No. 35219-2-II

COURT OF APPEALS - DIVISION II

OF THE STATE OF WASHINGTON

JAMES TOMLINSON,

Appellant,

v.

PUGET SOUND FREIGHT LINES,

Respondent.

APPELLANT'S BRIEF

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ORIGINAL

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

Assignments of Error:

1. The superior court misinterpreted the controlling statute, RCW 51.32.080(5), so erred in affirming the Board. 1

2. The superior court should have granted Tomlinson's motion for summary judgment, and ordered Puget Sound Freight Lines (PSFL) to pay him permanent partial disability of 75 percent of his leg above the knee joint with short thigh stump (3 inches or less below the tuberosity of ischium) 1

Issues Pertaining to Assignments of Error:

1. Tomlinson injured his knee in a fall at work. Before the fall, he had arthritis in the knee. RCW 51.32.080(5) provides that when an industrial injury results in permanent partial disability, but the injured worker already had *permanent partial disability* of the pertinent body part *before the industrial injury occurred, which the industrial injury increased,* the preexisting permanent disability should be subtracted from

the final permanent disability to determine the injured worker's permanent partial disability benefit. Did subsection (5) apply in this case, when:

a. As a matter of law, a condition is not "permanent" if it is progressive; and here, the evidence is clear, undisputed, and indisputable that at the time of the industrial injury Tomlinson's arthritis was progressive;

b. As a matter of law, a condition is not "permanent" until a physician determines that it is fixed and stable; and here, the evidence is clear, undisputed, and indisputable that the earliest such determination was December 15, 2000 – nearly a year-and-a-half *after* Tomlinson's industrial injury;

c. As a matter of law, a condition is not "permanent" if it can be changed by medical intervention; and here, the evidence is clear, undisputed, and indisputable that Tomlinson's arthritis was surgically removed;

d. The evidence is clear, undisputed, and indisputable that when Tomlinson's leg was medically determined to be fixed and stable and his permanent partial disability was determined, he had no arthritis;

e. The evidence is clear, undisputed, and indisputable that after

knee replacement surgery, permanent partial disability depends solely and entirely on how the recipient functions with the artificial knee; and

f. The evidence is clear, undisputed, and indisputable that when Tomlinson's leg became fixed and stable, his permanent partial disability was 75 percent of the leg above the knee joint with short thigh stump (3 inches or less below the tuberosity of ischium), solely and entirely because of very poor function with the knee prosthetic joint? 4

2. Where the medical evidence is clear, undisputed, and undisputable that when the leg became fixed and stable, Tomlinson had permanent partial disability 75 percent of the leg above the knee joint with short thigh stump (3 inches or less below the tuberosity of ischium), solely and entirely because of very poor function with the knee prosthetic joint, should the superior court be ordered to enter judgment in his favor for such disability? 4

B STATEMENT OF THE CASE 4

C. SUMMARY OF ARGUMENT 15

D. ARGUMENT 16

1. Standard of review 16

2. Tomlinson had no preexisting permanent partial disability; therefore, his permanent partial disability benefit should have been 75 percent of the leg 18

a. The fact that Tomlinson had arthritis in his knee before the industrial injury did not permit applying RCW 51.32.080(5), because the arthritis was *not permanent disability* 25

E. REQUEST FOR ATTORNEY FEE 31

F. CONCLUSION 31

APPENDIX

RCW 51.08.150 . . . . . A-1

RCW 51.12.010 . . . . . A-2

RCW 51.32.080 . . . . . A-3

RCW 51.52.130 . . . . . A-8

RCW 51.52.160 . . . . . A-9

WAC 263-12-195 . . . . . A-10

WAC 296-20-01002 . . . . . A-11

WAC 296-20-030 . . . . . A-18

WAC 296-20-2015 . . . . . A-19

TABLE OF AUTHORITIES

Table of Cases

Bennett v. Dep't of Labor & Indus.,

95 Wn.2d 531, 627 P.2d 104 (1981) 27

Beyer v. Dep't of Labor & Indus.,

17 Wn.2d 29, 134 P.2d 948, 137 P.2d 1016 (1943) 19

Brannan v. Dep't of Labor & Indus.,

104 Wn.2d 55, 700 P.2d 1139 (1985) 3, 7

Brand v. Dep't of Labor & Indus.,

139 Wn.2d 659, 989 P.2d 1111 (1999) 18

Cerrillo v. Esparza,

158 Wn.2d 194, 147 P.3d 155 (2006) 24

City of Bremerton v. Shreeve,

55 Wn. App. 334, 777 P.2d 568 (1989) 27

Cockle v. Dep't of Labor & Indus.,

142 Wn.2d 801, 16 P.3d 583 (2001) 18, 19

Dennis v. Dep't of Labor & Indus.,

109 Wn.2d 467, 745 P.2d 1295 (1987) 20, 29

Department of Labor & Indus. v. Gongyin,

154 Wn.2d 38, 109 P.3d 816 (2005) 24

Champion Int'l, Inc. v. Dep't of Labor & Indus.,

50 Wn. App. 91, 746 P.2d 1244 (1987) 29

Clauson v. Dep't of Labor & Indus.,

130 Wn.2d 580, 925 P.2d 624 (1996) 18

Double D Hop Ranch v. Sanchez,

133 Wn.2d 793, 947 P.2d 727 (1997) 20

Duskin v. Carlson,

136 Wn.2d 550, 965 P.2d 611 (1998) 18

Harper v. Dep't of Labor & Indus.,

46 Wn.2d 404, 281 P.2d 859 (1955) 28

Harry v. Buse Timber & Sales , Inc.,

134 Wn. App. 739, 132 P.3d 1122 (2006) 15

Health Ins. Pool v. Health Care Auth.,

129 Wn.2d 504, 919 P.2d 62 (1996) 17

Hiatt v. Dep't of Labor & Indus.,

48 Wn.2d 843, 297 P.2d 244 (1956) 21, 22, 23

Hubbard v. Dep't of Labor & Indus.,

140 Wn.2d 35, 992 P.2d 1002 (2000) 24

In re Bertha Ramirez,

No. 03 14933 (Bd. of Indus. Ins. Appeals, September 1, 2004) . . 9

In re Diane Deridder,

No. 98 22312 (Bd. of Indus. Ins. Appeals, May 30, 2000) 30

In re Frances J. Wareing,

No. 02 11829 (Bd. of Indus. Ins. Appeals, Significant Decision, July 2, 2003) 30

In re James I. McIntosh,

No. 89 2352 (Bd. of Indus. Ins. Appeals, Jan.30. 1991) 29

In re Lawrence Musick,

No. 48 173 (Bd. of Indus. Ins. Appeals, Significant Decision, March 20, 1978) 29

In re Suzanne E. Dyer,

No. 03 15747 [etc.], (Bd. of Indus. Ins. Appeals, March 1, 2005) 29

Jacobson v. Dep't of Labor & Indus.,

37 Wn.2d 444, 224 P.2d 338 (1950) 28

Lawrence v. Dep't of Health,

133 Wn. App. 665, 138 P.3d 124 (2006) 17

Lytle v. Dep't of Labor & Indus.,

66 Wn.2d 745, 405 P.2d 251 (1965) 27

Manor v. Nestle Food,

78 Wn. App 5, 895 P.2d 27 (1995) *reversed on other grounds*, 131 Wn.2d 439, 932 P.2d 628 (1997) 5

McClarty v. Totem Electric,

157 Wn.2d 214, 137 P.3d 844 (2006) 7, 20

McIndoe v. Dep't of Labor & Indus.,

144 Wn.2d 252, 26 P.3d 903 (2001) 3, 6, 15

Miller v. Dep't of Labor & Indus.,

200 Wash. 674, 94 P.2d 764 (1939) 26, 29, 31

Pend Oreille Mines & Metals Co. v. Dep't of Labor & Indus.,

64 Wn.2d 270, 391 P.2d 210 (1964) 3, 7

Pulver v. Dep't of Labor & Indus.,

185 Wash. 664, 56 P.2d 701 (1936) 28

Schneider Homes v. City of Kent,

87 Wn. App. 774, 942 P.2d 1096 (1997), *review denied*, 134 Wn.2d 1021, 958 P.2d 316 (1998) 17

Shea v. Dep't of Labor & Indus.,

12 Wn. App. 410, 529 P.2d 1131 (1974) 8, 21, 22, 23, 29

Solven v. Dep't of Labor & Indus.,

101 Wn. App. 189, 2 P.3d 492, *review denied*, 142 Wn.2d 1012, 16 P.3d 1265 (2000) 3, 7

State v. Keller,

143 Wn.2d 267, 19 P.3d 1030 (2001) 23

State v. Ose,

156 Wn.2d 140, 124 P.3d 635 (2005) 20

Summers v. Great S. Life Ins. Co.,

130 Wn. App. 209, 122 P.3d 195 (2005), *review denied*, 2006 Wash. Lexis 145 (2006) 21, 23, 24

Taylor v. Nalley's Fine Foods,

119 Wn. App. 919, 83 P.3d 1018 (2004) 29

Walmer v. Dep't of Labor & Indus,

78 Wn. App. 162, 896 P.2d 95, *review denied,* 128 Wn.2d 1003 (1995) 29

Wendt v. Dep't of Labor & Indus.,

18 Wn. App. 674, 571 P.2d 229 (1977) 29

Williams v. Virginia Mason Med. Ctr.,

75 Wn. App. 582, 880 P.2d 539 (1975) 21, 22, 23

Wynn v. Earin,

131 Wn. App. 28, 125 P.3d 226 (2005) 17

Statutes

RCW Chapter 51.14 5

RCW 51.08.150 18

RCW 51.12.010 . . . . . 18, 19

RCW 51.32.080 . . . . . Passim

RCW 51.52.130 31

RCW 51.52.160 30

Regulations and Rules

WAC 263-12-195 30

WAC 296-20-01002 . . . . . 22, 23

WAC 296-20-030 9

WAC 296-20-2015 9

Other Authorities

WPI 155.06 26

John Alan Appleman & Jean Appleman, *Insurance Law And Practice*, § 641, (1981) 20

Black's Law Dictionary (6th ed. 1990) 21

Webster's New International Dictionary (2d ed. 1954) 22

A. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Assignments of Error:

1. The superior court misinterpreted the controlling statute, RCW 51.32.080(5),[1] so erred in affirming the Board.

2. The superior court should have granted Tomlinson's motion for summary judgment, and ordered Puget Sound Freight Lines (PSFL) to pay him permanent partial disability of 75 percent of his leg above the knee joint with short thigh stump (3 inches or less below the tuberosity of ischium).

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[1] RCW 51.32.080, " Permanent partial disability – Specified – Unspecified, rules for classification – Injury after permanent partial disability," provides, in part"

> (1) (a) ...[F]or the permanent partial disabilities here specifically described, the injured worker shall receive compensation as follows:
>
> LOSS BY AMPUTATION
>
> Of leg above the knee joint with short thigh stump (3" or less below the tuberosity of ischium).....[a certain dollar amount, depending on the date of injury]
>
> . . . .
>
> **(5) Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.**

(Emphasis added.)

