

No.: 72816-4-I

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CLARK CONSTRUCTION GROUP, INC., AND  
THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE  
STATE OF WASHINGTON,

Appellants,

v.

ROLAND ANDERSON,

Respondent.

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**APPELLANT CLARK CONSTRUCTION GROUP INC.'S BRIEF**

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## I. INTRODUCTION

This workers' compensation case pertains to whether an unsuccessful repeat surgery in April 2012 meant the claim was not properly closed on December 28, 2011. The Department of Labor & Industries ("Department") issues closing orders when medical evidence establishes a worker's injury is fixed and stable, requiring no further curative treatment. Post-closure treatment that is not necessary and proper at the time of closure does not negate a worker's fixed and stable status.

The Department closed this claim on December 23, 2011 and confirmed closure on February 23, 2012. It found Respondent Roland Anderson fixed and stable, and found he received improper benefits as he engaged in willful misrepresentation. Mr. Anderson appealed the closing Order to the Board of Industrial Insurance Appeals ("Board"). Industrial Appeals Judge O'Connell issued a Proposed Decision and Order finding Mr. Anderson remained fixed and stable as of December 28, 2011 with 11% lower extremity impairment. Mr. Anderson appealed this Order and the Board affirmed. Mr. Anderson appealed to Snohomish County Superior Court ("Superior Court").

After a bench trial, the Superior Court held that the Board incorrectly found Mr. Anderson fixed and stable on December 28, 2011 and through February 23, 2012. The Superior Court did not rely on

substantial evidence to reach its conclusions regarding medical fixity. Instead of applying the proper standards—the hindsight rule, the attending physician rule—the Superior Court substituted its own analysis for the facts and medical testimony in the record. Therefore, the Superior Court’s decision should be reversed and this Court should affirm the Board’s Decision and Order.

## **II. ASSIGNMENTS OF ERROR**

### **A. First Assignment of Error**

The Superior Court erred when it entered Finding of Fact 11 and Conclusion of Law 2, finding a post-closure surgery was proper and necessary.

### **B. Second Assignment of Error**

The Superior Court erred when it entered Finding of Fact 11 and Conclusion of Law 3, finding Mr. Anderson was not fixed and stable as of December 2011.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the Superior Court fail to apply the correct standard to determine if the post-closure surgery was proper and necessary? (Assignment of Error 1).
2. Did the Superior Court draw a conclusion about the proper and necessary status of the post-closure surgery that no

reasonable fact finder could draw on this record?

(Assignment of Error 1).

3. Did the Superior Court misapply the attending physician rule when it failed to give any weight to the opinion of Dr. Lee? (Assignment of Error 2).
4. Did the Superior Court substitute its own speculation and analysis for medical testimony and the factual evidence? (Assignment of Error 2).
5. Did the Superior Court fail to rely on preponderance of the evidence, and make a finding lacking in substantial evidence, when it concluded Mr. Anderson was not fixed and stable at closure? (Assignment of Error 2).

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural Posture**

On October 7, 2005, Mr. Anderson was working as a superintendent for employer, when he “leap frogged” over a concrete barrier and rolled his left ankle. CP 255. After obtaining treatment, the claim closed November 20, 2006. CP 5. The Department awarded 9% permanent impairment of the left leg. CP 5.

The claim reopened in June 13, 2008, when Mr. Anderson started treating with Dr. James Lee. CP 5. After additional treatment, the

Department closed the claim on December 23, 2011. CP 5. The Department awarded a permanent impairment award of 11% of the left leg, less the previously awarded 9%. CP 186-188.

On March 6, 2012, Mr. Anderson appealed the February 23, 2012 Order. CP 183-185. On February 1, 2013, Industrial Appeals Judge O'Connell issued a Proposed Decision and Order, finding Mr. Anderson fixed and stable as of December 27, 2011 with 11% lower extremity impairment. CP 181. Claimant appealed, and the Board affirmed the finding that claimant was fixed and stable. CP 122-123.

Mr. Anderson filed an appeal of the Decision and Order to the Superior Court of Snohomish County. CP 496-497. A bench trial was held in front of Judge George Bowden on September 12, 2014. CP 102. On September 19, 2014, Judge Bowden reached out to parties indicating he was overturning the Board decision; he noted he would not have made this decision if the review were not "*de novo*." CP 72. On October 29, 2014, the Superior Court entered an Order finding Mr. Anderson was not fixed and stable and required further proper and necessary treatment in the form of a re-fusion surgery. CP 64-67. Employer filed a Motion for Reconsideration, which the Superior Court denied on November 12, 2014. CP 3-4.

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**B. Statement of Facts**

**1. Testimony of Dr. James Lee**

Dr. James Lee has been Mr. Anderson's attending physician since October 8, 2008, treating him approximately once a month for over three years, through claim closure. CP 353. He performed five surgeries during that time. CP 354-355. Dr. Lee testified that in placing work restrictions on Mr. Anderson during those three years, he first considered Mr. Anderson's subjective pain and function complaints, then the objective findings and the work requirements. CP 357-358.

