact have jurisdiction to hear the Employer's Appeal from the Decision of the Board, we then ask this Court address the second issue:

2. SHOULD MR. HERRON'S CLAIM FOR BENEFITS BE ALLOWED?

ASSIGNMENTS OF ERROR

1. THE TRIAL COURT LACKED JURISDICTION TO HEAR THE EMPLOYER'S APPEAL FROM THE MARCH 7, 2007, FINAL DECISION OF THE BOARD. THE DECISION OF THE TRIAL COURT SHOULD BE VACATED.
 - A. The employer's petition for review of the Board's Proposed Decision and Order was not timely, nor was an extension granted pursuant to RCW 51.52.104 (Finding of Fact No.1, in part: page 3, lines 21-23)
 - B. Service of the Employer's Notice of Appeal from the Decision of the Board was not perfected by serving the Board with the Notice of Appeal within the time proscribed in RCW 51.52.110. (04/03/07 and 04/25/07 Employer's Certificates of Service)

2. MR. HERRON'S APPLICATION FOR BENEFITS FOR HIS RIGHT FOOT SHOULD BE ALLOWED FOR AN INDUSTRIAL INJURY OR OCCUPATIONAL DISEASE, OR BOTH.

- A. On July 9, 2004, Mr. Herron sustained an industrial injury when he experienced, for the first time, an extreme pain to his right foot while in the course of employment with Community Transit, contrary to trial court's Finding of Fact No. 4.
- B. The pain Mr. Herron felt in his right foot while driving a bus, arose naturally and proximately from the distinctive conditions of his employment with Community Transit, and his condition is compensable as an occupational disease, contrary to the trial court's Finding of Fact No. 5.

ISSUES UNDER ASSIGNMENTS OF ERROR NO. 1

THE TRIAL COURT LACKED JURISDICTION TO HEAR THE EMPLOYER'S APPEAL FOR THE FOLLOWING REASONS, EITHER OF WHICH IS SUFFICIENT TO VACATE THE DECISION OF THE SNOHOMISH COUNTY SUPERIOR COURT:

A. Petition For Review Was Not Timely Filed: A Petition for Review was not timely filed with the Board, whereas rendering the Board's Order dated March 7, 2007, the Final Decision of the Board, which is not appealable unless a Petition For Review is first filed with the Board. RCW 51.52.104. (see trial court Finding of Fact No.1, in part: page 3, lines 21-23)

The Proposed Decision and Order of the Board was dated January 11, 2007. An aggrieved party has 20 to file a Petition For Review, or to request an extension. The Employer filed an Petition For Review on February 21, 2007. The certified copy of the Appeal Board record does not includes a request by the Employer for an extension in which to file their Petition For Review from the

Employer, nor does the record show an Order granting such an extension. Without a valid extension, the Employer failed to timely file their Petition. RCW 51.52.104

For a party to gain relief in Superior Court that was not granted to them in the Board's Proposed Decision and Order, they must file a Petition For Review. RCW 51.52.110; Homemakers Upjohn v. Russell, 33 Wn. App. 777 (1983) If a Petition For Review is not filed (timely), then the Proposed Decision and Order of the Board is considered "adopted". RCW 51.52.110.

Despite the language in RCW 51.52.104, which states: "...no appeal may be taken to the court where the Board has properly entered an Order adopting the Proposed Decision and Order...", a party may technically still appeal the Board's Final Order which adopted a Proposed Decision and Order to Superior Court, but the Trial Court will not be able to grant relief to the parties outside that which was granted in the Board's Order already. Homemakers Upjohn v. Russell.

B. Failure To Perfect Service of The Notice Of Appeal: The Employer's Notice of Appeal to Superior Court was not served on the Board within 30 days of receipt of the Board's final Order pursuant to RCW 51.52.110. (see 04/03/07 and 04/25/07 Employer's Certificates of Service)

The final Decision and Order of the Board was the March 7, 2007, Order Denying the Employer's Petition for Review. For a Trial Court to have jurisdiction, a Notice of Appeal from the Board's final Order must be filed with the proper trial Court and served on both the Board and the on Director of the Department within 30 days of receiving the Order. The Employer filed their Notice of Appeal and served the Director of the Department on April 3, 2007. However, the Employer failed to serve the Notice of Appeal on the Board until April 25, 2007, well beyond the 30 days proscribed in RCW 52.51.110.

Due to unperfected service on the Board, jurisdiction to hear the Employer's Appeal did not vest in the Superior Court, and therefore should not have been heard. The Snohomish County Superior Court Decision dated September 18, 2008, should be VACATED, and the final Decision of the Board dated March 7, 2007, shall become the final determination of ALLOWANCE in this claim.