Issues Pertaining to Assignments of Error:

1. Tomlinson injured his knee in a fall at work. Before the fall, he had arthritis in the knee. RCW 51.32.080(5) provides that when an industrial injury results in permanent partial disability, but the injured worker already had *permanent partial disability* of the pertinent body part *before the industrial injury occurred, which the industrial injury increased*, the preexisting permanent disability should be subtracted from the final permanent disability to determine the injured worker's permanent partial disability benefit. Did subsection (5) apply in this case, when:

a. As a matter of law, a condition is not "permanent" if it is progressive;[2] and here, the evidence is clear, undisputed, and indisputable that at the time of the industrial injury Tomlinson's arthritis was progressive;[3]

b. As a matter of law, a condition is not "permanent" until a

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[2] *See* pp. 20-23, below.

[3] *See* footnote 47 below.

physician determines[4] that it is fixed and stable;[5] and here, the evidence is clear, undisputed, and indisputable that there was no such determination until at least December 15, 2000[6] – nearly a year-and-a-half *after* Tomlinson's industrial injury;

c. As a matter of law, a condition is not "permanent" if it can be changed by medical intervention;[7] and here, the evidence is clear, undisputed, and indisputable that Tomlinson's arthritis was surgically removed;[8]

d. The evidence is clear, undisputed, and indisputable that when Tomlinson's leg was medically determined to be fixed and stable and his permanent partial disability was determined, he had no arthritis;[9]

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[4] McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 265, 26 P.3d 903 (2001) and Brannan v. Dep't of Labor & Indus.,104 Wn.2d 55, 56, 700 P.2d 1139 (1985), in footnote 27 below.

[5] *Id.;* also, Pend Oreille Mines & Metals Co. v. Dep't of Labor & Indus., 64 Wn.2d 270, 272, 391 P.2d 210 (1964) and Solven v. Dep't of Labor & Indus., 101 Wn. App. 189, 196, 2 P.3d 492, *review denied,* 142 Wn.2d 1012, 16 P.3d 1265 (2000), in footnote 29 below.

[6] *See* pp. 8-9 below.

[7] *See* p. 22 below.

[8] *See* footnote 48 below.

[9] *Id.*

e. The evidence is clear, undisputed, and indisputable that after knee replacement surgery, permanent partial disability depends solely and entirely on how the recipient functions with the artificial knee;[10] and

f. The evidence is clear, undisputed, and indisputable that when Tomlinson's leg became fixed and stable, his permanent partial disability was 75 percent of the leg above the knee joint with short thigh stump (3 inches or less below the tuberosity of ischium)?[11]

2. Where the medical evidence is clear, undisputed, and undisputable that when the leg became fixed and stable, Tomlinson had permanent partial disability 75 percent of the leg above the knee joint with short thigh stump (3 inches or less below the tuberosity of ischium), solely and entirely because of poor function with the knee prosthetic joint, should this court order the superior court to enter judgment in his favor for such disability?

B. STATEMENT OF THE CASE

On July 21, 1999, at work for PSFL, James Tomlinson fell down a

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[10] *See* footnote 50 below.

[11] *See* p. 10 below.

flight of several stairs, striking his left knee as he fell.[12] He made a workers' compensation claim for the knee injury, which the Department of Labor and Industries allowed. PSFL is a self-insuring employer under the Act,[13] so was responsible for paying his Act benefits.[14]

Tomlinson's attending physician was orthopedic surgeon John Jiganti, MD.[15] After months of conservative treatment failed, Dr. Jiganti determined that Tomlinson's knee joint should be replaced with a prosthetic joint.[16] Such surgery is known as "total knee replacement" ("TKR").[17] This was done on November 29, 1999.[18] The prosthetic knee "should [have] function[ed] like a normal knee";[19] but, unfortunately, it

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[12] Certified Appeal Board Record (CABR), Tomlinson testimony, p. 6 lines 7-19; CABR Smith testimony, p. 23 line 19 – p. 24 line 1.

[13] CABR 10 line 4.

[14] *See* RCW Chapter 51.14. *See also* Manor v. Nestle Food, 78 Wn. App. 5, 10, 895 P.2d 27 (1995) *reversed on other grounds*, 131 Wn.2d 439, 932 P.2d 628 (1997) ("Our Supreme Court has stated that employees should receive the same treatment whether their employer is self-insured or insures through the state fund," citation omitted).

[15] CABR 8; CABR DEPOSITIONS, Jiganti deposition, p. 3 lines 8-11 (orthopedic surgeon); p. 4 lines 11 - 19 (attended Tomlinson from 07/27/99 through 02/04/04).

[16] CABR Jiganti testimony, p. 8 lines 16-25.

[17] *Id.*, p. 9 lines 11-18; CABR Smith testimony, p. 58 lines 15-19.

[18] CABR Jiganti testimony, p. 9 lines 1-23.

[19] *Id.*, p. 9 lines 13-18.

didn't.[20] The poor result necessitated another surgical procedure, to remaining natural tissue,[21] and, later, replacement of the prosthetic joint.[22] The do-over did not help, either.[23] Nothing more could be done, and treatment stopped.[24] This was July 30, 2002.[25]

All that remained to do was determine permanent partial disability ("PPD") in the worker's compensation claim and close the claim.[26] Determination of PPD involves three steps: one or more physicians determine[27] whether the condition of the body part the statute addresses[28]

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[20] *Id.*, p. 9 line 24 - p. 10 line 2.

[21] *Id.*, p. 10 lines 3-12.

[22] *Id.*, p. 10 lines 12-24. *See also* CABR TRANSCRIPTS, Smith testimony, p. 39 lines 33-37 (Tomlinson had effusion as a complication of knee replacement surgery); p. 39 line 39 - p. 40 line 43 (Tomlinson had "substantial atrophy" as a complication of knee replacement surgery); p. 40 line 45 - p. 41 line 33 (Tomlinson had joint warmth as indicating complication from knee replacement surgery); p. 41 line 35 - p. 42 line 13 (Tomlinson had swollen joint lining and tenderness as complications of knee replacement surgery); and p. 42 lines 21-31 (no evidence shows Tomlinson had any of those before he fell down the stairs).

[23] *Id.*, p. 10 line 25 - p. 11 line 12.

[24] *Id.*, p. 11 lines 13-16.

[25] *Id.*, p. 11 line 8.

[26] *Id.*, p. 11 lines 13-17.

[27] *See* McIndoe v. Dep't of Labor & Indus., *supra*, 144 Wn.2d at 265:

> Just as Mr. Clauson's permanent partial disability claim was still open because his condition was not determined to be fixed and stable until he was examined by his physician, the workers in this case could not file their permanent partial disability claims until their physicians diagnosed their hearing loss and determined that they had an occupational disease. ...

is, in fact, permanent,[29] and the extent of permanent impairment, if any;[30] then the Department determines PPD by applying the law to the medical facts.[31] Where the employer is self insured, the employer chooses the

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See also Brannan v. Dep't of Labor & Indus.,104 Wn.2d 55, 56, 700 P.2d 1139 (1985) ("Department of Labor and Industries regulations [] require medical or osteopathic physicians or surgeons to rate permanent partial disabilities")

[28] Here, the "leg above the knee joint with short thigh stump (3" or less below tuberosity of ischum." RCW 51.32.080(1)(a).

[29] *See* footnote 27. *See also* Pend Oreille Mines & Metals Co. v. Dep't of Labor & Indus., *supra*, 64 Wn.2d at 272 ("A workman may not be rated for permanent total disability until his condition becomes static or fixed") [The difference between *total* and *partial* is immaterial; the material difference is between *temporary* and *permanent*. *See* authorities cited below at pp. 22-23.] *See also* Solven v. Dep't of Labor & Indus., 101 Wn. App. 189, 196, 2 P.3d 492, *review denied*, 142 Wn.2d 1012, 16 P.3d 1265 (2000) ("condition of claimant must be 'fixed' before Department can give permanent partial disability rating," citation omitted).

[30] *See* footnotes 27 and 29.

Recently our Supreme Court observed that *medical condition* and *disability* can be different things. *Cf.* McClarty v. Totem Electric, 157 Wn.2d 214, 227, 137 P.3d 844 (2006) ("The WLAD [Washington Law against Discrimination] speaks in terms of 'disability,' not of 'medical condition'" (citation omitted)). Similarly, under the Industrial Insurance Act, medical condition and disability are different things, and the former does not necessarily determine the latter (as RCW 51.32.080(5) exemplifies). The Act does not mandate benefits for medical conditions; it mandates benefits for disabilities.

[31] *See* RCW 51.32.080(3)(a):

> Compensation for any other permanent partial disability not involving amputation shall be in the proportion which the extent of such other disability, called unspecified disability, shall bear to the disabilities specified in subsection (1) of this section, which most closely resembles and approximates in degree of disability such other disability, and compensation for any other unspecified permanent partial disability shall be in an amount as measured and compared to total bodily impairment. **To reduce litigation and establish more certainty and uniformity in the rating of unspecified permanent partial disabilities, the department shall enact rules having the force of law classifying such disabilities in the proportion which the department shall determine such disabilities reasonably bear to total bodily impairment.** In enacting such rules, the department shall give consideration to, but need not necessarily adopt, any

examiner(s): here, orthopedic surgeons James Smith, MD, and David Chaplin, MD. Neither of them was involved in Mr. Tomlinson's medical care; they saw him solely to render opinions about permanent impairment.[32]

Drs. Smith and Chaplin examined Mr. Tomlinson separately, twice each: Dr. Smith on July 21, 2000[33] and December 15, 2000,[34] Dr. Chaplin on November 12, 2002[35] and February 24, 2004.[36] Dr. Smith testified that as of July 21, 2000, Tomlinson's leg had *not* reached "maximum medical improvement"[37] (a synonym for "fixed and stable"), and he recommended further medical evaluation.[38] Dr. Smith testified that at the exam of December 15, 2000 – nearly a year-and-a-half *after* the industrial injury –

> nationally recognized medical standards or guides for determining various bodily impairments.

(Emphasis added.)

[32] CABR TRANSCRIPTS, Smith testimony at p. 9 lines 5-31; CABR DEPOSITIONS, Chaplin testimony, p. 11 lines 12-15.

[33] CABR TRANSCRIPTS, Smith transcript, p. 23 lines 9-11.

[34] *Id.*, p. 23 lines 13-15, and p. 52 line 49.

[35] CABR DEPOSITIONS, Chaplin deposition, p. 11 lines 12-15.

[36] *Id.*, p. 25 lines 15-18.

[37] CABR TRANSCRIPTS, Smith testimony, p. 27 lines 19-21.

[38] *Id.*, p. 27 lines 33-39.

Tomlinson had permanent impairment of *75 percent of the leg, due in whole to the failed TKR*:

> Q: [W]hat was your impairment rating for his left knee in total? Not the preexisting impairment, if any, but his overall left knee impairment, referring to paragraph 4 of your report?
>
> A: For the – For the results of the knee with the total knee replacement?
>
> Q: Yes.
>
> A: 75 percent.[39, 40]

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[39] *See also* CABR Chaplin deposition, p. 47 lines 8-12:

> Q: Doctor, ultimately you noted that this man's overall impairment as of the date of claim closure in this case would best be described by the figure of 75 percent, is that right?
>
> A: That's correct.

