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

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DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF  
WASHINGTON,

Appellant,

v.

GARY D. HOLLIS, SR.,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

This case concerns Mr. Hollis's application for benefits under the Industrial Insurance Act. Mr. Hollis argues that he developed Reiter's syndrome as a result of a needle stick in a finger at work. Peter Mohai, M.D., testified that the needle stick was the proximate cause of Mr. Hollis's Reiter's syndrome. The Department of Labor and Industries objected to Dr. Mohai's causation opinion on the bases that (1) under the rule of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), such causation opinion is novel, not generally accepted in the relevant medical community, and not supported in the medical literature, and (2) such causation opinion is not admissible under ER 702 and ER 703.<sup>1</sup>

In his response brief to this Court, Mr. Hollis ignores the body of medical literature that Reiter's syndrome cannot be triggered by a needle stick, and he essentially ignores the Department's argument—supported by the medical literature and the testimony of Garrison Ayars, M.D., as well as by Dr. Mohai's silence on the relevant points—that under *Frye* analysis, Dr. Mohai's needle stick causation theory is novel, is not generally accepted in the medical community, and is not supported in the

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<sup>1</sup> In his response brief before this Court, Mr. Hollis does not directly respond to the Department's arguments regarding ER 702 and ER 703. *Compare* AB at 32-39 with RB at 10-11. The Department will not repeat its arguments under ER 702 and ER 703 in this Reply Brief.

medical literature. Mr. Hollis also all but ignores the line of Washington cases holding that a plaintiff claiming injury from a toxic agent must identify at least a toxic agent to which he was exposed.

This Court should reverse the trial court for two independently dispositive reasons. First, Dr. Mohai's causation theory is novel and should not have been admitted because Mr. Hollis has not established that his causation theory is either generally accepted in the medical community or supported in the medical literature. Second, even if Dr. Mohai's novel causation theory is admissible, Mr. Hollis has not established that he was exposed to even one toxin capable of triggering Reiter's syndrome. For either reason, there is insufficient evidence to support the jury's verdict and the Department is entitled to judgment as a matter of law.

## **II. REPLY TO MR. HOLLIS'S STATEMENT OF CASE**

### **A. Dr. Ayars Is Qualified To Offer An Expert Opinion On The Causation Of Reiter's Syndrome**

Mr. Hollis suggests in his response brief that Dr. Ayars would defer to a rheumatologist, RB at 7, and that Reiter's syndrome is "admittedly out of [Dr. Ayars's] area of expertise." RB at 14. In addition to being irrelevant to whether Dr. Mohai's opinions are based on a novel scientific theory that is not generally accepted by the scientific community, each of those suggestions is misleading.

Dr. Ayars is board-certified in infectious diseases, the field of medicine that diagnoses and treats conditions caused by organisms that produce infections. Ayars I at 5.<sup>2</sup> Dr. Ayars indicated that he would defer to a rheumatologist as to whether Mr. Hollis has a rheumatological syndrome and as to how to treat Mr. Hollis's symptoms. Ayars I at 40. But, Dr. Ayars testified that he would not defer to a rheumatologist as to causation, both because of his expertise in infectious diseases and because of his review of the relevant medical literature. Ayars II at 33. Dr. Ayars never suggested that Reiter's syndrome is out of his area of expertise.<sup>3</sup>

**B. Dr. Ayars Formed His Opinion That Medical Experts Would Agree With Him As To The Causes Of Reiter's Syndrome Before He Performed A Supplemental Search Of The Medical Literature**

Mr. Hollis suggests in his response brief that it was only after Dr. Ayars conducted a literature review via Medline that Dr. Ayars concluded that medical experts would agree with his conclusion that a

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<sup>2</sup> In this Reply Brief, the Department will follow the same citation convention for citing to the Board record that it followed in its opening brief to this Court. *See* AB at 3, n. 1.