ISSUES UNDER ASSIGNMENT OF ERROR NO. 2: MR. HERRON SUSTAINED AN INDUSTRIAL INJURY OR OCCUPATIONAL DISEASE TO HIS RIGHT FOOT AND HE IS ENTITLED TO INDUSTRIAL INSURANCE BENEFITS THEREFROM.

A. This Claim Should Be Allowed For An Industrial Injury:

Mr. Herron sustained an industrial injury as defined in RCW 51.08.100 and as such, his application for benefits should be ALLOWED, contrary to the trial court's Finding of Fact No. 4.

Finding Of Fact No. 4. Mr. Herron's right foot symptoms were more likely than not the (sic) caused by the diabetic condition and or the tumor that remained untreated at the time he became symptomatic. The symptomatic condition was not the result of a sudden and tangible happening of a traumatic nature while Mr. Herron was in the course of his employment with Community Transit. There is no medical evidence to support a tendon tear as found by the Board.

The Superior Court's Finding of Fact No. 4 is contrary to the practices and standards employed by the Department of Labor and Industries of this State when assessing an application for benefits. The Snohomish County Superior Court Decision reversed the March 7, 2007, Decision and Order of the Board which allowed this claim as an industrial injury only. That Order of the Board reversed the September 15, 2005 Order of the Department which allowed the claim as an industrial injury or an occupational disease.

The September 18, 2008 trial Court Decision should be REVERSED, so that Mr. Herron's application for benefits is ALLOWED for an compensable injury he sustained on July 9, 2004, while driving a bus for Community Transit

Quite simply the facts are that on July 9, 2004, Mr. Herron sustained an industrial injury when he experienced for the first time, an extreme pain to his right foot while in the course of employment

with community transit. The pain was such that Mr. Herron was unable to continue driving a bus beyond that date because the pain would return due to his right foot conditions. After seeking medical treatment, it was learned that Mr. Herron had underlying medical problems potentially affecting his right foot, but for which he was not being treated medically prior to experiencing the pain on July 9, 2004, all contrary to the trial court's Finding of Fact No. 4.

B. Claim Should Be Allowed For An Occupational Disease:

Mr. Herron's right foot condition is an occupational disease as defined in RCW 51.08.100 and his application for benefits should be ALLOWED. (see Finding of Fact No. 5)

Finding of fact No. 5: The right foot symptoms that Mr. Herron developed on July 9, 2004, during the course of his employment with Community Transit, and for which he sought medical treatment, did not arise naturally and proximately from distinctive conditions of his employment with Community Transit.

Mr. Herron's right foot condition arose naturally and proximately from the distinct conditions of his employment with Community Transit as defined in RCW 51.08.140, and is therefore an occupational disease for which he is entitled to receive benefits under the Industrial Insurance Laws of this State.

The trial Court erred in its Finding of Fact No. 5, as Mr. Herron's right foot condition developed, at least in part, from his duties as a bus driver for Community Transit. Driving a bus and enduring the

constant use of one's right foot to pump the air brake need not be *the* cause, of Mr. Herron's right foot condition, it need only be a cause.

This Finding of Fact is contrary to the Industrial Insurance Laws of this State, and it reversed the March 7, 2007 Decision of the Board which in part reversed the September 15, 2005, Decision of the Department, which allowed this claim for an injury or an occupational disease. Mr. Herron's application for benefits should therefore be ALLOWED for an occupational disease.

STATEMENT OF THE CASE

This appeal was filed by Don Herron, a worker covered within the scope of the Industrial Insurance Laws of the State of Washington. Mr. Herron asks this Court to review two issues, the first of which is: Did the trial Court have jurisdiction to hear the Employer's Appeal to Superior Court? If this Court does find jurisdiction, we then ask this Court to make a determination of whether Mr. Herron's application for benefits to the Department of Labor and

Industries should be allowed, either for an injury or for an occupational disease.

On July 9, 2004, while driving a bus for Community Transit, Don Herron experienced a distinct pain in his right foot, which he had not felt previously. He sought medical treatment that day and eventually began treating with Thomas Skalley, MD, an orthopedic surgeon, in September 2004.

Mr. Herron attempted to return to work with Community Transit, but the pain increased rendering him unable to return to his job driving a bus.

On November 8, 2004, Mr. Herron filed an application for benefits with the Department of Labor and Industries. On September 15, 2005, the self-insured section of the Department issued an Order which **ALLOWED** this claim stating Mr. Herron sustained an injury or occupational disease while in the course of employment with Community Transit; that the accepted conditions include partial tear and tendinopathy of the peroneus longus and brevis tendons of the right lower extremity; and directing the self-insured Employer to pay

all medical and time loss benefits as indicated in accordance with the Industrial Insurance Laws.

