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74664-2

NO. 74664-2-I
COURT OF APPEALS,
DIVISION I
IN THE STATE OF WASHINGTON

ALLA KOVAL,
APPELLANT/PLAINTIFF

v.

AUBURN REGIONAL MEDICAL
CENTER, INC.,
RESPONDENT/DEFENDANT.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1.

King County Superior Court erred when it gave Instruction No. 10, with inclusion of the last sentence over objection from Appellant.

Assignment of Error No. 2.

King County Superior Court abused its discretion when it sustained the objections to Lori Allen, VRC's testimony on page 68 ln. 17 through page 70 ln. 11 of the December 19, 2013, Transcript. (Verbatim Report pp. 25-30).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1. Did the Superior Court err when it included the last sentence of the Court's Instruction No. 10 because it is not an accurate statement of the law?

No. 2. Did the Superior Court abuse its discretion by striking testimony on whether Ms. Koval would benefit from vocational services because such testimony is relevant and an essential part of Appellant's theory of the case: that she was entitled to have a vocational counselor assess her employability prior to claim closure?

STATEMENT OF THE CASE

Ms. Koval, a full-time phlebotomist, twice fell in the course of employment: January 1, 2010, and September 21, 2011. Both falls caused injury to her bilateral knees, with her right knee being worse than her left knee. The January 1, 2010, claim was closed on May 27, 2010.

1. Evidence of Aggravation.

The evidence presented demonstrated Ms. Koval had, prior to the first injury, sought treatment for her knees. (Depositions of Drs. Singer and Moore). However, the last time, prior to these injuries, Ms. Koval saw a physician for her knees was a half-dozen times between May 2008, and April 2009. (Dep. Dr. Moore pp. 7-25).

After the second fall on September 21, 2011, Ms. Koval had conservative care of her knees. While there was a recommendation for surgery, the Respondents challenged whether the need for that surgery was due to the pre-existing arthritic condition. The Department closed the September 21, 2011, claim and Appellant appealed to the Board of Industrial Insurance Appeals.

Regarding the January 1, 2010, claim, Appellant also filed a re-opening application, alleging an objective worsening of her knees due to the

injury. The Department denied the reopening application on July 11, 2013, and Appellant further appealed.

The primary dispute in this appeal is what effect these injuries had on Ms. Koval's knees. Dr. Makovski testified her knees were aggravated by the injuries. (Deposition Dr. Makovski p. 24). Dr. Nayan testified these falls aggravated her pre-existing arthritis. (Deposition Dr. Nayan p. 53). Dr. Cheung testified the injury caused an exacerbation of her prior knee problems. (Deposition Dr. Cheung pp. 22-24).

On direct examination, Dr. Dinneberg, who performed a one-time medical examination, testified these injuries did not aggravate the pre-existing arthritis. (Deposition Dr. Dinneberg pp. 27-28, 30-31). On cross-examination, Dr. Dinneberg deferred to Dr. McCollum's opinions on aggravation, because he examined the patient closer in time to the injuries. (Dep. Dr. Dinneberg pp. 67-68). On re-direct, Dr. Dinneberg testified Ms. Koval does not have traumatic arthritis, yet he did not examine her close in time to either injury. (Dep. Dr. Dinneberg pp. 94-95).

Then there is Dr. McCollum, who also performed a one-time medical examination. Dr. McCollum's testimony highlights the problems with the Court's Instructions: how should evidence of natural progression of a pre-existing condition be weighed with concurrent evidence of injury-caused

aggravation? Dr. McCollum diagnosed pre-existing symptomatic knee arthritis, which was aggravated by the industrial injury. (Deposition Dr. McCollum p. 22). He qualified his opinion that she was also experiencing the natural progression of her pre-existing arthritis and the effects of her pre-existing obesity. (Dep. Dr. McCollum p. 22).

On cross examination, Dr. McCollum acknowledged physicians who examined Ms. Koval closer in time to her injuries are in a better position to assess aggravation. (Dep. Dr. McCollum p. 40). The record shows that Ms. Koval was working without restrictions prior to her second on-the-job injury. (Dep. Dr. McCollum p. 46). Dr. McCollum acknowledged Ms. Koval's knees impose work restrictions, but he did not believe those restrictions were due to the injury, merely the pre-existing condition. (Dep. Dr. McCollum pp. 47, 50-51). But he agreed that her current knee condition, regardless of cause, created a lot of restrictions. (Dep. Dr. McCollum pp. 50-51).

Then on re-direct, Dr. McCollum brought in another factor that plays a role in the Court's Instruction No. 10: Ms. Koval's pre-existing weight problem. Dr. McCollum testified that her pre-existing weight played a significant role in the development of arthritis in the knee. (Dep. Dr. McCollum pp. 55-56). This created the evidentiary basis for an instruction on susceptibility, because it creates the implication that her weight caused

damage to the knee joint, which made it more susceptible to a worse outcome for what would have otherwise had been considered a “small” injury. (Court’s Instruction No. 10).

Next there was Dr. Singer, who saw Ms. Koval once in 2002, and again in 2005. He noted diagnostic studies, during this time period, documented a progression of her knee arthritis. (Deposition Dr. Singer p. 18). Dr. Singer believes Ms. Koval’s pre-existing weight played a role in that progression. (Dep. Dr. Singer p. 19). Even though he last saw Ms. Koval in 2005, he reviewed medical records up through 2012. He believed her first fall had not objectively worsened after claim closure and her second fall did not require further treatment. (Dep. Dr. Singer pp. 25-27). Dr. Singer did not say why he reached this opinion. But when asked about work restrictions, he agreed Ms. Koval had them due to the progression of her knee arthritis. (Dep. Dr. Singer p. 27).

Finally, Dr. Moore testified about his examinations of Ms. Koval’s knees in 2008 and 2009. He did not review any additional records after 2009. Dr. Moore did not provide an opinion about whether these injuries aggravated Ms. Koval’s knee arthritis.

2. Evidence of Entitlement to Vocational Services.

One of Appellant's theories of recovery was the Department prematurely closed her second injury claim because there was no pre-closure vocational assessment. Without such assessment, Ms. Koval must be found temporarily totally disabled because she is not yet vocationally fixed and closure set aside.

In support of this theory, Appellant called Lori Allen, Vocational Counselor. Her testimony was taken over two days of live hearings. Ms. Allen testified about her understanding of RCW 51.32.095 and its application in pre-closure vocational assessments. (12/19/13 Tr. pp. 63-65). In short, RCW 51.32.095 has a return to work priority list and it is the role of the vocational counselor to assist the Department in determining where on that list the injured worker has ended up. Ms. Allen testified there was no evidence the employer, at injury, offered Ms. Koval modified or light duty jobs. (12/19/13 Tr. pp. 65-66). Ms. Allen testified that Ms. Koval had no other transferable skills within her residual physical abilities. (12/19/13 Tr. pp. 67-68).

