

No. 35957-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHUNYK & CONLEY/QUAD C,

Respondent,

v.

SAMMIE L. WILLIAMS,

Appellant,

APPELLANT'S OPENING BRIEF

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ORIGINAL

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A. **BRIEF INTRODUCTION**

Sammie Williams is a big guy. Ten years ago, he weighed 290 pounds and was bordering on morbid obesity. Williams had been diagnosed with hypothyroidism and was consequently susceptible to weight gain, but he kept his weight down with a physically active job and hobbies. In 1997, he injured his knee while working as a janitor for Quad C. The pain was debilitating and nothing seemed to help. He could no longer enjoy his long walks with family or basketball games with the boys he mentored. Following doctors' orders, Williams also stopped working. His weight crept up through the years, although he ate the same amount as before, and his knee continued to trouble him. He developed a foot condition, plantar faciitis, which obesity contributed to, and recommended knee surgery became impossible until he loses weight. Williams's doctor also wants to perform gastric bypass surgery, but that cannot happen unless the Department of Labor and Industries (L&I) approves the treatment.

L&I closed Williams's claim and Williams appealed to the Board of Industrial Insurance Appeals (Board or BIIA). The Board concluded that morbid obesity and plantar faciitis were proximately caused by the industrial injury, Williams's knee condition has not reached maximum medical improvement and, therefore, the employer must treat the three

conditions. Quad C appealed to superior court, where a jury was empaneled to conduct a de novo review of the closed record.

Quad C argued that Williams is personally responsible for his weight gain because he is lazy and gluttonous. According to undisputed evidence, the industrial injury was at least one proximate cause of Williams's weight gain because it caused him to become sedentary. But the jury nevertheless adhered to Quad C's argument, which rests entirely on appeals to prejudice, irrational assumptions, and misinterpretations of law. The jury also adhered to Quad C's theory that morbid obesity was an intervening, superceding cause of Williams's knee and foot problems. Substantial evidence does not support these conclusions.

The court tipped the balances by instructing the jury that it is to apply a different standard of scrutiny to the opinions of attending physicians than to other expert witnesses. Under well-settled law, jurors are to give special consideration to the opinion of attending physicians, i.e., those who treat a patient instead of dealing with the patient merely in anticipation of litigation. And it is well settled that jurors should determine the weight and credibility of *all* expert witnesses according to factors such as credentials, experience, and the witnesses' reason for testifying. But the court here informed the jury to apply these factors only to attending physicians. This instruction was misleading, confusing, and

misstates the law. It prejudiced Williams's case by encouraging the jurors to believe Quad C's expert, a non-attending physician, over Williams's experts who attended him.

In conclusion, Williams respectfully requests this court reverse, with prejudice, the verdict that is based on a mere scintilla of evidence and/or reverse based on the improper jury instruction. Further, if Williams's right to relief is sustained, attorney fees and costs should be awarded under RCW 51.52.120.

B. ASSIGNMENTS OF ERROR

1. Insubstantial evidence supported the conclusion that the industrial injury was not a proximate cause of Williams's morbid obesity. CP at 187 (Jury Question No. 3).
2. Insubstantial evidence supported the conclusion that the industrial injury was not a proximate cause of Williams's plantar faciitis, as that conclusion rested upon following Quad C's theory that morbid obesity was an intervening, superceding cause of the foot condition. CP at 187 (Jury Question No.2).
3. Insubstantial evidence supported the conclusions that Williams's knee condition proximately caused by the industrial injury was

fixed and stable and did not require medical treatment, as those conclusions rested upon following Quad C's theory that morbid obesity was an intervening, superceding cause of the current knee condition. CP at 186-88 (Jury Questions No.1, 4-7).

4. Jury Instruction No. 15 is misleading, confusing, an erroneous explanation of law, and a comment on the evidence. It prejudiced Williams and is a basis for reversal. CP at 178.

C. ISSUES

1. Williams was susceptible to weight gain before he was injured, but his weight did not skyrocket until he was injured on the job and consequently his life changed from active to sedentary. Employers must take a worker as they find him and an industrial injury is a proximate cause of a medical condition if it is even one of many causes in fact. Did substantial evidence support the verdict that the industrial injury was not a proximate cause of Williams's weight gain?
2. The opinions of attending physicians are entitled to special consideration by a jury, but it is the prerogative of jurors to determine the weight and credibility of all expert opinions based

on a list of well-established factors. The court instructed the jury to consider these factors only regarding attending physicians and the jury consequently affording the attending physicians' testimony little weight and rendered a verdict in Quad C's favor. Did the trial court err when it so instructed the jury?

D. FACTS

I. BACKGROUND

Sammie Williams is a big guy. He is about six feet tall and, in 1997, weighed about 290 pounds. Certified Appeals Board Record (CABR), 8/17/05 Test. of Sammie Williams, at 14. Williams has hypothyroidism, causing him to be overweight or obese most of his adult life, but he was doing okay in 1997. CABR 8/22/05 Dep. of Dr. H. Richard Johnson, at 42. He worked at physically active janitorial jobs that kept him on his feet and moving most of the day. CABR, 8/17/05 Test. of Williams, at 12-13. And he was physically active in his free time. He played basketball and football and regularly walked with his wife and young stepdaughter. CABR, 8/17/05 Test. of Williams, at 19.

On October 3, 1997, Williams worked as a janitor for Quad C at a healthcare facility. CABR, 8/17/05 Test. of Williams, at 12. He opened a door in an unlit area near the top of a ramp. In the dark, he stepped into a

huge steel laundry cart, set on wheels, which triggered it to start rolling into the left part of his body. Williams went home with pain, informed Quad C of the injury, and sought medical treatment. CABR, 8/17/05 Test. of Williams, at 13-16. Williams was immediately put onto light duty work. CABR, 8/17/05 Test. of Williams, at 15.

About two months after the injury, Dr. John Jiganti began treating Williams. CABR, 8/16/05 Dep. of Dr. Jiganti, at 8-9. Dr. Jiganti diagnosed a meniscal tear, which is a cartilage injury, to William's left knee and prescribed pain medication, cortizone injections, and physical therapy for the next two to three months. CABR, 8/17/05 Test. of Williams, at 16. Williams tried to continue working, but even part time shifts made his pain worse and so Dr. Jiganti told Williams to stop working. CABR, 8/17/05 Test. of Williams, at 16. Dr. Jiganti felt the miniscal tear was worsening, noted a limp, and performed surgery in late February 1998. CABR, 8/16/05 Dep. of Dr. Jiganti, at 10-12.

Williams returned to work following the surgery, but the pain increased and Dr. Jiganti took him off work again. CABR, 8/17/05 Test of Williams, at 16. Dr. Jiganti and Williams's primary care physician, Dr. Tonia Johnson, continued to provide medical care for the injury. But Williams's conditions did not resolve, he was not released to return to work, and through the years his weight slowly crept up.

According to Drs. Jiganti and Tonia Johnson, Williams had some preexisting wear and tear or early arthritis to his knee before the industrial injury, but it was not systematic until the injury. CABR, 8/16/05 Dep. of Dr. Jiganti, at 17; 8/16/05 Dep. of Dr. Tonia Johnson, at 14-15. And Williams developed left foot plantar fasciitis, which Drs. Jiganti and Tonia Johnson also opined was due to the industrial injury. CABR, 8/16/05 Dep. of Dr. Jiganti, at 27-28; 8/16/05 Dep. of Dr. Tonia Johnson, at 10. Dr. Tonia Johnson reasoned that the injury caused Williams to limp and the limp, in turn, caused plantar fasciitis. CABR, 8/16/05 Dep. of Dr. Tonia Johnson, at 10. She added that obesity worsened the foot condition, but Dr. Jiganti detailed that any degree of obesity would contribute to plantar fasciitis. CABR, 8/16/05 Dep. of Dr. Jiganti, at 34-35; 8/16/05 Dep. of Dr. Tonia Johnson, at 10. In other words, even if Williams still weighed around 290 pounds, as he did when injured, his weight would still contribute to the plantar fasciitis. CABR, 8/16/05 Dep. of Dr. Jiganti, at 34-35.

Dr. Tonia Johnson also opined that Williams's now morbid obesity was caused by the industrial injury. 8/16/05 Dep. of Dr. Tonia Johnson, at 10. Due to the industrial injury, Williams was in pain and couldn't maintain his previous lifestyle of active work and active recreation, yet he did not change his eating habits. She characterized this as a 'vicious

cycle' in which a patient gains weight because of pain and resulting lack of activity, which results in more pain and inactivity, which results in more weight gain. 8/16/05 Dep of Dr. Tonia Johnson, at 24-25. Williams has gained nearly 200 pounds in the ten years that Quad C has been forced to litigate his legitimate claims. See CABR, 8/17/05 Test. of Williams, at 14. His doctors would like to perform gastric bypass surgery, but this litigation has put this necessary medical treatment out of Williams's reach.