In claims involving the legs, doctors determine the *extent* of permanent impairment according to medical criteria in the current edition (here, the fifth; *see* CABR Smith testimony, p. 32 lines 22-24, and p. 43 lines 7-8; Chaplin deposition, p. 10 lines 7-19, and p. 28 line 18 - p. 29 line 14.) of the American Medical Association *Guides to the Evaluation of Permanent Impairment* ("the *Guides*," or "the *AMA Guides*"). No law expressly adopts the *AMA Guides* as the basis for rating permanent partial disability, but in practice the *Guides* govern. *See* In re Bertha Ramirez, No. 03 14933 (Bd. of Indust. Ins. Appeals, September 1, 2004):

> The Department argues that the industrial appeals judge went outside the record, or impermissibly "noticed" the *AMA Guides* as adjudicative facts. RCW 51.32.080 and the WACs talk about use of a nationally recognized rating method. The WACs make reference to the *AMA Guides* in many places. It can, therefore, be argued that the *AMA Guides* are incorporated into the Act or WACs. It is clear from prior cases that Department policies are replete with references to the AMA Guides. Also the recent WAC 296-20-030 that would discount Pain Table No. 18 in the most recent version of the *AMA Guides*, the 5th Edition, implicitly recognizes their use; more telling is WAC 296-20-2015. WAC 296-20-2015 implements a number of things with reference to Independent Medical Exam procedures and ratings, not the least of which is the overview for rating impairment. This describes the basis for different kinds of ratings. For example, specified disabilities are to be rated according to

CABR TRANSCRIPTS, Smith testimony, p. 29 line 45 - p. 30 line 9. (Dr. Smith was not asked, and did not say, that the leg was fixed and stable then. *Assuming* that he believed it was – because he testified to *permanent* disability – December 15, 2000 is the earliest date at which any PPD of the leg was established.) Like Dr. Smith, Dr. Chaplin testified that Tomlinson had 75 percent permanent impairment of the leg, entirely from poor outcome of TKR.[41] The attending orthopedic surgeon, Dr. Jiganti, concurred in the 75 percent impairment rating.[42] PSFL accepted the rating.[43] So did the Department.[44]

RCW 51.32.080, and ratings for extremities are to be done according to the *AMA Guides*. This simply recognizes what is well-established: at the very least, the *AMA Guides* are regularly used; at most, they are incorporated by reference into the applicable law. We believe the industrial appeals judge properly took judicial notice of them.

The parts of the *Guides* discussed in testimony appear at CABR EXHIBITS, Exhibit 1.

[40] Seventy-five percent is the highest permanent impairment possible, short of 100 percent for amputation of the leg at the hip. CABR Smith testimony, p. 53 lines 1-13.

[41] CABR Chaplin deposition, p. 29 lines 15-21.

[42] CABR Jiganti deposition, p. 12 lines 16-18; p. 26 line 23 - p. 24 line 8.

[43] CABR TRANSCRIPTS, Smith testimony, p. 26 lines 21-24 ("we [PSFL's attorney, speaking for PSFL] have no dispute about the ultimate percentage of impairment that should be assigned to this man to describe his overall knee condition"). *See also Verbatim Report of Proceedings* (VRP), p. 4 lines 18-25, and p. 5 lines 1-10.

[44] CABR 20 (the order from which this appeal originated): "The department is ordered to pay you a permanent partial disability award of 75% of the amputation value of the left leg above [the] knee joint with short thigh stump (3" or below the tuberosity of ischium[,]" less what the Department concluded was preexisting permanent partial disability.

However, the Department ordered PPD of 25 percent.[45] The Department did so because RCW 51.32.080 – the statute that governs payment of PPD benefits – directs that if part of a claimant's *permanent partial disability* predated his or her industrial injury, the *preexisting part* be subtracted to determine the PPD benefit. Before Tomlinson fell down the stairs, he had arthritis in his knee.[46] The arthritis was *progressive.*[47] *It was never determined to have been fixed and stable.* In the first TKR, the arthritis was *removed.*[48] When Tomlinson's leg first was determined to be

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[45] *Id.* PSFL paid that disability.

[46] *See* CABR Jiganti deposition, p. 5 lines 14-23. *See also id.*, Smith testimony, p. 13 lines 13-29.

[47] *See* CABR Chaplin deposition, p. 28 lines 6-11:

> The diagnosis was again his status post total knee arthroplasty for aggravation of preexisting **ongoing** degenerative condition, the aggravation being related to the injury of 07/21/99.

(Emphasis added.) *See also* CABR Smith testimony, p. 15 lines 11-13 ("In osteoarthritis, or degenerative arthritis, there is a **gradual but progressive** wearing away of the cartilage surface..." (emphasis added)). *See also id.* at p. 61 lines 9-13 (arthritis is "a cumulative process, [a] progression").

[48] *See* CABR Jiganti testimony, p. 9 lines 11-18 (knee replacement surgery involves "[r]eplacing the bones on either side of knee joint, the femur and the tibia, thigh bone and shin bone, with metal on the ends of the bones, then a plastic insert goes in between the two..."). *See* also CABR Smith testimony, p. 45 line 3 - p . 48 line 11, and p. 48 line 47 - p. 51 line 15 (in total knee replacement surgery arthritis is removed, bone surfaces and worn cartilage are replaced with metal and plastic, and the joint space is returned to that of a healthy, normal knee). *See also* CABR Chaplin deposition, p. 51 lines 7-18 (after knee replacement surgery Tomlinson no longer had arthritis, because "there is no longer a [natural] joint and there is nothing in that joint that now could get arthritis").

fixed and stable, *i.e.*, permanent, he no longer had arthritis;[49] *his 75 percent permanent impairment was based, solely and entirely, on his very poor TKR result.*[50] The condition of the knee before surgery is irrelevant.[51]

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[49] *See* footnote 48.

[50] *See* CABR TRANSCRIPTS, Smith testimony, p. 52 lines 1-51:

Q: [T]here are three possible ratings after knee replacement surgery, is that right?

A: Yes.

Q: And all three depend totally on how the knee is as a result of surgery, not how it was before surgery, is that correct?

A: Yes.

Q: And that's because the, as we just discussed, the problem that existed before surgery isn't there any more?

A: Probably.

Q: Now going back to the good, fair, and poor, you scored Mr. Tomlinson at 33 points. And that, according to Table 17-33, is far down in the poor results, is that correct?

A: It is.

Q: Anything less than 50 points is poor, is that right?

A: That's correct.

Q: Under [*Guides*] Table 17-33, a poor result from total knee replacement surgery makes permanent partial impairment 75 percent of the leg, is that correct?

A: Yes.

Q: And 75 percent permanent partial impairment of the leg is what you determined Mr. Tomlinson had on the left, on December 15, 2000, is that correct?

A: Yes.

See also CABR Smith testimony p. 47 line 29 - p. 48 line 7 and p. 48 line 13 - p. 49 line 9

Arthritis is not a consideration, precisely because it has been surgically removed.[52]

PSFL asked Drs. Chaplin and Smith how much impairment Tomlinson *would* have had, for arthritis, before he fell down the stairs.[53]

(permanent impairment for arthritis and permanent impairment after TKR are determined by different methods, which should not be mixed or combined). Particularly, *see* p. 49 lines 2-5:

> In this situation you're dealing with a joint that's been totally replaced, so you have no ability to combine method[s], it means you have to use separate method to assess it before and afterwards.

[51] CABR Smith testimony, p. 52 lines 1-21.

[52] *Id.*, p. 50 line 21 - p. 51 line 15.

[53] *See* CABR Smith testimony, p. 28 lines 7-15:

> Q: What was the purpose of your evaluation in December of 2000?
>
> A: The referral letter [from PSFL] indicated that it was for segregating the effects of a pre-existing condition [*i.e.*, arthritis] from the effects attributable to his industrial injury, and to make [a] recommendation regarding additional treatment.

See also Chaplin deposition, p. 12 lines 6-20:

> Q: Doctor, I'd like you to assume for purposes of your testimony and the issues currently before the Board of Industrial Insurance Appeals we're limiting our inquiry to the status of Mr. Tomlinson's left knee, both before his industrial incident at Puget Sound Truck Lines of 07/21/99 and thereafter; is that understood?
>
> A: Yes.
>
> Q: I'd also like you to assume that ultimately the issue before the board is whether or not Mr. Tomlinson' had any permanent impairment of his left knee before the industrial incident of 07/21/99, and if so, whether or not that impairment should be offset against any ultimate impairment found in part related to the industrial injury; is that understood?
>
> A: Yes.

Dr. Jiganti was not asked.

Dr. Smith first testified that "quantifying would not be possible" because the x-rays available from before the industrial injury were not taken weight bearing.[54] Later, however, he, and then Dr. Chaplin, testified that before injury impairment would have been 50 percent of the leg.[55] Both of them testified that the arthritis was progressive and ongoing.[56]

The Board of Industrial Insurance Appeals affirmed the Department.[57]

At superior court, Tomlinson moved for summary judgment to reverse the Board. PSFL acknowledged that there was no genuine

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[54] CABR Smith testimony, p. 13 line 13 - p. 14 line 3:

> Q: Did those records [*i.e.*, records from 1991 through 1995] include a description of the degree of arthritis present in his left knee and based on x-ray findings at various times when those x-rays were taken prior to the industrial injury in July of 1999?
>
> A: I'll have to answer that by saying the reports did show definite evidence of arthritis in the joints [joints, plural, meaning arthritis in both knees; there's only one joint in each knee]. As far as quantifying it, they weren't taken in a weight-bearing status, so quantifying would not be possible without weight-bearing status.

[55] *See* CABR TRANSCRIPTS, Smith Testimony at p. 32 lines 22-31, and Chaplin testimony at p. 44 lines 12-18.

[56] *See* footnote 47, above. Further, Dr. Smith testified that in none of the preinjury medical records PSFL gave him did any physician state an opinion that Tomlinson had permanent impairment. CABR Smith testimony, p. 56 line 45 - p. 57 line 11.

[57] CABR 10 at lines 23-27 and CABR 11 at lines 1-2.

question of material fact.[58] The court denied Tomlinson's motion.[59] The court did not explain its ruling, other than to say that the Board's decision seemed logical.[60]

After the ruling, discussion among the court and the parties (on the record) established that denial of summary judgment terminated review.[61] This appeal followed.

C. SUMMARY OF ARGUMENT

The Industrial Insurance Act provides benefits for "permanent partial disability."[62] RCW 51.32.080(5) provides that if, *before* an industrial injury, the worker was *"already...permanently partially disabled,"* and the industrial injury worsened the preexisting "*permanent*[] partial[] *disab[ility]*," the preexisting permanent disability should be subtracted from the final permanent disability to reach the proper PPD

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[58] In its memorandum in opposition to summary judgment, PSFL claimed that material facts were in dispute but it identified no such fact. At oral argument PSFL argued that outcome of the motion depended solely on the plain meaning of the statute. *See* the VRP.

