

No.: 38561-9-II

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**COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II**

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RAYONIER, INC., Appellant,

v.

STEVEN R. HULETT, Respondent.

*SAW*  
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STATE OF WASHINGTON  
JULY 1 2009

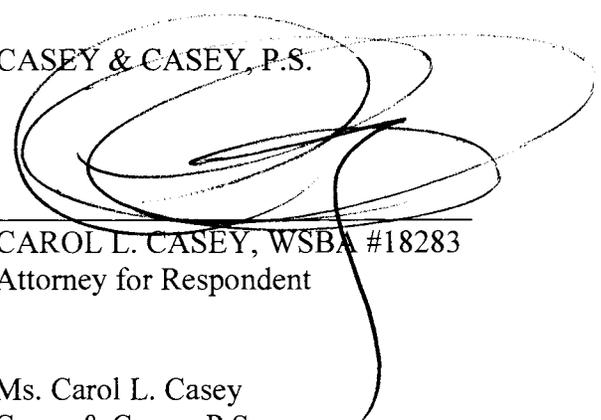
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**RESPONDENT'S BRIEF**

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CASEY & CASEY, P.S.

  
CAROL L. CASEY, WSBA #18283  
Attorney for Respondent

Ms. Carol L. Casey  
Casey & Casey, P.S.  
Attorneys at Law  
219 Prospect Ave.  
Port Orchard, WA 98366  
(360) 876-4123

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## **I. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

A. Did the Trial Court fail to apply the correct burden of proof when:

- The Trial Court, pursuant to RCW 51.52.115, held the trial de novo instead of using an appellate standard of review
- No evidence supports the argument that the Trial Court failed to use the correct burden of proof
- The Respondent met his burden of production by presenting a prima facie case
- The Trial Court found the Respondent met the burden of persuasion?

B. Did the Trial Court correctly issue a decision on the merits when:

- Medical evidence supports the Trial Court's determinations and the conclusions of law therefrom
- Vocational evidence supports the Trial Court's determinations and the conclusions of law flow therefrom
- Lay evidence supports the Trial Court's determinations and the conclusions of law flows therefrom?

C. Did the Trial Court apply the correct legal principles when:

- There is no basis to believe the Trial Court used any incorrect legal principle
- The decision of the Trial Court may be sustained on any basis and ample reasons exist supporting the Court's decision
- The Trial Court applied the lighting up doctrine which has long been the law applied in worker's compensation proceedings
- The Trial Court found no factual basis supporting the existence of "permanent partial disability" prior to the 1996 industrial injury so there was no reason to segregate pre-existing PPD?

## **II. STATEMENT OF THE CASE**

### **A. Factual History**

Steven Hulett was born in 1944, has a high school education and went to college immediately after high school to learn to read blueprints and play basketball. (BR Hulett 5).

Hulett began employment at Rayonier in 1963; he eventually transferred to maintenance as a pipe insulator. This was the job of injury and is in the medium to heavy physical demand. (BR Hoppe, p. 89).

The industrial injury occurred in February 1996. Prior to the industrial injury Steven Hulett was physically active, able to work without limitation or restriction, able to regularly put in overtime at Rayonier and able to do all home activities without restriction or limitation. He was not a person who complained of headaches, neck problems, or other difficulties. (E. Hulett, pp. 17-18). There is no suggestion that he was under any active or regular treatment.

This all changed with the industrial injury of February 22, 1996. Hulett was under some timbers at work when he stood and hit his head on a pipe. All Hulett remembers of the injury is a loud noise. He has no recollection of even where the injury occurred – someone else had to tell him. (BR Hulett, p. 43).

Since February 1996 Hulett has had continuing and ongoing problems with his neck, headaches, dizziness, cognitive difficulties and fatigability. The headaches are incapacitating and require Hulett to sit in a chair in a dark room. If they escalate they cause vomiting. Since the injury, family members verify that Hulett has speech difficulties, significant memory problems, and has “seizure” activity which seems to be associated with severe headaches and is often accompanied by a loss of bowel function. (BR Hulett, p. 45 (4/05), p. 11 (3/05), E. Hulett, pp. 22-24).

After the industrial injury most doctors refused to release Hulett to his former work. He was assigned part-time light-duty work but he was unable to sustain that. (BR Hulett 4/05 p. 49).

Dr. Oakes, Hulett's treating physician since the 1980's directed treatment under the claim. Symptoms persisted so in 1999 Hulett was sent to the Virginia Mason Neurological Rehabilitation Clinic. The 14 week program was part inpatient and part outpatient program. He was taught to keep a notebook of his daily activities. His speech pathology and stuttering were addressed. He participated in physical therapy, occupational therapy, group counseling, psychological services and vocational rehabilitation efforts. At the clinic he was prescribed Dilantin, Naprelan, Midrin and Fiorinal – to treat headaches which caused Hulett to become “nonfunctional.” Ritalin was used to help Hulett with cognitive tasks at the Clinic. He was instructed on how to “pace” himself in an attempt to avoid fatiguing. All measures were described as “coping” mechanisms; none of the measures were intended as “curative”. (BR Hulett 4/05, pp. 46-47) (BR Weinstein, pp. 66-67, 70).

Dr. Fordyce describes Hulett as not functioning well at the Virginia Mason Clinic. The Clinic records demonstrate Hulett had problems coping, difficulty with pacing, became overwhelmed and had an increase in anxiety. (BR Fordyce, pp. 29-30).

After release from the Virginia Mason Clinic in May 1999 Hulett and vocational counselor Camarda met. A description of the physical demands for “horse boarder” was prepared. The job required lifting up to 90 pounds – something that Hulett felt entirely capable of doing. Based on objective testing done at the Virginia Mason Clinic, Hulett’s abilities to lift are somewhere from 24 pounds to 50 pounds (depending on where the lift is). (BR Hoppe, p. 39). The job analysis was modified and Hulett was released to try to perform the modified version of horse boarding.

The horse boarding project required significant effort on the part of the Hulett’s. All evidence demonstrates that the Hulett’s were motivated and absolutely excited about the prospect of Steve Hulett’s possible employment. The Hulett’s worked with the county to obtain permits, easements, variances for a right of way. They went through legal proceedings to vacate their own right of way to obtain a setback and obtained agreements from neighbors for this process. They graveled their own roads, set up formal parking spaces to include handicapped designations, got the property cleaned up, installed additional fencing and gates, covered a stream, built an additional barn, had an existing barn rewired commercially, developed promotional material for the farm and spent a significant amount of their own funds on the project. Any “paperwork” and accounting involved were all done by Mrs. Hulett. (BR

Hulett 3/05, pp. 13-14) (BR E. Hulett, pp. 25, 27, 31). The Hulett's expended significant personal money and time to make this work.