Starting at page 68 is where the trial court sustained relevancy objections regarding the provision of vocational services. Ms. Allen testified that based upon her review of the claim file, she did not see where the Self-

Insured Employer conducted a pre-closure vocational assessment. (12/19/13 Tr. pp. 68-70).

In the Defendant's case-in-chief, it called Sybil Evans, Vocational Counselor. She conducted what she called a "forensic" vocational evaluation, which means she did not actually meet with or interview Ms. Koval. (Dep. Ms. Evans p. 7). Ms. Evans' testimony is silent on whether there was or should have been a pre-closure vocational assessment performed on Ms. Koval.

STANDARD OF REVIEW

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249 (2002). Even if the instructions are misleading, however, the verdict will not be reversed unless prejudice is shown. *Keller*, 146 Wn.2d at 249. An error is prejudicial if it presumably affects the outcome of trial. *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 23 (1996).

It is well established that it is within the trial court's discretion whether to give a particular jury instruction. *Stiley v. Block*, 130 Wn.2d 486, 498, (1996). Abuse of discretion means a disregard of "attendant facts and circumstances." *Samantha A. v. Dep't of Social and Health Serv.*, 171 Wn.2d 623, 645 (2011). This Court has also summarized this standard as:

An exercise of judicial discretion is a composite of, among other things, conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. A decision involving discretion will not be disturbed on review except on a clear showing of its abuse, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State Ex Rel. Carroll v. Junker, 79 Wn.2d 12, 26 (1971). Alternatively, the trial court abuses its discretion when it makes a decision contrary to the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, (1993). Yet the Supreme Court has also held, “Jury instructions are reviewed *de novo*, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party.” *Cox v. Spangler*, 141 Wash.2d 431, 442 (2000).

Finally, decisions to exclude evidence are reviewed for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69 (2010).

ARGUMENT

1. The last sentence of the Court’s Instruction No. 10 is not a correct statement of the law and its inclusion was prejudicial to Ms. Koval.

The last sentence of Instruction No. 10 does not accurately state or instruct the jury of Washington’s rule of multiple proximate cause. Instead, it instructs the jury to deny Ms. Koval any recovery if it finds her condition was due, even in part, to the natural progression of her pre-existing condition. In

addition, it asks the jury to speculate whether Ms. Koval “would have” eventually had needed treatment or be unable to work due to the natural progression of her pre-existing condition. This is error.

Inclusion of the last sentence to Instruction No. 10 was prejudicial to Ms. Koval. It was prejudicial because if the jury found that a part of Ms. Koval’s condition, as of the date of the Department’s orders, was due to the natural progression of the pre-existing condition, then it was required not to provide her any recovery. Alternatively, it was prejudicial because if the jury found that Ms. Koval’s knee condition was destined in the future to worsen to the point of requiring treatment, regardless of either injury, then there can be no recovery. Finally, it was prejudicial because Instruction No. 10 contradicted Instruction No. 8 and was therefore confusing to the jury.

a. The last sentence of Instruction No. 10 is not an accurate statement of the law.

It is well established in Washington that it is a multiple proximate cause state. *Dep’t of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 885-86 (2012). A fundamental principle of workers’ compensation is that if the accident or injury is a proximate cause of the disability or death for which compensation is sought, the previous physical condition of the worker is immaterial. *Shirley*, 171 Wn. App. at 886 (citing *Dennis v. Dep’t of Labor &*

Indus., 109 Wash.2d 467, 471 (1987)). This means an industrial injury need only be one cause among many for an injured worker to receive compensation.

Equally important to multiple proximate cause is what is commonly known as the eggshell doctrine. The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities. *Wendt v. Department of Labor & Indus.*, 18 Wn. App. 674, 682-83 (1977). When assessing causation, the finder of fact must do so within the context of those pre-existing conditions. *Dennis*, 109 Wash.2d at 471.

If those pre-existing conditions were latent, quiescent, or symptomatic, and if the injury causes those conditions to become active or symptomatic, then the injury is responsible for the entire condition. *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 682-83 (1939). This is what is known as lighting up. The jury was not instructed what the law is regarding pre-existing symptomatic conditions. However, the Court in *Dennis* suggests this symptomatic-asymptomatic distinction is only important when rating permanent partial disability per RCW 51.32.080(3). *Dennis*, 109 Wash.2d at 476.

The issue presented in this case is whether or not one or both of these injuries lit up Ms. Koval's pre-existing knee condition such that it now requires surgery and prevents her from working as a phlebotomist. A corollary

issue is whether Ms. Koval's pre-existing arthritis and weight made her knee susceptible for new on-the-job injuries to be more disabling. Defendants argue that any change is due to the "natural progression" of the pre-existing condition for which there can be no recovery. Plaintiff asserts there are multiple causes of this progression, one of which was one or both of these injuries.

Consistent with Plaintiff's theory of the case it proposed Jury Instruction No. 12, which was Washington Pattern Instruction No. 30.18.01. Plaintiff's proposed instruction omitted the optional/bracketed final sentence of the pattern instruction. However, over objection the Court included the bracketed final sentence in the Court's Instruction No. 10. (Corrected Verbatim Report pp. 65-73, 90). The Court's Instruction reads:

If you find that:

1. before this occurrence Alla Koval had a bodily condition that was not causing pain or disability; and
2. the condition made Alla Koval more susceptible to injury than a person in normal health,

then you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those would have been incurred under the same circumstances by a person without that condition. There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.

(emphasis added).

I have only been able to find one reported appellate case that discusses this last sentence of this instruction. *Torno v. Hayek*, 133 Wn. App. 244 (2006). The Court only addresses under what circumstances the optional last sentence should be included: “where the evidence supports a finding that *some* of the resulting injury would have resulted from the natural progression of the condition, even without the occurrence.” *Id.* at 252 (emphasis added). The Court does not discuss whether or not this standard comports with Washington’s multiple proximate cause standard. It does not. It does not because the Court acknowledges that it provides for no recovery only if “some” of the injury was due to the natural progression, which violates multiple proximate cause.

The final sentence of this instruction imposes a major or sole proximate cause rule not supported by existing case law. It imposes a major proximate cause requirement because it creates a false dichotomy: Ms. Koval’s knee condition was either caused by the injury or the natural progression of the pre-existing condition. It is a false dichotomy because the law in Washington is multiple proximate cause: so long as the injury is a cause, it does not matter if there is also a natural progression of the pre-existing disease.

Stated differently, this instruction informs the jury that so long as it finds that Ms. Koval's knee condition was due, at least in part, to the natural progression of the pre-existing condition, "there may be no recovery." Again, this is not a correct statement of proximate cause.

In addition, the final sentence instructs the jury to make a prediction on whether Ms. Koval's knee "would" eventually have required treatment due to the natural progression of the pre-existing condition. Asking the jury to speculate whether or not Ms. Koval "would have" needed treatment for her knee at some point in the future, regardless of the injuries was improper.