II. PROCEDURE

a. Pre-Litigation

Ten years ago, Williams applied for worker's compensation benefits, alleging a left knee injury on October 3, 1997. CABR at 75. L&I allowed the claim for medical treatment and other benefits. CABR at 75. At issue here, L&I entered an order on October 21, 2004 in which it closed Williams's claim with time-loss benefits paid through January 15, 2001. The Department reasoned that Williams's medical conditions were in a stable condition. In the order, L&I directed Quad C to pay Williams a permanent partial disability award of 2% of the amputation value of the left leg above the knee joint with a short thigh stump three centimeters or below the tuberosity of ischium, less previously paid partial disability

awards. CABR at 78. Williams timely appealed to the Board of Industrial Insurance Appeals (BIIA or Board). CABR at 78.

b. Board of Industrial Insurance Appeals

Industrial Appeals Judge Lyle O. Hanson heard the appeal. He entered a proposed decision and order containing three conclusions relevant to the current appeal. First, Williams's industrial injury proximately caused the need for further medical or surgical treatment. Second, Williams was temporarily totally disabled between January 16, 2001 and October 21, 2004 due to the industrial injury. Last, L&I must pay time-loss compensation and also allow medical treatment for three conditions, (1) aggravation of left knee degenerative joint disease, (2) left foot plantar fasciitis, and (3) morbid obesity. CP at 5-22. Quad C requested review by the Board, which was denied, therefore rendering the proposed decision and order final. CP at 4.

c. Superior Court

Quad C appealed to superior court and requested a jury. CABR at 2-20; CP at 60; RCW 51.52.110. L&I chose not to participate in the appeal. CP at 23-24. The issues, as defined in Quad C's petition for review and Instruction No. 6, were whether Williams's: (1) knee injury was fixed and stable; (2) plantar fasciitis was not proximately caused by the industrial injury in 1997; and (3) morbid obesity was not due to the

industrial injury. CP at 169. Both Williams and Quad C proposed jury instructions and verdict forms. CP at 102-55. In accordance with the unusual workers' compensation procedure, the attorneys read to the jury the Board transcript. The jury rendered a verdict in Quad C's favor and, on January 26, 2007, the court entered a judgment upon the verdict. CP at 186-88, 197-202. Williams timely appealed to this court.

E. ARGUMENT

I. **THE ENTIRE VERDICT SHOULD BE REVERSED BECAUSE INSUFFICIENT EVIDENCE SUPPORTS THE FINDING THAT THE INDUSTRIAL INJURY DID NOT PROXIMATELY CAUSE MORBID OBESITY AND THE REMAINING CONCLUSIONS TURNED UPON THIS FINDING.**

Quad C's primary case theory was that Williams's morbid obesity was a condition that (1) was not proximately caused by the industrial injury yet (2) was a superceding, intervening cause for the other medical conditions at issue. The jury apparently concurred with this theory, but the record does not support it and does not support the verdict.

a. Standard of Review

Below, Quad C carried the burden to prove by preponderance of evidence that the Board's findings were incorrect. RCW 51.52.110; *Frazier v. Dept. of Labor & Indust.*, 101 Wn. App. 411, 3 P.3d 221 (2000). The Board's findings are presumed correct. RCW 51.52.100.

The jury's verdict should be disturbed only if, when viewing the evidence in Quad C's favor, there is not substantial evidence to support it. *Venezelos v. Department of Labor & Indus.*, 67 Wn.2d 71, 406 P.2d 603 (1965); *Ehman v. Department of Labor & Indus.*, 33 Wn.2d 584, 206 P.2d 787 (1949). "Substantial evidence" is not a mere scintilla of evidence. *Omeitt v. Dept. of Labor & Indust.*, 21 Wn.2d 684, 686, 152 P.2d 973 (1944).

Rather, evidence is substantial only if it is of a character to convince an *unprejudiced, thinking mind* of the truth of the fact to which the evidence is directed. *Omeitt*, 21 Wn.2d at 686 (emphasis added). With all due respect to the jury, Quad C effectively played to its prejudices and irrationality in obtaining the verdict that, as demonstrated below, does not rest upon substantial evidence.

b. An Industrial Injury Proximately Causes a Medical Condition if the Injury Was But One Proximate Cause of the Condition. Medical Testimony Stated in Terms of Probability is Required to Meet a Party's Burden of Proof Regarding Causation.

"Proximate cause" means a cause that, in a direct sequence, unbroken by any new independent cause, produces the condition or disability complained of and without which such condition or disability would not have happened. CP at 173. There may be one or more proximate causes of a condition or disability. For a worker to recover

benefits under the Industrial Insurance Act, the industrial injury must only be one proximate cause of the alleged condition or disability for which benefits were sought. The law does not require that the industrial injury is the sole proximate cause of such condition or disability. CP at 173.

Medical testimony proffered to establish a causal relationship between an industrial injury and an alleged condition or disability must be phrased in terms of medical probability, not possibility. CP at 174. “Possibility” here means medical testimony confined to speculation and conjecture. CP at 174; *Vanderhoff v. Fitzgerald*, 72 Wn.2d 103, 107-08, 431 P.2d 969 (1967). Accordingly, speculation and conjecture by a medical expert is an inappropriate basis upon which to determine causation.¹ *Vanderhoff*, 72 Wn.2d at 107-08.

c. Insubstantial Evidence Supports the Finding that the Industrial Injury Was Not a Proximate Cause of Williams’s Morbid Obesity.

Insubstantial evidence supports the finding that the industrial injury was not a proximate cause of Williams’s morbid obesity. The question put to the jury was whether the Board was “correct that Sammie Williams’ industrial injury of October 3, 1997 was a proximate cause of his significant weight gain to the extent that by October 21, 2004, he was

¹ Most case law in this arena focuses on the claimant’s duty to prove causation. Yet at the trial court Quad C had the burden to *disprove* causation because it was the appellant. See RCW 51.52.115. Thus, the standard for medical testimony that typically is imposed upon the claimant applies here to Quad C.

morbidly obese?” CP at 187. The jury answered “no,” despite an utter lack of evidence to support the finding. CP at 187. We respectfully request this court reverse this finding.

i. The Record Contained Strong Evidence That The Industrial Injury Was A Proximate Cause of Williams’s Morbid Obesity

Although it is not an appellate court’s role to weigh evidence, it may prove helpful to review quickly the evidence in Williams’s favor on this issue. I also note, as a preliminary matter, that the typical standard for credibility determinations plays out differently in the context of workers’ compensation appeals. Typically, the Court of Appeals would defer to the jury on credibility determinations because only the jury can actually see the witnesses testify. *Hahn v. Dept. of Retirement Systems*, 137 Wn.App. 933, 155 P.3d 177 (2007). But the live witnesses in workers’ compensation litigation appear only at the Board hearing. During the Superior Court proceedings, the record is closed and the parties’ *attorneys read* the transcript to the jury. The attorneys are advised to read in the blandest way possible, without vocal inflection or physical gestures. Because the ALJ was the only trier of fact to see the witnesses, that judges’ credibility determinations are the ones that this court should defer to. With that gloss in mind, the evidence that follows was not contradicted at trial.

When injured, Williams weighed about 290 pounds; he stands about six feet tall. CABR, 8/17/05 Test. of Williams, at 14, 21. His job was active, involving mopping, waxing, stripping, and buffing floors, as well as other general housekeeping duties. CABR, 8/17/05 Test. of Williams, at 12. He worked on his feet six to seven hours out of an eight hour shift. CABR, 8/17/05 Test. of Williams, at 13. Williams was also physically active in his free time. He played basketball and football and regularly walked with his wife and young stepdaughter. CABR, 8/17/05 Test. of Williams, at 19. He especially enjoyed carrying his stepdaughter on his shoulders as they walked. CABR, 8/17/05 Test. of Williams, at 19.

After the industrial injury, Williams was in constant pain. CABR, 8/17/05 Test. of Williams, at 19. The active lifestyle he previously enjoyed suddenly became impossible because every movement hurt. CABR, 8/17/05 Test. of Williams, at 19-20. He tried to return to his physically active employment, but even a part-time shift increased the pain. CABR, 8/17/05 Test. of Williams, at 15. His doctors told him he couldn't work. CABR, 8/16/05 Dep. of Dr. Tonia Johnson, at 24; 8/17/05 Test. of Williams, at 15. After the industrial injury, Williams transformed from a physically active, yet obese, individual into a completely sedentary and morbidly obese individual.

Dr. Tonia Johnson has been Williams's primary care physician since January 2003. CABR, 8/16/05 Dep. of Dr. Tonia Johnson, at 6. Because she was a "attending physician," i.e., one who treated Williams instead of simply examining him for litigation purposes, her testimony was to be given special consideration by the jury. *Hamilton v. Dept. of Labor & Indust.*, 111 Wash.2d 569, 571, 761 P.2d 618 (1988). According to Dr. Johnson (and undisputed by other evidence), Williams did not change his eating habits after the injury. CABR, 8/16/05 Dep. of Dr. Tonia Johnson, at 10. He was simply less active and so he slowly gained weight. CABR, 8/16/05 Dep. of Dr. Tonia Johnson, at 10, 13. In her opinion, the industrial injury more likely than not caused morbid obesity. CABR, 8/16/05 Dep. of Dr. Tonia Johnson, at 10, 13.

ii. Dr. Richard G. McCollum's Opinion Was the Only Evidence Supporting the Verdict, Yet the Opinion Is Severely Flawed and Does Not Constitute Substantial Evidence.

The *only* evidence in the entire record that supports this conclusion is the following opinion of Dr. Richard G. McCollum:

If he gained weight, it wasn't related to this accident. He gained a lot of weight so I don't see how -- I mean we have hundreds and thousands of people that have knee surgery and don't gain weight so the probability of that is low. I don't see it's related.

CABR, 8/25/05 Dep. of Dr. McCollum at 20. This opinion fails to meet the standard for substantial evidence.