On November 9, 2011, Dr. Lee reviewed the report from Dr. Eugene Toomey, and discussed it with Mr. Anderson. He agreed with Dr. Toomey that Mr. Anderson was medically fixed and stable, as no further curative treatment was reasonable or necessary. CP 364. There were no clinical findings to support either further surgery or further treatment. CP 380.

Dr. Lee testified there was a discrepancy between Mr. Anderson's physical presentation at his office and his physical presentation demonstrated on surveillance video conducted during the summer of 2011. CP 365-368. In the video, Mr. Anderson showed no signs of a limp or antalgic gait, he was making full heel to toe contact. However, when he saw Dr. Lee in the clinic, he would walk with a limp, and not put full

weight on his left foot. CP 366-368. Dr. Lee also noted Mr. Anderson did not appear to be in stress or pain as he walked in the surveillance video. CP 366. Dr. Lee testified his actions in the video were inconsistent with the physical limitations he demonstrated at his doctors' appointments. CP 368-369.

After reviewing all of the medical records and the surveillance video, Dr. Lee maintained that Mr. Anderson was medically fixed and stable as of December 2011, and able to return to his job-at-injury. CP 369, 380.

## **2. Testimony of Dr. Eugene Toomey**

Dr. Toomey is an orthopedic surgeon with a concentration on foot and ankle conditions, who examined Mr. Anderson on August 27, 2012. CP 388-391, 401. Dr. Toomey's examination showed no evidence of any muscle atrophy, which he noted would be present if Mr. Anderson had a true antalgic gait. CP 406-407. Yet on examination, Mr. Anderson only walked on the outside of his foot, causing him to have a noticeably different gait pattern. CP 403-404.

Dr. Toomey had the opportunity to review the surveillance video. CP 398-399. He noted, on the video, there was no evidence of antalgia or any pain problems. CP 399. The surveillance did not depict any clinical pathology in either foot. CP 401. Dr. Toomey found a "huge conflict"

between Mr. Anderson's physical presentation in the video and his physical presentation on examination. CP 410. He explained that patients who truly have lower extremity pain would not move a refrigerator, especially when they complain of hypersensitivity of the foot to light touch. CP 409-410. At the very least, patients that truly have lower extremity pain would have some signs of a limp. CP 410.

Dr. Toomey concluded Mr. Anderson was medically fixed and stable and that further surgery was not reasonable or necessary. CP 407, 411-412. Dr. Toomey explained the IP joint fusion performed by Dr. Lee in October 2010 was not a failed fusion even if there was lucency on the x-ray. CP 423-424. Even if there is lucency on the x-ray, it does not require surgery, as the chances of the surgery improving the condition is not high. CP 412.

### **3. Testimony of Dr. Michael Brage**

Dr. Michael Brage is an orthopedic surgeon at Harborview Medical Center who has practiced orthopedic surgery for twenty-two years. CP 437. He examined Mr. Anderson on August 12, 2011 at the request of Dr. Lee to discuss Mr. Anderson's pain complaints and treatment options. CP 438. He recommended a repeat arthrodesis to help minimize Mr. Anderson's subjective pain. CP 439. His recommended course of treatment was significantly based on his subjective pain

complaints. CP 441. He last saw Mr. Anderson on January 29, 2012, post claim closure. CP 438.

However, after reviewing the surveillance footage, Dr. Brage testified that there were discrepancies between Mr. Anderson's actions in the surveillance video and his physical presentation. CP 443. He stated, in the video, Mr. Anderson had a normal gait pattern with no visible limp or handicap, and he did not seem to be in pain, as he was able to load a heavy object with no visible handicap. CP 443-445. Mr. Anderson's physical capacity in the surveillance was inconsistent with his presentation to Dr. Brage. CP 443-445. Specifically, Dr. Brage opined that someone with significant foot pain would limp; Mr. Anderson did not limp in the video. CP 444. Based on Mr. Anderson's inconsistent reporting and presentation in the surveillance, Dr. Brage agreed with Dr. Lee that Mr. Anderson was medically fixed and stable at the time of Dr. Lee's last examination. CP 445. Dr. Brage reasoned that Mr. Anderson's pain pattern was stable and did not need further curative treatment. CP 449.

#### **4. Testimony of Dr. Jeff Mason**

Dr. Jeff Mason is an orthopedic surgeon who first saw Mr. Anderson for his left foot condition on March 2, 2012, several months after claim closure. CP 457. He did not see Mr. Anderson while the claim was open. CP 470. He performed a re-fusion surgery April 25, 2012,

based on Mr. Anderson's self-reported functional limitations and pain complaints. CP 477, 479. Dr. Mason testified a patient's report of improvement from a surgery is a justification for the election to perform that surgery. CP 477. He further testified that Mr. Anderson's surgery should have provided benefits to Mr. Anderson's symptoms by October 2012. CP 477.

Dr. Mason testified that he had reviewed stills or a video clip of the surveillance. CP 478. However, he did not juxtapose the prior treatment notes with Mr. Anderson's presentation on the surveillance. CP 479.

