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DIVISION II

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

THE HOME DEPOT, INC.,

APPELLANT,

V.

**ROBERT D. TSCHABOLD, and THE DEPARTMENT OF LABOR
AND INDUSTRIES,**

RESPONDENTS.

**APPELLANT'S REPLY BRIEF OF
THE HOME DEPOT, INC.**

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REPLY BRIEF OF THE HOME DEPOT, INC.

I. REPLY ARGUMENT

- A. Claimant's brief generally provides little or no guidance to the Court on the issues raised by employer's assignments of error.

Employer understands the limited review standards applied by this Court in its review of workers' compensation decisions. It purposefully designed its Appellant's Brief to present a streamlined recital of the background facts, the evidence, and the rationales expressed by both the Board/Industrial Appeals Judge and the Superior Court Judge in entering their diametrically opposed decisions. Employer's account demonstrated how that difference in outcomes could be traced to their opposing findings on a single factual issue (causation) posed by a single expert's conflicted opinion.

Employer then outlined how the record lacked any substantial evidence to support the Superior Court's reversal of the Board and IAJ on that factual issue, and also how that circumstance deprived the Superior Court's decision of substantial reason sufficient to enable or withstand judicial review. Employer did so both to highlight the narrow issue posed by its assignments of error and to facilitate an efficient evaluation of their merit under the legal error/substantial evidence standard.

In contrast, claimant's brief almost seems designed to frustrate such an analysis. It opens with a ten-page summary of the evidence laden with lay testimony and sympathetic background details that are mostly irrelevant to the appellate issues employer raised. (Resp. Br. At pp. 1-10). Worse, that summary omits any reference to the contradictory statements made by the key medical expert, Dr. Sekhar, which employer clearly identified as the focus of this entire appeal. The IAJ, the Board, and even the Superior Court Judge acknowledged that conflict in his testimony and its pivotal importance, but claimant's brief discusses the facts as if that conflict were non-existent.

Claimant's subsequent legal arguments follow suit. They evince no awareness of the contradiction in Dr. Sekhar's statements and do not even mention the legal principles or authorities employer relied upon in assigning error to the Superior Court's oral ruling in disregarding it. Instead, the Respondent's Brief detours to offer a comparative analysis of all the expert opinions, seemingly asking *this* Court to determine a preponderance of the medical evidence independent of the findings and reasoning already entered below or the resultant winnowing of the issues.

Faced with the absence of any rebuttal directed to the arguments it actually presented, employer is hard-pressed to frame a helpful reply. Its best effort appears below.

B. The law neither requires nor permits a “liberal construction” of the evidence.

Claimant opens with the well-known mandate to “liberally construe” the provisions of the workers' compensation statutes and the attendant case law stricture to resolve “all doubts” as to their meaning in favor of the injured worker. RCW 51.12.010: *Cockle v. DLI*, 130 Wn.2d 801, 811 (2001). (Resp. Br. At 11). Equally well-known, however, are the cases which caution that this principle does not extend to interpretations of ambiguous medical evidence that a worker identifies to satisfy his burden of proof on causation issues. *Ruse v. DLI*, 90 Wash.App 448, 453-454 (1998), citing *Dennis v. DLI*, 109 Wash.2d 467, 477 (1987).

In this case, that obligation was reinforced by or at least consistent with claimant's burden (at the Superior Court level) to overcome the statutory presumption that the adverse findings entered by the Board were *prima facie* correct by establishing they were unsupported by a preponderance of the evidence. RCW 51.52.115; *Ravsten v. DLI*, 108 Wash.2d 143, 146 (1987). Unlike claimant, employer does not seek a *de novo* review of whether the evidence favored claimant's position on the factual issue of causation. Instead, employer contends the *Superior Court's* rationale in finding claimant met these burdens was, itself, legally inadequate or based on findings unsupported by substantial evidence in the

record. *See Groff v. DLI*, 65 Wash.2d 35, 38-39 (1964). The statutory mandate to liberally construe the provisions of the workers' compensation laws has no bearing on that analysis.

C. Claimant's summary of supportive evidence omits any reference to the contradiction in Dr. Sekhar's testimony that served as the focal point of the conflicting determinations entered by the IAJ/Board and the Superior Court.