First, the opinion is not framed in terms of medical probability, as required. CP at 174. Proper medical testimony regarding causation should read akin to: 'On a more likely than not basis, I believe that Williams's weight gain was not caused by his industrial injury.' And looking beyond form, this opinion is clearly the type of speculation and conjecture that the law disallows. Dr. McCollum asserted that because many knee surgery patients do not gain weight, Williams did not gain weight as a result of his surgery. This is pure conjecture, unscientific, and a logical fallacy. Even if true, the fact that many knee surgery patients do not gain weight does not mean that Williams did not gain weight as a result.

Second, the opinion is neither based on Williams as an individual patient nor on sound scientific methodology. Dr. McCollum did not examine or treat Williams and accordingly was in a poor position to make this assessment. The doctor did conduct a medical record review. But he did not base his opinion on that record review, as demonstrated by his failure to cite any evidence from Williams's medical history or care for his opinion. Instead, the opinion is based on pseudo-statistics formulated, one might guess, by Dr. McCollum's personal experiences and biases. This

type of medical testimony is likely inadmissible, but certainly is an improper and insufficient basis upon which to find substantial evidence that causation is lacking. See RCW 51.52.115.

Third, the opinion does not speak to the issue at hand. The jury's question was whether the *industrial injury* proximately caused weight gain. Yet Dr. McCollum opined whether the *knee surgery* proximately caused weight gain. Even if knee surgery itself did not cause Williams's weight gain, the record is replete with evidence (discussed above) that the industrial injury caused weight gain because the injury caused Williams pain, immobility, depression, and, most importantly, forced him into a more sedentary life because he could no longer continue his active janitorial employment or his physical recreational activities. A rational jury could not use this opinion upon which to base its finding of causation.

Fourth, Dr. McCollum's opinion focuses on the extent of Williams's weight gain, approximately 100 pounds, as a basis for his opinion that the knee surgery did not cause it. But the jury's question was not whether Williams gained the entire 100 pounds due to the injury. The question was whether the industrial injury was *a proximate cause* of his morbid obesity.

Even if Williams had gained only a few pounds on account of pain and immobility, that few pounds would have been enough to push him

into the category of morbid obesity. From another perspective, even if the pain, immobility, and sedentary lifestyle were but one cause of Williams's weight gain, the industrial injury would remain *a* proximate cause. This is the legal standard and insufficient evidence in the record supports the finding to the contrary. Dr. McCollum's testimony constitutes, if anything, a scintilla of evidence and no other evidence in the record supports the verdict. Reversal is warranted.

iii. The Law Requires Employers to Take an Injured Worker As They Find Him, and so Williams's Individual, Pre-Existing Susceptibility to Morbid Obesity Is Not, As a Matter of Law, a Sustainable Basis Upon Which to Find Lack of Causation.

Williams was already very close to morbidly obese when he was injured. CABR, 8/22/05 Dep. of Dr. H. Richard Johnson at 70. And Williams had a preexisting condition of hypothyroidism. CABR, 8/22/05 Dep. of Dr. Johnson at 42. These were certainly two causes of Williams's morbid obesity unrelated to the industrial injury. But it is a fundamental principle that, for disability assessment purposes, a worker is to be taken as he is, with all his preexisting frailties and bodily infirmities. *Wendt v. Dept. of Labor & Indust.*, 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977); *also see* CP at 170 (Instruction No. 7), 172 (Instruction No. 9).

Under this legal doctrine, it was key for a medical expert and jury to determine whether Williams as an individual, already nearing morbid obesity and particularly susceptible to the medical condition, became morbidly obese in part due to the industrial injury. The jury question was not, as Dr. McCollum implies, whether an average worker who injures his knee will become morbidly obese as a result. Juries are allowed to use common sense, and it is common sense that the industrial injury was not the only cause of Williams's morbid obesity, as is the conclusion that most workers who injure a knee will not subsequently gain almost 200 pounds. But the workers' compensation system does not credit such conclusions; they are legally irrelevant. Under the applicable legal standards, there is simply no evidence in the record to support the verdict.

iv. Conclusion

Appellate courts will not lightly reverse jury verdicts, but this is one of the rarest of cases in which the verdict rests wholly on prejudice, illogical assumptions, and legally irrelevant facts. Some may assume, as Quad C argued in closing, that Williams is personally responsible for his weight gain because he was lazy and gluttonous. There is a strong cultural prejudice against the obese and jurors and doctors are not immune from such prejudice. Such assumptions may pass muster in other contexts.

But our legal system presents a higher standard, allowing appellate review of verdicts in order to ensure they are based on substantial evidence in the record, not prejudice or irrationality. *Omeitt*, 21 Wn.2d at 686. Here, the unrebutted evidence showed that Williams gained weight because the industrial injury made him sedentary. That is the sound conclusion reached by the Administrative Law Judge, who saw Williams's live testimony and was in the best position to judge credibility. CP at 20 (Finding No. 6).

And the only evidence that Quad C can cling to, Dr. McCollum's testimony, is logically flawed to an extreme rarely seen in medical testimony. There is simply no basis, barring prejudice and irrationality, upon which the verdict rests. Accordingly, Williams respectfully requests this court reverse, with prejudice, the finding that the industrial injury was not a proximate cause of morbid obesity.

Further, reversal on this ground warrants reversal of the entire verdict. Quad C's case theory was that Williams's morbid obesity was not caused by the industrial injury and was instead an intervening, superceding cause of his disabling medical conditions. Some evidence supported the conclusion that but for the morbid obesity, Williams would not suffer degenerative joint disease or plantar faciitis and accordingly would not be prohibited from working or need medical treatment due to

his industrial injury. It is impossible to say why the jury entered the verdict it did. But the strongest presumption is that it adhered to Quad C's case theory. Accordingly, if it was erroneous for the jury to find that the industrial injury was not a proximate cause of morbid obesity, then morbid obesity cannot be an intervening, superceding cause of Williams's knee and foot injuries. The entire verdict and judgment should be reversed.

II. JURY INSTRUCTION NO. 15 WAS CONFUSING, MISLEADING, AND A MISSTATEMENT OF LAW, AS WELL AS A COMMENT ON THE EVIDENCE, BECAUSE IT APPLIES A MORE ONEROUS STANDARD AND INQUIRY ON ATTENDING PHYSICIANS' TESTIMONY THAN THAT PLACED ON OTHER EXPERTS. THE INSTRUCTION PREJUDICED WILLIAMS AND THIS COURT SHOULD ACCORDINGLY REVERSE.

The court instructed the jury that it is not bound by attending physicians' opinions and should carefully scrutinize attending physicians' opinions according to specified factors. While this is a sound proposition, the standard presented in this jury instruction applies equally to all opinion testimony. Yet the court did not instruct the jury to apply this standard equally and fairly to all opinion testimony, instead singling out attending physicians for this special scrutiny. The instruction is accordingly misleading, confusing, and an error of law. It also constitutes a comment on the evidence. And the instruction prejudiced Williams because it swayed the jury to give more weight to Dr. McCollum, a non-attending

physician who presented the sole testimony favorable to Quad C, as opposed to Williams's attending physicians, who each testified in his favor. The court should accordingly reverse.

a. Standard of Review

The Court of Appeals reviews de novo challenged jury instructions to determine whether they permits the parties to argue their theories of the case, whether it is misleading, and whether the instructions when read as a whole accurately inform the jury of the applicable law. *Williams v. Virginia Mason Medical Center*, 75 Wn. App. 582, 584, 880 P.2d 539 (1994).

b. Instruction No. 15 is Misleading, Confusing, and an Error of Law.

The trial court gave two instructions regarding the consideration given to attending physicians:

Instruction No. 14

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve such testimony. It does require that you give any such testimony careful through in your deliberations.

Instruction No. 15

You are not bound by the **attending physician's** opinions. In determining the credibility and weight to be given **such** opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that doctor, the reasons given for the opinion, the sources of the doctor's information, together with the factors already given you for evaluating the testimony of any other witness.

CP at 177-78 (emphases added). Williams's attorney objected to this instruction as confusing, misleading, redundant, and unsupported by current law. RP at 86-90.

Instruction No. 14 was taken from 6A Washington Practice, WPI 155.13.01 (5th ed.) and was specifically approved by our Supreme Court in *Hamilton v. Dept. of Labor & Indust.*, 111 Wn.2d 569, 761 P.2d 618 (1988). It accurately and fully states the applicable law, detailing that attending physicians should be given special consideration and thought but that it is the jury's decision whether to believe the testimony and how much weight to assign it.

Instruction No. 15 is highly problematic and prejudiced Williams. If the instruction substituted the term "expert opinion" or "medical opinion" for "attending physician's opinion," it would be perfectly

acceptable. This instruction is modeled after WPI 2.10, entitled “Expert Testimony”:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

Williams does not challenge the validity of this pattern jury instruction.

The instruction accurately explains the factors that the jury may consider when it decides the weight and credibility of *all* expert opinion evidence.

Contrary to WPI 2.10, however, Instruction No. 15 sets for the jury an extra set of considerations for attending physicians, while remaining silent about all other opinion testimony. Instead of stating that the jury is not bound by any opinion testimony, it singles out attending physicians. Instead of stating that the jury may consider a list of factors when evaluating any opinion testimony, it singles out attending physicians. The listed factors apply, but their terms, only to attending physicians’ opinions because the factors apply only to “such opinion evidence” and “such” is

limited by the previous sentence referring to only “attending physician’s opinions.”

No where else in the instructions is the fair standard embodied by WPI 2.10 set forth. The general jury instruction does state that the jurors are the sole judge of witnesses’ credibility and weight. CP at 160. But this does not cure the error because the Instruction No. 15 tells the jurors *how* to assess credibility and weight and it does so incorrectly. Rather than putting a special onus on attending physicians’ testimony, the law requires jurors to give that testimony special consideration. Accordingly, the instruction is misleading, confusing to the jury, and inaccurately states the law.

c. *Hamilton*, the Case that the Trial Court Relied Upon to Base its Ruling, Does Not Support Giving This Instruction As Worded.