<sup>3</sup> Although Mr. Hollis suggests that the Court should consider Dr. Mohai the more credible voice on Reiter's syndrome, the record reflects that Dr. Mohai diagnosed Mr. Hollis with Reiter's syndrome when, by Dr. Mohai's own admission, Mr. Hollis did not have two of the three symptoms—iritis and urarthritis—that, along with arthritis, Dr. Mohai considers to constitute the triad of Reiter's syndrome. Mohai at 69. Moreover, it was Dr. Mohai who, despite testifying that he had read the literature on Reiter's syndrome for 30 to 40 years, Mohai at 52, including most recently a few weeks before his testimony, Mohai at 44, was unable to identify a single specific article in the literature that supported his position. Mohai at 53 ("My memory's not that good.").

needle stick cannot cause Reiter's syndrome. RB at 8. This is incorrect. Dr. Ayars testified specifically that, prior to his Medline search, he was familiar with the causes of Reiter's syndrome described in the medical literature, and his opinion that Dr. Mohai's novel theory is not accepted in the medical community predated his Medline search. Ayars II at 35.

### III. ARGUMENT

#### A. The Department's Challenge To The Sufficiency Of The Evidence Is Properly Before This Court

Mr. Hollis argues, without any citation to authority, that the Department failed to preserve its right to appeal based on the sufficiency of the evidence. RB at 8-9. As an initial matter, the Washington Supreme Court has said that arguments without citation to authority are subject to summary rejection on appeal. *In re Dependency of Chubb*, 112 Wn.2d 719, 726, 773 P.2d 851 (1989).

Putting aside Mr. Hollis's failure to cite to any legal authority, his challenge is meritless for at least two additional reasons. First, it is not true that a party must file a motion at time of trial in order to preserve the right to argue that a jury's verdict was not supported by substantial evidence. It is well-settled that a superior court decision may be reversed for "failure to establish facts upon which relief can be granted." RAP 2.5(a)(2); *Gross v. City of Lynnwood*, 90 Wn.2d 395, 400, 583 P.2d 1197

(1978). No motion at the time of trial is necessary to preserve the right to argue that a verdict is not supported by the evidence. *Id.*<sup>4</sup>

Moreover, even assuming the Department was required to file a motion in order to preserve its challenge to the sufficiency of the evidence, the Department satisfied this alleged “requirement” when it unsuccessfully filed a motion for summary judgment with the trial court. CP at 3, 40. The Department is not raising a new issue in this Court.

**B. The Medical Literature Concerning Reiter’s Syndrome Shows That Dr. Mohai’s Testimony Is Based On A Novel Theory Not Generally Accepted By The Medical Community**

Under *Frye*, expert testimony based on a novel scientific theory is admissible only where the theory’s proponent establishes that the theory is generally accepted in the relevant scientific community, and that it is supported by reliable and reproducible data. *See Ruff v. Dep’t of Labor & Indus.*, 107 Wn. App. 289, 299-300, 28 P.3d 1 (2001). Here, both the testimony in the record and the medical literature demonstrate Dr. Mohai’s causation theory is novel and neither generally accepted in the medical community nor supported in the medical literature.

**1. The Medical Testimony And The Scientific Literature Establish That Only Certain Bacteria Can Trigger**

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<sup>4</sup> Mr. Hollis has also invoked the principle of “liberal construction” of Title 51. RB at 1. That principle does not relieve him of the requirement that, as a worker seeking benefits, he produce “strict proof” of his right to benefits. *Jenkins v. Dep’t of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996).

**Reiter's Syndrome, That The Bacteria Capable Of Triggering Reiter's Syndrome Do Not Infect The Body Via Needle Sticks, And That Conjunctivitis Is A Symptom, Not A Cause, Of Reiter's Syndrome**

Because a key issue in this case is whether Dr. Mohai's testimony is admissible under *Frye*, an understanding of the medical literature regarding the cause of Reiter's syndrome is critical in order to put the issues in the proper perspective. As the Department's opening brief demonstrates, AB at 12, the medical literature regarding the nature and etiology of Reiter's syndrome is complex. But the scientific literature establishes three key principles regarding Reiter's syndrome that are critical to understanding why Dr. Mohai's testimony in this case is inadmissible under *Frye*.