[59] CP 50-52.

[60] VRP, p. 8 line 14 - p. 25.

[61] VRP, p. 8 line 25 - p. 9 line 24. The order the court entered was titled "Order Denying Plaintiff summary Judgment And Affirming The Appealed Decision." CP 50-52.

[62] "A permanent partial disability is an injury or occupational disease that causes the loss, or loss of use, of a particular body part." *Harry v. Buse Timber & Sales, Inc.*, 134 Wn. App. 739, 744, 132 P.3d 1122 (2006) (citing McIndoe v. Dep't of Labor & Indus., *supra*, 144 Wn.2d at 256-57).

benefit. An injured worker cannot be "permanently partially disabled" until a physician examines the worker and determines that his condition is fixed and stable. Here, that did not happen until long *after* Tomlinson's industrial injury. Further, clear, undisputed, and indisputable evidence proves that the condition the trial court found to have been "preexisting ...permanent partial disability" – arthritis – was *not*: the arthritis (1) never became permanent; (2) was no longer present when PPD was determined; (3) was not among the criteria the AMA *Guides* authorized, and the doctors actually applied, to determine permanent impairment. In sum, Tomlinson had no pre-injury PPD, and his PPD benefit should be the full 75 percent of the leg. (If this were *un*clear, the law would require that the uncertainty be resolved in Tomlinson's favor.) This court should reverse the superior court, and remand for entry of summary judgment in Tomlinson's favor and for such other action as the facts and law may indicate.

D. ARGUMENT

1. Standard of Review

Where a trial court, based on its reading of a statute, denies a motion for summary judgment and decides the case for the nonmoving party, and on appeal the moving party claims the trial court misread the

statute, the standard for review is de novo. *Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 507, 919 P.2d 62 (1996). *See also* *Schneider Homes v. City of Kent*, 87 Wn. App. 774, 777 (text and n.4), 942 P.2d 1096 (1997), *review denied*, 134 Wn.2d 1021, 958 P.2d 316 (1998) ("when facts are not in dispute, court can order summary judgment in favor of the nonmoving party," citation omitted, in which case review is de novo).

Likewise, where, as here, the ultimate issue is whether a statute should apply to the facts at hand, review is de novo. *Wynn v. Earin*, 131 Wn. App. 28, 41, 125 P.3d 236 (2005) (whether a statute applies to the facts of a case is a conclusion of law); *Lawrence v. Dep't of Health*, 133 Wn. App. 665, 672, 138 P.3d 124 (2006) ("On mixed questions of law and fact, we determine the law independently and then apply it to the facts found by the agency," citation omitted).

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2. Tomlinson had no preexisting permanent partial disability; therefore, his PPD benefit should have been 75 percent of the leg

The Industrial Insurance Act is a self-contained,[63] remedial[64] plan of social insurance,[65] governed by the statutes therein.[66] In RCW 51.08.150[67] and RCW 51.32.080, the Act mandates payment of benefits for "permanent partial disability." For permanent disability of a leg, the benefit is paid for a percentage of amputation value, determined according to the AMA Guides.[68] Again, the part of §080 at issue in this appeal is subpart (5),

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[63] *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999) (the "Industrial Insurance Act is a self-contained system that provides specific procedures and remedies for injured workers").

[64] *See* RCW 51.12.010, and *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001), quoted below at pp. 19-20.

[65] The Act is "social insurance." *See Duskin v. Carlson*, 136 Wn.2d 550, 557, 965 P.2d 611 (1998) ("The Department's interest is efficient administration of the State's social insurance system and minimizing associated costs to the industrial insurance fund," citation omitted).

[66] *See Clauson v. Dep't of Labor & Indus.*,130 Wn.2d 580, 584, 925 P.2d 624 (1996) ("The right to workers' compensation benefits is statutory, and a court will look to the provisions of the Act to determine whether a particular worker is entitled to compensation," citation omitted).

[67] "Permanent partial disability" means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability."

The full text of all statutes cited in this brief are set out in the Appendix.

[68] *See* footnote 39.

which provides:

> (5) Should a worker receive an injury to a member or part of his or her body **already**, from whatever cause, **permanently partially disabled**, resulting in the amputation thereof or in an **aggravation or increase in such permanent partial disability** but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

(Emphasis added.) This appeal requires the court to determine the meaning of the terms in bold. This is a question of first impression in the courts.[69] In answering it, the court should bear in mind that the Industrial Insurance Act is remedial law, meant to minimize work-related suffering and economic loss, so reasonable doubt about its meaning must be resolved in the injured worker's favor. *See* Cockle v. Dep't of Labor & Indus., *supra*, 142 Wn.2d at 811:

> The 1971 Legislature also codified a principle already long recognized by our courts: "This Title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. In other words, where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker:

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[69] In the only court case Tomlinson knows of where subsection (5) was applied – Beyer v. Dep't of Labor & Indus., *supra* – the court did not have to evaluate the controlling language, because there was no dispute about whether the preexisting impairment was permanent.

> [T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (citing cases both predating and postdating the1971 codification of this principle); *see also* *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1997), 952 P.2d 590 (1998).

The Act does not attempt to define "permanently" or "permanent." "Where, as here, a statute fails to define a term, rules of statutory construction require us to give the term its plain and ordinary meaning, which we derive from a dictionary if possible." *McClarty v. Totem Electric*, *supra*, 157 Wn.2d at 225 (citations omitted.) The plain and ordinary meaning of "permanently" and "permanent" can be derived from a dictionary. In fact, this court recently did so, in the context insurance coverage for bodily impairment:

> **[The term] "'permanent' is a term of common understanding; it is not ambiguous.**[70] Under the definition put forth in *Richards* and other cases, "permanent" refers to "a state of indefinitie continuance...**something incapable of alteration, fixed or immutable."** 1C JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE, § 641, at 206 (1981). Under this definition, "**it must appear that the disability will probably continue for the remainder of the**

[70] "A statute is not ambiguous merely because different interpretations are conceivable." *State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005) (citation omitted).

> **insured's life**." APPLEMAN, *supra*, § 641, at 206; ***see also*** **BLACK'S LAW DICTIONARY 1139 (6th ed. 1990) (defining "permanent disability" as "one which will remain substantially the same during the remainder of worker's compensation claimant's life**...").

Summers v. Great S. Life Ins. Co., 130 Wn. App. 209, 216, 122 P.3d 195 (2005), *review denied*, 2006 Wash.Lexis 145 (2006) (emphasis added, citations omitted).

Summers cited four precedents for the meaning of "permanent," three of them workers' compensation decisions: *Hiatt v. Dep't of Labor & Indus.*, 48 Wn.2d 843, 297 P.2d 244 (1956), *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 880 P.2d 539 (1975), and *Shea v. Dep't of Labor & Indus.*, 12 Wn. App. 410, 415, 529 P.2d 1131 (1974), *review denied*, 85 Wn.2d 1009 (1975). In *Hiatt*, the Supreme Court adopted this statement:

> Except in the cases of permanent total disability that are specifically described in the statute, we believe a total **disability should not be declared to be permanent unless it appears pretty clearly that the affliction will not yield to treatment**, and that the workman will never be able to work at any gainful occupation.

48 Wn.2d 845-46 (citation and internal punctuation omitted, emphasis added.)[71] A few sentences later the court endorsed this definition of

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[71] The fact that Hiatt involved permanent *total* disability is immaterial. *See id.:*

> Permanent partial disability...contemplates a situation where the condition of the

"permanent", from *Webster's New International Dictionary* (2d ed. 1954):

> Continuing or enduring in the same state, status, place, or the like, without fundamental or marked change; **not subject to fluctuation or alteration**; fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient.

Id. (emphasis added). Finally, *Hiatt* concluded:

> **The use of the word "permanent" together with "disability" indicates the character of the disability. It signifies that the disability has expectedly an unchangeable existence; that the physical condition arising from the injury is fixed, lasting, and stable. A person whose condition is remediable is not permanently disabled.**

Id. (emphasis added). Similarly, the court said, in *Williams*:

> Permanent partial disability has been defined in case law as a partial incapacity to work as measured by loss of bodily function. ... [It] involve[s] the loss of working ability due to an industrial injury or condition which is **"permanent", that is**, an injury or condition which is fixed, lasting, stable, and **not remediable**.

75 Wn. App. at 585 (citations omitted, emphasis added). In *Shea*, the court said:

> When the disabling condition proximately caused by an injury is **no longer remedial** and its character has expectedly **an unchangeable existence**, the resultant disability is said to be permanent.

12 Wn. App. at 415 (emphasis added). *See also* WAC 296-20-01002, the "Definitions" for the Department of Labor and Industries Medical Aid

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injured workman has reached a fixed state from which full recovery is not expected," citation omitted).

Rules:

> **Permanent partial disability: Any anatomic abnormality or loss after maximum rehabilitation has been achieved, which is determined to be stable or <u>non</u>progressive at the time the evaluation is made.** ...

(Emphasis added.) The sole, uncontradicted, testimony is that before the industrial injury Tomlinson's arthritis was progressive, *i.e.*, never fixed and stable, or permanent.

When the meaning of statutory language is plain, the only permissible interpretation is that which gives effect to the plain language. <u>*State v. Keller*</u>, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001) (If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself." (citation omitted)). Here, <u>*Summers*</u>, <u>*Hiatt*</u>, <u>*Williams*</u>, <u>*Shea*</u>, and WAC 296-20-01002 establish that the arthritis Tomlinson had before his industrial injury was *not* permanent. It was *progressive*. It *was* changeable, alterable, and remediable. It *did, in fact*, yield to treatment. At the earliest date that Tomlinson's leg arguably was fixed and stable, he no longer had it. In other words, the impairment PSFL had Drs. Chaplin and Smith testify *would* have been permanent, *if left untreated*, in fact turned out to be *temporary*:

> **The words "permanent" and "temporary" are antonyms of each other and readily occur to the ordinary mind as such. A disability that is transient or temporary cannot be a permanent**

one.

Summers, 130 Wn. App. at 215 (emphasis added). *See also* Hubbard v. Dep't of Labor & Indus., 140 Wn.2d 35, 38 n.1, 992 P.2d 1002 (2000) ("The Industrial Insurance Act, Title 51 RCW, contemplates two separate and distinct disability classifications, temporary and permanent[.]"). Tomlinson's arthritis was not *preexisting permanent disability* under RCW 51.32.080.

Further, the purpose of RCW 51.32.080 – plain on the face of the statute, starting with its title – is to *provide PPD benefits*. Subpart (5) *restricts* the statutory remedy. Subpart (5) must be read in context with that purpose.[72] Restrictions on statutory remedies should be confined to their plain terms. Cerrillo v. Esparza, 158 Wn.2d 194, 202, 147 P.3d 155 (2006):

> This court has previously recognized that exemptions from remedial legislation...are narrowly construed and applied only to

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[72] Statutes are read as a whole, with regard for their purpose. *See* Department of Labor & Indus. v. Gongyin, 154 Wn.2d 38, 44-45, 109 P.3d 816 (2005):

> The meaning of a statute is inherently a question of law and our review is de novo. The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. If, after this inquiry, the statute can reasonably be interpreted in more than one way, then it is ambiguous and resort to principles of statutory construction to assist in interpreting it is appropriate.

> situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.

(Citations and internal punctuation omitted.) By the plain terms of subsection (5), Tomlin's arthritis was not permanent disability.

The superior court misunderstood the controlling statute, RCW 51.32.080(5), so erred in denying Tomlinson's motion for summary judgment and affirming the Board. The superior court should have ordered PSFL to pay Tomlinson PPD of 75 percent of his leg above the knee joint with short thigh stump (3 inches or less below the tuberosity of ischium). This court should order the superior court to do so.

a. <u>The fact that the industrial injury "aggravated" Tomlinson's arthritis, and subsection (5) talks about aggravation, does not make the statute applicable where the arthritis was not permanent partial disability</u>

Tomlinson's industrial injury aggravated his arthritis.[73] In subsection (5), "aggravation or increase in such permanent partial

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[73] CABR DEPOSITIONS, Jiganti testimony, p. 6 lines 14-18:

Q: What was your diagnosis in regard to Mr. Tomlinson on July 27, 1999?

A: That he had an arthritic aggravation of his left knee from his trauma of falling down the stairs.

See also CABR DEPOSITIONS, Chaplin deposition, p. 28 lines 6-11 ("The diagnosis was again his status post total knee arthroplasty for aggravation of preexisting ongoing degenerative condition, the aggravation being related to the injury of 07/21/99.).

disability," and "aggravation or increase of disability thereof,"[74] pertain to *permanent disability*. Because Tomlinson's arthritis was not permanent disability, subsection (5) does not apply.

It is crucial to read the term "aggravate" for its specific meaning in subsection (5) – *i.e.*, connected to permanent disability – and not confuse it with aggravation in the context of proximate cause. Among the longest-standing principles of workers' compensation law is that an employer takes the worker as he finds him, including infirmities, so where an industrial injury aggravates a preexisting condition that is *not* already permanently partially disabling, and the aggravation results in permanent disability, the employer is responsible for the *whole* disability:

> This instruction [that "If an industrial injury lights up or makes active a latent or quiescent infirmity or weakened physical condition, then the resulting disability is to be attributed to the injury and not to the pre-existing physical condition"] was based upon our holding in Miller v. Department of Labor & Indus., 200 Wash. 674, 94 P.2d 764 (1939), and the subsequent cases in which this court and the Court of Appeals have applied its doctrine. As explained there, the principle is that if the accident or injury complained of is the proximate cause[75] of the disability for which

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[74] *See* the text of the statute in footnote 1 or in the Appendix.

[75] The term "the" was inaccurate; industrial injury need be only *a* proximate cause, not *the* proximate cause. *See* WPI 155.06, "Proximate cause – allowed claim":

> The term "proximate cause" means a cause which in a direct sequence [, unbroken by any new independent cause,] produces the [condition] [disability] [death] complained of and without which the [condition] [disability] [death] would not have happened.

> compensation is sought, **the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness;** the theory upon which that principle is founded is that **the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.**

Bennett v. Dep't of Labor & Indus., 95 Wn.2d 531, 532-33, 627 P.2d 104 (1981) (citations omitted.) *See also* Lytle v. Dep't of Labor & Indus., 66 Wn.2d 745, 746, 405 P.2d 251 (1965):

> The facts relative to the employee's injury are not in dispute. He fell and suffered injuries to his back and left hip, resulting in the total-and permanent disability classification. **The medical evidence shows that the employee suffered from a preexisting disease, referred to as a condition of degenerative arthritis, which, prior to his injury of November 15, 1960, was latent, or quiescent, and not disabling. This arthritic condition was "lighted up," or aggravated, by the injury and the employee's permanent disability was due to the combined effects of both.**

(Emphasis added.)[76] Here there is no evidence that before the industrial

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> **[There may be one or more proximate causes of a [condition] [disability] [death]. For a worker to recover benefits under the Industrial Insurance Act, the [industrial injury] [occupational disease] must be a proximate cause of the alleged [condition] [disability] [death] for which benefits are sought. The law does not require that the [industrial injury] [occupational disease] be the sole proximate cause of such [condition] disability] [death].]**

(Emphasis added.) *See also* the "Comment" to the instruction.

[76] *See also* City of Bremerton v. Shreeve, 55 Wn. App. 334, 341, 777 P.2d 568 (1989) ("the worker is to be taken as he is, and a preexisting condition should not be considered a 'cause' of injury, but merely a condition upon which the 'proximate cause' operated" (citations omitted)).

injury Tomlinson's arthritis was disabling.[77] Then *see* Harper v. Dep't of Labor & Indus., 46 Wn.2d 404, 405, 281 P.2d 859 (1955):

> **It is well established that an injury may light up a dormant or quiescent arthritic condition, and that, if the injury is covered by our workmen's compensation act, the injured workman may recover for the full extent of the disability occasioned by the arthritis so lighted up.** Pulver v. Department of Labor & Industries (1936), 185 Wash. 664, 56 P. (2d) 701, and cases there cited. See, also, Jacobson v. Department of Labor & Industries (1950), 37 Wn. (2d) 444, 224 P. (2d) 338, and cases there cited.

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[77] While record shows that Mr. Tomlinson had a long history of episodic knee pain, there is no direct evidence that his back was either symptomatic or disabling at the time of the industrial injury. (For testimony that pain would have been episodic, *see* CABR Jiganti deposition at p. 21 lines 11-18, and CABR Smith testimony, p. 19 lines 31-51, then p. 20 line 49 - p. 21 line 2 ("It's also typically episodic in that people feel relatively well, and then have an episode of pain with or without associated activities or another injury."). Episodic pain does not imply permanent impairment. *See* CABR Jiganti deposition, p. 27 lines 23:

Q: ...Doctor, does the fact that someone has symptoms, pain in the knee, mean that they have permanent impairment of the knee?

A: No.

Q: Does the fact that someone has had knee pain on and off for many years mean that they have permanent impairment?

A: No.

(Emphasis added.) **As far as the record shows, the last time Tomlinson had seen a doctor for knee pain, before the industrial injury, was 1995 – four years earlier.** *See* CABR Smith testimony, p. 13 lines 13-19 and p. 20 lines 35-39. (There was evidence that his knee had been bothering him before the injury, see CABR Smith testimony at p. 21 line 41 - p. 22 line 27 – but not bad enough to seek medical care.) At the time of injury he was able to perform all his work duties. CABR Tomlinson testimony, p. 5 lines 39-51. When he reached medical stability he was incapable even of sedentary – meaning sitting – work. CABR Smith testimony, p. 56 lines 13-25.

(Emphasis added.)[78] This rule applies no matter how little the industrial injury contributes final disability:

> **The conclusion we draw is that the industrial injury was the proverbial "straw that broke the came's back." It was the causative event that began the symptomatic progression of the low back arthritis, as well as the acceleration of the underlying condition revealed by the serial MRIs. In short, the industrial injury was the proximate cause of the disability that originated when the previously asymptomatic and nondisabling low back arthritic condition became active and symptomatic.** Miller v. Department of Labor & Indus., 200 Wash. 674 (1939).

In re Suzanne E. Dyer, No. 03 15747 [etc.] (Bd. of Indus. Ins. Appeals, March 1, 2005) (emphasis added).[79] *See also* In re James I. McIntosh, No. 89 2352 (Bd. of Indus. Ins. Appeals, Jan.30. 1991):

> ...While the physical effect of this impairment may have been minor, its legal effect on the outcome of Mr. McIntosh's claim is significant. The impairment admitted to have been caused by the industrial injury is truly analogous to the "straw that broke the camel's back". While Mr. McIntosh may have been a marginal member of the workforce, he was employed for several years prior to the industrial injury [but because of the small additional effect of the industrial injury became unemployable]. ...

Finally, *see* In re Lawrence Musick, No. 48 173 (Bd. of Indus. Ins. Appeals,

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[78] Appellate courts said the same thing in Dennis v. Dep't of Labor & Indus., *supra*, 109 Wn.2d at 471; Champion Int'l, Inc. v. Dep't of Labor & Indus., 50 Wn. App. 91, 93-94, 746 P.2d 1244 (1987); Wendt v. Dep't of Labor & Indus., 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977); and Shea v. Dep't of Labor & Indus., *supra*, 12 Wn. App. at 414.

[79] *See* Taylor v. Nalley's Fine Foods, 119 Wn. App. 919, 924, 83 P.3d 1018 (2004) ("Although Board decisions are not controlling authority, they offer guidance when we determine the propriety of the Board's penalty assessments. *See* Walmer v. Dep't of Labor & Indus, 78 Wn. App. 162, 167, 896 P.2d 95, *review denied,* 128 Wn.2d 1003 (1995).").

Significant Decision,[80] March 20, 1978):

> What was the proximate cause of such total disability status? We believe it must be held to be the residual effects of the 1975 injury herein. Mild though such residuals were, in terms of hard physical findings, they were in our view the "straw that broke the camel's back" in light of the total record. **Claimant's severe, but intermittent, back problems prior to this injury were changed into continuous and more limiting and painful problems by said injury**; and the claimant – in Dr. Staker's words – has "run out of gas," as the result of this worsening effect. This, to us, appears to be the real import of this evidence: Claimant had always been well motivated to return to work in spite of his intermittent problems, but the further impact of this last injury "did him in," so far as continued working ability was concerned.

(Emphasis added.) **Courts must take care to keep this rule of proximate cause clearly in mind when determining whether RCW 51.32.080(5) should apply:**

> **Cases of this kind are to be distinguished from those where the worker is already *permanently partially disabled*,** within the meaning of the workers' compensation act, in which circumstances RCW 51.32.080(3) [now subpart (5)] applies. That section requires segregation of the preexisting disability and limits the award to the

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[80] The Board designates certain of its decisions "significant" as notice to practitioners of how the Board sees certain issues. *See* RCW 51.52.160 and WAC 263-12-195. However, significant decisions have no greater authority at the Board than other Board decisions. *See* In re Frances J. Wareing, No. 02 11829 (Bd. of Indus. Ins. Appeals, Significant Decision, July 2, 2003):

> Although Nilson is not a designated significant decision of the Board of Industrial Insurance Appeals, it is entirely appropriate to cite any prior Board decision that would help guide the parties in resolution of matters on appeal. It is our obligation to ensure consistency in all our rulings, irrespective of whether they are designated as one of our significant decisions published in accordance with RCW 51.52.160. In re Diane Deridder, [No. 98 22312 (Bd. of Indus. Ins. Appeals,] (May 30, 2000).

disability resulting from the later injury.

Miller v. Dep't of Labor & Indus., *supra,* 200 Wash. at 683 (emphasis added). Tomlinson's arthritis was a condition on which his industrial injury operated to cause PPD. The arthritis was not permanent. Accordingly, the arthritis was not, itself, a "preexisting permanent disability" under subsection (5).