It is improper because whether or not at some unspecified point in time in the future Ms. Koval's knees would have prevented her from working was not something determined by either the Department or Board. What was decided was whether, as of the dates of the two Department orders on appeal, one or both the on-the-job injuries were a proximate cause of Ms. Koval's inability to work or need for further treatment. The jury's task is to determine whether that decision was correct, not to predict what would happen in Ms. Koval's future.

The jury should have only been asked to determine whether as of the date the Department closed the second injury claim, was Ms. Koval's need for further medical treatment was due, at least in part, to that injury.

The jury should have only been asked to decide whether Ms. Koval's inability to work was due, at least in part, to the second injury. The jury should have only been asked to answer whether Ms. Koval's knee condition caused by the first injury had objectively worsened.

Also, the *Torno* case makes it clear the last sentence of WPI 30.18.01 is included so the defense in a personal injury case can argue for a lower damages award. *Torno*, 133 Wash. App. at 253. In other words, arguing that jury should give a lower pain and suffering or economic loss award because the plaintiff would have gotten to this point eventually anyway. Such considerations are not appropriate in the context of a workers' compensation claim.

So-called damages in a workers' compensation claim are statutory. RCW 51.04.010. The only consideration is whether the on-the-job injury remains a proximate cause of the current disability. So long as that is true, the injured worker is entitled to full statutory benefits. There is no mitigation, apportionment, or like defenses against these benefits, because the Legislature has withdrawn all such disputes from private causes of action in order to provide sure and certain relief to injured workers. RCW 51.04.010. This optional sentence does not belong in a jury

instruction in a workers compensation appeal in superior court. It was error for the Court to include it in Instruction No. 10.

Therefore, the Court should find the trial court erred by including the last sentence of Instruction No. 10. It erred because that sentence is not an accurate statement of the law. It is not a correct statement of the law because it contradicts Washington's multiple proximate cause rule. It also asks the jury to speculate about what would have happen to Ms. Koval had neither injury occurred. It was error to include it because it is used in personal injury cases as a defense to damages, which is not a consideration in workers' compensation appeals.

b. Including the last sentence in Instruction No. 10 was prejudicial.

A jury instruction is prejudicial if it could affect the outcome of the appeal. *Herring*, 81 Wn. App. at 23. The last sentence of Instruction No. 10 could have affected the outcome because if the jury concluded that at least some of Ms. Koval's knee problems were due to a natural progression, then they were instructed to give her no recovery. Yet that is not proper analysis.

The proper analysis is whether one or both injuries remain a cause of Ms. Koval's disability or need for treatment. There can be no recovery

for Ms. Koval if one or both injuries is not a cause of her disability or need for treatment. This is the proper analysis.

Yet this instruction confuses the issue. It asks the jury to determine whether one of the causes of Ms. Koval's knee condition is the natural progression of her pre-existing condition. This prejudices the jury's analysis and deliberation because it gives the jury a way out by simply deciding there is some natural progression followed by providing Ms. Koval no recovery.

Furthermore, jury instructions are to be read as a whole. *Cox*, 141 Wash.2d at 442. The Court's Instruction No. 8 correctly instructs the jury on proximate cause. It properly instructs the jury to focus its deliberation on whether one or both injuries are a proximate cause, one amongst many, of her disability and need for treatment. But Instruction No. 8 is contradicted by the last sentence of Instruction No. 10. This confuses the jury as to what standard of proximate cause it should apply: multiple proximate cause versus sole proximate cause. Again, the last sentence of Instruction No. 10 requires the jury to provide no recovery to Ms. Koval so long as it determines that one of the causes of her disability or need for treatment is the natural progression of the pre-existing condition. Read together, these two instructions inform the jury to apply a multiple and a sole proximate

standard when assessing what role these injuries have played in Ms. Koval's disability and need for treatment.

c. Conclusion.

The Court should set aside the verdict of the jury and remand this matter for a new trial. The last sentence of Instruction No. 10 is not a correct statement of the law. It switches the focus from whether the injuries are a proximate cause to whether a natural progression of the pre-existing condition was a proximate cause. It further invites the jury to speculate whether the natural progression "would have" at some point in the future have caused disability or a need for treatment had these injuries not occurred.

This error is prejudicial because it instructs the jury to switch its focus from whether these injuries were a proximate cause to whether the natural progression was a proximate cause of the disability and need for treatment. It is prejudicial because it informs the jury that if the natural progression is a proximate cause, there can be no recovery for Ms. Koval. It is prejudicial because when these instructions are read as a whole, the jury is confused, what is the proper proximate cause standard: multiple versus sole. This was ultimately confusing because it asked the jury to change its focus on whether the injuries remained a proximate cause to whether the

natural progression was a proximate cause of any current disability. This confusion was prejudicial because a jury might decide it was permissible to deny Ms. Koval recovery so long as the natural progression of the pre-existing condition was a proximate cause of her disability.

2. The trial court abused its discretion by excluding testimony that Ms. Koval was not provided vocational services prior to claim closure.

The trial court abused its discretion because it made an error of law that this evidence is not relevant. At its core, this testimony is at the core of one of Plaintiff's theory of recovery: The Department prematurely closed the claim because there was no pre-closure vocational assessment as required by RCW 51.32.095. This is the only testimony in the record on whether or not a pre-closure assessment was performed. Its exclusion was prejudicial because it precluded Plaintiff's ability to argue to the jury claim closure should be set aside because the Department did not conduct the required pre-closure assessment.

There is no appellate case law on this issue. However, there is a developing line of decisions by the Board of Industrial Insurance Appeals that finds injured workers are entitled, per RCW 51.32.095, to a pre-closure vocational assessment. The first significant decision of the Board was *In re Albina Pascual*, BIIA Dec. 09 20949 (2010). (Appendix A). Significant

decisions are those chosen by the Board as precedential upon the agency. WAC 263-12-195. Such decisions are, obviously, not binding on this Court, but may be persuasive authority from an agency that regularly interprets Title 51 RCW.

In *Pascual*, after conducting a thorough review of its procedural record, the Board noted its scope of review was limited to issues raised by the Department's order and further limited by the Notice of Appeal. The Board correctly noted that whether or not to provide vocational *services* (e.g. retraining) is within the sole discretion of the Director of the Department of Labor & Industries.

However, the Board also reviewed the Department's regulations regarding vocational assessments. WAC 296-19A. The Board correctly found the Department's regulations require a pre-closure assessment on whether or not a worker should receive vocational services. WAC 296-19A-30. The Department must then review that assessment report followed by a written determination, with notice to the parties. WAC 296-19A-030. The *Pascual* Board remanded the case to take more evidence on these issues.