The self-insured Employer, Community Transit , appealed this September 15, 2005, Decision to the Board of Industrial Insurance Appeals. After hearing the testimony of Mr. Herron, and reading the transcripts of the depositions of his treating physician Dr Skalley, and two independent medical examiners Dr. Robins and Dr. Kopp, the Board issued a Proposed Decision and Order dated January 11, 2007, stating Mr. Herron's right foot condition was not the result of an occupational disease; that Mr. Herron sustained an industrial injury during the course of employment with Community Transit; and remanded the matter back to the Department with direction to issue an Order allowing this claim as an industrial injury occurring on July 9, 2004; the accepted conditions include partial tear and tendinopathy of the peroneus longus and brevis tendons of the right lower extremity; and directed the self-insured employer to provide treatment and benefits to Mr. Herron as he is entitled under the law.

On February 21, 2007, the Employer Petitioned the Board for Review of the Proposed Decision and Order dated January 11, 2007. The Board issued an Order dated March 7, 2007, which

denied the Employer's Petition. The Proposed Decision and Order then became the final Order of the Board, appealable only to Superior Court.

On April 3, 2007, the Employer filed a Notice of Appeal in the Superior Court of Snohomish County and faxed the Notice of Appeal to David Threedy, the Director of the Department of Labor and Industries. The Notice of Appeal was sent via the United States Postal Service to the Board and other parties on April 25, 2007.

A bench trial was held as proscribed by statute in the Superior Court of Snohomish County, and on September 18, 2008, the Honorable George N. Bowden ruled that the Decision of the Board is reversed, finding that there was no basis to conclude that Mr. Herron sustained a compensable work-related injury or occupational disease.

The Department thereafter issued an order denying the claim for both an injury and an occupational disease, and assessed Mr. Herron with an overpayment for the benefits he received under this claim.

Mr. Herron hereby Appeals the Decision of the Snohomish County Superior Court, and requests a Decision that the trial Court

lacked jurisdiction to hear the Appeal due to the Employer's fatal flaw in perfecting service on the Board within the statutory 30 day timeframe. In the alternative, Mr. Herron requests a Decision allowing his claim for benefits as a compensable injury or occupational disease under the Industrial Insurance Laws of this State.

Therefore, if this Court finds that the trial Court did not have jurisdiction, we respectfully request that you VACATE the September 18, 2008, Superior Court Decision which reversed the March 7, 2007, Decision of the Board. This would allow the claim for an injury pursuant to the Order of the Board.

In the alternative, we ask this Court to REVERSE the Decision of the trial Court which reversed the March 7, 2007 Decision of the Board which ALLOWED this claim for an injury, or REVERSE the portion of the Board's Decision which denied the claim for an occupational disease, so that the September 15, 2005 Decision of the Department of Labor and Industries, which ALLOWED this claim for an injury or occupational disease become the final determination of allowance.

ARGUMENT FOR ASSIGNMENT OF ERROR NO. 1:
TRIAL COURT JURISDICTION

A. Untimely Petition For Review

An appeal to Superior Court must comply with the requirements of RCW 51.52.110, especially with respect to perfecting service.

RCW 51.52.110 Court appeal — Taking the appeal.

Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board shall become final.

In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the department's records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county. In all other cases the appeal shall be to the superior court of Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board....

The Proposed Decision and Order of the Board was dated January 11, 2007. An aggrieved party has 20 days within which to file a Petition For Review, or to request an extension. The

Employer filed a Petition For Review on February 21, 2007. The certified copy of the Appeal Board record does not include a request by the Employer for an extension in which to file their Petition For Review from the Employer, nor does the record show an Order granting such an extension. Without a valid extension, the Employer failed to timely file their Petition. RCW 51.52.104

For a party to gain relief in Superior Court that was not granted to them in the Board's Proposed Decision and Order, they must file a Petition For Review. RCW 51.52.110; Homemakers Upjohn v. Russell, 33 Wn. App. 777 (1983) If a Petition For Review is not filed (timely), then the Proposed Decision and Order of the Board is considered "adopted". RCW 51.52.110. (*Advanced Workers' Compensation in Washington*, Albo, Annan, Hall, and Pontarolo, Copyright 1991, pgs 102-104)