The trial court judge relied on *Hamilton*, 111 Wn.2d 569, for the proposition that Instructions No. 14 and 15 should be coupled, but *Hamilton* does not stand for that proposition. In *Hamilton*, L&I appealed a jury verdict favorable to the claimant. L & I argued that the “special consideration” instruction (No. 14 in this case) was a comment on the evidence. The high court held it was an accurate statement of law and was not a comment. And were it a comment, the Court noted, no prejudice

could have resulted because the trial court had also issued an instruction akin to No. 15 here. *Hamilton*, 111 Wn.2d at 574.

In *Hamilton*, no party assigned error to the instruction akin to No. 15. And the *Hamilton* court did not specifically approve of this instruction, finding merely that it cured the alleged defect that was not, as a matter of law, a defect at all. Further, the instruction in *Hamilton* did not contain the error complained of here; it spoke generally of “opinion testimony” and did not single out attending physicians’ testimony as that warranting special scrutiny. According to my research, no court has approved an instruction akin to No. 15 with its “attending physician” language. It is a confusing, misleading instruction that misstates the law.

- d. Instruction No. 15 is a Comment on the Evidence Because it Allows the Jury to Infer that the Judge Found Williams’s Attending Physicians Less Believable.

Instruction No. 15 is also a comment on the evidence. Judicial comments on the evidence are prohibited under Const. art. 4, § 16. Instructions that convey or allow the jury to infer that the judge personally believed or disbelieved particular testimony are judicial comments on the evidence. *Hamilton v. Dept. of Labor & Indust.*, 111 Wash.2d 569, 571, 761 P.2d 618 (1988). No. 15 allowed the jury to infer that the judge found

less persuasive or weighty the attending physicians' testimony. Accordingly, it constitutes an impermissible comment on the evidence.

- e. The Erroneous Instruction Prejudiced Williams Because It Swayed the Jury to Give More Weight to Dr. McCollum, Quad C's Witness, and Therefore Render a Verdict in Quad C's Favor.

Giving Instruction No. 15 prejudiced Williams. Williams's attending physicians, Drs. Tonia Johnson and Jiganti, testified favorable to him. Dr. Tonia Johnson testified that the industrial injury caused morbid obesity and plantar faciitis, aggravated a preexisting knee condition, and caused inability to work and the need for medical treatment. CABR, 8/16/05 Dep. of Dr. Tonia Johnson. Dr. Jiganti testified the industrial injury caused plantar faciitis, aggravated a preexisting knee condition, and caused inability to work and need for medical treatment. CABR, 8/16/05 Dep. of Dr. Jiganti. Dr. Jiganti also testified that Williams's obesity would exacerbate his other medical conditions regardless of whether he weighed 297 pounds, as he did when injured, or 400 pounds. CABR, 8/16/05 Dep. of Dr. Jiganti, at 34-35. On the other hand, the non-attending physician, Dr. McCollum, presented the only unfavorable testimony on these issues.

Instruction No. 15 tampered with the jury's duty to assess all medical opinion evidence based on similar methodology and to give

special consideration to attending physicians' testimony. Given the fact that a mere scintilla of evidence supported the verdict, and that scintilla was presented by the non-attending physician Dr. McCollum, it is extremely likely that Instruction No. 15 changed the outcome of the case and, accordingly, prejudiced Williams. This court should reverse.

F. ATTORNEY FEES AND COSTS

Williams requests attorney fees and costs if he prevails. RCW 51.52.120 reads, in relevant part:

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.

Quad C was the appellant at superior court. If this court reverses the superior court decision with prejudice, then it is sustaining the workers' right to relief and accordingly attorney fees must be granted to Williams.

G. CONCLUSION

In conclusion, the verdict cannot stand because it is based on a mere scintilla of evidence regarding morbid obesity and the remaining findings and conclusions rest upon the erroneous obesity finding.

APPENDIX

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: SAMMIE L. WILLIAMS) DOCKET NO. 04 26096
2 CLAIM NO. W-104395) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Lyle O. Hanson
4

5 APPEARANCES:

6 Claimant, Sammie L. Williams, by
7 Law Offices of David B. Vail, Jennifer M. Cross-Euteneier & Associates, per
8 William H. Lane

9 Self-Insured Employer, Chunyk & Conley Financial Service/Quad C, by
10 Groves & Groves, Inc., per
11 James L. Groves, Lay Representative

12 The claimant, Sammie L. Williams, filed an appeal with the Board of Industrial Insurance
13 Appeals on December 8, 2004, from an order of the Department of Labor and Industries dated
14 October 21, 2004. In this order, the Department corrected an order dated March 9, 2004, and
15 closed Mr. Williams's claim with time-loss compensation as paid to January 15, 2001, and with
16 compensation for permanent partial disability equal to 2.00 percent of the amputation value of the
17 left leg above the knee joint with a short thigh stump (3 inches or less below the tuberosity of
18 ischium), less the monetary sum of compensation for permanent partial disability previously paid
19 under the claim. The Department order is **REVERSED AND REMANDED**.

20 **PROCEDURAL AND EVIDENTIARY MATTERS**

21 On March 7, 2005, and March 31, 2005, the parties agreed that an amended copy of the
22 Board's Jurisdictional History should be made part of the Board's record for the sole purpose of
23 establishing the Board's jurisdiction to hear the appeal. The amended Jurisdictional History
24 contained a clerical error in that on the second page, the entry dated February 22, 2001, declares
25 that the self-insured employer protested an order dated January 7, 2001. The actual date of the
26 order the employer protested was January 17, 2001.

27 In *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965), this Board declared that it has the
28 authority to review and take notice of the contents of the Department's file on its own motion at any
29 stage of the proceedings in order to determine whether it has jurisdiction over the appeal. In
30 accordance with the foregoing authority, the Department's file has been reviewed and the
31 Jurisdictional History is hereby corrected to show that the self-insured employer protested the
32 January 17, 2001 Department order on February 22, 2001.

All rulings previously made in this matter are affirmed.

1 The deposition of Dr. Tonia Jensen taken to perpetuate her testimony on August 16, 2005, is
2 published. The objection is overruled. The deposition did not contain any motion.

3 The deposition of Dr. John Jiganti taken to perpetuate his testimony on August 16, 2005, is
4 published. The deposition did not contain any objection. Deposition Exhibit No. 1 is renumbered
5 Board Exhibit No. 1 and is admitted.

6 The deposition of Dr. H. Richard Johnson taken to perpetuate his testimony on August 22,
7 2005, is published. The objection on page 21 is sustained and the testimony on page 21 from
8 lines 1 through 15 is admitted for the sole and limited purpose allowed by ER 703. The objection
9 that appears on pages 22 and 23 is not timely regarding any testimony elicited prior to the objection
10 and to that extent, the objection is overruled. The objection is timely regarding all testimony
11 thereafter taken and to the extent that such testimony regarding medical records consists of
12 statements of medical fact or data, the testimony is allowed for the sole and limited purpose allowed
13 by ER 703. The objection on page 73 is sustained and the motion is granted. The testimony on
14 page 73 from lines 8 through 16 is stricken. The objection on page 89 is sustained. All other
15 objections are overruled. Since there was no objection, the motion to admit Deposition Exhibit
16 No. 1 is granted. The exhibit is renumbered Board Exhibit No. 2 and is admitted. The deposition
17 did not contain any other motion.

18 The deposition of Dr. Richard G. McCollum taken to perpetuate his testimony on August 25,
19 2005, is published. The objections on pages 9 and 39 are sustained. The objection on page 10 is
20 sustained and the motion is granted. The testimony on page 10 from lines 8 through 10 is stricken.
21 The objections on pages 11, 16, 33, and 43 at line 21 are deemed withdrawn because the
22 questions that led to the objections were withdrawn. All other objections are overruled. The other
23 motion is denied.

24 ISSUES

- 25 1. Did Mr. Williams's October 3, 1997, industrial injury proximately cause
26 him to develop a disabling medical condition described as left plantar
27 fasciitis?
- 28 2. Did the claimant's industrial injury proximately cause him to develop a
29 disabling medical condition described as tarsal tunnel syndrome in his
30 left foot?
- 31 3. Did Mr. Williams's industrial injury proximately cause him to develop a
32 disabling medical condition described as depression?

- 1 4. As of October 21, 2004, were all of the conditions Mr. Williams's
2 October 3, 1997, industrial injury proximately caused fixed and stable or
3 did any such condition require further proper and necessary medical or
4 surgical treatment within the meaning of RCW 51.36.010?
- 5 5. Between January 16, 2001, and October 21, 2004, was Mr. Williams
6 temporarily totally disabled within the meaning of RCW 51.32.090, as
7 the result of any condition his October 3, 1997, industrial injury
8 proximately caused?
- 9 6. If all of the medical conditions Mr. Williams's industrial injury proximately
10 caused were fixed and stable as of October 21, 2004, did he then have
11 more permanent partial disability than the Department recognized in its
12 order of that date?
- 13 7. If, as of October 21, 2004, all of the claimant's conditions proximately
14 caused by his industrial injury were fixed and stable, did those
15 conditions then render him permanently totally disabled?

16 **EVIDENCE PRESENTED**

17 Lay Testimony

18 *Sammie L. Williams*

19 Mr. Williams was born on October 8, 1958. He was 46 years old as of October 21, 2004.
20 The claimant is 5 feet 11 inches tall and as of October 3, 1997, he weighed 290 pounds.