Unfortunately Mr. Hulett was unable to keep up with the work. He has good days and he has bad days. On a bad day he requires help with even the most basic of chores. Several months after Hulett left the Virginia Mason Clinic medical records demonstrated a deterioration in function. (BR Fordyce, p. 14). Mr. Hulett found himself having frequent accidents and memory deficits while trying to make self-employment as a horse boarder a viable job. For example, he may hook up safety chains on the trailer and forget to hook up the ball – finding out the error only after he drove off. He left gates and stall doors open – the horses got out several times because of this. He chainsawed his knee. He would forget if he fed the horses or gave them medications. He lost a a horse. (BR E. Hulett pp. 29-30). He had ongoing trouble with the headaches which, at times, are incapacitating. (BR Hulett 4/05, pp. 52-53).

Hulett also found himself having “seizures”. (By terming these “seizures” we do not mean to medically label them – just to give them a name so that discussion may be had surrounding it.) With a seizure he might get stuck or might have a dizzy spell and fall. The falls are real; they have caused a broken rib, a split nose, cuts, and are often

accompanied by bowel problems which require a change of clothing. (BR Hulett 4/05, pp. 55-56, 59).

The business venture in self-employment as a horse boarder was called “Tenderfoot Farms”. It opened April 2000. In April 2000 Hulett’s daughter and son-in-law moved from Arizona to Washington State for the specific purpose of helping Hulett with Tenderfoot Farms. Mrs. Hulett and other family members helped with the chores spending 4-5 hours a day assisting Mr. Hulett. When it became apparent just how much help Steve Hulett needed with the work activities, the decision was made to have his daughter and son-in-law to move onto the property to assume more responsibility for running of the business. The “good” days where Hulett was active began to get fewer and further between.

While in the process of moving the mobile home to the Tenderfoot Farms there was an accident and the son-in-law died. Steve Hulett’s wife is employed outside the home and she could not keep up her own job and the horse boarding business concurrently. (BR Hulett 4/05, p. 59) (BR Hulett 3/05 pp.14-17, 21, 23) (BR E. Hulett, pp. 27-39). The business folded.

Even prior to the son-in-law’s death – when Hulett had help 4 – 5 hours a day on the farm – the business was not a success. Tenderfoot Farms did not make money despite the best efforts of everyone involved.

By April 2001 all customers had been contacted and asked to remove their horses. No horses were boarded for pay after May 2001. (BR E. Hulett, p. 27) (BR Camarda, pp. 136, 151-152).

Around October 3, 2000, vocational VRC Camarda contacted Dr. Weinstein from the Head Injury Clinic to see if medical modifications for the horse boarder position would be medically authorized to help Hulett with the position. Dr. Weinstein approved a number of modifications deeming them appropriate and medically reasonable. (BR Weinstein, pp. 81-82).

Even prior to the October 2000 medical modification to the job, job modifications had already been developed for Hulett. L&I approves of job modifications only up to \$5000 so VRC Camarda and Hulett paired down the list of modifications so it did not exceed the \$5000 cap. (BR Camarda, pp. 125).

Other than the attempt at self-employment, Hulett has had no work activity for any period addressed by the Court.

### **B. Expert Testimony Summary**

Thirteen “experts” testified in this factually complex case. Three of those experts are vocational witnesses. The remaining ten medical experts include an ophthalmologist, two physiatrists, one psychiatrist, one

psychologist, one neuro-psychologist, one orthopedic surgeon, two family practitioners and one neurologist.

The ophthalmologist, Dr. Bensinger, testified Steven Hulett had a pre-existing optic neuropathy but the optic neuropathy had never caused any limitations or employment nor did it cause any permanent impairment. (BR Bensinger, p. 106).

Dr. Weinstein is a physiatrist who treated Mr. Hulett in late 2008 and for periods up to September 7, 1999. Dr. Weinstein identified Hulett's problem as an "umbrella diagnosis" of post concussion syndrome - a form of mild traumatic brain injury. Dr. Weinstein testified that regardless of the medical label applied to Hulett, Hulett's problems "were quite real and quite debilitating" to Hulett. Dr. Weinstein noted that in its worst form, 5 -15% of those with a mild traumatic brain injury (concussion) simply do not improve and will continue with symptoms. The headaches, requiring four separate medications during the Virginia Mason Clinic, were caused by the 1996 injury in Dr. Weinstein's judgment. (BR Weinstein, pp. 60-62, 67, 70-71).

Dr. Bzrusek, a physiatrist seeing Hulett in June 2005, diagnosed a cerebral contusion with "obvious" continued residuals of a closed head injury, post concussive syndrome, depression, and neck strain with aggravation of pre-existing arthritis. All conditions were caused by the

injury. (BR Brzusek, pp. 16-18). Dr. Brzusek is board certified, is on the editorial board for the Journal of Musculoskeletal Medicine and for the Archives of Physical Medicine and Rehab, is an assistant clinical professor at the University of Washington School of Medicine (Dept. of Rehab medicine), past president of the Psychiatrists in Washington and was about to begin his term as president of the Independent Medical Examiners in Washington. Dr. Brzusek's opinion was that Hulett was totally and permanently disabled. (BR Brzusek, pp. 5-8, 18-19).

Dr. Carter is the psychiatrist who evaluated Hulett one time in 2004 at the request of the self-insured. Dr. Carter thought there were depressive symptoms but not actual depression. Dr. Carter based his opinion on the assessment of Drs. Green and Stump.

Dr. Fordyce is a psychologist who saw Mr. Hulett in July 1996 and looked at records in 2004. Dr. Fordyce's 1996 testing demonstrated mild depression/anxiety and somatic focus. Symptoms include constant headaches, forgetfulness, visual disturbances, fatigue, lack of stamina, word dysfunction and coordination problems. Dr. Fordyce diagnosed a mild concussion proximately caused by the industrial injury and felt that a mental health condition was permanently worsened by the effects of the industrial injury. He acknowledged that it is possible to have a mild traumatic head injury with protracted symptoms; this problem often has no

hard findings but still interferes with the individual's function. (BR Fordyce, pp. 5, 7, 11-12, 14, 28-29, 32, 46).

Jeffrey Powell is a neuro-psychologist who saw Mr. Hulett in 2004 at the employer's attorney's request. Dr. Powell offered no opinion on the neck, depression or anxiety as to how those could affect work.

Dr. Green is an orthopedic surgeon who saw Mr. Hulett in March 2004 (with Drs. Stump and Carter) at the employer's request. Dr. Green identified degenerative disc disease which caused physical limitations including no repetitive looking above head or working overhead and a limitation on the ability to regularly lift over 40 pounds based on age. Dr. Green felt that the neck problem (degenerative disc disease) had no relationship to the industrial injury and any condition from the injury had resolved within 6 – 8 weeks of February 1996. (BR Green, pp. 94-95, 107). Forty percent of Dr. Green's practice is IME's. (BR Green, p. 91).

Dr. Stump is a neurologist who saw Mr. Hulett in March 2004. Dr. Stump felt that all problems from the industrial injury had cleared 6 - 8 weeks after the injury. Fifty percent of Dr. Stump's practice involves IME's. (BR Stump, pp. 48, 50, 61, 78).

