

Docket No.: 67053-1-I

WASHINGTON COURT OF APPEALS, DIVISION I

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THE HOME DEPOT,

Appellant,

v.

THOMAS ACKLEY AND RITE AID, INC. AND THE DEPARTMENT  
OF LABOR AND INDUSTRIES,

Respondents

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**APPELLANT'S REPLY BRIEF**

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## **I. ASSIGNMENT OF ERROR**

The defendant in this Industrial Insurance case appeals a Snohomish County Superior Court decision that allowed both the aggravation of a right knee injury with respondent Rite Aid and a new right knee occupational disease claim with appellant The Home Depot, but failed to identify one employer as being responsible for claim costs. Contained within the compensability analysis is a determination of which employer is responsible for benefits under the claim.

The trial court determined that each claim was independently compensable without determining which employer is liable for claim costs. The determination ignores WAC 296-14-420, which requires the finder of fact to make a responsibility determination when it makes a compensability determination. The trial court erred in failing to address responsibility.

In determining responsibility, a successive employer is responsible for conditions arising out of an aggravation of a preexisting work-related injury with a different employer if the successive employer's work activities were a supervening cause of the claimed condition. The trial court failed to determine whether work activities with The Home Depot represented a supervening cause of respondent Thomas Ackley's knee condition.

The Home Depot contends the trial court failed to complete the necessary analysis by not evaluating the issue of responsibility for claim costs. Therefore, this Court should remand this case to the trial court with the directive to assign claim responsibility using the supervening cause standard.

## **II. STATEMENT OF THE CASE**

Thomas Ackley is a 54-year-old who worked for Rite Aid between 2002 and May 14, 2005. CP 25, 40. He injured his right knee on December 10, 2002. CP 40. The Department allowed the claim and Mr. Ackley underwent surgery to repair his right meniscus. CP 40. The claim was closed May 30, 2003 with an award of permanent partial disability. CP 40.

Mr. Ackley left Rite Aid in May 2005 and began to work for The Home Depot. On September 22, 2006, he filed an application to reopen his claim with Rite Aid. CP 40. The Department issued an order reopening the claim against Rite Aid on November 29, 2006. On January 24, 2007, Rite Aid filed a protest requesting reconsideration of the Department's November 2009 Order. CP 43, 123. Rite Aid argued the Department was required to issue a single determinative order, pursuant to WAC 296-14-420, addressing liability for claimant's condition as between Rite Aid and The Home Depot. The Department issued a single

determinative order on July 18, 2007 allowing the occupational disease claim against The Home Depot and denying the aggravation application. CP 39, 40. The Home Depot protested the order, and the Department issued a subsequent single determination order denying the claim with The Home Depot and reopening the claim with Rite Aid. CP 39, 40. Rite Aid then appealed to the Board of Industrial Insurance Appeals on November 26, 2007.

The Board judge issued her Proposed Decision and Order on February 5, 2009, finding the evidence established both an aggravation of a prior industrial injury with Rite Aid and a new occupational disease with The Home Depot. CP 42. The judge failed to address responsibility as between the employers. The Home Depot appealed and the trial court affirmed the Board decision.

### **III. ARGUMENT**

#### **A. When The Court Determines Compensability, It Must Also Determine Responsibility.**

##### **1. Compensability and responsibility must be addressed in a single order determination under WAC 296-14-420.**

When an injured worker has filed an application for payment of benefits and there is a genuine issue whether the benefits should be paid “pursuant to the reopening of an accepted claim or allowed as a claim for a new injury or occupational disease,” the Department is required to make

its determination in a single order. WAC 296-14-420(1) (emphasis added). This requirement helps to avoid piecemeal litigation, prevent inconsistent results and promote judicial economy. See Lenk v. Dep't of Labor & Indust., 3 Wn.App. 977, 478 P.2d 761 (1970) (strong public policy against piecemeal litigation). The Department must make a single order determination if there is substantial evidence the injured worker will be “entitled to benefits on one of the claims” and “there is uncertainty regarding which of the entities is responsible.” WAC 296-14-420(3)(a), (b).