Despite the language in RCW 51.52.104, which states: "...no appeal may be taken to the court where the Board has properly entered an Order adopting the Proposed Decision and Order...", a party may technically still appeal the Board's Final Order which adopted a Proposed Decision and Order to Superior Court, but the Trial Court will not be able to grant relief to the parties outside that which was granted in the Board's Order already. Homemakers

Upjohn v. Russell. (*Advanced Workers' Compensation in Washington*, Albo, Annan, Hall, and Pontarolo, Copyright 1991, pgs 102-104)

B. Unperfected Service of Notice of Appeal

In the present case, the Employer filed their Notice of Appeal of the Board's March 7, 2007, Decision and Order on April 3, 2008, in the Superior Court of Snohomish County and served the Director of the Department via facsimile on the same date. However, the Employer's Declaration of Service shows that the Board was served via United States Postal Service on April 25, 2008. This does not comply with the requirements of service in the applicable RCW. Superior Court jurisdiction is contingent upon the requirements in RCW 51.51.110, as the Court has addressed in multiple cases. Graves v. Vaagen Brothers Lumber, 59 Wn. App. 98 (1989).

In Rybarczyk v. Department of Labor and Industries, 24 Wn. App. 591 (1979), rev. denied, 93 Wn. 2d 1010 (1980); and Smith v. Department of Labor

and Industries, 23 Wn. App. 516 (1979). In Fay v. Northwest Airlines the Court held that it was without jurisdiction to entertain an appeal where the Director of the Department was not served within 30 days of receiving the final Order of the Board. Fay v. Northwest Airlines, 115 Wn. 2d 194 (1990). Given the language of the statute which states that a party appealing a decision of the Board must file and serve the Notice of Appeal on the Director and the Board, and 30 days is the only timeframe proscribed, one can infer that this timeframe is the same for both of these interested parties to receive service. (*Advanced Workers' Compensation in Washington*, Albo, Annan, Hall, and Pontarolo, Copyright 1991, pgs 102-104)

ARGUMENT FOR ASSIGNMENT OF ERROR NO. 2:

CLAIM ALLOWANCE - FINDING OF FACTS NO. 4 AND 5

**The question presented to the trial Court was did Don Herron meet his burden of establishing that he sustained an industrial injury or occupational disease while in the course of employment with Community Transit?
(Assignment of Error 2; Finding of Fact No. 4.)**

When deciding the question of whether the Claimant suffered an industrial injury or an occupational disease, the trial court's Finding

of Fact Nos. 4 and 5 strayed from the statutes, case law and significant decisions of the Board in worker's compensation cases.

It has long been held that the Washington State Industrial Insurance Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. The court is required to give a liberal interpretation of the Act in favor of the worker. **(citation)**

In the present case, the trial court's Findings of Fact No. 4 and 5 resulted in the conclusion that Mr. Herron did not sustain an industrial injury, nor was his condition an occupational disease. In Finding No. 4 the Court stated there wasn't any medical certainty and the issue of causation wasn't proven by the worker. However, the worker's compensation system is unique in the Claimant's requisite standard of proof for an injury, and medical testimony need not be beyond a reasonable doubt, but merely that the incident or occurrence produced an immediate result which was a proximate cause of the injury. As stated In In Re: Virginia Key it is clear that the requirements of proof for an industrial injury are not as stringent under our system as the requirements of proof for an occupational disease. An industrial injury need not rise naturally

and proximately out of employment; it must only occur during the course of employment. Proof that an on-the-job incident proximately caused the condition complained of will suffice. In Re: Virginia Key, Docket No. 94 4700. Therefore, the portion of the Board's decision that stated the worker suffered an occupational disease was correct, or in the alternative, the order of the DEPARTMENT that stated the claimant sustained an industrial injury or occupational disease was correct, and trial court's ruling should be overturned in total.

The Trial Court accepted the testimony of Mr. Herron "unequivocally with respect to the onset of symptoms, what he was doing, the manner in which he's called upon to operate the bus, and so forth." (Report of Proceedings, pg 4 lines 16-19) And the Board stated "Mr. Herron's testimony that he developed intense pain while driving a bus during the course of employment with Community Transit was credible, persuasive, supported by the fact that the day he reported the incident he sought medical assistance as soon as he could." (01/11/07 PD&O, pg. 8 lines 18-20)

"Mr. Herron did give a history to Dr. Skalley's assistant that he had some pain before he developed the intense pain. The evidence, however, when looked at as a whole establishes, more

probably than not, that it was the intense pain, which Mr. Herron's uncontroverted testimony established came on suddenly, that caused Mr. Herron to seek treatment." (01/11/07 PD&O, pg. 8 lines 20-24)

AN INDUSTRIAL INJURY IS DEFINED AS:

A sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom. RCW 51.08.100.