The Board's next significant decision is *In re Reuben Cuellar*, BIIA Dec. 12 13134 (2013). (Appendix B). The *Cuellar* Board sought to distinguish and limit the scope of the *Pascual* decision. The *Cuellar* Board

affirmed it does not have the authority to order vocational services. Instead, it clarified that *Pascual* merely stands for the proposition that it is within the Board's jurisdiction, on appeal of a closing order, to determine whether the Department followed its own regulations in the course of making a decision about vocational services. The evidence presented, but struck by the trial court, in the present appeal was the Department did not follow any of its own regulations regarding vocational assessments, per WAC 296-19A-030, prior to claim closure.

The start of any analysis of whether injured workers have a right to an assessment of whether she needs vocational services is RCW 51.32.095.

Subsection 1 reads:

One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers must utilize the services of individuals and organizations, public or private, whose experience, training, and interests in vocational rehabilitation and retraining qualify them to lend expert assistance to the supervisor of industrial insurance in such programs of vocational rehabilitation as may be reasonable to make the worker employable consistent with his or her physical and mental status. Where, after evaluation and recommendation by such individuals or organizations and prior to final evaluation of the worker's permanent disability and in the sole opinion of the supervisor or supervisor's designee, whether or not medical treatment has been concluded, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment, the supervisor or supervisor's designee may, in his or her sole discretion, pay

or, if the employer is a self-insurer, direct the self-insurer to pay the cost.

RCW 51.32.095(1). To paraphrase, RCW 51.32.095 requires (“must”) the Department or Self-Insurers to utilize the services of vocational counselors. These vocational counselors, once assigned, are required to provide an “evaluation and recommendation prior to final evaluation of the worker's permanent disability.” In other words, they “must” provide an evaluation and recommendation prior to claim closure. The evidence struck by the trial court demonstrated this was not done in Ms. Koval’s claim.

As identified by the Board’s *Pascual* decision, the Department’s regulations are also an important part of this assessment. WAC 296-19A-030 identifies the obligations of the injured workers, vocational counselors, physicians, and the Department when conducting such “evaluation and recommendation” as required by RCW 51.32.095. Nothing in WAC 296-19A-030 provides that such assessments are optional.

Instead, WAC 296-19A-030(2)(b) requires the Department, in Self-Insured Claims, to take certain actions:

(b) For self-insured claims, the department must:

(i) Review the assessment report and determine whether the worker is eligible for vocational rehabilitation plan development services.

(ii) Notify all parties of the eligibility determination in writing.

(Emphasis added). In the present appeal, the evidence was the Department did not review an assessment report, because no pre-closure assessment report was completed. In the present appeal, the evidence was the Department did not notify all parties of its eligibility determination, because no such determination was made because no assessment report was submitted to the Department.

The trial court abused its discretion when it excluded this evidence. It heard argument about vocational services. It simply thought such evidence was not relevant. This decision was exercised on untenable grounds: that evidence of no vocational assessment has no bearing on whether the Department correctly closed the claim. This decision was manifestly unreasonable because it eviscerated one of Plaintiff's theories of recovery based upon a reasonable reading and application of RCW 51.32.095 and WAC 296-19A-030. It was manifestly unreasonable because without this testimony, Plaintiff had no basis to argue to the jury whether the Department correctly followed the statute and its own regulations. The trial court's decision to strike this evidence was contrary to law because whether the Department followed RCW 51.32.095 prior to claim closure is relevant.

The trial court's decision was prejudicial and warrants a new trial. It was prejudicial because without this testimony, Plaintiff had no basis upon which she could argue this theory of the case: the Department prematurely closed the claim because it did not have a required vocational assessment. It was prejudicial because the legislature has required such pre-closure assessments and the jury was not informed whether one was performed.

This Court should reverse this evidentiary decision. This testimony is admissible. The Court should remand this matter to the trial court with instructions to grant a new trial.

3. Attorney Fees.

Attorney fees are awardable pursuant to RCW 51.52.130. Furthermore, because this is a case involving a self-insured employer, it is not necessary for the Department's accident fund to become affected before fees can be awarded. RCW 51.52.130; *Johnson v. Tradewell Stores*, 95 Wn.2d 739 (1981). Furthermore, the *Brand* Court held that it does not matter whether or not the injured worker prevailed on all issues. So long as he prevailed on at least one issue on appeal, all attorney fees are payable. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665 (1999).

RCW 51.52.130 mandates that if an injured worker prevails in a court appeal against a self-insured employer, then attorney fees and costs are payable. In *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 577 (2006), the Supreme Court awarded attorney fees where an injured worker appealed the trial court's grant of summary judgment. The Court set aside summary judgment and remanded the matter for a new trial. The Court awarded attorney fees payable by the Self-Insured Employer because the injured worker prevailed in its appeal.

Then there is the case of *Chuynk & Conley/Quad-C v. Bray*, 156 Wn. App. 246 (2010), where the injured worker appealed over failure to give a jury instruction. This case also involved a self-insured employer. The Court of Appeals agreed the failure to give the instruction was prejudicial error and remanded the case for a new trial. *Id.* at 248. The Court awarded the injured worker attorney fees, per RCW 51.52.130, for prevailing on appeal. *Id.* at 256. It did not require the injured worker to prevail with the new trial before awarding attorney fees.

CONCLUSION

This Court should reverse the judgment of the trial court and remand this matter for a new trial. The trial court erred when it advised the jury that it must not provide Ms. Koval any relief so long as it finds that the natural progression of the pre-existing condition would have caused the injury or disability. This is not a proper statement of Washington's multiple proximate

cause standard, conflicts with the multiple proximate cause instruction, and thereby was confusing to the jury.

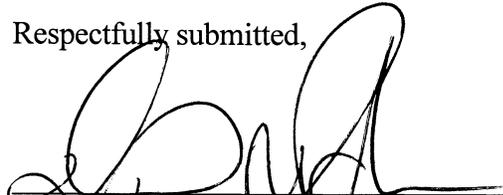
Had this sentence been eliminated, then the jury would have clearly known to focus its deliberations on whether one or both of these on-the-job injuries remained a proximate cause of Ms. Koval's current disability. Inclusion of this sentence invited the jury to, wrongly, focus on whether the natural progression of the pre-existing condition was a proximate cause of her current disability. This was prejudicial error.

The trial court also abused its discretion when it struck the only testimony regarding what vocational assessments were performed prior to the closing order. Such testimony is relevant because RCW 51.32.095 and WAC 296-19A-030 require such pre-closure assessments. The Department's failure to require such assessment is grounds for reversal of its closing order. Therefore, to find such testimony irrelevant is a clear error of law and prejudicial, which warrants a new trial.

Should Appellant prevail, she is entitled to an award of attorney fees and costs for time spent before this Court.

Dated: September 8, 2016.

