

NO. 73717-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AUTUMN MATTO,

Plaintiff/ Respondent,

v.

HAGGEN, INC.,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

Deborah K. Flynn, WSBA #21570
Jannine M. Myers, WSBA #37408
Attorneys for Appellant

Flynn Law Group, LLC
One Union Square
600 University Street, Ste. 2100
Seattle, WA 98101
(206) 801-0185

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TABLE OF CONTENTS

	Page
I. REPLY.....	1
A. The Trial Court Decision is not Supported by Substantial Evidence and Dr. Aldrich’s Testimony was Improperly Given Greater Weight.....	1
B. The Industrial Injury did not Cause the Degenerative Disc Disease at L5-S1.....	3
C. The “Lighting Up” Doctrine, even if Applicable, does not Establish Compensability for the Underlying Preexisting Condition.....	5
D. The Trial Court Erroneously Considered the Industrial Appeals Judge’s Proposed Decision and Order in its Decision.....	9
II. CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page
<i>In re Arlen Long</i> , BIIA Dec., 94 2539 (1996)	8
<i>Miller v. Dep't of Labor & Indus.</i> , 200 Wash. 674, 94 P.2d 764 (1939).....	5, 7, 8
<i>Oien v. Dep't of Labor & Indus.</i> , 74 Wn. App. 566, 874 P.2d 876 (1994).....	4
<i>Stratton v. Dep't of Labor & Indus.</i> , 1 Wn. App. 77, 459 P.2d 651 (1969).....	9, 10
<i>Wendt v. Dep't of Labor & Indus.</i> , 18 Wn. App. 674, 571 P.2d 229 (1977).....	6
<i>Zipp v. Seattle Sch. Dist. No. 1</i> , 36 Wn. App. 598, 607, 676 P.2d 538 (1984).....	6

I. REPLY

A. **The Trial Court Decision is not Supported by Substantial Evidence and Dr. Aldrich's Testimony was Improperly Given Greater Weight**

Judge Cook held that the Board erred in rejecting Dr. Aldrich's testimony and stated that Dr. Aldrich did provide testimony to support that the arthritic changes were related to the industrial injury (CP 332-333). This Court must be reminded that the only evidence and testimony the trial court apparently relied upon in its decision was a couple of sentences from the testimony of Dr. Aldrich. Dr. Aldrich's testimony was contradictory and did not meet the substantial evidence test. While Haggen disagrees with the trial court's findings and believes that Matto's testimony is not credible, Haggen also understands that this Court will not reweigh evidence or address the credibility determinations made by the trial court. That being said, Haggen respectfully submits that the record does not support that Matto's industrial injury was a proximate cause of her worsened low back condition between March 4, 2009 and April 5, 2013.

The trial court clearly based the entirety of its decision on the testimony of Dr. Aldrich. Therefore, when reviewing his testimony alone, and admitting the truth of that evidence, it does not support the trial court's Findings of Fact numbered 2, 3 and 4 and its ultimate Conclusions of Law numbered 2 through 4. Dr. Aldrich contradicted himself multiple times

throughout his testimony and his conclusory statement, which is cited by the trial court in its letter on April 2, 2015, is not supported by the substantial evidence in the record. In addition, merely because he was the attending physician, does not mean his opinion should be given special consideration, or greater weight as the trial court did in this case.

One example of Dr. Aldrich's contradictory statements is that he testified that before the September 16, 2008 injury he did not believe Matto had any symptoms going down either leg, so this was a "game changer" with new onset of symptoms after the industrial injury. The trial court relied on the testimony of Dr. Aldrich that after the industrial injury Matto had symptoms down the back of her left leg. However, Matto herself testified that she had bilateral foot pain and weakness in her legs prior to the industrial injury (CP, 137). Dr. Aldrich also testified that Matto was having burning, numbness and tingling in her lower extremities *prior* to the industrial injury and it did not go away (CP 162, 167).

Even viewed in light most favorable to the prevailing party, the reasonable inference from Dr. Aldrich's testimony is that Matto had a preexisting, symptomatic and progressing degenerative low back condition at the time of her industrial injury. Accepting the veracity of his further testimony that there was an absence of any findings at L4-5, either clinically or diagnostically, at the time of the first closure date on March 14, 2009;

that an injury to a different level of the spine (here L5-S1) would not lead to deterioration at another level; that Matto then had findings consistent with degeneration at L4-5 as of April 15, 2013 which he related back to the 2008 industrial injury, is not sufficient evidence to persuade a person that these findings were causally related to an industrial injury in 2008. In addition, although there was evidence on the July 17, 2013 MRI that the L5-S1 level had increased narrowing, Dr. Aldrich's own testimony does not support that was the cause of Matto's symptoms as of the second terminal date of April 5, 2013. (4/2/15 RP 27). So, even if this Court accepts the truth of Dr. Aldrich's testimony, without even considering the testimony of The Board Certified neurologist, Dr. Stump, and Board Certified Orthopedist, Dr. Seligman, there is an absence of substantial evidence to support the trial court's decision.