Dr. Earle's practice focuses on occupational medicine. Dr. Earle's 2004 exam revealed significant abnormal clinical findings including a straightening of the cervical lordosis, spasm in the neck, abnormal cervical

range of motion (confirmed with validity testing) and loss of two point discrimination in the left and right hands. Dr. Earle diagnosed post concussion syndrome, depression and a cervical strain with ongoing aggravation of the neck degenerative disc disease. These were more probably than not caused by the industrial injury. Dr. Earle identified physical limitations imposed as a result of the industrial injury.

Dr. Earle's limits on employability related to the neck were on lifting overhead work, ladder work, static positioning and unpredictable symptom flares. As a "whole" person, Dr. Earle thought physical activity should be limited to light-duty (not over 25 pounds). No job was identified by any witness fitting these limitations with Hulett's vocational skills. (BR Earle, pp. 5, 26, 30, 32, 34-36, 50 -51).

Dr. Oakes is the family practitioner who has seen and treated Mr. Hulett since the mid-1980's. Dr. Oakes noted that Mr. Hulett's problems are "complex" and the "working diagnosis" is post concussion syndrome. Dr. Oakes opinion was that Mr. Hulett was not capable of employment as a result of the effects of the industrial injury. (BR Oakes, pp. 11-12, 17).

Dr. Oakes began treatment of Mr. Hulett in 1980. Prior to the 1996 industrial injury, Dr. Oakes described Hulett as "highly functional" and a very good worker. In 1980 Dr. Oakes referred Hulett for an evaluation of irritable bowel syndrome; Hulett was worked up for the

persistent headaches and a lot of fatigability, spells (seizures) – “in essence he’s had a significant change in his ability to function since that accident.” (BR Oakes p. 9). Dr. Oakes describes spells that are hard to characterize but are of sufficient concern that seizure medication is prescribed to control them. Dr. Oakes treats Hulett for the physical effects of those spells – where Hulett falls and sustains physical injury. (BR Oakes pp. 8-11).

Dr. Oakes describes that part of the complexity of Hulett’s condition is that a head injury is often tied up with a variety of psychosocial issues. This can occur even with a seemingly minor head injury. (BR Oakes, pp. 12-14). Dr. Oakes describes Hulett as having had “a distinct change in his ability to function and work since the accident and I think it’s that change that’s most dramatic.” (BR Oakes, p. 15).

Dr. Oakes was asked:

“Q: So in your opinion, as far as regular gainful employment since at least July of 2000, is that something that he’s been capable of maintaining?”

A: I don’t think so.

Q: And is it because, in your opinion, of the effects of this industrial injury of 1996 on a more probable than not basis?

A: I do. Yes.” (BR Oakes, p. 17).

John Berg was called as a vocational witness on behalf of the claimant. If Vocational Counselor Berg used the information provided by Dr. Brzusek, Mr. Hulett is totally disabled. If Vocational Counselor Berg used the physical limitations provided by Dr. Oakes, Mr. Hulett is totally disabled. If Vocational Counselor Berg used the physical limitations objectively tested by Virginia Mason Clinic, Mr. Hulett is totally disabled.

Vocational counselor Camarda and Hoppe felt Hulett was employable using restrictions from other practitioners or by claiming “Tenderfoot Farms” was a success.

### C. Procedural History

The fact of the industrial injury of February 22, 1996 cannot be disputed by either party. (Finding of Fact 1). On May 27, 2004 the Department of Labor & Industries issued an order requiring the self-insured pay of loss of earning power under the claim effective July 1, 2000. Loss of earning power is payable when an industrial injury limits the individual’s employability. Both the employer and the worker challenged the Department order of May 27, 2004.

On January 24, 2005 the Department issued an order closing the claim. The worker challenged the claim closure.

The appeals were consolidated before the Board of Industrial Insurance Appeals and resulted in a Proposed Decision & Order which

found the injury caused a post concussion syndrome, depression, cervical strain with aggravation of degenerative disc disease and found Hulett in need of treatment as of January 2005 and not employable from July 2000 to January 2005 because of the industrial injury.

Both parties petitioned for review of the decision of the Industrial Appeals Judge. At no time did the employer challenge whether Hulett presented a prima facie case.

The Board accepted review and found that the industrial injury caused a cervical strain with aggravation of cervical disc disease but that Hulett was employable. On appeal to Superior Court, the Trial Court issued its determination finding Steve Hulett to be totally and permanently disabled.

### **III. ARGUMENT**

#### **A. Burden of Proof was Properly Applied**

There is no factual support for Rayonier's chief allegation – that the Trial Court applied an erroneous standard of review.

In an appeal from a Department of Labor & Industries decision, evidence and testimony is presented before the Board. An Industrial Appeals Judge issues a Proposed Decision & Order. Upon a timely request, the Board may review the case. In its decision the Board is charged with issuing “Findings and Conclusions as to each contested

issued of fact and law.” RCW 51.52.100, RCW 51.52.104, RCW 51.52.106.

An aggrieved party challenging the decision of the Board must appeal to Superior Court. The procedure and standard of review in Superior Court are statutorily prescribed in RCW 51.52.115. The statute provides in relevant portion:

“Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo . . . and all court proceedings under or pursuant to this title defining the decisions of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same.” RCW 51.52.115 (partial recitation).

The trier of fact in Superior Court, be it jury judge, is reviewing the decision of the Board. The review is appellate only in the sense that the evidence is the same as presented at the Board and objections or arguments are limited to those preserved at the Board. The standard of review is the same as in most civil proceedings – the Plaintiff has the burden of proof (to bring forth a prima facie case) after which the burden is more properly characterized as a burden of persuasion. Harrison Memorial Hosp. v. Gagnon, 110 Wn.App. 476, 40P.3d 1221 (2002).

If the case is a jury trial, the jurors are provided, through instruction, the “material” findings of the Board. The jurors are instructed

that the Board's findings are presumed correct and that the presumption is rebuttable. WPI 5<sup>th</sup> Ed., 155.02, 155.03. Whether the case is tried to a jury or to the bench the burden of proof remains the same. There is "no limitation on the intensity of its review of that record" whether the finder of fact be judge or jury. Garrett Freightlines v. Dept. of Labor & Indust., 45 Wn.App. 335 (1986).

Only where the finder of fact cannot make a determination on the facts is it justified on deferring to the Board.

Where the issue is a question of law, there is no presumption of correctness of the Board. N.A. Degerstrom, Inc. v. Dept. of Labor & Indust., 25 Wn.App. 97, 102, 604 P.2d 1337, reviewed on grounds sub nom Westinghouse Elec. Corp. v. Dept. of Labor & Indust., 94 Wn.2d 875, 621 P.2d 147 (1980).