Respectfully submitted,



Douglas M. Palmer, WSPA No. 35198
Attorney for Anna Koval
Appellant/Plaintiff

APPENDIX A

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 IN RE: ALBINA M. PASCUAL)	DOCKET NO. 09 20949
)	
2 CLAIM NO. AF-16640)	ORDER VACATING PROPOSED DECISION
)	AND ORDER AND REMANDING THE
)	APPEAL FOR FURTHER PROCEEDINGS

APPEARANCES:

Claimant, Albina M. Pascual, Pro Se

Employer, Holiday Inn Express, by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Dana E. Blackman, Assistant

The claimant, Albina M. Pascual, filed an appeal with the Board of Industrial Insurance Appeals on August 21, 2009, from an order of the Department of Labor and Industries dated July 27, 2009. In this order, the Department affirmed its June 3, 2009 order in which it ended time-loss compensation benefits as paid through May 12, 2009, and closed the claim effective June 3, 2009, with no further treatment and no permanent partial disability. The appeal is **REMANDED FOR FURTHER PROCEEDINGS.**

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on May 13, 2010, in which the industrial appeals judge dismissed the appeal for failure to establish a prima facie case under RCW 51.52.050. The Department filed a response on June 30, 2010. The Board received a letter from the claimant's treating chiropractor, F. Douglas Wilson, D.C., on July 2, 2010.

At hearing, the claimant raised the issues of treatment and vocational services. The industrial appeals judge found she had not made a prima facie case regarding the former and determined the latter was not within the Board's jurisdiction in an appeal from a closing order. We agree with the resolution of the treatment issue. However, a remand is necessary to develop the record regarding whether any issues regarding vocational services are properly before the Board in this appeal.

1 The claimant presented the testimony of her treating chiropractor, F. Douglas Wilson, D.C.
2 Dr. Wilson agreed he was only recommending palliative care. That does not meet the definition of
3 proper and necessary treatment contained in WAC 296-20-01002. The industrial appeals judge
4 therefore correctly concluded that Ms. Pascual had failed to make a prima facie case regarding
5 entitlement to further treatment as of July 27, 2009.

6 The claimant has petitioned for review, attaching a March 3, 2010 letter from another
7 chiropractor, Lucas Q. Homer, D.C. She contends she did not have time to present this second
8 opinion and asks that we consider it. This appears to be the same letter Ms. Pascual brought to the
9 hearing, although Dr. Homer's name was not mentioned at that time. The industrial appeals judge
10 explained to Ms. Pascual that he could not review the document, unless the Assistant Attorney
11 General was willing to stipulate to its admissibility, which she was not. Once it became clear the
12 industrial appeals judge intended to dismiss her appeal for failure to make a prima facie case,
13 Ms. Pascual indicated she would like to present the testimony of the doctor who prepared the letter.
14 The industrial appeals judge explained that she had not confirmed that witness and disallowed the
15 testimony. Even considering the letter as an offer of proof, it does nothing to help Ms. Pascual
16 overcome the hurdle of making a prima facie case. Like Dr. Wilson, Dr. Homer is recommending
17 maintenance care. Thus, there is no merit in the claimant's challenge to the Proposed Decision
18 and Order with respect to the treatment issue.

19 On July 2, 2010, after we granted review, Dr. Wilson filed a letter dated June 25, 2010,
20 arguing that the claimant's condition had worsened since claim closure, that she needs further
21 treatment to decrease her pain and improve her function, and that she is physically unable to work
22 at this time due to the March 5, 2008 injury. To the extent Dr. Wilson is contending that the
23 claimant's condition has become aggravated within the meaning of RCW 51.32.160, the proper
24 remedy would be to file an application to reopen with the Department. The issue is not before us in
25 the current appeal.

26 Dr. Wilson's contention that Ms. Pascual is not able to work is related to one of the remedies
27 the claimant is seeking in this appeal, vocational retraining. As a threshold matter, the Board
28 cannot order the Department to provide vocational services. That determination is within the
29 Department's sole discretion under RCW 51.32.095, and can only be reviewed for abuse of
30 discretion by the Board. However, there is still the question of whether any aspect of the vocational
31 issue that Ms. Pascual attempted to raise at hearing is within the scope of the Board's review in this
32 appeal from the July 27, 2009 closing order.

1 The Notice of Appeal consists of three letters from Dr. Wilson, dated June 8, 2009, July 23,
2 2009, and August 18, 2009. In all three letters, he seeks to have the claim remain open so that the
3 worker may receive vocational retraining. The first two letters were addressed to the Department,
4 and Dr. Wilson also filed a separate appeal from the initial June 3, 2009 closing order, in Docket
5 No. 09 15975. That appeal was denied because the Department held the order in abeyance. A
6 court may take **judicial notice** of its own records in the same case. *Cloquet v. Department of*
7 *Labor & Indus.*, 154 Wash. 363 (1929). Pursuant to ER 201, we take judicial notice of the fact that
8 Dr. Wilson's June 8, 2009 letter served as the Notice of Appeal in Docket No. 09 15975.

9 Thus, the Department had ample notice from the outset that the claimant was seeking
10 retraining and can be fairly assumed to have considered that issue when it held the June 3, 2009
11 closing order in abeyance, affirmed it on July 27, 2009, and chose not to reassume jurisdiction
12 thereafter. Based on that rationale alone, Ms. Pascual at least should have been allowed to
13 present her own testimony and that of Dr. Wilson to explain what vocational rehabilitation issue they
14 were attempting to raise, for example, what they were complaining about in terms of Department
15 action or inaction.

16 Initially, the claimant was advised that she would be able to raise her concerns. As a result
17 of the December 21, 2009 pre-hearing conference, an Interlocutory Order Establishing Litigation
18 Schedule was issued. Two issues were identified, treatment and "Whether the claimant is entitled
19 to vocational re-training." Both the claimant and the Department identified Jennifer Bows, a
20 vocational expert, as a witness at that time. On December 31, 2009, the industrial appeals judge
21 sent Ms. Pascual a letter explaining the process and her burden of proof. With respect to
22 vocational retraining, she was advised: "If you believe you were not employable due to your
23 condition(s) related to the industrial injury or occupational disease, you must prove that the Director
24 of the Department of Labor and Industries abused discretion regarding whether you were
25 employable. Testimony of a vocational counselor, medical witness, or other expert may be helpful."

26 In her January 21, 2010 witness confirmation letter, Ms. Pascual confirmed that Dr. Wilson
27 would testify and notified the industrial appeals judge that she would not be presenting Ms. Bows'
28 testimony. In its January 27, 2010 witness confirmation letter, the Department confirmed that
29 Dr. Joseph McFarland and Dr. Stephen A. Liston would testify.