Claimant's brief then turns to what a caption labels as "substantial evidence" in support of the Superior Court Judge's causation findings. (Resp. Br. at 12-15). The summary that follows, however, contains no reference to Judge McCarthy's findings or analysis. It merely sets out selected portions of the lay testimony and those parts of Dr. Sekhar's deposition testimony that, if considered alone, might reasonably support an initial factfinder's determination that claimant's functional impairment "was unchanged" by the intercerebral hemorrhage and resultant hematomas that occurred during the second, non-work-related brain surgery. (*Id.*).

Inexplicably, however, claimant's discussion contains no reference to the additional, contradictory statement on that issue that Dr. Sekhar admitted endorsing in his testimony. (Sekhar Depo., pp. 40-41). As highlighted in employer's brief, the Board and IAJ specifically cited that unexplained contradiction as their basis for rejecting Dr. Sekhar's

causation testimony as unpersuasive. (CABR 2-4; 53). The Superior Court Judge himself also acknowledged that Dr. Sekhar “did, in his testimony, conflict” with the opinion he had previously endorsed in his November 30, 2007 letter, but found the doctor “explained why he did so.” (Verbatim Transcript, pp. 42-43).

As postured before this court, Dr. Sekhar’s utterance of contradictory causation opinions is an established and (insofar as the Respondent’s Brief reflects) *uncontested* fact. Just as plainly, the record reflects that the presence or absence of an explanation for the contradiction was the determinative factual issue. Claimant does no service by describing the record as if neither the contradiction nor the existence of an explanation were germane to this Court’s review.

D. The Superior Court’s flawed finding cannot be masked or remedied by Dr. Sekhar’s treating doctor status.

Claimant’s argument vigorously promotes Dr. Sekhar’s status as one of the physicians who provided him with treatment. (Resp. Br. at 15-19). Dr. Sekhar’s participation in claimant’s treatment for a period of time late in this claim was an established and uncontested fact. Employer has not disputed his participation, nor is there any question that a treating doctor’s opinion is generally entitled to “special consideration.” *Groff v. DLI, supra*.

The issue on review, however, is not *whether* Dr. Sekhar's opinion merited "special consideration," but *which* of his opinions merited such consideration. On November 28, 2007, Dr. Sekhar admittedly signed his name to a letter that described improvement in claimant's condition as reflected in the medical records preceding his own surgery. He also specifically agreed, "had it not been for the aneurysm surgery and subsequent complications, ... Mr. Tschabold would have been able to return to his work duties with regard to the industrial injury of 4/9/05." (Sekhar Depo., pp. 40-41). At the same time, Dr. Sekhar offered statements in his deposition that claimant's Respondent's Brief and the Superior Court Judge cited for the opposite conclusions. (Sekhar Depo., pp. 19-22; CP 42).

Dr. Sekhar was just as much claimant's treating physician when he signed the November 28, 2007 letter as he was when testifying at his subsequent deposition. Presumably, each of his contradictory opinions was equally well-informed by experience in observing and treating the worker's condition. Accordingly, neither Dr. Sekhar's treating doctor status nor the law entitling his testimony to "special consideration" offer a basis for resolving his contradictory opinions.

This section of claimant's brief also refers to isolated statements or aspects of testimony by the other physicians. That discussion ignores the

fact that each of the tribunals below recognized the pivotal nature of Dr. Sekhar's testimony in that he was the *only* physician to offer expert causation testimony capable of supporting the claim – on an issue claimant needed to prove through persuasive medical evidence in order to prevail. *Dobbins v. Com. Aluminum Corp.*, 54 Wash.App. 788, 792 (1989); *Saylor v. DLI*, 61 Wn.2d 439 (1963); *Bonko v. DLI*, 2 Wash.App. 22 (1970). See also WAC 296-20-01002 (“All time loss compensation must be certified by the attending doctor based on objective findings”); *Wilber v. DLI*, 61 Wash.2d 439 (1963). Neither the Board nor the ALJ interpreted those other expert opinions to support the claim, and Superior Court Judge McCarthy's disregard for them was apparent. At this level of review, claimant may not attempt to construct a medical basis for upholding the claim that none of the fact finders relied upon below.