First, both the medical testimony in this case and the available scientific literature reveal that only certain, specific pathogens are capable of triggering Reiter's syndrome: *Salmonella*, *Yersinia*, *Shigella*, *Chlamydia*, and *Campylobacter*. See Janet E. Pope, M.D., et al., *Campylobacter Reactive Arthritis: A Systematic Overview*, 37 SEMIN. ARTH. RHEUM. 48, 48-51 (2007) (Pope study); Mohai at 42 (as to *Chlamydia*, *Salmonella*, and *Campylobacter*); Ayars I at 16 (as to *Shigella*, *Campylobacter*, and *Yersinia*); Ayars I at 18 (as to *Chlamydia*). The literature also reveals a handful of other, less-common pathogens that

either can, or are hypothesized to, trigger Reiter's syndrome. These include *Giardia*, *E. coli*, and *Streptococcus*. Pope study at 49. There is no evidence that Mr. Hollis was exposed to any of the above bacteria.

Second, the medical literature indicates that in order to trigger Reiter's syndrome, these pathogens must enter and infect the body via *certain specific pathways*: either through the gastrointestinal tract, the genitourinary tract, or, perhaps, the respiratory tract. John D. Carter, M.D., *Reactive Arthritis: Defined Etiologies, Emerging Pathophysiology, and Unresolved Treatment*, 20 *INFECT. DIS. CLIN. N. AM.* 827, 828 (2006). Mr. Hollis was pricked in a finger by a needle. Even assuming the needle contained a pathogen capable of causing Reiter's syndrome (the record provides no support for such a conclusion), the scientific literature does not support the conclusion that such a needle stick can trigger a gastrointestinal, genitourinary, or respiratory infection.

Third, although there may be some debate as to whether it is iritis or conjunctivitis that forms a portion of the Reiter's triad, there is no debate that the manifestations of Reiter's syndrome are symptoms, not causes of Reiter's syndrome. Ayars II at 13 (noting that the three conditions are symptoms of Reiter's syndrome); Mohai at 29 (noting that Reiter's syndrome is triggered by certain bacteria, which then manifests in the symptoms of arthritis, urarthritis, and iritis). That is, one does not

develop Reiter's syndrome as a result of having contracted conjunctivitis. Rather, conjunctivitis may be one of the symptoms one has when one develops Reiter's syndrome as a result of an infection by one of the bacteria capable of triggering Reiter's syndrome.

**2. Mr. Hollis Fails To Offer A Persuasive Reason To Conclude That Dr. Mohai's Testimony Is Admissible Under *Frye***

In his response brief, Mr. Hollis does not respond to the Department's explanation that the available scientific literature establishes the three principles outlined above: (1) that Reiter's syndrome is caused only by certain specific bacteria, (2) that Reiter's syndrome is caused only by an infection of the gastrointestinal, the genitourinary, or, perhaps, the respiratory tract, and (3) that conjunctivitis is a symptom of Reiter's syndrome but not a cause of it. Mr. Hollis also fails to directly respond to the Department's argument that Dr. Mohai's opinion that Mr. Hollis developed Reiter's syndrome as a result of the needle stick is grounded upon a novel scientific theory that is not generally accepted.

Instead, Mr. Hollis presents an oversimplified picture of Reiter's syndrome in an effort to portray Dr. Mohai's theory as less novel, and more accepted, than it actually is. Mr. Hollis suggests that all that is necessary to support a diagnosis of Reiter's syndrome is to show that "a person has an event that gives him a potential infection, subsequently

develops conjunctivitis, test [sic] positive for HLA-B27 antigen, and develops arthritis.” RB at 3. But neither the available scientific literature nor even Dr. Mohai’s own testimony supports Mr. Hollis’s simplistic description of the nature and cause of Reiter’s syndrome.