30 At the beginning of the March 18, 2010 hearing, the industrial appeals judge noted the two
31 issues listed in the Interlocutory Order Establishing Litigation Schedule and that Ms. Pascual had
32 decided not to call a vocational expert. He asked if she was still seeking vocational retraining and

1 she confirmed that she was. When he asked the Assistant Attorney General if she agreed with his
2 statement of the issues, she said that, on further review, the Department believed that entitlement
3 to vocational retraining was not within the Board's jurisdiction, because the appeal was from a
4 closing order and "we don't have a process that went through VDRO or Vocational Dispute
5 Resolution Office." 3/18/10 Tr. at 5. The industrial appeals judge did not ask the Assistant Attorney
6 General and the claimant to elaborate regarding what, if anything, had happened procedurally
7 regarding vocational services at the Department level, or to produce any documents from the claim
8 file, to supplement the Jurisdictional History, which contains no information in that regard.

9 After referring to RCW 51.32.095, the industrial appeals judge concluded that: "Because the
10 issue of vocational retraining has not been decided at the Department level, or at least is not shown
11 to be so within this Appeal, the Board apparently has no jurisdiction to issue an Order regarding
12 vocational retraining based on the Order under appeal of July 27, 2009, which affirms the Closing
13 Order of June 3, 2009." 3/18/10 Tr. at 6.

14 Thereafter, in questioning the claimant, the industrial appeals judge asked no questions
15 regarding what, if anything, had happened regarding vocational services at the Department level.
16 When it came time for Dr. Wilson to testify, he was asked if Ms. Pascual's condition related to the
17 March 5, 2008 industrial injury was fixed and stable. He responded that Ms. Pascual "wasn't given
18 the chance for vocational rehabilitation." 3/18/10 Tr. at 46. The Assistant Attorney General
19 objected, based on relevance, and that testimony was stricken. Dr. Wilson asked: "We can't bring
20 up vocational rehabilitation? No." 3/18/10 Tr. at 49. That statement was stricken. After his
21 testimony was concluded, and when he thought he was off the record, Dr. Wilson said: "Yeah, that
22 was my main reason we filed a Reopening, was for vocational." 3/18/10 Tr. at 49-50. That
23 comment was also stricken.

24 In summary, having first agreed that vocational retraining could be addressed in this appeal,
25 the Department changed course on the day of hearing. It argued that the issue was not within the
26 Board's jurisdiction, because the appeal was not from a decision made through the VDRO process.
27 The industrial appeals judge agreed, and precluded the claimant from offering any evidence on this
28 issue. When Dr. Wilson attempted to explain that he had sought to keep the claim open for the
29 purpose of seeking retraining for Ms. Pascual, his limited testimony was stricken, and the issue was
30 not explored through questions and answers in colloquy.

31 As explained above, the Notice of Appeal consists of correspondence from Dr. Wilson.
32 Taken as an offer of proof, those letters indicate he would likely have testified that: He requested a

1 vocational evaluation, and received no response; he was never made aware of the claimant
2 working with a vocational counselor and did not review job descriptions or release her for work; the
3 medical examiners released her, with no restrictions, and signed job descriptions stating she could
4 perform the types of jobs she was performing that caused her initial injury; and, in his opinion, Ms.
5 Pascual needed to be retrained for lighter work that would not exacerbate her condition.

6 The questions the Board may consider and decide are limited by the order from which the
7 appeal was taken and the issues raised by the notice of appeal. *Lenk v. Department of Labor &*
8 *Indus.*, 3 Wn. App. 977, 982 (1970). The determination of whether a worker is eligible for
9 vocational services is a matter within the sole discretion of the supervisor of industrial insurance,
10 with our review limited to whether there has been an abuse of discretion as to the determination or
11 the process laid out in RCW 51.32.095 and WAC 296-19A. The Jurisdictional History reveals
12 nothing regarding what action, if any, the Department took with respect to vocational services. We
13 have reviewed the Department file under the authority of *In re Mildred Holzerland*, BIIA Dec.,
14 15,729 (1965), to determine if the Department made a determination regarding Ms. Pascual's
15 eligibility for vocational services, whether any dispute was filed with the VDRO, and whether a
16 Director's decision was issued. See, WAC 296-19A-410 through WAC 296-19A-470. We have
17 found no indication that any of those actions were taken at the Department level.

18 The Department file does show some indications of vocational activity, including an Ability to
19 Work Progress Report, a Job Analysis for laundry laborer, and an Assessment Closing Report, fax
20 received at the Department on May 19, 2009. We have not read the contents of those documents
21 nor are we considering them in any way to resolve the merits of this appeal. However, the
22 existence of those documents raises the question of whether a vocational expert has assessed the
23 worker's employability or her eligibility for vocational services. If so, then the Department may have
24 been required to: "(iv) Review the assessment report and determine whether the worker is eligible
25 for vocational rehabilitation plan development services. and (v) Notify all parties of the eligibility
26 determination in writing." WAC 296-19A-030(2)(iv) and (v). In addition, the claimant would have
27 been entitled to dispute that determination pursuant to WAC 296-19A-410 through 296-19A-470.

28 Furthermore, if the vocational counselor failed to include Dr. Wilson in the process, as his
29 letters suggest, the vocational process might be subject to challenge because he is listed as the
30 attending provider on the July 27, 2009 Department order, and that status was confirmed by his
31 testimony. The attending provider plays an important role under the vocational rehabilitation rules.
32 See, e.g., WAC 296-19A-030(1). Under the medical aid rules, as well, the attending provider has a

1 role to play. If the worker has not returned to work, the provider is required to indicate in the 60-day
2 report whether a vocational assessment will be necessary to evaluate a worker's ability to return to
3 work and why. WAC 296-20-06101. The same requirement is set forth in the definitional section,
4 WAC 296-20-01002, under "Attending provider report."

5 The evidentiary record does not contain the necessary information to make determinations
6 regarding any of these matters, and the claimant was precluded from presenting such evidence
7 through her own testimony or that of Dr. Wilson. As a general proposition, the July 27, 2009 closing
8 order would be considered an adjudication of "the totality of the claimant's entitlement to all benefits
9 of whatever form, as of the date of claim closure." *In re Randy Jundul*, BIIA Dec., 98 21118
10 (1999), at 3. Thus, in an appeal from a closing order, our scope of review could conceivably include
11 a contention that the Department has failed to act or failed to follow the process set forth in
12 RCW 51.32.095 or WAC 296-19A, with respect to vocational services. Just because the claimant
13 has not appealed from a director's decision resulting from the VDRO process, that does not
14 necessarily mean there are no issues with respect to vocational services cognizable in this appeal.