21 Mr. Williams completed high school. His relevant work history is exclusively as a janitor.

22 On October 3, 1997, Chunyk & Conley/Quad C (hereafter Quad C), employed Mr. Williams
23 on a full-time basis as a housekeeper at its Bel Air Healthcare Facility. The claimant described his
24 duties as including mopping, waxing, stripping, and buffing floors. He was also responsible for
25 disposing of garbage. Mr. Williams said that he spent six to seven hours of his work shift either
26 walking or otherwise on his feet.

27 On October 3, 1997, Mr. Williams disposed of garbage at the end of his work shift. As he
28 reentered the building into an unlit room, a steel laundry cart, which was located on a ramp, rolled
29 against the claimant's left leg. In medical records, the claimant reported that he twisted at that time.
30 He immediately experienced left knee pain. Mr. Williams then went home.

31 Mr. Williams reported the incident to his supervisor at work the next day. He then obtained
32 treatment at Allenmore Hospital's emergency room. Medical personnel restricted him to
33 performance of light work for the next two to three weeks and provided him with a crutch.

34 Because Mr. Williams continued to experience left knee pain, on November 17, 1997, he
35 consulted with Dr. John Jiganti, who is an orthopedic surgeon. Dr. Jiganti caused the claimant to

1 undergo a conservative course of treatment which included physical therapy, provision of pain
2 medication and an injection of a cortisone-like medication.

3 Mr. Williams then attempted to return to his usual work, but his symptoms continued.
4 Dr. Jiganti obtained an MRI study of the claimant's left knee on December 4, 1997. It revealed
5 what the doctor described as a possible tear in the medial meniscus and a mild injury to the medial
6 collateral ligament.

7 The claimant's symptoms continued to increase. On February 24, 1998, Dr. Jiganti
8 performed arthroscopic surgery on Mr. Williams's left knee. The orthopedic surgeon said that
9 during the surgery, he found a tear in the medial meniscus, which he resected, and
10 chondromalacia, or roughening of the undersurface of the kneecap, for which he performed a
11 chondroplasty, or smoothing of the undersurface.

12 After Mr. Williams recovered from the surgical procedure, he attempted to return to work as a
13 janitor/light kitchen helper for two weeks at the Park Rose Healthcare Facility. The claimant said
14 that his left knee symptoms were worsened by the activity and he stopped working.

15 At a time that the record did not make expressly clear, Mr. Williams was provided with
16 vocational rehabilitation services, the result of which was development of a plan that called for him
17 to attend Bates Technical College to be trained as a parking lot attendant/cashier. On August 14,
18 2003, however, the Director of the Department determined that Mr. Williams did not require
19 vocational services in order to return to work because he was capable of returning to his usual work
20 as a janitor. Exhibit No. 2. Mr. Williams stopped receiving time-loss compensation payments as of
21 January 15, 2001.

22 Mr. Williams testified that between January 16, 2001, and October 21, 2004, his left knee
23 condition made him unable to participate in the basketball, football, bowling, and walking activities
24 he had enjoyed prior to October 1997. He said that he could not stand long enough to cook a meal
25 and that he walked with a left limp and had to use a cane for ambulation. The claimant declared
26 that he could walk for short distances, but that he had to stop to rest often.

27 The record revealed that after October 1997, Mr. Williams progressively gained weight. He
28 weighed 398 pounds as of May 2004. When he testified in this appeal on August 17, 2005, the
29 claimant weighed 474 pounds. Mr. Williams attributed his weight gain to his inability to be active
30 due to his left knee symptoms.

1 Mr. Williams began to experience left foot pain in approximately January 2003. On
2 January 20, 2005, Dr. Jared Clifford, a podiatric specialist, performed surgery to correct a condition
3 the record described as tarsal tunnel syndrome.

4 *Candy Williams*

5 Ms. Williams, who is the claimant's wife, described her husband as very active prior to
6 October 1997. She said that together, they attended picnics, bowled, and often walked.

7 The witness testified that after Mr. Williams was injured at work, he was unable to engage in
8 any of those activities. She declared that she had witnessed the claimant fall because his left knee
9 had given way.

10 Medical Testimony

11 *Dr. John Jiganti*

12 The American Board of Orthopedic Surgery certifies Dr. Jiganti as a specialist. He first
13 examined Mr. Williams for left knee complaints on November 17, 1997, on a referral from
14 Dr. Schultz.

15 Based on his initial examination, Dr. Jiganti suspected that Mr. Williams had a torn medial
16 meniscus in his left knee. Accordingly, he obtained the December 1997 MRI, the results of which
17 have previously been described. After a period of conservative treatment, the orthopedist
18 performed the February 24, 1998, arthroscopic surgery, which has also previously been described.
19 Dr. Jiganti testified that Mr. Williams's industrial injury proximately caused both the torn medial
20 meniscus and the chondromalacia he found during the surgical procedure. He said that the
21 degenerative chondromalacia had not been symptomatic prior to October 3, 1997, and that the
22 industrial injury and Mr. Williams's weight caused it to become symptomatic.

23 Dr. Jiganti released Mr. Williams to return to janitorial work and restricted him from doing so
24 on more than one occasion. The claimant's left knee swelled and he returned to see the doctor
25 with increased pain complaints each time after Mr. Williams returned to work. In September and
26 October 1998, Dr. Jiganti disapproved notions that the claimant could work as a dishwasher or
27 janitor.

28 On May 11, 1999, the physician obtained a second MRI scan of the claimant's left knee.
29 Dr. Jiganti said that the pictures showed the residuals of the arthroscopic surgery and "not a lot else
30 besides that." Jiganti Dep. at 18. The surgeon then recommended a course of cortisone injections
31 to treat Mr. Williams's symptoms. It does not appear that the treatment reduced the claimant's
32 complaints.

1 Mr. Williams underwent a performance based physical capacities evaluation on August 23,
2 1999. Dr. Jiganti determined that the tests documented that the claimant could perform only
3 sedentary work. In February 1999, the doctor approved a written description of the work of a
4 parking lot attendant/cashier as within Mr. Williams's capacities.

5 In November 2000, Dr. Jiganti recommended that Synvisc be injected into Mr. Williams's left
6 knee. The doctor acknowledged that the treatment would not cure the claimant's underlying
7 condition. In any event, he said, authorization for the proposed treatment was denied.

8 Dr. Jiganti last treated Mr. Williams on November 12, 2002. He certified that the claimant
9 had been unable to work to that date.

10 Before he testified in this matter, the surgeon reviewed a report authored by Dr. H. Richard
11 Johnson. The treating orthopedist agreed with Dr. Johnson that Mr. Williams's industrial injury was
12 a proximate cause of the plantar fasciitis, which Dr. Johnson diagnosed.

13 *Dr. Tonia Jensen*

14 Dr. Jensen is an osteopathic physician, whom the American Board of Internal Medicine
15 certifies as a specialist. She became Mr. Williams's attending primary care physician in January
16 2003. The doctor has treated the claimant for hypertension, hypothyroidism, sleep apnea,
17 dysmetabolic syndrome, diabetes, peripheral neuropathy, tarsal tunnel syndrome, and B12
18 deficiency as well as his left knee complaints.

19 Dr. Jensen was aware that Mr. Williams had been diagnosed as having plantar fasciitis. She
20 said that a chronic limp could be a proximate cause of the condition. The doctor declared that
21 Mr. Williams's weight could also be a proximate cause of the condition.

22 Dr. Jensen attributed the claimant's weight gain after October 1997 to inactivity secondary to
23 his left knee injury and depression associated with Mr. Williams's inability to work. She
24 recommended that the claimant undergo gastric bypass surgery to treat his obesity.

25 The attending doctor described Mr. Williams's last left knee MRI as depicting degenerative
26 changes in the medial and patella femoral joints with bone marrow edema on the medial side, and
27 degeneration of the meniscus. Dr. Jensen said that the left knee condition was debilitating in that
28 the condition meant that Mr. Williams was unable to stand or walk for eight hours during a workday.

29 *Dr. H. Richard Johnson*

30 The American Board of Orthopedic Surgeons certifies Dr. Johnson. He examined
31 Mr. Williams on May 26, 2004. From the record, it appears that Dr. Johnson reviewed a
32 comprehensive set of the claimant's medical and vocational records related to his industrial

1 insurance claim. By the time he testified in this appeal, the physician had also reviewed medical
2 records which were authored after Dr. Johnson examined Mr. Williams.

3 Mr. Williams told the examining orthopedist that he had moderate to severe pain that was
4 almost constant in his left knee and that was constant in his left foot.

5 Dr. Johnson said that Dr. Jiganti's operative record of February 24, 1998, showed that
6 Mr. Williams's left knee had a full-thickness meniscus tear and fragmentation of the medial femoral
7 condyle.

8 The orthopedist reviewed the radiologists' reports regarding left knee MRI studies performed
9 on May 11, 1999, and on March 4, 2004. Dr. Johnson said that the 1999 films showed grade 2
10 degenerative changes in the posterior horn of the claimant's medial meniscus and that the 2004
11 images revealed degeneration of the medial and femoral patellae joints and as well as the medial
12 meniscus. Regarding the October 20, 2004, electrodiagnostic studies, the doctor said they were
13 positive for tarsal tunnel syndrome. Dr. Johnson noted that Dr. Clifford had surgically repaired the
14 condition in January 2005.