#### **5. Testimony of Roland Anderson**

Mr. Anderson testified on October 24, 2012, approximately six months after Dr. Mason performed the re-fusion surgery. CP 264. He provided an overview of his treatment and pre- and post-closure symptoms. Mr. Anderson testified that following the June 2010 surgery, he was unable to put weight on his big toe, so Dr. Lee recommended surgery to fuse the first joint on the big toe. CP 260. That surgery was performed on October 12, 2010. CP 260. Mr. Anderson saw Dr. Toomey in August 2011, and followed up with Dr. Lee on November 9, 2011. It was determined that he did not need additional treatment other than an orthotic, and was released to work. CP 262. He received the orthotic on December 28, 2011 and the claim closed. CP 263.

Months after the claim closed, Mr. Anderson began seeing Dr. Mason, who performed a re-fusion surgery on April 25, 2012. CP 264. Mr. Anderson testified that his pain in his left foot remained the same after the surgery. CP 305, 309. Specifically, the pain arising from bearing weight on the medial or inside of the foot has been the same since the date of injury in October 2005. CP 305, 309.

## V. ARGUMENT

To close a claim under Washington's Industrial Insurance Act, a preponderance of the medical evidence must show a worker's condition is medically fixed and stable, and he is employable based on the compensable condition. WAC 296-15-450; *Roberts v. Dep't of Labor & Indus.*, 46 Wn.2d 424, 425, 282 P.2d 290 (1995) *Harper v. Dep't of Labor & Indus.*, 46 Wn.2d 404, 407, 281 P.2d 856 (1955). Medical fixity, or maximum medical improvement, occurs when no fundamental or marked change in an accepted condition can be expected with or without treatment. WAC 296-20-01002. A worker can be fixed and stable yet still have fluctuations in pain and function levels or require palliative care.<sup>1</sup> *Id.* If further curative treatment is proper and necessary, the worker has not reached maximum medical improvement. WAC 296-20-01002; *Rogers*

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<sup>1</sup> After claim closure, a worker can obtain further care via an aggravation.

*v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 185, 210 P.3d 355, 360 (2009)

The relevant date in determining whether a condition is fixed and stable is the date the closure order issues. *Du Pont v. Dep't of Labor & Indus.*, 46 Wn. App. 471, 477, 730 P.2d 1345 (1986); *citing, Roberts*, 46 Wn.2d at 425. A worker has the burden to prove, based on medical testimony, that he or she was not fixed and stable when a closure order issues.

At Superior Court, Mr. Anderson had the burden to prove with medical testimony that he was not fixed and stable on December 28, 2011.<sup>2</sup> The Department, an industrial appeals judge, and the Board all found that Mr. Anderson was fixed and stable, and a post-closure surgery was not reasonable or proper and hence did not negate the fact. The Superior Court's determination otherwise lacks substantial evidence.

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<sup>2</sup> There is some discrepancy regarding the date Mr. Anderson reached maximum medical improvement. The Department closed the claim on December 23, 2011. This was the original date Mr. Anderson reached maximum medical improvement. However, the Board changed the date to December 28, 2011 when Mr. Anderson received his orthotics, and was released to regular work.

**A. The Superior Court Erred in Finding Mr. Anderson's Post-Closure Surgery was Proper and Necessary Treatment.**

The Superior Court's Finding of Fact 11 states: "As of December 23, 2011, and through February 23, 2012, Mr. Anderson's conditions proximately caused by the industrial injury were not fixed and stable and required further proper and necessary treatment, *including a re-fusion of the interphalangeal joint of the left great toe.*" CP 66.

(emphasis added). The Superior Court's Conclusion of Law 2 states: "Mr. Anderson required, and was entitled to, further necessary and proper treatment after December 23, 2011." CP 66.

When an injured worker undertakes post-closure treatment, the worker must establish that treatment was proper and necessary to show the worker was not fixed and stable at closure. WAC 296-20-01002. This means demonstrating, in hindsight, that the treatment was curative or rehabilitative. *Id.* The Superior Court failed to apply the correct legal standard, and its conclusions do not have support in the factual record.

**1. Standard of review**

Challenges to a Superior Court's decisions regarding workers' compensation are reviewed under the ordinary standard of review for civil cases. RCW 51.52.140. A Superior Court's legal determinations are reviewed under an error of law standard. *Energy Northwest v. Harje*, 148

Wn. App. 454, 199 P.3d 1043 (2009). The Court of Appeals also reviews for whether “substantial evidence supports the trial court’s factual findings made after the superior court’s *de novo* review, and whether the court’s conclusions of law flow from the findings.” *Ruse v. Dep’t of Labor and Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep’t of Labor and Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).

Substantial evidence is “evidence of such a character and substance as to convince an unprejudiced, thinking mind of the truth of that to which the evidence is directed.” *Ehman v. Dep’t of Labor and Indus.*, 33 Wn.2d 584, 597, 206 P.2d 787 (1949) (internal citations omitted). The evidence must be sufficient to convince a rational fact finder that an assertion is true. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008). The Court of Appeals should reverse the Snohomish County Superior Court judgment because Judge Bowden did not rely on substantial evidence when finding a re-fusion surgery was proper and necessary treatment. *Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 185, (2009).