To constitute an industrial injury, each of the following elements must be established: 1) That there was an identifiable happening, incident, event, or occurrence at a specific time and place during the course of employment; 2) That the incident produced an immediate and prompt result; 3) That law and medical testimony establishes that the incident proximately caused the physical condition complained of on a more probable than not basis.

The Board has interpreted each element within the definition of an injury through significant decisions as set out below:

"Sudden and tangible happening" An event is a sudden and tangible happening of a traumatic nature when it is something of notoriety, fixed as to time and susceptible of investigation. In this decision In Re: Adeline Thompson, BIIA Dec., 90 4743 (1992) is designated as "significant." In Re: Virginia Key, 94 4700 (1996) [dissent]. The Board's decision was appealed to

Superior Court under King County Cause No. 97-2-24869-9KNT.]

"Traumatic nature" A worker's aspiration of a piece of steak during a business lunch is a "sudden and tangible happening, of a traumatic nature...occurring from without," and meets the statutory definition of an injury. No showing of external physical violence is necessary for an incident to qualify as "traumatic." In Re: Donald Cawley, Dec'd., 41,864 (1974) [dissent]

The Board has also decided that unusual exertion while performing their job function is not required by a worker, as stated in significant decision In Re: Gary Sundberg, 62,107 (1983) [dissent]:

Unusual exertion not required The aggravation of preexisting lung blebs (weakened spots) ruptured by routine on-the-job exertion is compensable as an "injury." It is not necessary to show unusual exertion as in cases of cardiovascular incidents.

Acting in the course of employment RCW 51.08.013 provides the definition of Acting in the course of employment as a worker who is "acting at his or her employer's direction or in the furtherance of his or her employer's business..."

The trial court's FINDING FACT NO. 4 is as follows. Mr. Herron's right foot symptoms were more likely than not the (sic) caused by the diabetic condition and or the tumor that remained untreated at the time he became symptomatic. The symptomatic condition was not the result of a sudden and tangible happening of a traumatic nature while Mr. Herron was in the course of his employment with Community Transit. There is no medical evidence to support a tendon tear as found by the Board.

In light of the definitions provided above, the specific errors of the trial court are as follows:

“...more likely than not...”

This relates to the burden of proof upon a party. In the instant case, the Employer appealed the Decision and Order of the Department. The burden of proof in that instance is provided in significant decision In re: Christine Guttromson, 55,804 (1981):

In an employer appeal, the employer must first present evidence sufficient to make a prima facie case. The burden then shifts to the worker to establish her entitlement to benefits by a preponderance of the evidence.

“...caused by the diabetic condition and or the tumor *that remained untreated at the time he became symptomatic....*”

One of the tenets of the industrial insurance system in this state is that we must take the worker as they are, or “as we find them” See Metcalf v. Department of Labor & Indus., 168 Wash. 305, 11 P.2d 821 (1932). To say that the onset of extreme pain Mr. Herron experienced *for the first time* while driving a bus for Community Transit, is in no way attributable to the force and repetition required to operate such, but rather due to his diabetes, which he has managed with insulin since 1974 and which never

caused him pain in his right foot¹ prior to July 9, 2004, or the tumor on his foot, which wasn't known about by Mr. Herron or his physicians prior to July 9, 2004, or the combination of both of these, is to turn a blind eye to a pillar upon which this system relies.

In In Re: Marion Lindblom, Dec'd the Board pointed out in the dissent that statute defining an injury does not require that an injury "arise out of employment" and that an injury sustained while in the course of employment is compensable, even if the injury is caused by conditions personal to the worker. In Re: Marion Lindblom, Dec'd., Docket No. 45,619 (1976) [dissent] where a worker fell and sustained a compensable injury while experiencing a seizure due to alcohol withdrawal.

"...The symptomatic condition was not *the result*..."

Despite Mr. Herron's less than perfect health and the fact that he was in his seventies, Mr. Herron was still working part-time driving a bus as of July 2004. That is until he experienced a sharp pain in his right foot, unlike anything he had experienced before, which forced him to stop driving a bus altogether. The law does not

¹ Mr. Herron testified that he had a "problem in the ankle" while walking for extended periods, compared to the "sharp pain in the lateral hind foot" he experienced when driving a bus requiring him to pump air brakes, for which he filed this application for benefits.

require that the industrial injury or occupational disease be the sole proximate cause of a worker's condition.