15 We also note that in his June 25, 2010 letter, Dr. Wilson raised the issue of whether the
16 claimant is employable. That question is intertwined with the vocational issues. On remand, the
17 claimant's vocational concerns may become moot. Further inquiry may reveal that she is arguing in
18 the alternative, that is, she is either challenging the way the Department addressed the vocational
19 aspect of the claim or she is contending that, without vocational services, she is not employable
20 and is therefore entitled to time-loss compensation or permanent total disability benefits. If
21 Ms. Pascual is seeking the latter, the industrial appeals judge will be called upon to determine
22 whether she is employable or not. That is the same determination the Department would have to
23 make in deciding whether Ms. Pascual is entitled to vocational services. There would therefore be
24 no reason to remand the claim to the Department to make the same determination. *In re Peter*
25 *Dodge*, Dckt. No. 90 4017 (January 2, 1992).

26 The May 13, 2010 Proposed Decision and Order is vacated. This order is not a final
27 Decision and Order of the Board within the meaning of RCW 51.52.110. This appeal is remanded
28 to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings to determine what
29 issues Ms. Pascual is raising regarding vocational services and employability, and to allow both
30 parties to present evidence on those issues. Unless the matter is settled or dismissed, the
31 industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain
32

1 findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the
2 new Proposed Decision and Order may petition the Board for review, pursuant to RCW 51.52.104.

3 Dated: July 22, 2010.

4 BOARD OF INDUSTRIAL INSURANCE APPEALS

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6
7 /s/ _____
8 DAVID E. THREEEDY Chairperson

9
10 /s/ _____
11 FRANK E. FENNERTY, JR. Member

12
13 /s/ _____
14 LARRY DITTMAN Member

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APPENDIX B

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 IN RE: RUBEN CUELLAR)	DOCKET NOS. 12 13134 & 12 13135
)	
2 CLAIM NO. Y-089408)	ORDER VACATING PROPOSED DECISION
)	AND ORDER AND REMANDING FOR
)	FURTHER PROCEEDINGS

APPEARANCES:

Claimant, Ruben Cuellar, by
Law Offices of Betsy Rodriguez, P.S., per
Betsy Rodriguez and Dwayne L. Christopher

Employer, Commons at Federal Way Mall, by
Washington Retail Association,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Christine J. Kilduff, Assistant

In Docket No. 12 13134, the claimant, Ruben Cuellar, filed an appeal with the Board of Industrial Insurance Appeals on March 15, 2012, from an order of the Department of Labor and Industries dated February 10, 2012. In this order, the Department affirmed an October 18, 2011 order in which it paid loss of earning power compensation benefits through August 2, 2011, and then terminated time-loss compensation benefits because the worker was able to work. **APPEAL REMANDED FOR FURTHER PROCEEDINGS.**

In Docket No. 12 13135, the claimant, Ruben Cuellar, filed an appeal with the Board of Industrial Insurance Appeals on March 15, 2012, from an order of the Department of Labor and Industries dated February 13, 2012. In this order, the Department affirmed a November 2, 2011 order in which it closed the claim with a permanent partial disability award of 12 percent of the left leg above the knee joint with short thigh stump (3 inches or below tuberosity of ischium). **APPEAL REMANDED FOR FURTHER PROCEEDINGS.**

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on March 8, 2013, in which the industrial appeals judge dismissed the appeals.

We have granted review because we believe that Mr. Cuellar's appeals should not have been dismissed. We find that Mr. Cuellar presented a prima facie case supporting his entitlement

1 to total disability benefits and this matter must be remanded to the hearing process to allow the
2 Department to present evidence.

3 Mr. Cuellar appealed two orders, one terminating time-loss compensation benefits and the
4 other closing his claim. On appeal and in his Petition for Review, Mr. Cuellar has repeatedly
5 requested the Board remand his claim to the Department for the purpose of obtaining additional
6 vocational services. Without additional vocational services Mr. Cuellar asserts that he cannot
7 perform reasonably continuous gainful employment. Claimant's Petition for Review, pg 18,
8 lines 18 – 20. During the hearings and in briefs filed by the parties the question of whether the
9 Board could direct the Department to provide vocational services was thoroughly analyzed.
10 However, the question raised by this appeal is not whether the Board can direct the Department to
11 provide 'further' vocational services (we cannot) but whether, in the alternative, Mr. Cuellar is
12 entitled to benefits as a permanently totally disabled worker.

13 It is well established that vocational services are provided by the Department of Labor and
14 Industries (Department) at the discretion of the 'supervisor.' The decision to provide or not to
15 provide vocational services is discretionary and may only be challenged based on a showing of
16 abuse of discretion by the supervisor. RCW 51.32.095 (1) and (2), *In re Todd Eicher*, BIIA
17 Dec., 88 4477 (1990). See also, *In re Mary Spencer*, BIIA Dec., 90,0264 (1991), and *In re*
18 *Armando Flores*, BIIA Dec., 87 3913 (1989).

19 We note that in the Petition for Review, and elsewhere in the record, Mr. Cuellar does not
20 contend that the director (supervisor) abused his or her discretion in providing vocational services
21 while the claim was open. Rather, Mr. Cuellar asserts that the vocational services were provided
22 by the Department but were not sufficient to make him capable of reasonably continuous gainful
23 employment. He further asks the Board to direct the Department to provide additional vocational
24 services in order to become capable of reasonably continuous gainful employment. The question
25 of vocational services – any and all vocational services – has been limited to the discretion of the
26 supervisor by the Legislature. Mr. Cuellar has cited no authority that allows the Board to direct the
27 Department to provide vocational services absent a showing that the supervisor abused his or her
28 discretion.

29 The only logic we can see in Mr. Cuellar's argument for additional vocational services is that
30 once the supervisor has authorized services that the Board may then review the adequacy of those
31 services in an appeal closing the claim. Again, Mr. Cuellar cites no authority to extend the Board's
32

1 scope of review to determine whether additional vocational services are warranted. Vocational
2 services, as a benefit under the Industrial Insurance Act, are solely within the discretion of the
3 supervisor.

4 When the Department closes a claim it must determine the extent of any permanent
5 disability proximately caused by the industrially related condition. If there is permanent disability
6 then Department must further evaluate whether the disability prevents the injured worker from
7 obtaining and performing reasonably continuous gainful employment and is permanently totally
8 disabled. *Leeper v. Department of Labor and Indus.*, 123 Wn.2d 803 (1994). The Department runs
9 a risk when closing a claim if it determines that an injured worker is capable of reasonably
10 continuous gainful employment. An injured worker may challenge that decision on appeal. If the
11 worker is successful the Department cannot defend on the basis that vocational services would
12 make the worker capable of reasonably continuous gainful employment.

13 In our recent decision of *In re Tesfai G. Ukbagergis*, Dckt No. 09 20737, (April 21, 2011), we
14 addressed the question of whether further retraining would help Mr. Ukbagergis become
15 employable.