When the Trial Court issues a decision following a trial de novo, an appeal may lie as in any other civil proceeding. RCW 51.52.140. However, the review by the Court of Appeals is constitutionally limited to determining whether there is "substantial evidence to support the Trial Court's findings." Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959); Benedict v. Dept. of Labor & Indust., 63 Wn.2d 12, 385 P.2d 380. Substantial evidence is the amount of evidence sufficient to persuade a fair-minded person of the truth of the declared

premise. Young v. Dept. of Labor & Indust., 81 Wn.App. 123,128, 913 P.2d 402 (rev.den. 130 Wn.2d 1009, 928 P.2d 414 (1996). In a review of the Trial Court’s decision, the evidence is to be viewed in the light more favorable to the prevailing party. Harrison Mem’l Hosp. v. Gagnon, 110 Wn.App. 475, 485, 40 P.2d 1221, rev. den., 147 Wn.2d 1011, 56 P.3d 565 (2002).

The Respondent argues that if there is “substantial evidence” to support the Board’s findings then the Board determination is to be upheld. Respondent cites to Springstun v. Wright Schuchart, Inc., 70 Wn.App. 83, 88, 851 P.2d 755 (1993) for support. Springstun involved a compromise of a worker’s compensation lien for which the lien holder has sole statutory discretion to compromise if specified factors are considered. RCW 51.24.060(3). In Springstun, the issue was not factual – it was solely legal – and the review was based on an abuse of discretion standard; these are not issues present in Hulett.

Respondent alleges “agency interpretation” is to be granted deference. In Hulett, the Board made no interpretation of the law, the Board decision in Hulett is based solely upon fact. There is no support for the idea that an appeal from a factual determination of the Board (or the Department) is afforded deference. Even as to a question of law Washington Courts do not cede jurisdiction to the Board or Department

“Both history and uncontradicted authority make clear that it is emphatically the province and duty of the judicial branch to say what the law is” and “to determine the purpose and meaning of statutes . . .”) Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (cited in Cockle v. Dept. of Labor & Indust., 142 Wn.2d 801, 16 P.3d 583 (2001)).

Respondent seems to suggest that the burden of proof “is at all times with the worker.” (Resp. Br. p. 38). Not true. At the trial court level the burden is on the appealing party. RCW 51.52.115. When the review is from the trial court’s decision, the burden of proof is on the appealing party. RCW 51.52.140.

The idea that the Trial Court refused to engage in a trial de novo is made up of wholecloth. There is simply no factual support for the claim. At no point does the Trial Court rely on the IAJ’s findings and at no time was it suggested, argued or implied that the IAJ’s findings were to be presumed correct. Reference to the phrase coined by the IAJ to describe the Hulett’s life after the 1996 injury as “a living nightmare” accurately summarizes the Hulett’s experience and attributing to the IAJ avoids a charge of plagiarism.

In Stratton v. Dept. of Labor & Indust. 1 Wn.App. 77, 459 P.2d 651 (1969) the Court explained that in a jury case only the Board’s

material findings of fact are given to a jury. This is appropriate because the jury is to presume the board's material facts correct. If a jury presumed an IAJ's finding correct and the board's finding correct – the two may be irreconcilable and “confusion would reign.” In Hulett there was no presumption the IAJ was correct – in fact, the Trial Court's conclusions are inconsistent with the IAJ's findings concerning the need for treatment and characterization of the total disability as temporary instead of permanent.

**B. & C. The Findings of Fact are Supported by Evidence and Represent a Correct Application of the Law**

Findings of fact which represent an assessment of credibility of a witness's testimony are not an appropriate subject for review at the Appellate Court level. See State v. Vazquez, 66 Wn.App. 573, 832 P.2d 883 (1992). Credibility determinations are for the trier of the fact and should not be reversed on appeal. State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990). It is the trier of fact who resolves conflicting testimony and weighs the persuasiveness of the evidence. Davis v. Dept. of Labor & Indust., 94 Wn.2d 119, 124, 615 P.2d 1279 (1980).

The Trial Court findings may be sustained on any theory within the proof presented even if the trial court did not consider it. Homemakers Upjohn v. Russell, 33 Wn.App. 777, 658 P.2d 27 (1983); Rap 2.5 (a).

Further, even if error has occurred, if harmless, then reversal is inappropriate. An error is harmless unless there is a demonstration that the claimed error materially affected the outcome of the trial. Thomas V. French, 99 Wn.2d 95, 659 P.2d 1097 (1983); Thornton v. Annest, 19 Wn.App. 174, 574 P.2d 1199 (1978).

On appellate review no determination of factual issues should be entertained. Old Windmill Ranch v. Smotherman, 69 Wn.2d 383, 418 P.2d 720 (1966).

Where trial counsel does not point out to the Court the Court's alleged error in assessment of the case but alleges for the first time on appeal judicial action as error, the reviewing court should not consider the matter. See Olson v. City of Seattle, 54 Wn.2d 387, 341 P.2d 153 (1959); State v. Clem, 49 Wash. 373, 94 P. 1079 (1908).

Unchallenged conclusion of law will become the law of the case. See State v. Moore, 73 Wn.App. 805, 871 P.2d 1086 (1994); King Aircraft Sales, Inc. v. Lane, 68 Wn.App. 706, 846 P.2d 550 (1993).

Where the findings are supported by substantial evidence, those findings are treated as verities on appeal. Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993).

The bulk of Appellant's arguments are nothing more than a request that this Court weigh the evidence, make credibility assessments and

resolve conflicts. As this is contrary to the constitutional grant of authority I will address the arguments the Trial Court's findings by identifying the factual basis and, where appropriate, legal principles.

### FINDING OF FACT 3

Finding of Fact 3 is well supported. The appellant does, however mischaracterize the finding – the Trial Court never identified the pre-existing neck condition as “symptomatic.” (Appellant Brief, page 2). The Trial Court specifically found that the neck condition pre-existing the 1996 industrial injury was asymptomatic. (Finding of Fact 12).

The lighting up doctrine is well accepted in worker's compensation – whether the event is an industrial injury (Wendt v. Dept. of Labor & Indust., 18 Wn.App. 674, 571 P.2d 229 (1977)) or an occupational disease (Dennis v. Dept. of Labor & Indust., 109 Wn.2d 467, 745 P.2d 1295 (1987)). If an industrial injury lights up or aggravates a pre-existing condition, then the resulting condition or disability is to be attributed to the effects of the industrial injury. In such an instance, the pre-existing condition becomes immaterial. Longview Fibre Co. v. Weimer, 95 Wn.2d 583, (1981) (“For purposes of coverage under the industrial insurance act, it is sufficient to sustain an injury which aggravates a pre-existing infirmity. [cites omitted]. Though Weiner's medical history evidences prior instances of back troubles, the testimony of the two medical experts

indicates the present back injury was causally related to the picking up of the metal strap. Thus, petitioner is entitled to recovery under the industrial insurance act for this aggravation.”); Jacobson v. Dept. of Labor & Indust., 37 Wn.2d 444 (1950) (“It has been established in a long line of cases, that if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury and not to the pre-existing physical condition. [cites omitted].