It is significant that Mr. Herron's testimony at the Board regarding the requirements of his duties as a transit driver was uncontroverted. Also significant is that the Trial Court accepted the testimony of Mr. Herron "unequivocally with respect to the onset of symptoms, what he was doing, the manner in which he's called upon to operate the bus, and so forth." (Report of Proceedings, pg 4 lines 16-19) And the Board stated "Mr. Herron's testimony that he developed intense pain while driving a bus during the course of employment with Community Transit was credible, persuasive, supported by the fact that the day he reported the incident he sought medical assistance as soon as he could." (01/11/07 PD&O, pg. 8 lines 18-20) "Mr. Herron did give a history to Dr. Skalley's assistant that he had some pain before he developed the intense pain. The evidence, however, when looked at as a whole establishes, more probably than not, that it was the intense pain, which Mr. Herron's uncontroverted testimony established came on suddenly, that caused Mr. Herron to seek treatment." (01/11/07 PD&O, pg. 8 lines 20-24)

Here are some significant decisions by the Board that help illustrate how the Board rules on issues of proximate cause:

Combination of work and non-work: When a worker sustains an injury covered by the Industrial Insurance Act, he is entitled to be compensated for all of the disability which is proximately caused, either directly or indirectly, by his industrial condition whether to the same part or some other part of the body. (citation)

Normal bodily movement: A normal bodily movement must be in response to the requirements of the job for any resulting injury to be compensable. Therefore, a secretary who breaks a tooth while eating popcorn on the job has not sustained an "injury" under RCW 51.08.100. In Re: Carol Rivkin, Docket No. 85 1694 (1986) [Overruled, In re Philip Carstens, Jr., Docket No. 89 0723 (1990)]

An attorney, who broke loose a dental crown when he bit into a piece of candy taken from a dish located on the reception desk of his employer, sustained an industrial injury. The issue in such a case was not whether the eating activity was in response to a requirement of the job, but rather, whether the eating activity was permissible and reasonably incidental to the duties of the job. Overruling In Re Carol Rivkin, Docket No. 85 1694 (1986) In Re: Philip Carstens, Jr., Docket No. 89 0723 (1990) [special concurrence]

Injury to a particular worker: The Industrial Insurance Act of this state applies to all persons covered by its provisions regardless of their age or the previous condition of their health. In determining the effect of an industrial condition upon a worker, such effect must always be determined with reference to the particular worker involved, rather than what effect, if any, such an injury would have had upon some other person.

The court in City of Bremerton v. Shreeve, 55 Wn.App. 334,

777 P.2d 568 (1989), held that the worker:

...is to be taken as he or she is, and a preexisting condition should not be considered a 'cause' of the injury, but merely a condition upon which the 'proximate cause' operated." City of Bremerton v. Shreeve, 55 Wn.App. at 341, 342, 777 P.2d at 572.

"...of a sudden and tangible happening of a traumatic nature while in the course of his employment..."

An event is a sudden and tangible happening of a traumatic nature when it is something of notoriety, fixed as to time and susceptible of investigation. In this decision *In re Adeline Thompson*, BIIA Dec., 90 4743 (1992) is designated as "significant." In re: Virginia Key, 94 4700 (1996)[dissent] [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 97-2-24869-9KNT.]

"There is no medical evidence to support a tendon tear as found by the Board."

In addition to a tangible happening, there must be a resulting physical condition or bodily harm before an industrial accident can constitute an "injury", and the causal relationship between the physical condition and the accident must be established by medical testimony. In Re: Kenneth Heimbecker, Docket No. 41,998 (1975)

Where the worker has shown through competent expert testimony that he developed a mental condition as a result of a sudden emotional stress during the course of employment, he has presented sufficient proof that he has suffered an industrial injury. The worker need not show that the stress was "unusual," or that it "arose out of" employment. In Re: Robert Hedblum, Docket No. 88 2237 (1989) The Board's decision was appealed to superior court under Thurston County Cause No. 89-2-02751-5.]

in a case heard by a jury, a common jury instruction is:

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

WPI 155.13.01

In Hamilton v. Department of Labor and Industries, 111 Wn.2d 569, 761 P.2d 618 (1988), the Washington Supreme Court held that instructing the jury to give special consideration to the opinion of the plaintiff's attending physician."