E. The extent of claimant's impairment and resultant disability are not contested on review.

The Respondent's Brief also identifies lay and medical testimony to support the determination that claimant is permanently and totally disabled. The extent of claimant's disability is not disputed on appeal. Indeed, in the Appellant's Brief, employer acknowledged it was uncontested that claimant exhibited “permanent and seriously disabling cognitive impairment and hemiparesis” after the second brain surgery and

the attendant complications. (App. Br. at 4). Employer has only charged the Superior Court Judge with error in arriving at or explaining his conclusion that Dr. Sekhar's opinion sufficed to establish the necessary causal relationship between his ultimate disability and the original work injury/basal ganglion hemorrhage.

F. Claimant has effectively conceded error.

Employer has scrutinized the Respondent's Brief with great care so that it might provide helpful replies to the rebuttal arguments claimant directed to the assignments of error in its Appellant's Brief. Surprisingly, that review reveals that the following points remain uncontested:

- Claimant could not prevail on any of the disability issues in this complicated case without adducing a preponderance of expert opinion ascribing his ultimate disability to the work injury.
- Dr. Sekhar was the only physician to offer an opinion that claimant's ultimate impairment and disability were related solely to his work injury and original brain surgery.
- Dr. Sekhar also admitted to endorsing contradictory statements indicating that claimant was improving and would not have been prevented from returning to gainful employment by the original work-related injury.
- The Board and IAJ found this contradiction to be unexplained and, therefore, rejected Dr. Sekhar's opinion as unpersuasive.
- Superior Court Judge McCarthy reversed the Board based specifically on an express finding of fact that Dr. Sekhar

“explained why” he endorsed contradictory opinions during his deposition testimony.

- Dr. Sekhar neither provided nor was asked to provide such an explanation during that deposition.

In light of these uncontested points, claimant’s brief effectively confesses the error they reflect. *Cf. Tilly v. DLI*, 52 Wash.2d 148, 151 (1958) (employer’s brief admitting to the existence of conflicting evidence on the issue of causation was “clearly a concession” that the factfinder was “entitled to” find for the worker on that issue absent demonstration of an error in the legal standards conveyed by the jury instructions). As a result, the only way for this Court to affirm the Superior Court’s ruling would be by conducting its *own* rationale as a factfinder to find Dr. Sekhar’s testimony persuasive notwithstanding the unexplained contradiction. That is not within this Court’s purview under the pertinent review standards.

G. Employer does not contest claimant’s counsel’s entitlement to the fee awarded in the Superior Court Judgment, nor to an additional fee should claimant prevail on judicial review.

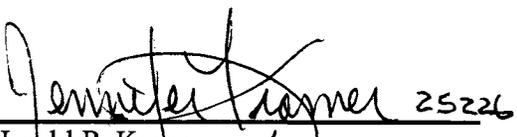
Employer has not challenged the attorney fees or costs awarded claimant’s counsel for services before the Superior Court, unless, of course, the underlying decision is reversed. (CP 49-51). The law also allows for the assessment of reasonable fees to counsel for workers for

successful work in representing injured workers before this Court. RCW 51.52.130.

II. CONCLUSION

Claimant has not challenged employer's characterization of the issues, the contradictory nature of the critical medical testimony, the rationales stated by the tribunals below, nor the legal principles employer has cited in support of a claim for relief on appeal. Having provided no opposition, claimant has effectively conceded error. In any event, whether based on the concession or on the merits of employer's arguments, this Court should reverse the Superior Court judgment and reinstate that entered by the Board of Industrial Insurance Appeals.

Respectfully submitted,


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Attorney for The Home Depot, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing
APPELLANT'S REPLY BRIEF and this **CERTIFICATE OF**

STATE OF WASHINGTON

BY  _____
DEPUTY

SERVICE on the following individuals on September 28, 2010, by
mailing to said individuals one true copy thereof, certified by me as such,
contained in a sealed envelope, with postage prepaid, addressed to said
individuals at their last known address, to wit:

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and deposited in the post office at Seattle, Washington on said date.

I further certify that I filed the original and one copy of the
foregoing with:

David C. Ponzoha, Court Clerk
The Court of Appeals of the State of Washington, Division Two
950 Broadway, Suite 300, MS TB-06
Tacoma, WA 98402-4454

By depositing in the post office at Seattle, Washington on the 28th day of
September, 2010.

REINISCH MACKENZIE, P.C.



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