Dr. Earle’s diagnosis includes a cervical strain with ongoing aggravation of cervical degenerative disc disease described as “very well documented” in the notes, particularly Dr. Oakes’ notes.” (BR Earle, p. 32).

Dr. Jensen’s IME of May 24, 1996 found the pre-existing degenerative disc disease was aggravated by the industrial injury of 1996. (BR Powell, p. 34). Dr. Powell reviewed the records provided by Appellant and admits an absence of any ongoing neck problems immediately prior to the February 1996 industrial injury. (BR Powell, pp. 35-36). Dr. Brzusek diagnosed a neck strain with aggravation of pre-existing arthritis. (BR Brzusek, pp. 15-16).

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#### FINDING OF FACT 4 IS SUPPORTED BY EVIDENCE

Evidence indisputably supports this finding. Most workers sustaining an on-the-job injury/disease do have pre-existing “conditions”. The assessment of a pre-existing disability differs depending upon whether permanent partial disability (a loss of function) or total disability, temporary or permanent (inability to work) is being addressed. Whether PPD or TD, the existence of a pre-existing condition is not a “cause” of any disability when the industrial injury lights up or makes symptomatic the pre-existing condition. (As is the Trial Court’s finding.) *Wendt, supra*.

Assuming no lighting up, if the pre-existing condition causes a loss of function then the effect of that pre-existing loss of function must be segregated from any PPD compensable under the worker’s compensation claim. RCW 51.32.080(5). The Trial Court did not find a pre-existing PPD (loss of function) so segregation was inappropriate (and the Trial Court did find a lighting up).

Assuming no lighting up, if the pre-existing condition causes a loss of function, the assessment of total disability factors in the pre-existing condition(s) (if the pre-existing condition affects employability). Fochtman v. Dept. of Labor & Indust., 7 Wn.App. 286 (1972). WAC

296-19A-010(1). (“Employable” requires consideration of “pre-existing physical and mental limitations”).

Of course, in this case the Trial Court found total disability not permanent partial disability so segregation of any pre-existing permanent partial disability is moot.

The Appellant cite to Puget Sound Energy v. Lee, No. 61779-8-I (Slip. Op., April 27, 2009) involved a question of whether an employer got second injury fund relief under RCW 51.16.120(1). Second injury fund relief does not affect the worker’s benefit one way or the another and the statutory standard is not applicable here.

The Trial Court found no pre-existing disabling conditions. Hulett does have pre-existing conditions. The overwhelming evidence is that these pre-existing conditions were not a source of any disability and were not affecting employability.

Vocational Counselor Berg identified pre-existing conditions but they imposed no limitation on employability. (BR Berg, p. 44). (4/05). Dr. Earle found no loss of function prior to the 1996 industrial injury. (BR Earle, pp. 19-20).

Because Dr. Oakes saw Hulett from the 1980’s up to his testimony in 2005, he has first-hand knowledge of a medical expert as to the existence of pre-existing disabling conditions. (BR Oakes, p. 6).

Prior to the 1996 industrial injury Hulett had no problems similar to what Dr. Oakes saw after 1996; before 1996 Hulett was “pretty healthy”, a person who “at times” had symptoms and medical problems but was “always highly functional and a good worker”. (BR Oakes, p. 9).

Ms. Simmons lay testimony established that prior to the industrial injury Hulett was physically active, did not complain of neck problems, never had trouble forming words and was not observed having any incapacitating headaches. (BR Simmons, p. 4).

Mrs. Hulett described her husband as “extremely active” prior to the 1996 industrial injury, working full-time and coming home to physical activity with no limitations described. After the shoulder/neck problems (several years prior to the 1996 injury) Hulett had shoulder surgery, physical therapy and “he healed”. Mrs. Hulett describes no incapacitating headaches prior to the industrial injury. He did not require use of a notebook to track his activity, medications, or days activity. Prior to the industrial injury there were no speech problems, no seizure activity and no memory difficulties. (BR E. Hulett, pp, 14, 17, 23, 29).

Dr. Bensinger described the pre-existing optic neuropathy as benign and asymptomatic. (BR Bensinger, pp. 103, 106).

Hulett’s job of injury required a 15 pound tool belt, significant time on ladders, carrying roofing paper (110 pounds), lifting 50 pound tar

buckets while climbing a ladder – all done without physical problem. (BR Hulett, p. 45).

Dr. Powell's examination and review of records from 1965 through 2004 demonstrate no record of any ongoing neck problems immediately prior to the 1996 industrial injury. (BR Powell, p. 36).

Hulett has no family history of mental or emotional illness. Dr. Carter acknowledged no history of any psychiatric or psychological treatment or loss of functioning prior to the industrial injury. (BR Carter/05, pp. 25-27, 28, 94, 13) (4/05 p. 109 – 110).

Dr. Fordyce testified that for twenty years prior to this industrial injury Hulett had “a limited number, probably six or seven, maybe eight visits to clinics” for dizziness, headache, gastric distress or those types of symptoms. Dr. Fordyce confirmed there is no evidence of any impairment in ability to function prior to the industrial injury. (BR Fordyce, pp. 16, 24).

Dr. Brzusek described pre-existing conditions as “not a lot of serious medical illness” prior to 1996. The 1992 shoulder/neck injury was one which Dr. Brzusek noted Hulett had recovered. (BR Brzusek, p. 11).

#### FINDING OF FACT 6 IS SUPPORTED BY THE EVIDENCE

A worker has the right to treatment “at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice”

under the Worker's Compensation Act. RCW 51.36.010. In a complex case it is appropriate for the attending physician to refer the worker for consults, tests or other treatments under the claim. The period at issue in this appeal is July 2000 through January 2005. The only medical practitioner to have seen Mr. Hulett as a treating practitioner during that period of time is Dr. Oakes.

Mr. Hulett describes Dr. Oakes as the attending physician under his claim. (BR Hulett, p. 45). Mr. Hulett did not identify any other practitioner as his attending physician. Dr. Oakes saw Mr. Hulett for about a decade prior to the 1996 industrial injury and for about a decade after the industrial injury of 1996. Dr. Oakes initiated a long course of consults, treatment, observations and evaluations. From 2000 through 2005 Dr. Oakes was actively involved in the care, treatment and evaluation of Steven Hulett. (BR Oakes, pp. 6, 8, 27-28, 30).

Dr. Weinstein did not see or treat Hulett once from 2000 through 2005. Dr. Weinstein first saw Hulett in December 1998 with a group of other medical practitioners and issued a "group" decision to admit Hulett into the Virginia Mason program. Hulett was an inpatient in the Virginia Mason program for two weeks, then outpatient for twelve weeks ending May 20, 1999. He was seen by a host of occupational therapists, physical therapists, vocational counselors, neurologists, psychologists, speech

therapists, rehab psychologist and in group treatment. The number of times he was seen and treated by Dr. Weinstein is not clear – Dr. Weinstein does not even recall what the last few weeks of Hulett’s treatment at the program involved. When Dr. Weinstein last saw Hulett, September 7, 1999, there was no exam and Dr. Weinstein could “not recall” when he last physically examined Hulett – he could only guess that during the program “I may have physically examined him during one or more of those times.” (BR Weinstein, pp. 54, 60-61, 64-67, 76, 84).