**2. The Superior Court made unclear or inaccurate findings about what surgery was necessary and proper.**

In Finding of Fact 7, the Superior Court found Dr. Lee’s fusion surgery on October 12, 2012 was necessary and proper. It made no

specific mention of the post-closure surgery by Dr. Mason on April 25, 2012. CP 264. It referenced vaguely a re-fusion surgery.

Dr. Lee performed a fusion of the left hallux interphalangeal joint on October 12, 2010. CP 260, 356. Mr. Anderson had no surgery on October 12, 2012. Possibly the reference in Finding of Fact 7 is a typographical error, but the Superior Court also did not make any clear finding about Dr. Mason's April 25, 2012 surgery. The reference to Dr. Lee's treatment in 2010, mislabeled as occurring in October 2012, creates doubt about the Superior Court's ruling. It is unknown if this error influenced the Superior Court's analysis. If the Superior Court mistakenly relied on Dr. Lee's surgery as occurring in October 2012, the conclusions of law do not flow from the findings of facts. *Nelson v. Washington State Dep't of Labor & Indus*, 175 Wn. App. 718, 723, 308 P.3d 686 (2013).

**3. The Superior Court did not apply the proper analysis to whether the post-closure surgery was necessary and proper.**

The determination of whether additional treatment is necessary and proper is based on the opinions and recommendations of the medical professionals formed from their expertise and objective medical findings. Under the Industrial Insurance Act, as relevant, "proper and necessary" medical treatments include:

(b) Curative or rehabilitative. Care must be of a type to cure the effects of a work-related injury or illness, or it must be rehabilitative. Curative treatment produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition. Rehabilitative treatment allows an injured or ill worker to regain functional activity in the presence of an interfering accepted condition. Curative and rehabilitative care produce long-term changes;

WAC 296-20-01002.

Mr. Anderson contends all the doctors agreed the fusion surgery he had after claim closure was “an appropriate way to reduce pain.”

However, whether the surgery is “appropriate” is not the same as whether is it medically necessary and proper. “Necessary and proper” treatment is treatment that is “reflective of accepted standards of good practice,” and produces long-term changes either by permanent clinical improvement or regained function.

When a surgery has already been performed, the Board and Court of Appeals have chosen to use a hindsight test to determine if the unauthorized surgery was curative or rehabilitative:

“We will act with the advantage of hindsight and allow this surgery where the claimant has proven by a preponderance of the credible medical evidence, some of it based on objective findings, that the surgery was medically necessary. We recognize that the Department of Labor and Industries, however careful, deliberate, and well intentioned, will err from time to time in evaluating a given claimant's need for surgery. To fail to provide recourse for the claimant and physician who proceed with a successful surgery, despite an absence of authorization and/or a consulting opinion, is to place simplistic, mechanical adherence to the medical aid rules

above the requirement that the Industrial Insurance Act be liberally construed. Such a purely mechanical approach is ill founded and will not be followed here.”

*Rogers*, 151 Wn. App. at 184, citing *In re Krawiec*, BIIA Dckt. No. 90 2281 (1991).

Here, the Superior Court did not apply the standard of “necessary and proper” or the hindsight test when it concluded Mr. Anderson’s post-closure surgery was necessary and proper. It did not evaluate the medical testimony to determine if the surgery resulted in positive, permanent changes or allowed Mr. Anderson to gain functionality. Instead, the Superior Court constructed its own narrative in an attempt to negate Mr. Anderson’s testimony that the surgery did not provide a benefit. Without any support whatsoever in the record, the judge speculated that Mr. Anderson’s ongoing pain and apparent lack of improvement stemmed from a screw used in the surgery. CP 69.

The Superior Court erred in relying on the simple occurrence of the re-fusion surgery to conclude Mr. Anderson was not fixed and stable as of December 28, 2011. The judge queried, “Does it really make sense that [Mr. Anderson] would choose to undergo more painful surgery, the insertion and removal of screws or other hardware, risk more infection, face months of more limited activity and lack of weight-bearing, and additional physical therapy if he wasn’t in enough pain as to make that

choice appear attractive, especially when he already knew that surgery might not be successful?” CP 9. By engaging in this speculation, the judge failed to consider the infinite reasons someone might undergo surgery. They may do it for unrelated conditions, because private insurance will pay for it, as part of drug seeking behavior, to stay on time loss benefits, with the misguided belief it will help, or to posture the claim for a pension. More importantly, the Superior Court’s focus on Mr. Anderson’s motivation to have surgery is directly at odds with the required focus on the hindsight rule. Instead of reviewing the case law, statutes, or administrative code, the Superior Court opted to rely on the question of “why else would he undergo surgery?” to establish the surgery was proper and necessary treatment.

Neither judges nor workers have the medical expertise to determine if a procedure is necessary and proper, and a desire to undergo surgery does not make that surgery curative. The Superior Court failed to apply the hindsight rule and failed to accurately evaluate the necessary and proper standard.

**4. Mr. Anderson’s post-closure surgery was not proper and necessary treatment.**

Mr. Anderson testified at hearing that his average daily pain level after the surgery was no different than before that re-fusion surgery.