PSFL has never denied responsibility for the TKR.[81] Intrinsic to responsibility for the *surgery* is responsibility for the *outcome*. Not *part* of the outcome; *all* of it.

E. REQUEST FOR ATTORNEY FEE

If Tomlinson prevails in this appeal, he request a reasonable attorney fee pursuant to RCW 51.52.130, "Attorney and witness fees in court appeal." The statute provides that an injured worker who obtains on appeal relief that was denied below is entitled to a reasonable fee.

F. CONCLUSION

On the record before the court, RCW 51.32.080(5) should not apply. This court should reverse the superior court, and remand to that

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[81] *See* VRP p. 7 lines 3-6, where PSFL said:

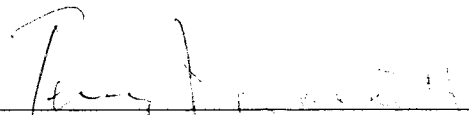
> ...[T]hat arthritic condition contributed to the need for the [total knee] replacements. Our injury played a role on top of that That's why we're responsible for the claim ....

court with instruction to enter summary judgment awarding Tomlinson permanent partial disability of 75 percent of his left leg above the knee joint with short thigh stump (3 inches or less below the tuberosity of ischium)

DATED this 20 of November 2006.

Respectfully submitted,

RUMBAUGH RIDEOUT BARNETT & ADKINS



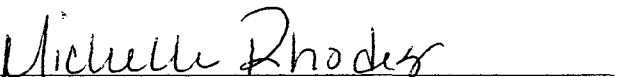
Terry J. Barnett, WSB 8080, Attorneys for appellant Tomlinson

CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of APPELLANT'S BRIEF to:

Steve Reinisch
Reinisch, Mackenzie, Healey, Wilson & Clark
10260 SW Greenburg Rd., #1250
Portland, OR 97223

DATED this 20 day of November 2006.



Michelle E. Rhodes, Legal Assistant

RCW 51.08.150
"Permanent partial disability."

"Permanent partial disability" means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability.

[1961 c 23 § **51.08.150**. Prior: 1957 c 70 § 17; prior: 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

RCW 51.12.010
Employments included -- Declaration of policy.

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

[1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § **51.12.010**. Prior: 1959 c 55 § 1; 1955 c 74 § 2; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

RCW 51.32.080
Permanent partial disability -- Specified -- Unspecified, rules for classification -- Injury after permanent partial disability.

(1)(a) Until July 1, 1993, for the permanent partial disabilities here specifically described, the injured worker shall receive compensation as follows:

LOSS BY AMPUTATION	
Of leg above the knee joint with short thigh stump (3" or less below the tuberosity of ischium)	$54,000.00
Of leg at or above knee joint with functional stump	48,600.00
Of leg below knee joint	43,200.00
Of leg at ankle (Syme)	37,800.00
Of foot at mid-metatarsals	18,900.00
Of great toe with resection of metatarsal bone	11,340.00
Of great toe at metatarsophalangeal joint	6,804.00
Of great toe at interphalangeal joint	3,600.00
Of lesser toe (2nd to 5th) with resection of metatarsal bone	4,140.00
Of lesser toe at metatarsophalangeal joint	2,016.00
Of lesser toe at proximal interphalangeal joint	1,494.00
Of lesser toe at distal interphalangeal joint	378.00
Of arm at or above the deltoid insertion or by disarticulation at the shoulder	54,000.00
Of arm at any point from below the deltoid insertion to below the elbow joint at the insertion of the biceps tendon	51,300.00
Of arm at any point from below the elbow joint distal to the insertion of the biceps tendon to and including	48,600.00

A-3

mid-metacarpal amputation of the hand	
Of all fingers except the thumb at metacarpophalangeal joints	29,160.00
Of thumb at metacarpophalangeal joint or with resection of carpometacarpal bone	19,440.00
Of thumb at interphalangeal joint	9,720.00
Of index finger at metacarpophalangeal joint or with resection of metacarpal bone	12,150.00
Of index finger at proximal interphalangeal joint	9,720.00
Of index finger at distal interphalangeal joint	5,346.00
Of middle finger at metacarpophalangeal joint or with resection of metacarpal bone	9,720.00
Of middle finger at proximal interphalangeal joint	7,776.00
Of middle finger at distal interphalangeal joint	4,374.00
Of ring finger at metacarpophalangeal joint or with resection of metacarpal bone	4,860.00
Of ring finger at proximal interphalangeal joint	3,888.00
Of ring finger at distal interphalangeal joint	2,430.00
Of little finger at metacarpophalangeal joint or with resection of metacarpal bone	2,430.00
Of little finger at proximal interphalangeal joint	1,944.00
Of little finger at distal interphalangeal	972.00

joint . . . . . .

MISCELLANEOUS

Loss of one eye by enucleation	21,600.00
Loss of central visual acuity in one eye	18,000.00
Complete loss of hearing in both ears	43,200.00
Complete loss of hearing in one ear	7,200.00

(b) Beginning on July 1, 1993, compensation under this subsection shall be computed as follows:

(i) Beginning on July 1, 1993, the compensation amounts for the specified disabilities listed in (a) of this subsection shall be increased by thirty-two percent; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the compensation amounts for the specified disabilities listed in (a) of this subsection, as adjusted under (b)(i) of this subsection, shall be readjusted to reflect the percentage change in the consumer price index, calculated as follows: The index for the calendar year preceding the year in which the July calculation is made, to be known as "calendar year A," is divided by the index for the calendar year preceding calendar year A, and the resulting ratio is multiplied by the compensation amount in effect on June 30 immediately preceding the July 1st on which the respective calculation is made. For the purposes of this subsection, "index" means the same as the definition in RCW 2.12.037(1).

(2) Compensation for amputation of a member or part thereof at a site other than those specified in subsection (1) of this section, and for loss of central visual acuity and loss of hearing other than complete, shall be in proportion to that which such other amputation or partial loss of visual acuity or hearing most closely resembles and approximates. Compensation shall be calculated based on the adjusted schedule of compensation in effect for the respective time period as prescribed in subsection (1) of this section.

(3)(a) Compensation for any other permanent partial disability not involving amputation shall be in the proportion which the extent of such other disability, called unspecified disability, shall bear to the disabilities specified in subsection (1) of this section, which most closely resembles and approximates in degree of disability such other disability, and compensation for any other unspecified permanent partial disability shall be in an amount as measured and compared to total bodily impairment. To reduce litigation and establish more certainty and uniformity in the rating of unspecified permanent partial disabilities, the department shall enact rules having the force of law classifying such disabilities in the proportion which the department shall determine such disabilities reasonably bear to total bodily impairment. In enacting such rules, the department shall give consideration to, but need not necessarily adopt, any nationally recognized medical standards or guides for determining various bodily impairments.

(b) Until July 1, 1993, for purposes of calculating monetary benefits under (a) of this subsection, the amount payable for total bodily impairment shall be deemed to be ninety thousand dollars. Beginning on July 1, 1993, for purposes of calculating monetary benefits under (a) of this subsection, the amount payable for total bodily impairment shall be adjusted as follows:

(i) Beginning on July 1, 1993, the amount payable for total bodily impairment under this section shall be

increased to one hundred eighteen thousand eight hundred dollars; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the amount payable for total bodily impairment prescribed in (b)(i) of this subsection shall be adjusted as provided in subsection (1)(b)(ii) of this section.

(c) Until July 1, 1993, the total compensation for all unspecified permanent partial disabilities resulting from the same injury shall not exceed the sum of ninety thousand dollars. Beginning on July 1, 1993, total compensation for all unspecified permanent partial disabilities resulting from the same injury shall not exceed a sum calculated as follows:

(i) Beginning on July 1, 1993, the sum shall be increased to one hundred eighteen thousand eight hundred dollars; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the sum prescribed in (b)(i) of this subsection shall be adjusted as provided in subsection (1)(b)(ii) of this section.

(4) If permanent partial disability compensation is followed by permanent total disability compensation, any portion of the permanent partial disability compensation which exceeds the amount that would have been paid the injured worker if permanent total disability compensation had been paid in the first instance, shall be deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly.

(5) Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

(6) When the compensation provided for in subsections (1) through (3) of this section exceeds three times the average monthly wage in the state as computed under the provisions of RCW 51.08.018, payment shall be made in monthly payments in accordance with the schedule of temporary total disability payments set forth in RCW 51.32.090 until such compensation is paid to the injured worker in full, except that the first monthly payment shall be in an amount equal to three times the average monthly wage in the state as computed under the provisions of RCW 51.08.018, and interest shall be paid at the rate of eight percent on the unpaid balance of such compensation commencing with the second monthly payment. However, upon application of the injured worker or survivor the monthly payment may be converted, in whole or in part, into a lump sum payment, in which event the monthly payment shall cease in whole or in part. Such conversion may be made only upon written application of the injured worker or survivor to the department and shall rest in the discretion of the department depending upon the merits of each individual application. Upon the death of a worker all unpaid installments accrued shall be paid according to the payment schedule established prior to the death of the worker to the widow or widower, or if there is no widow or widower surviving, to the dependent children of such claimant, and if there are no such dependent children, then to such other dependents as defined by this title.

(7) Awards payable under this section are governed by the schedule in effect on the date of injury.

[1993 c 520 § 1; 1988 c 161 § 6; 1986 c 58 § 2; 1982 1st ex.s. c 20 § 2; 1979 c 104 § 1; 1977 ex.s. c 350 § 46; 1972 ex.s. c 43 § 21; 1971 ex.s. c 289 § 10; 1965 ex.s. c 165 § 1; 1961 c 274 § 3; 1961 c 23 §**51.32.080** . Prior: 1957 c 70 § 32; prior: 1951 c

115 § 4; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

NOTES:

Effective date -- 1993 c 520: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 18, 1993]." [1993 c 520 § 2.]

Effective dates -- 1988 c 161: See note following RCW 51.32.050.

Effective date -- 1986 c 58 §§ 2, 3: "Sections 2 and 3 of this act shall take effect on July 1, 1986." [1986 c 58 § 7.]

Effective date -- 1982 1st ex.s. c 20: See note following RCW 51.32.075.

RCW 51.52.130
Attorney and witness fees in court appeal.

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

[1993 c 122 § 1; 1982 c 63 § 23; 1977 ex.s. c 350 § 82; 1961 c 23 § **51.52.130**. Prior: 1957 c 70 § 63; 1951 c 225 § 17; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

NOTES:

Effective dates -- Implementation -- 1982 c 63: See note following RCW 51.32.095.

RCW 51.52.160
Publication and indexing of significant decisions.

The board shall publish and index its significant decisions and make them available to the public at reasonable cost.

[1985 c 209 § 1.]

WAC 263-12-195 Significant decisions.(1) The board's publication "*Significant Decisions*," prepared pursuant to RCW 51.52.160, contains the decisions or orders of the board which it considers to have an analysis or decision of substantial importance to the board in carrying out its duties. Together with the indices of decision maintained pursuant to WAC 263-12-016(4), "*Significant Decisions*" shall serve as the index required by RCW 42.17.260 (4)(b) and (c).