TESTIMONY OF DR. SKALLEY AT THE BOARD: Thomas C. Skalley, M.D., testified that the Department's characterization of Mr. Herron's right foot condition fit his understanding of Mr. Herron's conditions. Specifically, Dr. Skalley testified that his "impression was that he had chronic right peroneal tendonosis versus a peroneal tendon tear with tenosynovitis..." (PD&O, p.3)

Dr. Skalley was asked to opine as to whether the conditions were due to a sudden occurrence or if they happened over time, to which Dr. Skalley responded, "They could actually be either. There can be an acute injury or there can be a chronic condition which is suddenly exacerbated. (PD&O, p.4)

When asked what caused Mr. Herron's symptoms, he stated, "peroneal tendon abnormality such as a tear or tendonosis is certainly a reasonable cause of his symptoms. And with his history of sudden onset of these symptoms that is a very likely cause of his symptoms. However, I cannot exclude that this lesion or neoplasm may also have some contributing cause." (PD&O, p.4)

AN OCCUPATIONAL DISEASE IS DEFINED AS:

Such disease or infection which arises naturally and proximately out of employment.

In Wendt v. Department of Labor and Industries, 18 Wn.App. 674, 571 P.2d 229 (1977), the court held that there may be multiple proximate that the disability resulted from the combined effects of the industrial injury and other unrelated conditions

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the condition complained of and without which such condition would not have happened. There may be one or more proximate causes of a condition. The law does not require that the industrial injury be the sole proximate cause of such condition. Wendt v. Department of Labor and Industries, 18 Wn.App. 674 (1977)

In Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 745 P.2d 1295 (1987), the Supreme Court noted that an occupational disease must arise both “naturally” and “proximately” out of employment. The Washington Pattern Jury Instructions give attorneys and judges clarity on these issues by noting “The court [In Dennis] stated that the term “naturally” must be construed in its ordinary sense and must be tied to the “arising out of employment” language in RCW 51.08.140. WPI 155.06

Also in Dennis the court stated:

We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the “naturally” requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of employment, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace. Dennis v. Department of Labor and Industries, 109 Wn.2d at 481, 745 P.2d at 1303. See also Favor v. Department of Labor and Industries, 53 Wn.2d 698, 336 P.2d 382 (1959);

McClelland v. ITT Rayonier, Inc., 65 Wn.App. 386, 828 P.2d 1138 (1992).

The trial court's FINDING OF FACT NO. 5 is as follows: The right foot symptoms that Mr. Herron developed on July 9, 2004, during the course of his employment with Community Transit, and for which he sought medical treatment, did not arise naturally and proximately from distinctive conditions of his employment with Community Transit.

Aggravation of pre-existing condition In assessing whether Mr. Herron's specific job requirements of driving a bus were a cause or his condition, the Court may also consider whether his job functions may have aggravated a pre-existing condition.

In In re: Donald Plemmons, 04 12018 (2005) the Board stated that:

...an aggravation of a pre-existing condition by distinctive conditions of work can be the basis for an occupational disease claim allowance without a showing that the pre-existing condition has objectively worsened.

Also on the issue of proximate cause is the Board's decision in

In re: Shauna Guyman, 05 13662 (2006), where they stated:

An industrial injury need not be a "significant" proximate cause of a condition; an industrial injury need only be a proximate cause of the condition in order for the condition to be covered under the claim...

Mr. Herron may have had diabetes, but he had not ever experienced a pain in his right foot like he did on July 9, 2004. It is hardly likely that his 20 years of managing his diabetes caused the

pain he felt while driving a bus on that date. It is equally unlikely that the tumor in his foot, of which he was unaware prior to July 9, 2004, became symptomatic on that date, completely unrelated to the functions of his employment with Community Transit.

It seems much more likely that his foot condition was either an aggravation of a pre-existing condition, or his employment potentially lit up his underlying medical conditions. In such a case, the Board has issued significant decision In re: Forrest Pate, 58,399 (1982):

The insurer on the risk for an occupational disease claim (lung condition) on the date of compensable disability is responsible for the full costs of the claim if the exposure on that date was "of a kind" contributing to the condition for which the claim was made. The date of compensable disability was the date on which the worker was advised by a physician that he had an occupational disease precluding him from gainful employment...

Mr. Herron was aware of his diabetes on July 9, 2004, but he was not aware of a tumor in his right foot, nor was there any medical or lay testimony that he was aware of it until he sought treatment on that date for the extreme pain which occurred while driving a bus.

INDUSTRIAL INJURY VS. OCCUPATIONAL DISEASE

The Claimant believes he did meet this burden of proof establishing that he sustained an industrial injury or occupational

disease, or both. Mr. Herron testified to a specific time when he first felt the onset of pain to his right foot on July 9, 2004, while driving a bus for Community Transit. This testimony was uncontroverted and the trial Court noted that Mr. Herron's attending physician, Dr. Skalley, testified that based on the history provided by Mr. Herron, the physical requirements of driving a bus were more than likely a proximate cause of the pain in Mr. Herron's right foot. This testimony of Mr. Herron's attending physician, orthopedic surgeon Thomas Skalley, MD, is to be given more weight than that of the independent medical evaluators, Drs. Kopp and Robins. The Claimant correctly met his burden of proof that he sustained an injury or an occupational disease while in the course of employment with Community Transit.