The worker chooses his attending physician. Hulett chose Oakes.

FINDING OF FACT 7 IS SUPPORTED BY THE EVIDENCE

Finding of Fact 7 is specific as to Dr. Oakes’ characterization of what he saw before and after the industrial injury. Dr. Oakes’ testimony at page 6 is the basis for this finding.

FINDING OF FACT 9 IS SUPPORTED BY THE EVIDENCE

Finding of Fact 9 is well documented. Over the several years immediately prior to Oakes’ testimony Dr. Oakes had seen Hulett averaging every month or two. Oakes’ opinion has been solicited by both attorneys involved in the case, he has referred Hulett to neurologist McLean, approved the neuro-rehab program attendance, directed Hulett’s care under the claim, was active in assessing employability questions for the employer, made the neurological evaluation to Dr. Patterson for post

concussion syndrome, addressed and coordinated medication needs for the post concussion syndrome and anti-depressants along with psychiatric consults. (BR Oakes, pp. 10-11, 14, 16, 26-27, 30, 32) (BR Earle, pp. 17, 15, 34) (BR Carter, p. 25).

FINDINGS OF FACT 10 AND 11 ARE SUPPORTED BY THE  
EVIDENCE

Findings of Fact 10 and 11 are supported by the evidence. In Bennett v. Dept. of Labor & Indust., 95 Wn.2d 531, 533, 627 P.2d 104 (1981) the Supreme Court recognized that there are occasions where medical facts are “observable by a (lay persons) senses and describable without medical training”. Here the lay testimony confirms a dramatic before and after picture with the industrial injury of February 22, 1996 being the significant intervening event. Prior to the industrial injury there were no observable headaches (from a lay perspective), seizures, neck pain, dizziness, ringing in the ears, hand numbness, difficulty finding words transposing numbers or letters, problems with fatigue, memory or concentration. After the injury multiple medical witnesses verify not just the symptoms but also the causal connection between the symptoms and the February 1996 industrial injury. It is at this point that the Intalco case is helpful.

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Intalco was cited for support of the proposition that it is not always possible to explain with scientific certainty “how” an event caused a condition, but the law does not demand scientific perfection – the law demands a casual relationship “established” through a medical testimony on a more probable than not basis. Italco v. Dept. of Labor & Indust., 66 Wn.App. 644, 833 P.2d 390, rev. den. 120 Wn.2d 1031, 847 P.2d 481 (1993). The Italco principle is derived from a worker’s compensation cause involving an industrial injury, Halder v. Dept. of Labor & Indust., 44 wn.2d 537, 268 P.2d 1020 (1954). The argument that the standard of evidence needed to support causal relationship changes dependent upon whether the basis of the claim is an “injury” or “occupational disease” differs because these are statutorily different concepts. The proof needed for causal relationship is a “more probable than not” standard regardless of whether the underlying claim is injury or disease.

Symptoms from a post concussion syndrome can include headaches, depression, memory problems and cognitive problems. (BR Carter, p.87). Dr. Carter recognized that coping and cognitive difficulties can occur even with a minute brain injury. (BR Carter, p. 90).

Dr. Powell diagnosed a concussion with Hulett as a probability. Dr. Powell noted that a concussion may resolve but symptoms may

continue (usually associated with emotional overlay or other mental health issues). (BR Powell, p. 16).

Dr. Powell tested Mr. Hulett's subjective complaints for validity. Hulett passed the symptom validity testing – Hulett “was not pretending.” (BR Powell, p. 33). Dr. Powell noted that testing supporting the emotional basis for Hulett's symptoms with a link between physical discomfort experienced by Hulett and the development of emotional stress/symptom forming anxiety. (BR Powell, p. 17). Dr. Powell quoted from the IME's of 1996 and 1998 that

“He has a very clear cut history, typical of significant concussion, of amnesia for several minutes after the concussion. Tells the story in a manner of someone with genuine concussion. He did not even know this had happened until the accident investigation was carried out, at which time he discovered he had events mixed up, and did not recall some of the events.” (BR Powell, p. 34).

The IME of June 1998 identified a “closed head injury” and possible complex seizure disorder. Dr. McLean's neurological evaluation of August 1998 revealed a post concussive headache syndrome with worrisome episodes of lack of awareness which could be seizures (despite the normal EEG. The discharge diagnosis from the Virginia Mason Neurological Rehab Program included post concussion syndrome related to the industrial injury. Dr. Patterson's October 2002 neurological evaluation concluded “symptoms of prolonged post concussion syndrome,

now possibly contaminated by primary depression and anxiety.” (BR Earle, pp. 13-15).

Dr. Earle noted a post concussion syndrome related to the industrial injury depression (related to the concussion, chronic pain and job loss). These conditions are caused by industrial injury. The neck condition is associated with dizziness, loss of balance and is consistent with the worker’s complaints. (BR Earle, pp. 31-33, 37).

Dr. Oakes describes the “working diagnosis” as a post concussion syndrome. Dr. Oakes explained that when a post concussion syndrome persists it is often tied up with a variety of psychosocial issues (including the individual’s inability to work). The “big change” in Hulett’s life has been the industrial injury and Dr. Oakes explained that the symptoms expressed are “certainly consistent” with post concussion syndrome. (BR Oakes, pp. 11-13). Post concussion syndrome is a complex of symptoms that occur after head injury – even a minor injury. Dr. Oakes concluded that there was enough evidence to make the statement that Hulett does in fact have a seizure disorder. (BR Oakes, p. 40).

The psychological testing done by Dr. Fordyce immediately after the industrial injury identifies the presence of underlying depression and anxiety. (BR Fordyce, p. 11). Dr. Fordyce diagnosed a mild concussion resulting from the industrial injury. (BR Fordyce, p. 14). A post

concussion syndrome is a cluster of symptoms which often does not have any hard findings. Despite the lack of “hard” findings it does exist and it can interfere with the person’s abilities. (BR Fordyce, p. 46).

Dr. Brzusek described this as a “complicated problem”. He felt there had been a cerebral contusion from the industrial injury, closed head injury from the trauma and at the point of Brzusek’s evaluation in 2005 Hulett “still had residuals of closed head injury” along with the post concussive syndrome and depression which was traumatically induced and neck strain with pre-existing arthritis. (BR Brzusek, p. 18). The symptoms Hulett has were described as “typical” of those with post concussion syndrome and that syndrome is a collection of medical problems. (BR Brzusek, p. 18).

Regardless of the diagnostic label used, the symptoms expressed by the Trial Court are clearly supported by the evidence offered in the case as having a causal relationship to the industrial injury.