15 Mr. Williams weighed 398 pounds when Dr. Johnson examined him. The doctor noted,
16 however, that on June 24, 2005, Dr. Jensen had measured the claimant at 474 pounds.
17 Dr. Johnson observed that the claimant changed position often during the three-hour examination.
18 Mr. Williams walked with a left limp.

19 Dr. Johnson said that Mr. Williams was able to perform only 25 percent of a normal squat
20 due to left knee pain. The claimant was unable to heel walk or toe walk on the left for the same
21 reason. The examining orthopedic surgeon declared that patellofemoral compression caused pain
22 and the doctor was able to feel a grinding sensation in Mr. Williams's left knee. The doctor could
23 also feel that a moderate degree of synovial thickening existed in the knee, as did one-plus
24 effusion. The worker could not perform McMurray's test. His left knee flexion was limited to
25 60 degrees. Dr. Johnson said that since Mr. Williams's left thigh was 2½ centimeters smaller than
26 his right thigh, the claimant's left leg was atrophied.

27 During his examination of Mr. Williams's left foot, Dr. Johnson noted three-plus tenderness
28 and moderate swelling along the bottom of the foot.

29 Dr. Johnson reached 15 diagnoses. Of those, the doctor determined that the claimant's
30 industrial injury was a proximate cause of nine. He did not testify whether Mr. Williams's tarsal
31 tunnel syndrome was proximately caused by the claimant's October 3, 1997, injury event.
32 Dr. Johnson determined that some of the diagnoses related to Mr. Williams's industrial injury

1 required further proper and necessary treatment. All of the diagnoses which the doctor said had a
2 proximate cause nexus to the claimant's industrial injury and the treatment he recommended for
3 some of those diagnoses follow:

- 4 • Left knee contusion, left knee sprain/strain, a tear of the left medial meniscus,
5 permanent aggravation of pre-existing asymptomatic degenerative joint disease in the
6 left knee, status post-operative left knee arthroscopy, and rapid degenerative joint
7 disease of the left knee. Dr. Johnson recommended that Mr. Williams undergo the
8 Synvisc injection, which Dr. Jiganti initially proposed. The examining doctor said that
9 although the injection would not cure the claimant's left knee condition, it would allow
10 him to function better for at least a year;
- 11 • Left plantar fasciitis. Dr. Johnson described the fascia as a tough fibrous band which
12 runs along the bottom of the foot and which can be irritated and become inflamed by
13 an abnormal gait, such as Mr. Williams's left limp;
- 14 • Morbid obesity. The doctor observed that at 290 pounds, Mr. Williams was close to
15 being morbidly obese on October 3, 1997, but he said that because the claimant
16 became inactive secondary to his left knee surgery, he had gained a significant
17 amount of weight. To treat the condition, Dr. Johnson recommended that the claimant
18 undergo the gastric bypass surgery Dr. Jensen had suggested; and
- 19 • A mild major depressive disorder.

20 Based primarily on the left knee condition, Dr. Johnson declared that Mr. Williams was
21 capable of performing only sedentary work activities after September 1998.

22 Dr. Johnson was asked to rate the permanent left lower extremity impairment, which
23 Mr. Williams's industrial injury had proximately caused, if the claimant was unable to obtain further
24 treatment for the condition. The orthopedist determined that per the American Medical Association
25 guidelines, the worker had a 2 percent impairment secondary to the meniscectomy, a 7 percent
26 impairment for the degenerative joint disease, and a 10 percent impairment secondary to his loss of
27 range of motion. Dr. Johnson said that the total impairment was 18 percent of the amputation value
28 of the left lower extremity.

29 *Dr. Richard G. McCollum*

30 On August 24, 2005, Dr. McCollum, whom the American Board of Orthopedic Surgery
31 certifies as a specialist, reviewed the records contained in Mr. Williams's industrial insurance file in
32 addition to Dr. Johnson's report and other records.

The reviewing doctor concluded that the claimant's industrial injury proximately caused a left
knee contusion and torn medial meniscus. From the records he read, Dr. McCollum determined
that the knee condition was fixed and stable and had resulted in permanent partial disability equal

1 to 2 percent of the amputation value of the claimant's left leg above the knee joint with a short thigh
2 stump (3 inches or less below the tuberosity of ischium).

3 The orthopedist did not find any causal nexus between Mr. Williams's October 3, 1997, injury
4 event and his weight gain, his plantar fasciitis, or symptoms secondary to degenerative joint
5 disease in the claimant's left knee.

6 Regarding the plantar fasciitis, Dr. McCollum explained his reasoning as follows: "I can't see
7 any scientific reason. It just developed later [than the claimant's industrial injury], much later."
8 McCollum Dep. at 20.

9 As to Mr. Williams's weight gain, the doctor said:

10 He gained a lot of weight so I don't see how—I mean we have hundreds
11 and thousands of people that have knee surgery and don't gain weight
12 so the probability of that is low. I don't see it as related.

12 McCollum Dep. at 20.

13 So far as aggravation of Mr. Williams's left knee degenerative joint disease was concerned,
14 Dr. McCollum testified:

15 The reason I say that is because the tear that he had was a flap tear. It
16 only involved the posterior horn, and if the chondromalacia was just in
17 the exact juxtaposition to the posterior tear, then you might incriminate
18 the chondromalacia due to this injury. But since it involved the whole
19 medial femoral condyle it said diffusely over it, I think that it was an area
20 that far exceeded that which might be caused from a flap tear in the
21 posterior horn from four months earlier. That would be my reason.

20 McCollum Dep. at 15.

21 DECISION

22 As the appellant in this matter, Mr. Williams held the burden of producing a preponderance
23 of the persuasive evidence to support his prayers for relief. RCW 51.52.050.

24 Mr. Williams presented evidence that the conditions his industrial injury caused required
25 further proper and necessary treatment as of October 21, 2004. Thus, the issues he initially
26 identified as his eligibility for increased permanent partial disability compensation or an adjudication
27 that he was permanently totally disabled will not be further addressed in this decision.

28 Medical Conditions the Claimant's Industrial Injury Proximately Caused

29 *Depression*

30 Both Dr. Jensen and Dr. Johnson declared that Mr. Williams developed a depressive
31 disorder as the result of his weight gain and inability to work. From the record, it does not appear
32 that the claimant has ever been treated for a mental health disorder. And neither Dr. Johnson nor

1 Dr. Jensen proposed a specific treatment plan to address the claimant's alleged disorder. In his
2 testimony, Mr. Williams did not describe limitations on his ability to function that were clearly related
3 to a disabling mental health impairment.

4 Mr. Williams did not produce a preponderance of the persuasive evidence to support a
5 conclusion that as of October 21, 2004, the Department should have accepted responsibility for
6 depression.

7 *Tarsal Tunnel Syndrome*

8 Dr. Johnson declared that Mr. Williams's industrial injury was a proximate cause of the tarsal
9 tunnel syndrome for which Dr. Clifford operated in January 2005. He did not explain the nature of
10 the condition or provide a detailed explanation regarding how Mr. Williams's industrial injury could
11 have been a proximate cause of the tarsal tunnel syndrome.

12 Dr. Clifford did not testify in this matter. Dr. Jiganti was not asked for an opinion regarding
13 the proximate cause of the condition. Dr. Jensen offered the following testimony:

14 I would agree that the plantar fasciitis would more probable [sic] than not
15 be due to the limp. The tarsal tunnel syndrome, which was due to
16 hypertrophy of one of his tendons, I'm not quite as sure about that one
17 just because it's out of my field of expertise, but I would guess that it
18 could be due to limping also.

19 Jensen Dep. at 14.

20 On balance, it cannot be said that Mr. Williams presented sufficient evidence to warrant a
21 conclusion that the Department should have accepted responsibility for his tarsal tunnel syndrome.

22 *Plantar Fasciitis*

23 Both Dr. Jiganti and Dr. Jensen agreed with Dr. Johnson that the combination of
24 Mr. Williams's weight and the left limp the claimant's knee injury created resulted in his
25 development of plantar fasciitis. As Mr. Williams's attending physicians, the opinions of Dr. Jensen
26 and Dr. Jiganti were entitled to special consideration in the absence of good cause for giving the
27 opinions less consideration. *Spalding v. Department of Labor & Indus.*, 29 Wn.2d 115 (1947).

28 Dr. Jensen is peer-certified in internal medicine. Dr. Johnson and Dr. Jiganti are both
29 peer-certified as orthopedic surgeons. No evidence in the record suggested that those physicians
30 were unqualified to offer expert opinions regarding the cause of plantar fasciitis, either generally or
31 in this case.

32 Dr. McCollum's stated reason for his opinion that the claimant's industrial injury was not a
proximate cause of Mr. Williams's foot condition was incomplete and unpersuasive. From the
record, it appeared that Dr. McCollum was less than intimately familiar with Mr. Williams's medical

1 records. His testimony that a limp could not be a cause of plantar fasciitis was conclusory and
2 unconvincing.

3 The Department should be required to accept responsibility for Mr. Williams's plantar fasciitis
4 condition.

5 *Degenerative Joint Disease of the Left Knee*

6 The evidence established that Mr. Williams already had degenerative changes in portions of
7 his left knee before he was injured on October 3, 1997. The record was equally clear that the
8 claimant had never experienced any symptoms of that condition before he was injured at Quad C.
9 He demonstrated medical findings that the condition became symptomatic after the laundry cart
10 struck him during the course of his work.