16 We agree with the Department that, with retraining, Mr. Ukbagergis likely would be
17 employable. The question before us, however, is whether he is employable absent
18 any retraining. The Department, citing *Pacific Car and Foundry Co. v. Coby*, 5 Wn.
19 App. 547 (1971), argues that the worker's "occupational retraining prognosis" must be
20 considered in assessing total disability. However, *Coby* involved an appeal by the
21 employer from an order of the Department that had classified the worker as
22 permanently totally disabled; certainly a worker's "occupational retraining prognosis"
23 would be a factor considered by the Department in assessing whether a worker is
24 totally disabled, because the Department has the authority to provide vocational
25 services to injured workers who require and likely would benefit from such services.
26 **However, after the Department has determined that the worker is not totally
27 disabled and that determination has been appealed to this Board, the worker's
28 "occupational retraining prognosis" is no longer a factor in determining
29 whether the worker is totally disabled.**

30 *Ukbagergis*, at 4. (Emphasis added)

31 The focus in a dispute of a closing order is either proper and necessary medical treatment or
32 the extent of permanent disability. If a worker seeks benefits as a permanently totally disabled
worker it is not necessary to show that he or she would remain unemployable even if further
retraining was provided. The issue on appeal from a closing order is the extent of permanent
disability – if any – and not whether vocational services would mitigate total disability. As noted, the
Department runs a risk in closing a claim when there are serious unresolved vocational issues. The

1 remedy for the failure to provide vocational services sufficient to make a worker capable of
2 obtaining reasonably gainful employment is permanent total disability.

3 We note that the industrial appeals judge did not identify permanent total disability as an
4 alternative issue in the Interlocutory Order Establishing Litigation Schedule dated September 24,
5 2012. Mr. Cuellar, through his attorney, steadfastly argued throughout the hearing process and in
6 the Petition for Review that vocational services were the primary relief sought in the course of the
7 appeal. As we have explained, the Board cannot direct the Department to provide vocational
8 services absent a showing of abuse of discretion by the supervisor/director. Therefore, what
9 remains to be decided is the extent of permanent disability. Mr. Cuellar's counsel presented
10 permanent total disability as an alternative remedy at the hearing held on January 23, 2013.
11 1/23/13 Tr. at 93. In the Petition for Review Mr. Cuellar renewed permanent total disability as
12 alternative relief and cited appropriate legal authority. *Kuhnle v. Department of Labor & Indus.*,
13 12 Wn.2d 191 (1942), *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972) and
14 *Leeper*. Irrespective of Mr. Cuellar's insistence to the contrary, we cannot direct or award further
15 vocational services. Because he has not pursued keeping the claim open for further treatment, the
16 only remaining relief available to Mr. Cuellar on appeal is consideration of whether he is entitled to
17 further disability benefits.

18 We wish to briefly distinguish our decision of *In re Albina Pascual*, BIIA Dec., 09 20949
19 (2010). In *Pascual* the Board reviewed the claim file under the authority of *In re Mildred Holzerland*,
20 BIIA Dec., 15,729 (1965), to determine if the Department had appropriately responded to a request
21 for vocational services. The Board found that communications from Ms. Pascual's attending
22 physician and other documents in the file raised the issue of the need for vocational services. We
23 held:

24 However, the existence of those documents raises the question of whether a
25 vocational expert has assessed the worker's employability or her eligibility for
26 vocational services. If so, then the Department may have been required to:
27 "(iv) Review the assessment report and determine whether the worker is eligible for
28 vocational rehabilitation plan development services, and (v) Notify all parties of the
29 eligibility determination in writing." WAC 296-19A-030(2)(iv) and (v). In addition, the
30 claimant would have been entitled to dispute that determination pursuant to
31 WAC 296-19A-410 through 296-19A-470.

32 *Pascual* at 5.

The claim file did not indicate that the Department had taken the actions required by its own
regulations to address the request for vocational services. The Board remanded the appeal to the

1 hearing process to take evidence on whether the Department had responded to a request for
2 vocational services consistent with the Industrial Insurance Act and its own regulations.

3 *Pascual* does not hold that the Board will order vocational services; it holds only that the
4 Board's scope of review on vocational issues extends to whether the Department followed its
5 procedures under the statute and regulations in the course of making a decision about vocational
6 services. If the appealing party could affirmatively show that the Department did not follow a
7 requirement of its own rules, the Board could direct the Department, that is, the supervisor, to follow
8 those procedures and issue a further decision. The Board would not direct the Department to
9 provide vocational services.

10 We clarified the limited holding of *Pascual* in the subsequent decision of *In re Craig R. St.*
11 *Onge*, Dckt Nos. 09 14365, 09 19470, 09 20162, 09 20163, 09 20164 & 09 20164-A & 09 20667,
12 (September 2, 2010). The Board held:

13 None of the orders before us explicitly address vocational benefits. We are cognizant
14 that in a recent decision, *In re Albina M. Pascual*, Dckt. No. 09 20949 (July 22, 2010),
15 we remanded an appeal to the hearings process to address a vocational issue despite
16 the absence of an order on appeal explicitly addressing vocational issues. We
17 remanded because an issue was raised regarding whether the Department followed
18 the process set forth in RCW 51.32.095 or WAC 296-19A with respect to vocational
19 services.

18 *St. Onge*, at 3.

19 The issue in *Pascual* and *St. Onge* is the Department's process regarding vocational
20 determinations and not the substance of those determinations. Substantive vocational decisions
21 can only be challenged on an abuse of discretion standard.

22 *Pascual* is not applicable in Mr. Cuellar's case as he has not alleged any procedural or
23 substantive error by the Department regarding vocational services. Mr. Cuellar simply argues that
24 he needs more services.

25 RCW 51.32.095(10) specifies that claims cannot be 'reopened' for vocational rehabilitation
26 services only. The Department argues that the word 'reopening' refers generally to 'keeping' a
27 claim open to provide vocational services as opposed to a situation involving the application to
28 reopen a claim. This view is consistent with our decision in *Ukbagergis*. An appeal based on the
29 claim for additional vocational service must be based on an abuse of the Department's discretion in
30 either awarding or denying such benefits.

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These appeals were dismissed by the industrial appeals judge on a motion by the Department of Labor and Industries because Mr. Cuellar had failed to show a prima facie case that the Department had abused the discretion to provide vocational services as provided by RCW 51.32.095 and had failed to show a prima facie case for loss of earning power benefits. The Department rested on its motion. However, as we have explained the vocational issue is not dispositive of all the issues raised by these appeals. We remand for further hearings on Mr. Cuellar's alternate basis for relief – total disability, either temporary or total.

On remand, the Department of Labor and Industries should be allowed to present the evidence indentified in the Interlocutory Order Establishing Litigation Schedule dated September 24, 2012. Mr. Cuellar is not allowed to reopen his case-in-chief but may present rebuttal evidence consistent with the rules of the Board and the Rules of Superior Court. After completing the record of evidence the industrial appeals judge will issue a new proposed decision and order addressing the issues presented by both appeals. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104.

Dated: May 29, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEEDY Chairperson

/s/
FRANK E. FENNERTY, JR. Member