#### FINDING OF FACT 12 IS SUPPORTED BY THE EVIDENCE

Finding of Fact 12 has been discussed in conjunction with Finding of Fact 3. The Trial Court was responsible for credibility assessments and did not accept the notion from Dr. Stump/Green that neck condition was “symptomatic” immediately prior to 2/96 - particularly in light of the fact that no medical records support a symptomatic neck condition

immediately prior to the industrial injury, there were no medical restrictions imposed on Hulett for any problem immediately prior to the industrial injury and he was under no active medical treatment for neck (or other) problem immediately prior to the industrial injury and he performed a physical demanding job without apparent difficulty.

#### FINDING OF FACT 13 IS SUPPORTED BY THE EVIDENCE

The initial assessment at the Virginia Mason Neurological Rehabilitation Clinic was “a variety of complaints that included difficulties with headaches, with balance, with being able to perform some types of cognitive work-related tasks and also had some black-out spells.” (BR Weinstein, p. 55). Post concussion syndrome is a mild traumatic brain injury which in 5 – 15% of people it “doesn’t get better.” That group will continue with “a persisting set of difficulties that include physical problems, usually headache, pain complaints or dizziness, emotional difficulties and thinking difficulties.” Dr. Weinstein diagnosed the headaches and the “spells” as related to the industrial injury. These were treated at the clinic. The discharge diagnosis from the clinic was “post concussion syndrome”. (BR Weinstein, pp. 62, 71-72, 96).

The “post concussion syndrome” (for which Hulett was admitted to Virginia Mason) was identified by Dr. Oakes, Dr. Brzusek and Dr. Earle as being causally related on a more probable than not basis to the

industrial injury. The IME of 1998, Dr. Hoque, Dr. McLean and Dr. Patterson also diagnosed the post concussion syndrome as causally related to the industrial injury.

FINDINGS OF FACT 14, 15, 16, 17, 18 AND 19 ARE SUPPORTED BY  
THE EVIDENCE

Those findings all involve the vocational rehabilitation effort and will be discussed as a group.

At the Virginia Mason program a vocational specialist was involved. The third month of the program involved simulated work trials, job station, voc rehab then development of a rehab plan. (BR Weinstein, p. 66).

A goal for boarding horses in a self-employment setting was developed. Mr. Camarda was skeptical about it but “willing to be considerate of his (Hulett’s) wishes”. (BR Camarda, p. 115).

Camarda assessed the physical demands involved in the horse boarding. The job analysis required lifting to 90 pounds. A performance based physical capacities evaluation done at Virginia Mason program in 1999 demonstrated the Hulett’s physical ability was significantly less than 90 pounds. Vocational counselor Camarda submitted the job analysis to Virginia Mason which expressed concerns over the lifting; Camarda modified the job analysis to reflect lower lifting demands. (BR Camarda,

p. 120). Mr. Camarda describes Hulett's efforts as responsible, conscientious, and Mr. Hulett was very motivated to succeed. (BR Camarda, pp 125, 141).

A number of modifications were made to "facilitate" the horse boarding position for Hulett – to make it less physically demanding. A job modification fund through the Department of Labor & Industries allows \$5,000 for "accommodations necessary to perform the essential function of an occupation in which an injured worker is seeking employment". RCW 51.32.095(4). Modifications requested include attachments to the tractor for lifting, an electric hoist, chained hoist, a cart for transportation purposes, an attachment to the tractor to take hay off of his pick up. (BR Camarda, p. 164). These are not all of the requests submitted by Hulett - Hulett's initial request exceeded \$5,000. Hulett out of his own funds bought some of what was not covered though L&I. (BR Camarda, p. 125).

Camarda found Hulett eligible for vocational services. Under the criteria identified in RCW 51.32.095 Camarda found Hulett was not capable of returning to work with his former employer or with any employer performing the same job because of the effects of the industrial injury and had no skills upon which to perform or obtain other employment. (BR Camarda, p. 134, 143).

Mr. Camarda concedes that each month of operation he reviewed the business was a loss. (BR Camarda, pp. 151-152).

Dr. Weinstein approved the modifications as medically and legally appropriate and very reasonable. The modifications were medically appropriate and “very reasonable.” (BR Weinstein, pp. 81-82).

Vocational Counselor Berg noted the employment goal of animal boarding “didn’t work out” and “I don’t believe he became gainfully employed with his venture call Tenderfoot Farms and “His training plan failed. I don’t believe he’s competition employable or likely – as it’s called – to be considered for retraining. (BR Berg, p. 22, 25, 26-27, 32).

Mr. Berg noted that Hulett had no transferable skills based upon the residuals of the industrial injury if one used the restrictions imposed by Dr. Oakes or the Virginia Mason Clinic. (The attempt with “Tenderfoot Farms” was a money loser and it exceeded Mr. Hulett’s physical restrictions. (BR Berg, pp. 25, 27-28). Mr. Berg confirmed that the limitations from the injury Hulett could do the position then the need for modifications places the position in the odd lot category requiring the employer to produce a work opportunity in which Hulett could obtain such work. Kuhnle v. Dept. of Labor & Indust., 12 Wn.2d 191, 120 P.2d 1003 (1942).

Mrs. Hulett described her husband as excited when there was a chance to return to work. (BR E. Hulett, p. 25). The Hulett's did considerable work using their own funds to bring the property up to standards for purposes of making this employment venture work. An electrician was engaged and a barn rewired commercially. Buffer plans were drawn up, a proposal to dispose of fertilizer was formulated, advertising generated, permits obtained, easements and variances for right of ways solicited, they owned a right of way for a setback which they vacated in order to facilitate the project, contacted neighbors to identify any objections to the modifications, laid gravel for roads for parking, designated a handicapped parking spot, solicited their daughter to do brochures, a web site and business cards, and contacted local community leaders (humane society/vets) to solicit customers. (BR E. Hulett, pp. 25 – 26).

Hulett was not able to keep up with horse boarding. The family would come to help with the business – Hulett's daughter and her husband helped with feeding, turning horses out, cleaning stalls, exercising horses, raking manure. On a good day, Hulett was able to do these things but the good days "were getting fewer than the bad days." The son-in-law and daughter "helped a lot" – with the son-in-law spending four to five hours a day on the ranch trying to get it going and assisting Hulett. Because of the

amount of work involved it was agreed that the son-in-law and daughter would move onto the property. The move was solely because of the attempt to set up Tenderfoot Farms. (BR E. Hulett, pp. 27-28).

The need for assistance was obvious. Mrs. Hulett worked is a bank manager and could not keep up with Tenderfoot Farms and her position with Washington Mutual. Mr. Hulett could not do it on his own; he chainsawed his knee, forgot to close gates behind him; forget if he gave a horse food or vitamins, forget to put brakes on equipment; forget to hitch up trailers, horses got out – one horse was lost. On a bad day Mr. Hulett needed help even with the basics at Tenderfoot Farms. (BR E. Hulett, pp. 29-30). All of the paperwork/accounting was done by Mrs. Hulett; Steve Hulett was not capable of doing the paperwork associated with the business. (BR E. Hulett, p. 31).