11 Mr. Williams's weight probably caused the degenerative condition. It is well established in
12 our law, however, that aggravation initiated by an industrial injury which morphs an asymptomatic
13 condition into a symptomatic and disabling one requires that the Department accept responsibility
14 for the worsening under the worker's claim. *Miller v. Department of Labor & Indus.*, 200 Wash. 674
15 (1939).

16 Here, the testimony of Mr. Williams's attending physicians and of Dr. Johnson produced a
17 preponderance of the persuasive evidence. The Department should accept responsibility for
18 Mr. Williams's left knee degenerative joint disease.

19 *Morbid Obesity*

20 Morbid obesity is: "[T]he condition of weighing two or three, or more, times the ideal weight;
21 so called because it is associated with many serious and life threatening disorders" *Dorland's*
22 *Illustrated Medical Dictionary* 1251 (29th ed. 2000).

23 Mr. Williams was obese before he was injured at Quad C. He became morbidly obese
24 afterwards.

25 In *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972), our Supreme Court
26 said:

27 Initially we note that the provisions of the workmen's compensation act
28 are not limited in their benefits to persons who are completely free from
29 disease or physical or mental abnormalities. If the injury complained of
30 is the proximate cause of the disability for which compensation is
31 sought, the previous physical condition of the workman is immaterial
32 and recovery may be had for the full disability, independent of any
physical or congenital weakness. The theory upon which this principle
is founded is that the workman's prior physical condition is not deemed

1 the cause of the injury, but merely a condition upon which the real cause
2 operated.

3 *Fochtman*, at 291.

4 It is also important to understand that an industrial injury or occupational disease and its
5 sequelae need not be the only cause of a disabling medical condition in order for the Department to
6 take responsibility for the condition. The injury or disease need only be a proximate cause of the
7 condition. See WPI 155.06.

8 In this appeal, Mr. Williams attributed his significant weight gain to the inactivity imposed
9 upon him by his left knee injury. Both of the claimant's attending physicians concurred with that
10 assessment.

11 Dr. McCollum's rejoinder that because thousands of people who have knee surgeries do not
12 gain weight, Mr. Williams's weight gain was probably not related to his left knee injury was
13 dismissive in nature and was unpersuasive.

14 In view of his weight as of October 3, 1997, it may well be that the claimant's industrial injury
15 was not the only cause of his now life-threatening weight. Nevertheless, a majority of the
16 convincing evidence established that Mr. Williams's industrial injury was more probably than not a
17 proximate cause of the claimant's profound weight gain. The Department should accept
18 responsibility for Mr. Williams's morbid obesity under the claim that is here at issue.

19 The Need for Further Proper and Necessary Treatment

20 RCW 51.36.010 guarantees workers that they are entitled to proper and necessary medical
21 or surgical treatment for their occupational injuries or diseases. Moreover, in appeals in which the
22 validity of a worker's claim is not itself, at issue, our Legislature and our Supreme Court have
23 mandated that the Industrial Insurance Act be liberally construed, with doubts resolved in favor of
24 the injured worker. RCW 51.12.010; *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467
25 (1987). Liberal construction of the Act is especially appropriate when a worker seeks approval for
26 treatment which is designed to allow him or her to as fully recover from an industrial injury or
27 occupational disease as is possible.

28 In *In re Susan Pleas*, BIIA Dec., 96 7931 (1998), this Board noted that parties sometimes
29 framed determinations of whether treatment was proper and necessary as palliative (unnecessary)
30 and curative (necessary). The Board declared that the dichotomy had no basis in statute, case law,
31 or regulation. Rather, the Board said, "treatment that improves functioning, even if it does not
32 improve the underlying pathology" (*Pleas*, at 8) is rehabilitative and is thus medically necessary
within the meaning of WAC 296-20-01002.

1 The Synvisc injection that both Dr. Johnson and Dr. Jiganti, who are orthopedic surgeons,
2 recommended that Mr. Williams undergo to treat his left knee condition will, Dr. Jiganti said, not
3 cure the claimant's underlying condition. But the evidence made clear that the injection is designed
4 to improve the claimant's ability to function. As such a measure, the proposed treatment is
5 necessary and proper within the meaning of the Industrial Insurance Act.

6 Mr. Williams's obesity is now life threatening. Dr. Johnson and Dr. Jensen both
7 recommended that the claimant undergo gastric bypass surgery to redress the condition.
8 Dr. McCollum did not address that recommendation, since he merely viewed the claimant's weight
9 as not proximately caused by his industrial injury. That is an opinion which has been rejected in
10 this Proposed Decision and Order.

11 The Department should keep Mr. Williams's claim open for proper and necessary medical or
12 surgical treatment for his left knee condition and his morbid obesity.

13 Mr. Williams's Ability to Work

14 The Industrial Insurance Act does not specifically define temporary total disability. The
15 phrase has meaning only when one understands how the following principles act together. In
16 RCW 51.08.160, permanent total disability is defined, in relevant part, as: "[Any] condition
17 permanently incapacitating the worker from performing any work at any gainful occupation." The
18 Washington Supreme Court has clarified that permanent inability to obtain employment, proximately
19 caused by an industrial injury or occupational disease, also constitutes permanent total disability.
20 *Leeper v. Department of Labor & Indus.*, 123 Wn.2d 803 (1994). The only distinction between
21 permanent and temporary total disability is the duration of the disability. *Bonko v. Department of*
22 *Labor & Indus.*, 2 Wn. App. 22 (1970).

23 Mr. Williams has a high school education but his relevant work experience has all been as a
24 janitor. The claimant testified that the work required him to stand or walk for seven hours in an
25 eight-hour day.

26 Based on Mr. Williams's testimony and the testimony of his attending physicians, the record
27 was persuasive that the claimant's left knee injury, standing by itself, made it impossible for the
28 claimant to perform janitorial work at all times on and after January 16, 2001. Dr. Jensen declared
29 that Mr. Williams was unable to stand and walk for an eight-hour workday. The worker's torn
30 medial meniscus and degenerative joint disease in his left knee probably reduced his physical
31 capacities to performance of sedentary activities. No evidence in the record suggested that

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1 Mr. Williams's education and prior employment gave him skills that were transferable to sedentary
2 work.

3 Mr. Williams produced a majority of the convincing and credible evidence to establish that as
4 a result of medical conditions his October 3, 1997, industrial injury proximately caused, between
5 January 16, 2001, and October 21, 2004, the claimant was probably unable to obtain and perform
6 any form of gainful activity on a full-time reasonably continuous basis.

7 SUMMARY

8 The October 21, 2004, order of the Department of Labor and Industries is incorrect. It
9 should be reversed and this matter should be remanded to the Department, with directions to issue
10 an order which accepts responsibility under the claim for conditions described as morbid obesity,
11 degenerative joint disease of the left knee, and plantar fasciitis of the left foot and denies
12 responsibility for conditions described as depression and left tarsal tunnel syndrome, which pays
13 time-loss compensation to the claimant for the period from January 16, 2001, through October 21,
14 2004, and which declares that the claim remains open for further proper and necessary medical or
15 surgical treatment. The Department shall thereafter take such other and further action as the law
16 and the facts dictate.

17 FINDINGS OF FACT

- 18 1. On October 16, 1997, Sammie L. Williams filed an Application for
19 Benefits with the Department of Labor and Industries, alleging that he
20 had been injured on October 3, 1997, during the course of his
21 employment with Chunyk & Conley/Quad C (hereafter Quad C). The
22 Department allowed the claim for benefits on February 6, 1998. On
23 January 17, 2001, the Department ordered Quad C to pay time-loss
24 compensation to Mr. Williams for the period of time from May 27, 2000,
25 through January 16, 2001, and to continue such payments as indicated
26 by the law and the facts. On January 25, 2001, the Department ordered
27 Quad C to pay Mr. Williams the sum of \$1,325.61 in addition to other
28 benefits paid under the claim. Quad C protested the January 17, 2001,
29 order on January 24, 2001, and it protested the January 25, 2001, order
30 on February 5, 2001. However, the Department affirmed the provisions
31 of the January 17, 2001, order on February 22, 2001, and it affirmed the
32 provisions of the January 25, 2001, order on February 23, 2001.

On February 27, 2001, Quad C filed a Notice of Appeal from the
February 22, 2001, order with the Board of Industrial Insurance Appeals.
The Board assigned Docket No. 01 12389 to the appeal. The Board
denied the appeal on March 29, 2001.

1 On February 27, 2001, Quad C filed a Notice of Appeal from the
2 February 23, 2001, order with the Board. The Board assigned Docket
3 No. 01 12390 to the appeal, granted the appeal on March 29, 2001, and
4 ordered that further proceedings be held in the matter. On March 6,
5 2001, the Department issued an order correcting and superseding its
6 February 22, 2001, order and affirming the provisions of its January 17,
7 2001, order. On May 4, 2001, Quad C mailed a Notice of Appeal of the
8 March 6, 2001, order to the Board. The Board received the appeal on
9 May 7, 2001. After the Board extended the time within which it had to
10 consider the appeal on June 6, 2001, and June 18, 2001, the Board
11 granted the appeal on June 20, 2001. It assigned Docket No. 01 14898
12 to the appeal and ordered that further proceedings be held in the matter.

13 On March 4, 2002, a Proposed Decision and Order was issued in the
14 appeals in which both the February 23, 2001, and March 6, 2001,
15 Department orders were affirmed. Quad C filed a Petition for Review
16 from the Proposed Decision and Order with the Board on April 30, 2002.
17 On May 16, 2002, the Board issued an Order Denying Petition for
18 Review.