The Department’s determination is twofold: it must 1) determine whether the claim is compensable and should be allowed, and 2) determine which employer is responsible for the claim costs. Typically, these two parts of the determination are implicit in the Department order. For example, when the Department issues an order allowing a claim against a single employer, contained within the order is the determination that the claim is compensable and that the employer is responsible for the claim costs. Although compensability and responsibility are not expressly stated, the Department makes these determinations when analyzing a claim. Under WAC 296-14-420 the two-part determination must be made in a single order if there is a dispute over claim benefits and under which claim benefits should be paid.

WAC 296-14-420 and the single order determination requirement apply to the present case. This dispute started on January 24, 2007 when Rite Aid filed a Request for Reconsideration, and asked for a decision regarding whether benefits should be paid under the reopening of an accepted claim or allowed under a new claim. There is also substantial evidence Mr. Ackley will be entitled to benefits under one of the claims and ambiguity concerning whether Rite Aid or The Home Depot is responsible for the cost.

The Department's order was issued at the request of Rite Aid who asked for joinder of The Home Depot and a ruling pursuant to WAC 296-14-420. Section (3)(b) of this rule provides that the Department is required to act only if "there is uncertainty regarding which of the entities is responsible." At the request of Rite Aid, the Department considered responsibility and determined Rite Aid is responsible for the claim.

In a prior case, the Board remanded to the Department when the parties and the judge failed to consider the application of WAC 296-14-420(1), noting the statute directs that where an application for benefits is filed which requires a determination of whether benefits should be paid pursuant to reopening of an accepted claim or allowed as a claim for a new injury or occupational disease, the Department shall make the determination by a single order. In re Craig Fruth, BIIA Dec., 91, 5394 &

91, 4490 (1992). In the present case, the Department actually made the necessary determination and reopened the claim with Rite Aid. However, the Board's order ignores WAC 296-14-420(1) and is, therefore, incomplete.

The Department followed its statutory requirement and issued a single order determination addressing compensability and responsibility for both claims. However, for reasons which are unclear, both the Board and the trial court failed to address the issue of responsibility. Instead, both made a partial determination and left the responsibility issue for a separate round of litigation involving the same litigants.

**2. The trial court had jurisdiction to determine claim responsibility.**

When a Washington workers' compensation claim is appealed, the Board and the trial court only have jurisdiction over matters "first determined by the Department." Lenk at 982. In the present case, respondent Rite Aid argues the court does not have jurisdiction to address the issue of claim responsibility because the Department has not yet made a determination on that issue. However, the Department did make a responsibility determination, at Rite Aid's request, and reopened the Rite Aid claim and denied the Home Depot claim.

Inherent in the Department's Order reopening one claim and denying the other is the determination that responsibility for claim costs goes to the one employer with the compensable claim. In other words, under the Department's determination, only the aggravation claim was found compensable thereby assigning claim responsibility to Rite Aid alone. Department orders do not specifically identify issues, arguments or make specific findings of fact. However, the Department's Order, issued at Rite Aid's request, pursuant to WAC 296-14-420, is sufficient to grant the trial court jurisdiction to address the issue. The trial court had the jurisdiction to address the issue of responsibility and it erred in failing to do so.

**3. A clear responsibility determination is necessary where there are two open claims with two successive employers for the same or similar medical conditions.**

In a typical workers' compensation claim, the only dispute is whether the claim is compensable and should be allowed; if the claim is allowed, there is no question which employer is responsible to pay the benefits. However, if there are two allowed claims against successive employers for the same or similar medical conditions, the responsibility determination is not obvious in the compensability finding and must be stated in unambiguous terms. Failure to do so results in the current

situation: litigation that does not answer the question of who should pay benefits.

Both the Board and the Department have developed mechanisms to avoid such a situation. The Department mechanism is to make a single order determination, pursuant to WAC 296-14-420, addressing both compensability and responsibility. The Board addresses the issue of responsibility by evaluating whether the new claim represents a supervening cause. See Leonard C. Roberson, BIIA Dec., 89, 0106 (1990); Donald R. Dolman, Dckt. No. 05 11285 (September 18, 2006); Richard A. Heuschekel, Dckt. No. 93 1760 (July 1, 1994). This allows the Board to determine responsibility along with the compensability determination and helps to prevent future litigation regarding which employer bears the claim costs.