The son-in-law and daughter moved up from Arizona to Washington in April 2000 - when the business opened to help “in running the business”. (BR Hulett, p. 15). On December 19, 2000 they were trying to position the house on the property. The house fell on Hulett’s son-in-law. The son-in-law was killed. (BR Hulett, p. 23, 51, 59).

#### FINDING OF FACT 20 IS SUPPORTED BY THE EVIDENCE

Finding of Fact 20 represents the Court’s credibility determination with respect to Drs. Stump and Green. Dr. Oakes, Dr. Brzusek and Dr.

Earle testified to the long term nature of the effects of the industrial injury. That the symptoms were disabling and related to the February 1996 industrial injury is verified by Drs. Brzusek, Earle, Oakes and vocational counselor Berg.

FINDING OF FACT 21 IS SUPPORTED BY THE EVIDENCE

Dr. Fordyce last saw Mr. Hulett in June/July 1996. (BR Fordyce, p. 5). Dr. Weinstein testified saw Mr. Hulett in September 1999. (BR Weinstein, p. 83 ).

FINDING OF FACT 22 IS SUPPORTED BY THE EVIDENCE

Dr. Brzusek's testimony is clear and unambiguous. Dr. Brzusek's testimony is not ambiguous. Here is a sampling:

“Obviously he can't work vocationally;

And vocational impairment, that was that this gentleman is going to have a real challenge returning to any type of work;

The vocational program failed in the past, I think for all practicality this gentleman is permanently and totally disabled”, he's been unemployable since the failed self - employment effort.” (BR Brzusek, pp. 11, 16, 19, 21).

FINDINGS OF FACT 23, 24, AND 25 ARE SUPPORTED BY THE EVIDENCE

How anyone can argue that Dr. Oakes is not in a unique position when he saw Hulett before and after the industrial injury is puzzling. That

Dr. Oakes has seen Hulett over decades and has had multiple contacts with Hulett is undisputed. That Dr. Oakes monitored and directed medical care is substantiated in the record (review of Finding of Fact 9 demonstrates some portions of the record substantiating this) and no evidence supports an allegation that Dr. Oakes identified a “curative” medical treatment.

FINDINGS OF FACT 26 AND 27 ARE SUPPORTED BY  
SUBSTANTIAL EVIDENCE

Virtually every practitioner seeing Hulett after the industrial injury has noted the symptoms described.

Dr. Oakes describes symptoms which include cognitive changes, memory problems, persistent headaches, fatigue ability, difficulty with stamina, and seizure spells. Even in to 2005 (Dr. Oakes point of testimony) the symptoms persisted, were disabling, and caused by the effects of the industrial injury. (BR Oakes, pp. 13-17).

Dr. Brzusek noted debilitating headaches, numbness in fingers, fatigue, vertigo, memory problems, attention span deficiency and delay in response time described as “pretty significant.” Dr. Brzusek causally related the problems to the injury and found they caused Hulett total and permanent disability.

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Dr. Earle describes the changes, attributes them primarily to depression and neck, causally relates those to the industrial injury, and describes limitations which, vocationally, leave Hulett unemployable.

FINDINGS OF FACT 28 AND 29 ARE SUPPORTED BY  
SUBSTANTIAL EVIDENCE

Ms. Simmons testified to the change after 1996 to Hulett. She regularly checks in on Hulett and more often than not finds him incapacitated with severe head pain or somewhat incoherent. She has seen the seizure-type activity with loss of bowel control. She has seen him lose his balance. (BR Simmons, pp. 6-8, 10).

Elva Hulett testified that since 1996 her husband has had difficulty driving, gets headaches that are incapacitating and cause vomiting with an inability to function. With seizure activity he loses bowel function. (BR E. Hulett, pp. 16, 22, 24, 27).

Dr. Oakes noted recurring symptoms of headaches, dizziness, fatigue and cognitive complaints which increase with activity. Dr. Oakes testified Hulett is not capable of sustained activity or employment.

FINDING OF FACT 30 IS SUPPORTED BY THE EVIDENCE

The PBPCE at Virginia Mason Clinic objectively demonstrates decreased ability. Using that objective testing vocationally Hulett is totally disabled. (BR Berg, p. 25). Using the limits identified by Dr. Earle,

vocationally Hulett is totally disabled. (BR Berg, pp. 25,31). Using the medical opinion of Dr. Brzusek, Hulett is totally disabled. (BR Berg, p. 6 [8/05]). Using the medical opinion of Dr. Oakes, Hulett is totally disabled. (BR Berg, p. 19). All these opinions relate the total disability to the industrial injury. The trial court had ample evidence for this finding.

#### FINDING OF FACT 31 IS SUPPORTED BY THE EVIDENCE

The trial court has ample reason to accept Dr. Oakes assessment. The number of contacts with Hulett, the decades of knowing Hulett, the personal ability to identify a before and after effect, the numerous sources of information available, the consistency of Dr. Oakes opinion with the life Mr. Hulett has had since 1996 and the attending physician rule.

#### **IV. ATTORNEY'S FEES**

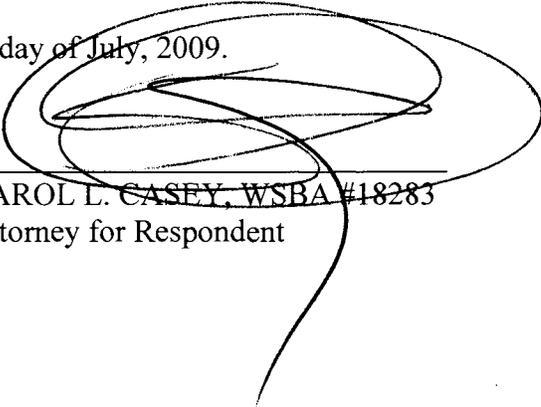
RCW 51.52.130 authorizes attorney fees and costs to the Respondent "if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained" to be paid by the self-insured employer. In the event that Mr. Hulett's right to relief is sustained then Respondent requests attorney fees and costs. An affidavit and cost bill will be filed if appropriate.

#### **V. CONCLUSION**

The Appellant seeks to change the burden of proof, reverse Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183

(1959) and ignore RCW 51.52.115 and RCW 51.52.140. The Appellant requests should be rejected. The Trial Court's decision is supported by overwhelming evidence and no error exists.

Respectfully submitted this 30<sup>th</sup> day of July, 2009.



CAROL L. CASEY, WSBA #18283  
Attorney for Respondent



John Wasberg, Senior Counsel, Office of the Attorney General,  
800 5<sup>th</sup> Ave., Ste. 800, Seattle, WA 98104 (regular).

Ruth W. Corcoran  
RUTH W. CORCORAN, PARALEGAL  
CASEY & CASEY, P.S.

SUBSCRIBED AND SWORN to before me this 30<sup>th</sup> day of July 2009.



Timothy A. Hale

NOTARY PUBLIC for the State of WA  
Residing at: TACOMA  
My Commission Expires: 10/28/12