CP 305. He testified that he could not work after the post-closure surgery just as he believed he could not work at the time of closure on December 28, 2011. CP 306. No evidence in the record confirms any permanent improvement brought about by surgery or any gains in functional capacity. Instead, the evidence establishes the opposite. Even the physician Mr. Anderson relies upon, Dr. Mason, agreed that a lack of improvement after surgery would verify the surgery was unnecessary. CP 476-477. On this record, the facts establish the post-closure surgery was not proper and necessary.

The Court in *Rogers* determined unauthorized spine surgery was not necessary and proper treatment because the worker's testimony established the surgery was a failure. *Rogers*, 151 Wn. App. at 185. Similarly here, Mr. Anderson's own testimony establishes the surgery did not provide a benefit, medically or in terms of function. CP 305, 309. Even Mr. Anderson's sole expert acknowledged that failure to improve after a surgery verifies the surgery was unnecessary.

Applying the "necessary and proper" standard outlined in WAC 296-20-01002, including the hindsight rule, no rational fact finder could conclude the post-closure surgery was necessary and proper treatment—Mr. Anderson did not obtain relief following that surgery. Therefore, substantial evidence does not support the Superior Court's

implied finding that the re-fusion surgery was necessary and proper curative or rehabilitative treatment. This error undermines the Superior Court's conclusions of law and requires reversal.

**B. The Superior Court Erred in Finding Mr. Anderson was Not Fixed and Stable as of December 2011.**

The Superior Court's Finding of Fact 11 states: "As of December 23, 2011, and through February 23, 2012, Mr. Anderson's conditions proximately caused by the industrial injury were not fixed and stable and required further proper and necessary treatment, including a re-fusion of the interphalangeal joint of the left great toe." CP 66. The Superior Court's Conclusion of Law 3 states: "Mr. Anderson's injury related conditions were not fixed and stable as of December 23, 2011, and through February 23, 2012." CP 66.

The Superior Court's conclusion that Mr. Anderson was not fixed and stable was based primarily on the belief that a post-closure surgery was proper and necessary. The Superior Court failed to give proper credence to the Board's findings, misapplied the attending physician rule, substituted its own conclusions for those of the medical experts, and does not have substantial support in the record.

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**1. Standard of review**

The Court of Appeals reviews whether “substantial evidence supports the trial court’s factual findings made after the Superior Court’s *de novo* review, and whether the Court’s conclusions of law flow from the findings.” *Ruse*, 138 Wn.2d at 5. The evidence must be sufficient to convince a rational fact finder that an assertion is true. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008).

Mr. Anderson challenged the Board’s Decision and Order before the Superior Court, and as a result, had the burden to prove the Board’s Decision and Order was incorrect by a fair preponderance of the evidence. *Groff v. Dep’t of Labor & Indus.*, 65 Wn.2d 35, 43-44, 395 P.2d 633 (1964). The Court of Appeals should reverse the Superior Court’s judgment because the Superior Court failed to apply the proper legal standards, and substantial evidence does not support its conclusions.

**2. The Superior Court failed to apply the proper standard of review, misapplied the attending physician rule, and substituted its own opinion for medical testimony.**

***a) The Superior Court failed to give the Board’s finding prima facie credit.***

The Board’s findings are *prima facie* correct in an appeal heard by the Superior Court. RCW 51.52.115. The Superior Court substitutes its own findings and decision for the Board’s only if it finds from a fair

preponderance of the credible evidence the Board's findings and decision is incorrect. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). But, if the Superior Court finds the evidence to be equally balanced, then the findings of the Board must stand. *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977).

The Superior Court stated that if "this matter were not a *de novo* review, I would have simply upheld the decision of the Board of Industrial Insurance Appeals." CP 68. Since it was a *de novo* review, the Superior Court concluded that Mr. Anderson met his burden to prove the claim should not be closed despite the special consideration given to Dr. Lee as the attending physician. CP 68. But the Superior Court did not credit the Board's finding as correct unless a preponderance of the evidence showed otherwise. At most, the Superior Court found the evidence equally balanced by concluding Dr. Mason's opinion about the post-closure surgery deserved the same weight as Dr. Lee's opinion. If equivocal, a preponderance of evidence did not support a conclusion that the Board's finding was incorrect. Nonetheless, the Superior Court issued a Judgment concluding claim closure was inappropriate.

On September 19, 2014, the Superior Court wrote a letter to counsel that outlined his preliminary findings and conclusions. CP 68-70. The Superior Court's statements in that letter and at the trial reflect that it

did not afford *prima facie* weight to the Board's finding of fact, and reveals the Court did not properly apply the preponderance of the evidence standard. The Superior Court erred when it did not apply the correct burden of proof to overturn the Board's finding.

**b) *The Superior Court erred in its application of the attending physician rule.***

The judge noted "Dr. Mason was also Mr. Anderson's treating physician and hence his opinion was, to my view, entitled to the same special consideration" as that of Dr. Lee. CP 69; *see also* RP 24-25.