B. The Industrial Injury did not Cause the Degenerative Disc Disease at L5-S1

The trial court found that on March 4, 2009, Ms. Matto's objective findings proximately *caused* by the industrial injury were the findings on imaging studies which revealed degenerative disc disease at L5-S1. (Finding of Fact No. 2, CP 356). There is a difference between "caused by" and "aggravated by" and there is absolutely no evidence to support that Ms. Matto's degenerative disc disease at L5-S1 was *caused* by the industrial

injury. Dr. Aldrich testified that the degenerative disc disease at L5-S1, including an annular tear, was present on the October 10, 2007 MRI, which was prior to the September 16, 2008 industrial injury. Dr. Stump and Dr. Seligman confirmed these findings as well. (CP 243-244, 249, 285, 306). Dr. Aldrich also testified that there was no appreciable change in those findings at the L5-S1 level *after* the industrial injury as seen on the MRI on September 26, 2008. (CP 182, 213). Therefore, the substantial evidence supports that as of the first terminal date of March 4, 2009, the findings at L5-S1 were not *caused* by the industrial injury because they were preexisting and had not changed.

Despite the lack of evidence, the trial court went on to find that Matto's industrial injury *caused* the degenerative disc disease at L5-S1. This is physically impossible, based on the medical testimony presented, since it was clearly present prior to the industrial injury. How can an event be the cause of something that was already present? In *Oien v. Department of Labor & Industries*, the Court found on similar facts that the claimant's preexisting back condition was not aggravated by the industrial injury because the doctor testified the defects were present prior to the industrial injury. *Oien v. Dep't of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994). Here, we have a trial court that found Matto's degenerative disc disease was *caused* by the industrial injury despite testimony it was present

prior to the injury. The trial court then erroneously relied on this finding to also find that since the L5-S1 degenerative disc disease had increased as of April 5, 2013, that it was proximately caused by the industrial injury (Finding of Fact No. 3, CP 356). The trial court then ultimately concluded that Matto's industrially related condition had objectively worsened between the terminal dates (Conclusion of Law No. 2, CP 357). Since the trial court's finding that the L5-S1 degenerative disc disease was caused by the industrial injury is clearly not supported by the substantial evidence, then its conclusions of law are without support, and must be reversed.

C. The "Lighting Up" Doctrine, even if Applicable, does not Establish Compensability for the Underlying Preexisting Condition

In her response brief, Matto argues that it is reversible error not to give an instruction on a claimant's "lighting-up" theory when determining proximate cause. (RB, 8-9). The "lighting up" situation is exemplified in the *Miller* case when the claimant has sustained a compensable injury or disease, and then seeks benefits for disability resulting from a preexisting asymptomatic disease on the basis the workplace injury produced symptoms of the disease and thus caused the disability for which benefits were sought. *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939). However, the lighting up theory is not applicable and is not supported by substantial evidence in this case. For an instruction about

“lighting up” a pre-existing condition it must be non-symptomatic. *Wendt v. Dep’t of Labor & Indus.*, 18 Wn. App 674, 571 P.2d 229 (1977). Testimony that the pre-existing condition was latent or inactive is “necessary to trigger the ‘lighting up doctrine’ as a theory of liability.” *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 607, 676 P.2d 538 (1984). It was Matto’s burden to produce such evidence and she did not meet that burden. To the contrary, the evidence presented established that Matto had preexisting low back pain, in fact chronic pain according to Dr. Aldrich, and progressing lower back degenerative disc disease that was symptomatic prior to her industrial injury. (CP, 163; 171-172). Therefore, this was not the case of a latent condition which was not causing symptoms and therefore the “lighting up” theory does not apply and reliance on it is misplaced.

The “lighting up” theory is further not applicable here since the L5-S1 level of the spine was the cause of symptoms immediately after the industrial injury in 2008, but according to the medical experts, it was not causing her symptoms at the time Matto filed her reopening application in 2012. Even Dr. Aldrich’s testimony supported that any clinical exam findings she demonstrated at the time of his November 5, 2012 examination were in the L4-5 distribution, including sensory deficits and absent left knee jerk. (CP, 189).

Even if this court finds that Matto's preexisting condition was asymptomatic prior to the injury and the industrial injury caused a temporary aggravation, or lighting up, of her preexisting lumbar degenerative disc disease at L5-S1, the employer does not become responsible for the underlying disease process and its progression over time. The substantial evidence in this case does not support that the industrial injury was the cause of the worsened findings as seen on the 2013 MRI of disc space narrowing at the L4-5 level nor was it the cause of the increased narrowing at the L5-S1 level between March 4, 2009 and April 5, 2013. Matto is seeking to make her underlying degenerative disc disease compensable as part of her claim, verses only the work-related disability and lumbar strain. She can only do so when she proves that the work injury, from lifting a cucumber crate, aggravated or worsened her underlying pathology and was the direct cause of the worsening between the dates of March 4, 2009 and April 5, 2013. At the time of her claim closure on March 4, 2009, there was no proof of pathological worsening of her underlying degenerative disc disease, therefore the evidence does not support that her preexisting disease is compensable.