(2) The board selects the decisions or orders to be included in "*Significant Decisions*" based on recommendations from staff and the public. Generally, a decision or order is considered "significant" only if it provides a legal analysis or interpretation not found in existing case law, or applies settled law to unusual facts. Decisions or orders may be included which demonstrate the application of a settled legal principle to varying fact situations or which reflect the further development of, or continued adherence to, a legal principle previously recognized by the board. Nominations of decisions or orders for inclusion in "*Significant Decisions*" should be submitted in writing to the executive secretary.

(3) "*Significant Decisions*" consists of microfilmed copies of the decisions and orders identified as significant and headnotes summarizing the proposition or propositions for which the board considers the decisions or orders "significant." Indices are also provided to identify each decision or order by name and by subject. Permanent revisions and additions to "*Significant Decisions*" are prepared annually. A cumulative supplement is prepared annually between permanent updates and is provided to subscribers of "*Significant Decisions*." The cumulative supplement contains decisions or orders identified by the board as "significant" in the interim between permanent updates.

(4) Copies of "*Significant Decisions*" and permanent updates are available to the public at cost. Requests for information concerning the purchase of "*Significant Decisions*" should be directed to the executive secretary.

[Statutory Authority: RCW 51.52.020. 91-13-038, § **263-12-195**, filed 6/14/91, effective 7/15/91.]

WAC 296-20-01002 Definitions.Acceptance, accepted condition: Determination by a qualified representative of the department or self-insurer that reimbursement for the diagnosis and curative or rehabilitative treatment of a claimant's medical condition is the responsibility of the department or self-insurer. The condition being accepted must be specified by one or more diagnosis codes from the current edition of the International Classification of Diseases, Clinically Modified (ICD-CM).

Appointing authority: For the evidence-based prescription drug program of the participating agencies in the state purchased health care programs, appointing authority shall mean the following persons acting jointly: The administrator of the health care authority, the secretary of the department of social and health services, and the director of the department of labor and industries.

Attendant care: Those proper and necessary personal care services provided to maintain the worker in his or her residence. Refer to WAC 296-20-303 for more information.

Attending doctor report: This type of report may also be referred to as a "60 day" or "special" report. The following information must be included in this type of report. Also, additional information may be requested by the department as needed.

(1) The condition(s) diagnosed including ICD-9-CM codes and the objective and subjective findings.

(2) Their relationship, if any, to the industrial injury or exposure.

(3) Outline of proposed treatment program, its length, components, and expected prognosis including an estimate of when treatment should be concluded and condition(s) stable. An estimated return to work date should be included. The probability, if any, of permanent partial disability resulting from industrial conditions should be noted.

(4) If the worker has not returned to work, the attending doctor should indicate whether a vocational assessment will be necessary to evaluate the worker's ability to return to work and why.

(5) If the worker has not returned to work, a doctor's estimate of physical capacities should be included with the report. If further information regarding physical capacities is needed or required, a performance-based physical capacities evaluation can be requested. Performance-based physical capacities evaluations should be conducted by a licensed occupational therapist or a licensed physical therapist. Performance-based physical capacities evaluations may also be conducted by other qualified professionals who provided performance-based physical capacities evaluations to the department prior to May 20, 1987, and who have received written approval to continue supplying this service based on formal department review of their qualifications.

Authorization: Notification by a qualified representative of the department or self-insurer that specific proper and necessary treatment, services, or equipment provided for the diagnosis and curative or rehabilitative treatment of an accepted condition will be reimbursed by the department or self-insurer.

Average wholesale price (AWP): A pharmacy reimbursement formula by which the pharmacist is reimbursed for the cost of the product plus a mark-up. The AWP is an industry benchmark which is developed independently by companies that specifically monitor drug pricing.

Baseline price (BLP): Is derived by calculating the mean average for all NDC's (National Drug Code) in a specific product group, determining the standard deviation, and calculating a new mean average using all prices within one standard deviation of the original mean average. "Baseline price" is a drug pricing mechanism developed and updated by First Data Bank.

Bundled codes: When a bundled code is covered, payment for them is subsumed by the payment for the codes or services to which they are incident. (An example is a telephone call from a hospital nurse regarding care of a patient. This service is not separately payable because it is included in the payment for other services such as hospital visits.) Bundled codes and services are identified in the fee schedules.

By report: BR (by report) in the value column of the fee schedules indicates that the value of this service is to be determined by report (BR) because the service is too unusual, variable or new to be assigned a unit value. The report shall provide an adequate definition or description of the services or procedures that explain why the services or procedures (e.g., operative, medical, radiological, laboratory, pathology, or other similar service report) are too unusual, variable, or complex to be assigned a relative value unit, using any of the following as indicated:

(1) Diagnosis;

(2) Size, location and number of lesion(s) or procedure(s) where appropriate;

(3) Surgical procedure(s) and supplementary procedure(s);

(4) Whenever possible, list the nearest similar procedure by number according to the fee schedules;

(5) Estimated follow-up;

(6) Operative time;

(7) Describe in detail any service rendered and billed using an "unlisted" procedure code.

The department or self-insurer may adjust BR procedures when such action is indicated.

Chart notes: This type of documentation may also be referred to as "office" or "progress" notes. Providers must maintain charts and records in order to support and justify the services provided. "Chart" means a compendium of medical records on an individual patient. "Record" means dated reports supporting bills submitted to the department or self-insurer for medical services provided in an office, nursing facility, hospital, outpatient, emergency room, or other place of service. Records of service shall be entered in a chronological order by the practitioner who rendered the service. For reimbursement purposes, such records shall be legible, and shall include, but are not limited to:

(1) Date(s) of service;

(2) Patient's name and date of birth;

(3) Claim number;

(4) Name and title of the person performing the service;

(5) Chief complaint or reason for each visit;

(6) Pertinent medical history;

(7) Pertinent findings on examination;

(8) Medications and/or equipment/supplies prescribed or provided;

(9) Description of treatment (when applicable);

(10) Recommendations for additional treatments, procedures, or consultations;

(11) X rays, tests, and results; and

(12) Plan of treatment/care/outcome.

Consultation examination report: The following information must be included in this type of report. Additional information may be requested by the department as needed.

(1) A detailed history to establish:

(a) The type and severity of the industrial injury or occupational disease.

(b) The patient's previous physical and mental health.

(c) Any social and emotional factors which may effect recovery.

(2) A comparison history between history provided by attending doctor and injured worker, must be provided with exam.

(3) A detailed physical examination concerning all systems affected by the industrial accident.

(4) A general physical examination sufficient to demonstrate any preexisting impairments of function or concurrent condition.

(5) A complete diagnosis of all pathological conditions including ICD-9-CM codes found to be listed:

(a) Due solely to injury.

(b) Preexisting condition aggravated by the injury and the extent of aggravation.

(c) Other medical conditions neither related to nor aggravated by the injury but which may retard recovery.

(d) Coexisting disease (arthritis, congenital deformities, heart disease, etc.).

(6) Conclusions must include:

(a) Type of treatment recommended for each pathological condition and the probable duration of treatment.

(b) Expected degree of recovery from the industrial condition.

(c) Probability, if any, of permanent disability resulting from the industrial condition.

(d) Probability of returning to work.

(7) Reports of necessary, reasonable X-ray and laboratory studies to establish or confirm the diagnosis when indicated.

Doctor: For these rules, means a person licensed to practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry.

Only those persons so licensed may sign report of accident forms and certify time loss compensation except as provided in WAC 296-20-01502, When can a physician assistant have sole signature on the report of accident or physician's initial report? and WAC 296-23-241, Can advanced registered nurse practitioners independently perform the functions of an attending physician?

Emergent hospital admission: Placement of the worker in an acute care hospital for treatment of a work related medical condition of an unforeseen or rapidly progressing nature which if not treated in an inpatient setting, is likely to jeopardize the workers health or treatment outcome.

Endorsing practitioner: A practitioner who has reviewed the preferred drug list and has notified the health care authority that he or she has agreed to allow therapeutic interchange of a preferred drug for any nonpreferred drug in a given therapeutic class.

Fatal: When the attending doctor has reason to believe a worker has died as a result of an industrial injury or exposure, the doctor should notify the nearest department service location or the self-insurer immediately. Often an autopsy is required by the department or self-insurer. If so, it will be authorized by the service location manager or the self-insurer. Benefits payable include burial stipend and monthly payments to the surviving spouse and/or dependents.

Fee schedules or maximum fee schedule(s): The fee schedules consist of, but are not limited to, the following:

(a) Health Care Common Procedure Coding System Level I and II Codes, descriptions and modifiers that describe medical and other services, supplies and materials.

(b) Codes, descriptions and modifiers developed by the department.

(c) Relative value units (RVUs), calculated or assigned dollar values, percent-of-allowed-charges (POAC), or diagnostic related groups (DRGs), that set the maximum allowable fee for services rendered.

(d) Billing instructions or policies relating to the submission of bills by providers and the payment of bills by the department or self-insurer.

(e) Average wholesale price (AWP), baseline price (BLP), and policies related to the purchase of medications.

Health services provider or provider: For these rules means any person, firm, corporation, partnership, association, agency, institution, or other legal entity providing any kind of services related to the treatment of an industrially injured worker. It includes, but is not limited to, hospitals, medical doctors, dentists, chiropractors, vocational rehabilitation counselors, osteopathic physicians, pharmacists, podiatrists, physical therapists, occupational therapists, massage therapists, psychologists, naturopathic physicians, and durable medical equipment dealers.

Home nursing: Those nursing services that are proper and necessary to maintain the worker in his or her residence. These services must be provided through an agency licensed, certified or registered to provide home care, home health or hospice services. Refer to WAC 296-20-091 for more information.

Independent or separate procedure: Certain of the fee schedule's listed procedures are commonly carried out as an integral part of a total service, and as such do not warrant a separate charge. When such a procedure is carried out as a separate entity, not immediately related to other services, the indicated value for "independent procedure" is applicable.

Medical aid rules: The Washington Administrative Codes (WACs) that contain the administrative rules for medical and other services rendered to workers.

Modified work status: The worker is not able to return to their previous work, but is physically capable of carrying out work of a lighter nature. Workers should be urged to return to modified work as soon as reasonable as such work is frequently beneficial for body conditioning and regaining self confidence.

Under RCW 51.32.090, when the employer has modified work available for the worker, the employer must furnish the doctor and the worker with a statement describing the available work in terms that will enable the doctor to relate the physical activities of the job to the worker's physical limitations and capabilities. The doctor shall then determine whether the worker is physically able to perform the work described. The employer may not increase the physical requirements of the job without requesting the opinion of the doctor as to the worker's ability to perform such additional work. If after a trial period of reemployment the worker is unable to continue with such work, the worker's time loss compensation will be resumed upon certification by the attending doctor.

If the employer has no modified work available, the department should be notified immediately, so vocational assessment can be conducted to determine whether the worker will require assistance in returning to work.