Rather, the scientific literature shows that it is generally accepted in the medical community that a *specific type of bacteria* must produce an infection in a *specific tract of the body* (the gastrointestinal, the genitourinary, or, perhaps, the respiratory tract). Both because Mr. Hollis was pricked *on the finger* by a needle, and because there is no evidence the needle contained a Reiter’s-triggering bacteria, Dr. Mohai’s opinion that Mr. Hollis developed Reiter’s syndrome as a result of being pricked by a needle is novel, not generally accepted, and inadmissible under *Frye*.

Dr. Mohai’s testimony, when viewed in its entirety, also belies the simplistic analysis of Reiter’s syndrome suggested by Mr. Hollis. In his brief, Mr. Hollis presents a portion of Dr. Mohai’s testimony as the sequence of events by which a person acquires Reiter’s syndrome: “a person has an event that gives him a potential infection, subsequently develops conjunctivitis, test [sic] positive for HLA-B27 antigen, and develops arthritis.” RB at 3. But close review of Dr. Mohai’s testimony reveals that he was describing the series of events that Mr. Hollis experienced, rather than describing the actual process by which Reiter’s

syndrome is triggered. Mohai at 30. A review of the medical literature, as well as the testimony of Dr. Ayars, discloses that although these events may be necessary elements of Reiter's syndrome, they are not themselves sufficient to trigger Reiter's syndrome, because Reiter's syndrome requires two additional elements, neither of which is present in this case: (1) a specific set of pathogens, and (2) a specific set of pathways by which those pathogens can enter the body.

Thus, it is not enough, as Mr. Hollis suggests, for a person to be exposed to a pathogen via a needle stick of the skin, even if the needle stick occurs near the arthritic joint. No known study—including the Pope study, which reviewed 40 years of reactive arthritis studies—indicates that Reiter's syndrome may be triggered by a needle stick of the skin. It is not the initial infection that triggers Reiter's syndrome—rather, Reiter's syndrome is triggered when the body has a body-wide immune response to the infection, and this immune response then brings about an arthritic response in the body's periphery. Danielle Lauren Petersell, M.D., et al., *Reactive Arthritis*, 19 *INFECT. DIS. CLIN. N. AM.* 863, 869-70 (2005).

**3. There Is Not An Established Connection Between Reiter's Syndrome And The Vaccines For Hepatitis B And Measles, Mumps, & Rubella**

Mr. Hollis argues in his response brief that Dr. Mohai testified there have been documented cases of reactive arthritis caused by the

Hepatitis B vaccine and the Measles, Mumps, and Rubella vaccine. RB at 4. Dr. Mohai did not explicitly testify that this is true. Rather, Dr. Mohai testified that people have contracted “arthritis conditions” after the Hepatitis B vaccine, Mohai at 42, and he testified only that there is a “high suspicion” of the MMR vaccine. Mohai at 42. The literature demonstrates that at least one study that examined incidents of rheumatic complaints following the Hepatitis B vaccine reported that the authors were unable to determine a causal connection between the Hepatitis B vaccine and reactive arthritis. J.F. Maillfert, et al., *Rheumatic Disorders Developed after Hepatitis B Vaccination*, 38 RHEUMATOLOGY 978 (1999).

Even assuming that Mr. Hollis’s characterization of Dr. Mohai’s testimony regarding those vaccines is accurate, it is no more than a red herring. The issue before this Court is whether the conclusion that Mr. Hollis developed Reiter’s syndrome following a needle stick is based on a novel scientific theory. Mr. Hollis was not injured in the course of undergoing vaccinations against any of the above illnesses, nor is there any evidence that he was vaccinated against them as a result of the needle stick. Even assuming that the medical literature supported the theory that Reiter’s syndrome can be triggered as a result of such vaccinations—which it does not—Dr. Mohai’s opinion regarding the cause of Mr. Hollis’s condition would still be novel and unaccepted.