The Board of Industrial Insurance Appeals has interpreted the *Miller* rule to hold that a finding of "lighting up" makes the employer responsible only for the disability resulting from the injury at the time the award was

made, not for the underlying disease or its subsequent progression. *In re Arlen Long*, BIIA Dec., 94 2539 (1996). The Board correctly stated that no law, including *Miller* and its progeny, “requires the employer to assume responsibility for the preexisting condition in and of itself” merely because the injury previously had lit up the preexisting condition. *Long* at 7-8. The Board also correctly noted that while an injury can make a preexisting condition symptomatic, the injury “may only have a limited or finite effect on the preexisting condition.” *Id.* Here, Matto’s lumbar strain on September 16, 2008 did cause a temporary aggravation of her preexisting and symptomatic low back condition, without any objective worsening on the September 25, 2008 MRI, and it resolved without permanent disability by the time her claim closed on March 4, 2009. Therefore, the limited or finite effect the industrial injury may have had on her underlying degenerating discs in her back, resolved and the progression of that condition is not the employer’s responsibility.

Dr. Aldrich himself stated the L4-5 findings on the MRI in 2013 were new since 2008 and that an injury at L5-S1 level would not contribute to deterioration of the L4-5 disc level and he could not say with any precision what the cause was. (CP, 218, 224). His ultimate conclusion that the narrowing at this level was caused by the industrial injury was not even supported by his own testimony and thus the trial court’s decision is also

not supported by substantial evidence since Dr. Aldrich is the only doctor who she based her decision on.

D. The Trial Court Erroneously Considered the Industrial Appeals Judge's Proposed Decision and Order in its Decision

Under *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App 77, 459 P.2d 651 (1969), the trier of fact, in this case the trial court judge sitting for a bench trial, is not to be instructed and is not to consider a Proposed Decision and Order of the Board where the Board has reversed the Proposed Decisions because the PD&O is not the final decision of the Board. Matto improperly referred to the PD&O in oral argument, as well as in its trial brief (CP, 378; 4/2/15 RP 10), and the trial court clearly relied upon it in making its decision because Judge Cook's April 2, 2015 letter cited to the "31 page Proposed Decision and Order" because it gave the appropriate consideration to the treating physician. (CP, 332). During the oral argument in this case, counsel referred to a "two and a half page" decision of the Board compared to "Judge Metzger's decision which was almost like forty pages of explanation" and the trial judge apparently relied on this information to substantiate her decision since she made almost the exact same reference and explanation to support her decision. (CP, 332). The trial court clearly did erroneously rely upon the Proposed Decision and Order and the explanation given by the Industrial Appeals Judge in that decision.

Otherwise, why would the trial judge reference it in her April 2, 2015 decision?

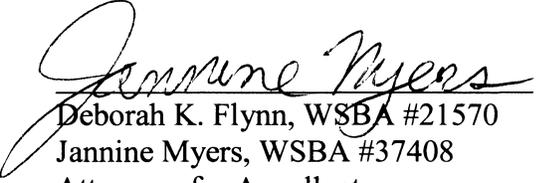
A preliminary determination by the IAJ is immaterial to the only question to be decided by the trier of fact: whether the Board's ultimate determination was correct. *Stratton v. Dep't of Labor & Indus.*, at 80, 459, P.2d 651. The trial court incorrectly assumes the Board in its Decision and Order did not give special consideration to Dr. Aldrich apparently because its written decision was three pages verses thirty one pages. The Certified Appeal Board Record is to be reviewed de novo by the trier of fact, however the trial court can not consider or rely upon the preliminary determination by the IAJ, which is immaterial to the question before it. Therefore, by specifically referencing Judge Metzger's June 30, 2014 Proposed Decision and Order and concluding that it gave the "appropriate" special consideration to Dr. Aldrich, the trial court clearly relied upon that analysis and determination in making its ultimate decision. The trial court's reliance on the IAJs determination and analysis is reversible error.

II. CONCLUSION

For the reasons stated herein and in the appellant's opening brief, this Court should reverse the June 5, 2015 decision of the Superior Court and affirm the October 29, 2014 Board of Industrial Insurance Appeals Decision.

RESPECTFULLY SUBMITTED this 14th day of January, 2016.

FLYNN LAW GROUP, LLC


Deborah K. Flynn, WSBA #21570
Jannine Myers, WSBA #37408
Attorneys for Appellant

CERTIFICATE

The undersigned, under penalty of perjury under the laws of the State of Washington, certifies:

1. On this date, the original and one copy of the REPLY BRIEF OF APPELLANT was filed as follows:

Court of Appeals, Div. I VIA HAND DELIVERY
One Union Square
600 University Street
Seattle, WA 98101

2. On this date, I sent by first-class mail, postage prepaid, a copy of the REPLY BRIEF OF APPELLANT to the following:

Brock D. Stiles
Stiles & Stiles, Inc., P.S.
PO Box 228
Sedro Woolley, WA 98284

Anastasia Sandstrom
Office of the Attorney General
800 5th Ave #2000
MS TB-14
Seattle, WA 98104-3188

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements of fact are true and correct to the best of my knowledge and belief.

DATED this 12th day of January, 2016.



Jenica Berube
Senior Paralegal/ Office Administrator