In having two open claims with two successive self-insured employers for the same body part, the dispute over who pays remains until responsibility is determined. Deferring responsibility will only prolong the litigation and delay benefits to the injured worker. On appeal, the trial court stands in the shoes of the Board; therefore, it erred in not assessing the issue of responsibility.

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**B. Responsibility Is Determined Using The Supervening Cause Standard.**

The claim involving The Home Depot is an occupational disease claim and the general rule is the proximate cause standard applies in assessing liability. However, in its case law, the Board has carved out an exception to the general rule. Where there are two claims, one an aggravation claim and one a new claim brought against two different employers by the same injured worker for the same or similar medical conditions, the Board has applied the supervening cause standard to determine which employer is responsible for the claim costs. See Dolman, (prior employer held responsible for all claim costs when work activities at subsequent employer not found to be a supervening cause); Roberson, (work activities with subsequent employer constituted a supervening cause; therefore, subsequent employer responsible for claim costs). If subsequent work conditions are not found to be a supervening cause of an injured worker's current condition, the prior employer is responsible for all claim costs associated with such condition. See Dolman.

A supervening cause is one that is independent of the earlier injury. The determination is made by asking "but for the original industrial injury, would the worker have sustained the subsequent condition?" In re Robert Tracy, BIIA Dec., 88, 1695, 6-7 (1990). In other words, the court must

ask whether the distinctive conditions of Mr. Ackley's employment at the Home Depot constituted a supervening cause, independent of the knee condition that arose during his employment with Rite Aid. Would Mr. Ackley's current condition have occurred if his knee had not been compromised by his earlier compensable injury at Rite Aid?

Respondent Rite Aid argues the supervening cause standard would be impossible to prove in a case where an injured worker's second claim is for a new occupational disease stemming from the aggravation of a preexisting disease because "the type of occupational disease which constitutes an aggravation of the original injury may never really be an 'independent' cause." (Resp. Rite Aid Br. 27, citing Dennis v. Dep't of Labor & Indust., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987)).

There are three errors in Rite Aid's argument. First, it confuses the initial compensability determination using the proximate cause standard with the responsibility determination, which uses the supervening cause standard. At issue in this case is the responsibility determination; therefore, this argument is not applicable here. Second, whether an occupational disease, which can also be an aggravation of an original injury, is an independent cause is determined by medical evidence. Respondent is attempting to mislead the Court by suggesting the standard is impossible to prove. Third, this argument is premature as both the

Board and the trial court never reached the question of supervening cause and it is not for this Court to determine whether the supervening cause standard has been met.

The Board and trial court erred in failing to address responsibility by determining whether the employment at The Home Depot was a supervening cause of claimant's knee condition. Therefore, this Court should remand this case to the trial court to assess responsibility using the supervening cause standard.

**C. The Case Law Establishes The Framework Under Which This Case Should Be Analyzed.**

This case involves two claims against successive employers for the same or similar medical conditions. The Board has developed a framework for analyzing this type of case. The trial court should look to cases such as Roberson, Dolman and Clevenger, which are factually and procedurally similar, for guidance in determining the proper analysis for the present case. See Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 138, 814 P.2d 629 (1991) (Board decisions are not binding, but are persuasive authority for the court and are "entitled to great deference.").

In Roberson, the injured worker had a prior compensable injury against the first employer. After going to work for the second employer the injured worker filed two claims, one to reopen the claim against the

first employer and the second for a new occupational disease claim against the second employer. In making its determination, the Board confirmed the two-part analysis noting:

“As in all requests for benefits, we must first look at the issue of proximate cause...a cause must be proximate in the sense that there is no intervening cause, and but for the exposure in the employment, the disease would not have been contracted. In other words, the question here is: Did Mr. Roberson’s subsequent employment activity constitute a supervening cause....”  
Roberson at 7-8 (internal citation omitted).

The Board acknowledged that where there are successive employers and benefits are at issue, compensability and responsibility are essential parts of the ultimate decision.

Similarly, in Dolman, the injured worker had two claims with successive employers: one for an aggravation of a prior claim and the other for a new occupational disease. In analyzing compensability, the Board found the injured worker’s condition was the result of work activities with both employers. Dolman at 6. The Board then went on to the second part of the analysis and addressed responsibility, concluding that the subsequent employment was not a supervening cause of the injured worker’s condition; therefore, the prior employer was responsible for all claim costs. Id. The assessment of compensability and responsibility happened in the same order.