RELIEF REQUESTED

MR. HERRON HEREBY APPEALS THE DECISION OF THE SNOHOMISH COUNTY SUPERIOR COURT, AND REQUESTS THIS COURT RENDER A DECISION AS FOLLOWS:

- 1. That the trial Court lacked jurisdiction to hear the Employer's Appeal; the Decision of the Snohomish County Superior Court entered on September 18, 2008, is hereby VACATED; and the March 7, 2007, Decision of the Board is the FINAL Order in this matter because:**
 - a. lacking a timely Petition For Review, it adopted the Proposed Decision and Order of the Board.**

The Employer's Petition was not filed within 20 days of receipt of the Proposed Decision and Order, and the Board record fails to show that a timely extension was requested or granted.

OR

- b. jurisdiction of the Trial Court is dependent on perfecting service of the Notice of Appeal on the Board within 30 days of receipt of the Board's Order, and the Employer's failure to do so was fatal to their appeal.

IN THE ALTERNATIVE, MR. HERRON REQUESTS A DECISION FROM THIS COURT AS FOLLOWS:

2. Mr. Herron's application for benefits is ALLOWED, for:
 - a. an industrial injury. The Superior Court Decision entered on September 18, 2008, is REVERSED, AND the March 7, 2007, Order of the Board is AFFIRMED, which allowed this claim for an industrial injury, but denied it for an occupational disease. The Board's Order Reversed, in part, the September 15, 2005 Decision and Order of the Department of Labor and Industries which allowed this claim for an industrial injury or occupational disease. This matter is REMANDED to the Department with direction to issue a Decision and Order ALLOWING this claim for an industrial injury occurring on July 9, 2004; accepted conditions include partial tear and tendinopathy of the peroneus longus and brevis tendons of the right lower extremity; and directed the self-insured employer to provide treatment and benefits to Mr. Herron as he is entitled under the facts and the law.

OR

- b. an occupational disease. The Superior Court Decision entered on September 18, 2008, is REVERSED, AND the March 7, 2007, Order of the Board is REVERSED; this claim is ALLOWED for an occupational disease, and DENIED for an industrial injury. The Board's Order Reversed, in part, the

September 15, 2005 Decision and Order of the Department of Labor and Industries which allowed this claim for an industrial injury or occupational disease. This matter is REMANDED to the Department with direction to issue a Decision and Order ALLOWING this claim for an occupational disease which manifested itself on July 9, 2004; the accepted conditions include partial tear and tendinopathy of the peroneus longus and brevis tendons of the right lower extremity; and directing the self-insured employer to provide treatment and benefits to Mr. Herron as he is entitled under the facts and the law.

OR

c. an industrial injury or occupational disease. The Superior Court Decision entered on September 18, 2008, is REVERSED, AND the March 7, 2007, Order of the Board is REVERSED in regards to the question of whether Mr. Herron's condition is an occupational disease, and AFFIRMED on the issue of whether Mr. Herron sustained an industrial injury. The September 15, 2005 Decision and Order of the Department of Labor and Industries which ALLOWED this claim for an injury or occupational disease is determined CORRECT and AFFIRMED.

CONCLUSION

Appellant respectfully requests this Court to decide whether the trial court had jurisdiction to hear this appeal, and if this Court finds that the trial Court did not have jurisdiction, we respectfully request that you issue an Order which would VACATE the September 18, 2008, Superior Court Decision which reversed the March 7, 2007, Decision of the Board. This would allow the claim for an injury only pursuant to the final Order of the Board.

In the alternative, we ask this Court to REVERSE the Decision of the trial Court which reversed the March 7, 2007 Decision of the Board which ALLOWED this claim for an injury, or REVERSE the portion of the Board's Decision which denied the claim for an occupational disease, so that the September 15, 2005 Decision of the Department of Labor and Industries, which ALLOWED this claim for an injury or occupational disease become the final determination of allowance.

Dated this 24th day of July, 2009.

Respectfully submitted,

//electronically signed//
Fiona A.C. Kennedy
Attorney for Appellant
WSBA No. 32385

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the forgoing OPENING BRIEF OF APPELLANT to the following via UPS Overnight Delivery as follows:

Terry Dale Peterson
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John R. Wasberg
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Seattle, WA 98104-3188

Dated this 23rd day of July 2009.

//signed electronically//
FIONA A.C. KENNEDY

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2009 JUL 24 PM 12:06