In workers' compensation cases, the court gives special consideration to the attending physician's opinion because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case. *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 654, 833 P.2d 390 (1992) (citing *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988)). For purposes of workers' compensation, an attending physician who has cared for and treated a patient over time is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once. *Ruse*, 138 Wn.2d at 6; *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 129, 186 P.2d 76 (1947). For example, in *Ruse*, the court held that a family physician who provided

treatment over an eight-year period was the attending physician and not the doctor who saw claimant once, five months after quitting his job. *Ruse*, Wn.2d at 6. Before applying the attending physician rule, the length of treatment time and extent of examination is considered. *Spalding*, 29 Wn.2d at 129. Deference stems from treatment over time. When the Washington Supreme Court first outlined the doctrine of giving special weight to testimony from attending physicians, it did so based on the opinion that a doctor “who has attended a patient for a considerable period of time for the purpose of treatment” deserves this consideration. *Id.* at 128-129.

Dr. Lee treated Mr. Anderson almost monthly from October 2008 through December 2011. CP 354. Conversely, Dr. Mason began to treat Mr. Anderson after the claim was closed; the record only confirms two dates of treatment: March 2, 2012 and the surgery date in April 2012. CP 458. While Dr. Lee is clearly entitled to special consideration as a long-term treating physician, Dr. Mason did not treat Mr. Anderson for a considerable length of time, and not until months after the key date of December 28, 2011. Dr. Mason is not entitled to special consideration as the attending physician because he did not treat Mr. Anderson for a considerable period of time. *Spalding*, 29 Wn.2d at 128-29; *Ruse*, 138 Wn.2d at 6.

The Superior Court erred in giving special deference to Dr. Mason, and erred because it did not give any special consideration to Dr. Lee's opinion. The judge stated, "Dr. Mason was also Mr. Anderson's treating physician and hence his opinion was, to my view, entitled to the same special consideration as that of Dr. Lee." CP 69. The verbatim report corroborates the fact that the Superior Court did not provide Dr. Lee special deference. Judge Bowden repeatedly asked, "Wouldn't Dr. Mason also be entitled to that same deferential consideration?" RP 24-25. It appears the judge focused on April 2012 when he found Dr. Mason equally entitled to weight regarding the need for a second surgery and claimant's status, but this was the wrong focus. The operative date is the closure date of December 28, 2011, when Dr. Mason had not even treated Mr. Anderson.

A review of Judge Bowden's analysis reveals he gave no special deference to Dr. Lee. Dr. Lee testified Mr. Anderson was fixed and stable as of that date, and Dr. Lee's testimony requires heightened weight. CP 364, 369. Nothing in the judge's letter suggests he gave any weight to Dr. Lee's fixed and stable opinion. CP 68-70. Even if both Dr. Lee and Dr. Mason were afforded equal consideration, the Superior Court should have recognized the evidence was equally balanced: one attending physician supported fixed and stable status and one did not. In

a case of equivocal evidence, the findings of the Board must stand. *Jepson*, 89 Wn.2d at 401. In reality, the Superior Court gave no consideration to Dr. Lee, and wrongly afforded Dr. Mason special consideration.

c) ***The Superior Court improperly performed its own medical analysis when determining the Board's Decision and Order was incorrect.***

Mr. Anderson must establish by the testimony of competent medical experts that there is a probable (as distinguished from a possible) causal relationship between an industrial injury and a subsequent physical condition. *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966); *Parr v. Department of Labor and Industries*, 46 Wn.2d 144, 278 P.2d 666 (1955). In *Sayler*, the Court held that an expert opinion based on an incomplete or inaccurate medical history is without probative value. *Sayler*, 69 Wn.2d at 893, 896-97. Instead of relying on the medical experts' testimonies in this case, the Superior Court decided to perform its own inappropriate medical analysis of the surveillance.

While a fact finder is given wide latitude in determining the weight to give expert opinion, the fact finder is bound by the un-rebutted, un-contradicted evidence that formed the basis for the expert's opinions. *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 637, 865 P.2d 527 (1993); *Taylor v. Balch Land Dev. Corp.*, 6 Wn. App. 626, 632 495 P.2d

1047 (1972). A key part of the Superior Court's rulings was the importance of the surveillance footage.

The surveillance allowed the medical experts to compare Mr. Anderson's presentation during exams with his real and objective presentation during daily activities when he thought nobody was watching. While the Superior Court is not bound by the experts' testimonies, the un-rebutted, un-contradicted evidence that formed the basis for those opinions binds it. *Krivanek*, 72 Wn. App. at 637. Drs. Lee, Barges, and Toomey all reviewed the surveillance and explained that it revealed function inconsistent with Mr. Anderson's presentation on exam. The medical importance of the surveillance was not rebutted because Dr. Mason did not review the surveillance footage.<sup>3</sup> CP 477. The surveillance was not presented for the Judge's benefit or for him to make a medical analysis of whether Mr. Anderson was fixed and stable and employable. It was submitted to help the doctors assess whether, clinically, Mr. Anderson needed further treatment.