In Clevenger, the court held the last-injurious-exposure rule is inapplicable in industrial injury cases. Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 577, 141 P.3d 1 (2006). As in the present case, Clevenger had a reopened injury claim with one employer and that employer tried to shift responsibility to a subsequent employer. The court concluded the last-injurious-exposure rule did not apply to this type of case, and remanded the case for further proceedings.

In its response brief, Rite Aid argues the court should rely on the holding of In re Soledad Pineda, BIIA Dec., 08, 19297 (2010) because it is a more recent significant decision by the Board, noting that *Roberson* is an significant decision, decided in 1990. (Resp. Rite Aid Br. 24). In making this argument, Rite Aid ignores that under Washington workers' compensation law, the age of a case does not matter. A case decided in 1950 may be more reliable than a case decided in 2010.

The facts in Pineda are different than the facts in the present case. First, there was no joint order or reference to WAC 296-14-420. Second, the more recent claim in Pineda involved a specific injury as opposed to an occupational disease claim like the present case. Pineda is not instructive on what the court should do in this case.

In his response brief, Mr. Ackley relies on the Board decisions of Tracy and In re Mary L. Wardlaw, BIIA Dec., 88, 2105 (1990) to support

his argument that the Board does not have a duty to make an additional responsibility determination using the supervening cause standard. (See Resp. Ackley Br. 8-10). Factually, Tracy and Wardlaw both involved a work injury followed by a non-work injury. Neither Tracy nor Wardlaw involved successive employers; therefore, the Board did not address responsibility for claim benefits or WAC 296-14-420. The Board analysis in cases involving a work-related injury and a non-work-related injury does not control or assist this Court in evaluating the present situation in which there is an allowed injury claim and a new occupational disease claim.

The Roberson, Dolman and Clevenger decisions evidence the necessary framework for analyzing the present case. These decisions, taken together, demonstrate that when there are two claims, one an aggravation claim and the other a new occupational disease claim, against successive employers for the same or similar medical conditions, a complete analysis requires addressing both compensability, using the proximate cause standard, and responsibility, using the supervening cause standard. None of the cases relied on by respondents are instructive in the present case. Therefore, the trial court erred in not addressing responsibility when it determined compensability.

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**D. The Home Depot Has Not Waived Its Right To Appeal The Allowance Of The Occupational Disease Claim.**

The Home Depot is appealing the trial court decision which, like the Board decision, only completed half of the analysis by addressing compensability and failing to address responsibility. Respondent Rite Aid argues that by appealing the trial court's partial decision, The Home Depot has essentially conceded that the facts and medical evidence establish a compensable occupational disease claim. (Resp. Rite Aid Br. 7, 12-13). However, The Home Depot cannot appeal a determination which has not yet been made. At this point the trial court has not addressed responsibility; therefore, it has not completed the analysis and has not made a complete determination. The Home Depot's appeal of a partial determination does not equate to a concession.

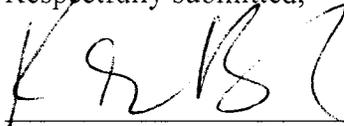
**IV. CONCLUSION**

The trial court erred in failing to complete the analysis and address the issue of responsibility for claim costs after assessing compensability. In failing to make a responsibility determination, the trial court delayed benefits to the injured worker and created unnecessary litigation between two successive employers regarding the payment of such benefits. This Court should remand this case to the trial court with the directive to assign

claim responsibility, specifically to determine whether Mr. Ackley's work activities with The Home Depot represent a supervening cause.

Dated: November 16, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Balasubramani', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I filed the original and one copy of APPELLANT’S REPLY BRIEF via first class mail, postage prepaid, with the United States Postal Service to the following the following:

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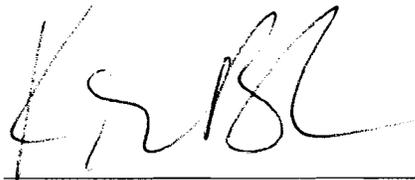
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