19 On March 9, 2004, the Department issued an order, which closed
20 Mr. Williams's claim with time-loss compensation as paid through
21 May 26, 2000, and with compensation for permanent partial disability
22 equal to 2.00 percent of the amputation value of the claimant's left leg
23 above the knee joint with a short thigh stump (3 inches or less below the
24 tuberosity of ischium). The claimant protested the order on May 6,
25 2004. On October 21, 2004, the Department corrected the March 9,
26 2004, order and issued an order, which closed Mr. Williams's claim with
27 time-loss compensation as paid through January 15, 2001, and with
28 compensation for permanent partial disability equal to 2.00 percent of
29 the amputation value of the claimant's left leg above the knee joint with a
30 short thigh stump (3 inches or less below the tuberosity of ischium), less
31 the payment previously made for permanent partial disability. On
32 December 8, 2004, Mr. Williams filed a Notice of Appeal with this Board
from the October 21, 2004, Department order. This Board assigned
Docket No. 04 26096 to the appeal and extended the time within which it
had to consider the appeal on January 7, 2005, and January 18, 2005.
On January 21, 2005, the Board granted the appeal and ordered that
further proceedings be held in the matter.

2. Mr. Williams was born on October 8, 1958. He was 46 years old as of October 21, 2004. As of October 3, 1997, Mr. Williams was 5 feet 11 inches tall and he weighed 290 pounds.
3. The claimant's only relevant work experience has been as a janitor. As a janitor, Mr. Williams had to be able to stand and walk for seven hours in an eight-hour workday. His duties included mopping, waxing, stripping, and buffing floors.

- 1
2 4. Prior to October 3, 1997, Mr. Williams had degenerative joint disease in
3 his left knee, which was not symptomatic or disabling.
- 4 5. On October 3, 1997, a steel laundry car, which was located on a ramp,
5 rolled against Mr. Williams's left knee and he twisted the knee during the
6 incident. He immediately experienced left knee pain.
- 7 6. Mr. Williams's October 3, 1997, industrial injury proximately caused a
8 left knee contusion, left knee sprain/strain, a tear of the left medial
9 meniscus, aggravation and rapid progression of the pre-existing
10 degenerative joint disease in his left knee, and plantar fasciitis of the left
11 foot. The industrial injury proximately caused the degenerative joint
12 disease to become symptomatic and disabling. The reduction in
13 Mr. Williams's ability to be active, proximately caused by his left knee
14 injury, was a proximate cause of the claimant's significant weight gain to
15 the extent that by October 21, 2004, he was morbidly obese.
- 16 7. The claimant's October 3, 1997, industrial injury did not proximately
17 cause Mr. Williams to develop disabling medical conditions described as
18 depression and left tarsal tunnel syndrome.
- 19 8. Between January 16, 2001, and October 21, 2004, the conditions
20 proximately caused by Mr. Williams's industrial injury caused him to be
21 physically limited to performing only sedentary occupational activities.
- 22 9. Between January 16, 2001, and October 21, 2004, in view of his age,
23 education, work experience, and the conditions his industrial injury
24 proximately caused, Mr. Williams was unable to obtain and perform any
25 form of gainful activity on a reasonably, full-time basis in the competitive
26 labor market.
- 27 10. The conditions the claimant's October 3, 1997, industrial injury
28 proximately caused, particularly his left knee condition and his morbid
29 obesity, were not medically fixed and stable and the conditions required
30 further proper and necessary medical or surgical treatment.
- 31 11. Because as of October 21, 2004, Mr. Williams required further proper
32 and necessary treatment for conditions his industrial injury proximately
caused, as of that date, he did not have more permanent partial
disability than the Department indicated in its October 21, 2004, order,
nor had his industrial injury proximately caused him to be rendered
permanently unable to obtain and perform any form of gainful activity on
a reasonably, full-time basis in the competitive labor market.

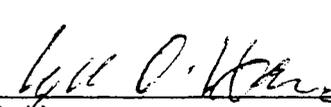
CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and subject matter of this appeal.
2. As of October 21, 2004, the conditions Mr. Williams's October 3, 1997, industrial injury proximately caused required further proper and necessary medical or surgical treatment, as that term is used in RCW 51.36.010.
3. Between January 16, 2001, and October 21, 2004, the conditions proximately caused by Mr. Williams's industrial injury rendered him temporarily totally disabled, as that term is used in RCW 51.32.090.
4. The October 21, 2004, Department order is incorrect and is reversed. This matter is remanded to the Department with directions to issue an order that denies responsibility under the claim for conditions described as left tarsal tunnel syndrome and depression; accepts responsibility under the claim for conditions described as aggravation of degenerative joint disease of the left knee, left plantar fasciitis, and morbid obesity; pays Mr. Williams time-loss compensation for the inclusive period of time from January 16, 2001, through October 21, 2004; and declares that the claim remains open for further proper and necessary medical or surgical treatment. The Department should thereafter take such other and further action as the law and the facts dictate.

It is so ORDERED.

OCT 19 2005

DATED: _____



Lyle O. Hanson
Industrial Appeals Judge
Board of Industrial Insurance Appeals

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

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Dated at Olympia, Washington 10/19/2005
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: 
DAVID E. THREEDY
Executive Secretary

In re: SAMMIE L WILLIAMS
Docket No. 04 26096

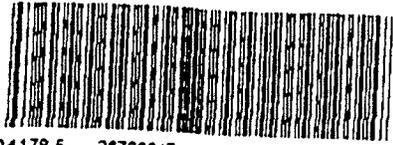
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INSTRUCTION NO. 15

You are not bound by the attending physician's opinions. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that doctor, the reasons given for the opinion, the sources of the doctor's information, together with the factors already given you for evaluating the testimony of any other witnesses.

INSTRUCTION NO. 14

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve such testimony. It does require that you give any such testimony careful thought in your deliberations.



06-2-04178-5 26796647 VRD 01-16-07



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

12	CHUNYK & CONLEY/QUAD C)	Case No. 06-2-04178-5
13)	
14	Plaintiffs,)	VERDICT FORM
15)	
16	v.)	
17	SAMMIE L. WILLIAMS,)	
18)	
19	Defendant.)	

QUESTION NO. 1: Was the Board of Industrial Insurance Appeals correct that Sammie Williams' industrial injury of October 3, 1997 was a proximate cause of the aggravation and rapid progression of his degenerative joint disease in his left knee to the extent that it was symptomatic and disabling as of October 21, 2004.?

Answer: No (Yes or No)

1 **QUESTION NO. 2:** Was the Board of Industrial Insurance Appeals correct that
2 Sammie Williams' industrial injury of October 3, 1997, was a proximate cause of a
3 rapid progression of plantar fasciitis in his left foot as of October 21, 2004?

4 Answer: No (Yes or No)

5 **QUESTION NO. 3:** Was the Board of Industrial Insurance Appeals correct that
6 Sammie Williams' industrial injury of October 3, 1997 was a proximate cause of
7 his significant weight gain to the extent that by October 21, 2004, he was
8 morbidly obese?

9 Answer: No (Yes or No)

10 **QUESTION NO. 4:** Was the Board of Industrial Insurance Appeals correct in
11 finding that between January 16, 2001, and October 21, 2004, in view of his age,
12 education, work experience, and the conditions proximately caused by his October
13 3, 1997 industrial injury, Sammie Williams was unable to obtain and perform any
14 form of gainful activity on a reasonably, full-time basis in the competitive labor
15 market?

16 Answer: No (Yes or No)

17 **QUESTION NO. 5:** Was the Board of Industrial Insurance Appeals correct in
18 finding that as of October 21, 2004, Sammie Williams was entitled to further
19 necessary and proper medical treatment for the conditions proximately caused by
20 his October 3, 1997 industrial injury?

21 Answer: No (Yes or No)

22 *If your answer is "yes", answer no further questions. If your answer is "No",*
23 *please answer Question No. 7.*
24
25

1 **QUESTION NO. 6:** Was the Board of Industrial Insurance Appeals correct that,
2 as of October 21, 2004, Sammie Williams was not permanently totally disabled as
3 a result of the conditions proximately caused by the industrial injury of October 3,
1997?

4 Answer: yes (Yes or No)

5 *If your answer is "No", then answer no further questions. If your answer is*
6 *"Yes", then proceed to Question No. 8.*

7
8 **QUESTION NO. 7:** Was the Board of Industrial Insurance Appeals correct that,
9 as of October 21, 2004, Sammie Williams was not permanently and partially
10 disabled as a result of the conditions proximately caused by the industrial injury of
October 3, 1997 for the following conditions?

11 yes Left Knee (Yes or No)
12 If your answer is "No", what is Sammie Williams' percentage of
13 disability? (Cannot be less than 2% and nor greater than 18%)

14 DATED THIS 9th day of January, 2007,

15
16 
17 Presiding Juror

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the _____ day of October, 2007, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

D. Jeffrey Burnham
Johnson Graffe Keay
Moniz & Wick LLP
925 4th Ave., Suite 2300
Seattle, WA 98104-1145

DATED this _____ day of October, 2007.

LYNN M. ADLER, Secretary

CERTIFICATE OF MAILING

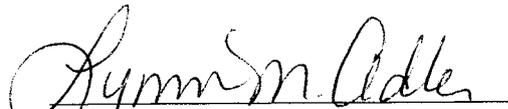
SIGNED at Tacoma, Washington.

FILED BY 

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 22nd day of October, 2007, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

D. Jeffrey Burnham
Johnson Graffe Keay
Moniz & Wick LLP
925 4th Ave., Suite 2300
Seattle, WA 98104-1145

DATED this 22nd day of October, 2007.


LYNN M. ADLER, Secretary