Long-term attending physician Dr. Lee testified Mr. Anderson's actions in the video were inconsistent with the physical abilities he

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<sup>3</sup> Dr. Mason initially said he had not seen the surveillance. He later could not remember or thought he may have seen still pictures from the surveillance.

demonstrated at his appointments. CP 368-369. This confirmed some prior doubts Dr. Lee had regarding Mr. Anderson's clinical presentation and report of activities he performed. Consulting physician Dr. Brage testified the surveillance showed Mr. Anderson was able to load heavy objects onto a truck with a normal gait pattern and without noticeable pain, which contradicted Mr. Anderson's examinations. CP 443-444. Dr. Toomey testified there was a "huge conflict" between Mr. Anderson's physical presentation in the video and his physical presentation on examination. CP 410.

Clinical presentation is paramount to whether further treatment is necessary and proper or whether an individual is fixed and stable, particularly in this case where pain complaints, not objective pathology, was the consideration for further treatment. Each expert who had an opportunity to compare Mr. Anderson's true and objective presentation on surveillance with his manufactured presentation during examinations concluded Mr. Anderson was fixed and stable and not in need of further treatment as of the date of closure. Dr. Lee's opinion deserves special consideration because he treated Mr. Anderson for over three years and had the best opportunity to observe his abilities on exam.

When the Superior Court elected to reject the above opinions, it also rejected the un-rebutted surveillance that demonstrated

Mr. Anderson's presentation during examination was inconsistent with his presentation outside of examinations. The ability for experts to make this comparison was the sole purpose for surveillance. It was used to help all experts in establishing their opinions. It was not submitted for the purpose of showing Mr. Anderson was fixed and stable and able to return to work to a fact finder. Such a finding can only be based on expert medical opinion. The Superior Court relied on the surveillance to make its own medical determination about whether Mr. Anderson's clinical presentation was straightforward. Though the Court can give surveillance less weight, it cannot take away the weight the expert opinion places upon it to reach a medical conclusion.

**3. The Superior Court's conclusion that Mr. Anderson was not fixed and stable is not supported by substantial evidence.**

Three experts—the attending physician, a consulting physician, and an independent medical examiner—relied on an accurate history, personal examinations, and an analytical review of the surveillance to conclude Mr. Anderson was at maximum medical improvement and capable of returning to work as of December 2011. CP 369, 377, 407-409, 445, 449. Mr. Anderson's choice to seek surgery several months after claim closure did not alter Drs. Lee, Toomey, or Brage's conclusions. Continued complaints at the time of the October 2012 hearing corroborate these

experts' opinions, as the re-fusion procedure provided no benefit to Mr. Anderson. CP 179. The Superior Court's reliance on Dr. Mason to find Mr. Anderson fixed and stable was unreasonable.

***a. The opinions of Dr. Lee, Dr. Brage, and Dr. Toomey strongly support fixed and stable status.***

Dr. Lee treated Mr. Anderson at the time of claim closure and is entitled to special consideration as the attending physician. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988); CP 178. Dr. Lee found Mr. Anderson fixed and stable as of December 28, 2011. CP 369. In reaching this conclusion, he compared Mr. Anderson's presentation during examination with the surveillance. Judge Bowden incorrectly stated the surveillance did not significantly influence Dr. Lee. CP 69. Dr. Lee discussed the influence of the surveillance, which confirmed some doubts he already had about the validity of Mr. Anderson's presentation on exam: "he comes to the clinic typically with a limp, unable to put full weight on his surgical foot;" yet the surveillance showed "he had full contact heel to toe and no appearance of antalgic gait...[and] doesn't appear that he's in stress or pain." CP 365-366. His testimony directly controverts Judge Bowden's conclusion that because Dr. Lee felt a fusion in 2010 was proper and necessary treatment that such a fusion would also be proper and necessary in 2012. CP 69.

Dr. Lee decided against a re-fusion in favor of orthotics. Even after the re-fusion surgery, Dr. Lee expressly testified Mr. Anderson was fixed and stable on December 28, 2011. CP 369.

Like Dr. Lee, Dr. Brage's conclusion is based on firsthand knowledge prior to claim closure. Dr. Brage noted Mr. Anderson reported significant pain during examinations. CP 441. Mr. Anderson reported his pain resulted in a limp due to the inability to fully bear weight on the foot. CP 444. Judge Bowden also seemed to believe the surveillance did not impact Dr. Brage's opinion. CP 69. He also miscited Dr. Brage's opinion that a re-fusion would be a reasonable choice based on pain complaints. Dr. Brage testified that such an operation would be based on pain, he felt Mr. Anderson's pain pattern was stable, but it could deteriorate. In that context of deterioration, he said a re-fusion would be a reasonable curative procedure. CP 449. The judge also ignored Dr. Brage's opinion that Mr. Anderson's subjective presentation of pain on examination was highly inconsistent with what was shown on the surveillance. CP 69, 444-445. Dr. Brage testified the surveillance showed Mr. Anderson was able to load heavy objects onto a truck with a normal gait pattern without noticeable pain. CP 443-444. Dr. Brage explained the surveillance footage demonstrated Mr. Anderson was capable of performing his job-at-injury by August 22, 2011, stating: "He seems to be walking normally. He

doesn't seem to be in a terrible amount of pain. Therefore, if his job was ambulatory and he was on his feet a lot, it seems to me that he could perform his job." CP 446. Dr. Brage concluded, based on Mr. Anderson's presentation during examinations and on surveillance, that Mr. Anderson was at maximum medical improvement as of December 2011. CP 445. The Superior Court failed to review the entirety of the testimony of Dr. Brage.