Nonemergent (elective) hospital admission: Placement of the worker in an acute care hospital for medical treatment of an accepted condition which may be safely scheduled in advance without jeopardizing the worker's health or treatment outcome.

Physician: For these rules, means any person licensed to perform one or more of the following professions: Medicine and surgery; or osteopathic medicine and surgery.

Practitioner: For these rules, means any person defined as a "doctor" under these rules, or licensed to practice one or more of the following professions: Audiology; physical therapy; occupational therapy; pharmacy; prosthetics; orthotics; psychology; nursing; physician or osteopathic assistant; and massage therapy.

Preferred drug list: The list of drugs selected by the appointing authority to be used by applicable state agencies as the basis for the purchase of drugs in state purchased health care programs.

Proper and necessary:

(1) The department or self-insurer pays for proper and necessary health care services that are related to the diagnosis and treatment of an accepted condition.

(2) Under the Industrial Insurance Act, "proper and necessary" refers to those health care services which are:

(a) Reflective of accepted standards of good practice, within the scope of practice of the provider's license or certification;

(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;

(c) Not delivered primarily for the convenience of the claimant, the claimant's attending doctor, or any other provider; and

(d) Provided at the least cost and in the least intensive setting of care consistent with the other provisions of this definition.

(3) The department or self-insurer stops payment for health care services once a worker reaches a state of maximum medical improvement. Maximum medical improvement occurs when no fundamental or marked change in an accepted condition can be expected, with or without treatment. Maximum medical improvement may be present though there may be fluctuations in levels of pain and function. A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with the passage of time. Once a worker's condition has reached maximum medical improvement, treatment that results only in temporary or transient changes is not proper and necessary. "Maximum medical improvement" is equivalent to "fixed and stable."

(4) In no case shall services which are inappropriate to the accepted condition or which present hazards in excess of the expected medical benefits be considered proper and necessary. Services that are controversial, obsolete, investigational or experimental are presumed not to be proper and necessary, and shall be authorized only as provided in WAC 296-20-03002(6) and 296-20-02850.

Refill: The continuation of therapy with the same drug (including the renewal of a previous prescription or adjustments in dosage) when a prescription is for an antipsychotic, antidepressant, chemotherapy, antiretroviral or immunosuppressive drug.

Regular work status: The injured worker is physically capable of returning to his/her regular work. It is the duty of the attending doctor to notify the worker and the department or self-insurer, as the case may be, of the specific date of release to return to regular work. Compensation will be terminated on the release date. Further treatment can be allowed as requested by the attending doctor if the condition is not stationary and such treatment is needed and otherwise in order.

Temporary partial disability: Partial time loss compensation may be paid when the worker can return to work on a limited basis or return to a lesser paying job is necessitated by the accepted injury or condition. The worker must have a reduction in wages of more than five percent before consideration of partial time loss can be made. No partial time loss compensation can be paid after the worker's condition is stationary. **All time loss compensation must be certified by the attending doctor based on objective findings.**

Termination of treatment: When treatment is no longer required and/or the industrial condition is stabilized, a report indicating the date of stabilization should be submitted to the department or self-insurer. This is necessary to initiate closure of the industrial claim. The patient may require continued treatment for conditions not related to the industrial condition; however, financial responsibility for such

care must be the patient's.

Therapeutic alternative: Drug products of different chemical structure within the same pharmacologic or therapeutic class and that are expected to have similar therapeutic effects and safety profiles when administered in therapeutically equivalent doses.

Therapeutic interchange: To dispense with the endorsing practitioner's authorization, a therapeutic alternative to the prescribed drug.

Total permanent disability: Loss of both legs or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful employment. When the attending doctor feels a worker may be totally and permanently disabled, the attending doctor should communicate this information immediately to the department or self-insurer. A vocational evaluation and an independent rating of disability may be arranged by the department prior to a determination as to total permanent disability. Coverage for treatment does not usually continue after the date an injured worker is placed on pension.

Total temporary disability: Full-time loss compensation will be paid when the worker is unable to return to any type of reasonably continuous gainful employment as a direct result of an accepted industrial injury or exposure.

Unusual or unlisted procedure: Value of unlisted services or procedures should be substantiated "by report" (BR).

Utilization review: The assessment of a claimant's medical care to assure that it is proper and necessary and of good quality. This assessment typically considers the appropriateness of the place of care, level of care, and the duration, frequency or quantity of services provided in relation to the accepted condition being treated.

[Statutory Authority: 2004 c 65 and 2004 c 163. 04-22-085, § **296-20-01002**, filed 11/2/04, effective 12/15/04. Statutory Authority: RCW 51.04.020, 70.14.050. 04-08-040, § **296-20-01002**, filed 3/30/04, effective 5/1/04. Statutory Authority: RCW 51.04.020. 03-21-069, § **296-20-01002**, filed 10/14/03, effective 12/1/03. Statutory Authority: RCW 51.04.010, 51.04.020, 51.04.030, 51.32.080, 51.32.110, 51.32.112, 51.36.060. 02-21-105, § **296-20-01002**, filed 10/22/02, effective 12/1/02. Statutory Authority: RCW 51.04.020, 51.04.030, 51.32.060, 51.32.072, and 7.68.070. 01-18-041, § **296-20-01002**, filed 8/29/01, effective 10/1/01. Statutory Authority: RCW 51.04.020 and 51.04.030. 00-01-039, § **296-20-01002**, filed 12/7/99, effective 1/8/00. Statutory Authority: RCW 51.04.030, 70.14.050 and 51.04.020(4). 95-16-031, § **296-20-01002**, filed 7/21/95, effective 8/22/95. Statutory Authority: RCW 51.04.020, 51.04.030 and 1993 c 159. 93-16-072, § **296-20-01002**, filed 8/1/93, effective 9/1/93. Statutory Authority: RCW 51.04.020(4) and 51.04.030. 92-24-066, § **296-20-01002**, filed 12/1/92, effective 1/1/93; 92-05-041, § **296-20-01002**, filed 2/13/92, effective 3/15/92. Statutory Authority: RCW 51.04.020. 90-14-009, § **296-20-01002**, filed 6/25/90, effective 8/1/90. Statutory Authority: RCW 51.04.020(4) and 51.04.030. 90-04-057, § **296-20-01002**, filed 2/2/90, effective 3/5/90; 87-24-050 (Order 87-23), § **296-20-01002**, filed 11/30/87, effective 1/1/88; 86-20-074 (Order 86-36), § **296-20-01002**, filed 10/1/86, effective 11/1/86; 83-24-016 (Order 83-35), § **296-20-01002**, filed 11/30/83, effective 1/1/84; 83-16-066 (Order 83-23), § **296-20-01002**, filed 8/2/83. Statutory Authority: RCW 51.04.020(4), 51.04.030, and 51.16.120(3). 81-24-041 (Order 81-28), § **296-20-01002**, filed 11/30/81, effective 1/1/82; 81-01-100 (Order 80-29), § **296-20-01002**, filed 12/23/80, effective 3/1/81.]

WAC 296-20-030 Treatment not requiring authorization for accepted conditions.(1) A maximum of twenty office calls for the treatment of the industrial condition, during the first sixty days, following injury. Subsequent office calls must be authorized. Reports of treatment rendered must be filed at sixty day intervals to include number of office visits to date. See chapter 296-20 WAC and department policies for report requirements and further information.

(2) Initial diagnostic x rays necessary for evaluation and treatment of the industrial injury or condition. See WAC 296-20-121 for further information.

(3) The first twelve physical therapy treatments as provided by chapters296-21, 296-23, and 296-23A WAC, upon consultation by the attending doctor or under his direct supervision. Additional physical therapy treatment must be authorized and the request substantiated by evidence of improvement. In no case will the department or self-insurer pay for inpatient hospitalization of a claimant to receive physical therapy treatment only. USE OF DIAPULSE, THERMATIC (standard model only), SPECTROWAVE AND SUPERPULSE MACHINES AND IONTOPHORESIS IS NOT AUTHORIZED FOR WORKERS ENTITLED TO BENEFITS UNDER THE INDUSTRIAL INSURANCE ACT.

(4) Routine laboratory studies reasonably necessary for diagnosis and/or treatment of the industrial condition. Other special laboratory studies require authorization.

(5) Routine standard treatment measures rendered on an emergency basis or in connection with minor injuries not otherwise requiring authorization.

(6) Consultation with specialist when indicated. See WAC 296-20-051 for consultation guidelines.

(7) Diagnostic or therapeutic nerve blocks. See WAC 296-20-03001 for restrictions.

(8) Intra-articular injections. See WAC 296-20-03001 for restrictions.

(9) Myelogram if prior to emergency surgery.

[Statutory Authority: RCW 51.04.020 and 51.04.030. 00-01-040, § **296-20-030**, filed 12/7/99, effective 1/20/00. Statutory Authority: RCW 51.04.020, 51.04.030 and 1993 c 159. 93-16-072, § **296-20-030**, filed 8/1/93, effective 9/1/93. Statutory Authority: RCW 51.04.020(4) and 51.04.030. 86-06-032 (Order 86-19), § **296-20-030**, filed 2/28/86, effective 4/1/86. Statutory Authority: RCW 51.04.020(4),51.04.030 , and 51.16.120(3). 81-24-041 (Order 81-28), § **296-20-030**, filed 11/30/81, effective 1/1/82; 81-01-100 (Order 80-29), § **296-20-030**, filed 12/23/80, effective 3/1/81; Order 76-34, § **296-20-030**, filed 11/24/76, effective 1/1/77; Order 75-39, § **296-20-030**, filed 11/28/75, effective 1/1/76; Order 74-7, § **296-20-030**, filed 1/30/74; Order 71-6, § **296-20-030**, filed 6/1/71; Order 70-12, § **296-20-030**, filed 12/1/70, effective 1/1/71; Order 68-7, § **296-20-030**, filed 11/27/68, effective 1/1/69.]

WAC 296-20-2015 What rating systems are used for determining an impairment rating conducted by the attending doctor or a consultant? The following table provides guidance regarding the rating systems generally used. These rating systems or others adopted through department policies should be used to conduct an impairment rating.

Overview of Systems for Rating Impairment

Rating System	Used for These Conditions	Form of the Rating
RCW 51.32.080	Specified disabilities: Loss by amputation, total loss of vision or hearing	Supply the level of amputation
AMA *Guides to the Evaluation of Permanent Impairment*	Loss of function of extremities, partial loss of vision or hearing	Determine the percentage of loss of function, as compared to amputation value listed in RCW 51.32.080
Category Rating System	Spine, neurologic system, mental health, respiratory, taste and smell, speech, skin, or disorders affecting other internal organs	Select the category that most accurately indicates overall impairment
Total Bodily Impairment (TBI)	Impairments not addressed by any of the rating systems above, and claims prior to 1971	Supply the percentage of TBI

[Statutory Authority: RCW 51.32.055, 51.32.112, 51.32.114, 51.36.060, and 51.36.070. 04-04-029, § **296-20-2015**, filed 1/27/04, effective 3/1/04.]