Unlike Drs. Lee and Brage, the judge recognized the surveillance significantly impacted Dr. Toomey's opinion. CP 69. Dr. Toomey testified: "after looking at the surveillance tape and seeing what heavy activities [Mr. Anderson] does and is willing to take on compared to what he complained about in his hypersensitivity of the foot to light touch at the time of my exam, this whole thing just doesn't quite add up." CP 401, 410. Specifically, Dr. Toomey saw no clinical pathology of either foot in the video. In contrast, on examination Mr. Anderson only walked on the outside of his foot and refused to place any weight on the inside of his foot, causing him to have a noticeably different gait pattern. CP 403-404. The August 27, 2011 examination corroborates Drs. Lee and Brage's conclusions. After a review of the medical records and surveillance, Dr. Toomey concluded Mr. Anderson was fixed and stable, did not need

further surgery, and had complaints far out of proportion to objective findings. CP 407-409.

***b. In light of the timing of his exam and his lack of information, Dr. Mason's opinion does not rebut Mr. Anderson's fixed and stable status on December 28, 2011.***

The only physician who felt Mr. Anderson was not fixed and stable on December 28, 2011 was Dr. Mason. His testimony alone does not provide substantial evidence to support the finding that Mr. Anderson was not at medical fixity.

Dr. Mason drew conclusions without either firsthand knowledge or a complete understanding of the gravity of Mr. Anderson's conditions and functional ability. CP 464. Dr. Mason examined Mr. Anderson first in March 2012, several months after the claim was closed. CP 470. He did not know if Mr. Anderson tried orthotics, he could not recall reviewing the surveillance, did not analyze if the information in past treatment notes matched the surveillance, and did not know the specifics of the original injury. CP 461, 478-479, 483. He inconsistently testified about Mr. Anderson's gait: he first testified he could see it because he looks for it as a doctor but it would not necessarily be seen by a lay person; a few minutes later he agreed Mr. Anderson had an altered gait such that a lay person could observe it. CP 468-469, 474.

Further, his opinion is insufficient to uphold the substantial evidence standard because he felt surgery was warranted based on subjective pain and limited function. CP 473. *Hasting v. Department of Labor & Indus.*, 24 Wn.2d 1, 9-10, 163 P.2d 142 (1945) (citing *Cooper v. Department of Labor & Indus.*, 20 Wn.2d 429, 433, 147 P.2d 522 (1944)). He felt that the attempted re-fusion meant the condition was not fixed and stable.<sup>4</sup> CP 458. But he also conceded that improvement from surgery verifies the need for surgery, and he expected improvement given the time since the surgery had been performed. CP 476-477. Mr. Anderson testified his pain and functional ability had not improved. CP 305-306. Therefore, Dr. Mason's opinion has no probative value and cannot sustain Mr. Anderson's burden of proof.

The record overwhelming supports a finding that Mr. Anderson was at maximum medical improvement as of December 28, 2011. The only physician who supported Mr. Anderson's argument that the work injury was not at maximum medical improvement was Dr. Mason, who had little or no understanding of the injury or the course of treatment since the injury. His opinions are based entirely on Mr. Anderson's subjective complaints, complaints that have been shown to be inconsistent with

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<sup>4</sup> He agreed another option was use of orthotics, lacking all knowledge that Mr. Anderson had orthotics to use. CP 459, 461.

Mr. Anderson's physical abilities. A rational fact finder cannot conclude Mr. Anderson was not at maximum medical improvement at the time of closure after reviewing the medical testimony and Mr. Anderson's testimony, as both establish Mr. Anderson had reached medical fixity as of December 28, 2011.

## VI. CONCLUSION

The Superior Court misapplied the law and made factual findings unsupported by substantial evidence. It is uncontested that Mr. Anderson had no improvement, physically or in function, after the April 25, 2012 surgery. That surgery formed the sole basis for finding Mr. Anderson was not fixed and stable as of December 28, 2011 and continuing through February 23, 2012. Based on the foregoing points and authorities, the employer respectfully request that the Judgment of the Superior Court be reversed and the Order of the Board be affirmed.

Dated: February 19, 2015

Respectfully submitted,

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

Aaron J. Bass, WSBA No. 39073  
Of Attorneys for Appellant Clark Construction  
Group, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I served an original and one copy of APPELLANT CLARK CONSTRUCTION GROUP INC.'S BRIEF via first class mail to the following:

Richard D. Johnson  
Court Administrator/Clerk  
Washington Court of Appeals, Division I  
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I further certify that on this date, I mailed a copy of the foregoing APPELLANT CLARK CONSTRUCTION GROUP INC.'S BRIEF via first class mail, postage prepaid, with the United States Postal Service to the following:

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