**4. Dr. Mohai's Testimony Does Not Demonstrate That His Novel Causation Theory Is Accepted In The Medical Literature**

Mr. Hollis asserts in his response brief that Dr. Mohai testified that the medical literature supported his conclusion that Mr. Hollis contracted Reiter's syndrome via the industrial injury. RB at 6. Although this claim may be technically accurate, a complete review of Dr. Mohai's testimony reveals, by Dr. Mohai's own admissions and vague evasions, how little support his conclusion finds in the literature. Under *Frye's* de novo review standard (*see* AB at 17-18), the overwhelming evidence that conflicts with Dr. Mohai's vague and, at times evasive, references to medical literature compels the rejection of Dr. Mohai's claims of any support in the medical literature.

Dr. Mohai was asked on multiple occasions to discuss whether there was any support in the medical literature for his theory that Reiter's syndrome can be triggered via a needle stick. The following is typical of Dr. Mohai's responses: "Well, again, the supporting medical literature that would support it is that he's HLA-B27 positive and that he was exposed to a pathogen." Mohai at 45. But this response does nothing more than restate two of the generally accepted elements of Reiter's syndrome: the presence of the HLA-B27 gene and exposure to a pathogen. The response says nothing about Dr. Mohai's novel theory that

the bacteria that trigger Reiter's syndrome may enter the body via a needle stick. The response says nothing about why, when Dr. Ayars and the medical literature indicate that the Reiter's-triggering bacteria may enter the body only via certain specific pathways, Dr. Mohai departed from that generally accepted scientific principle and, instead, concluded that Reiter's-triggering bacteria may also act upon the body via a needle stick. When Dr. Mohai's vague responses regarding acceptance, or lack thereof, in the literature are examined, it is apparent that, as Dr. Ayars testified, the medical literature does not support the theory that a needle stick can cause Reiter's syndrome. Ayars I at 18; Ayars II at 42.

**C. Dr. Mohai's Testimony Is Subject To *Frye* Scrutiny Because It Is Based On A Novel Theory**

**1. The Department Challenges The Methods Dr. Mohai Used To Conclude That Mr. Hollis's Industrial Injury Triggered Reiter's Syndrome**

Mr. Hollis argues that a *Frye* analysis is not necessary in this case because only an expert's methods and principles, not his or her ultimate conclusions, are subject to *Frye*. RB at 11. Mr. Hollis contends that Dr. Mohai's "methods" for diagnosing Reiter's syndrome are not novel, and that this proves that his theory regarding the proximate cause of Reiter's syndrome is also not novel, and therefore is immune from a *Frye* challenge. RB at 11. Mr. Hollis even suggests that the Department does

not challenge the methods used by Dr. Mohai in arriving at an opinion regarding the cause of Reiter's syndrome in this case. RB at 12. Mr. Hollis misunderstands both the Department's position and what is meant by "method" or "principle" under *Frye*.

It is true that the Department does not dispute the basic elements of a Reiter's *diagnosis*—these include the presence of the HLA-B27 antigen, an infection by one of the bacteria capable of triggering Reiter's syndrome via one of the accepted pathways, and the triad of Reiter's symptoms. The Department does not dispute that the diagnosis of Reiter's syndrome itself is not based on a novel theory; indeed, the Department does not deny that Mr. Hollis has Reiter's syndrome. But the issue in this case is whether Mr. Hollis developed that condition *as a proximate result* of his industrial injury, and it is this aspect of Dr. Mohai's testimony that runs afoul of *Frye*. To support his *conclusion* that Mr. Hollis contracted Reiter's syndrome as a proximate result of the industrial injury in this case, Dr. Mohai relied on the novel *principle* that a needle stick is capable of triggering Reiter's syndrome.

The Department squarely disputes the principle advanced by Dr. Mohai that a needle stick is capable of triggering Reiter's syndrome. For the reasons discussed above, the principle underlying this conclusion is novel and it is not generally accepted by the medical community.

Dr. Ayars testified that the medical literature does not support the assertion that a needle stick is capable of triggering Reiter's syndrome and that such a theory is not generally accepted by the relevant medical community. Ayars I at 18; Ayars II at 42. Dr. Mohai's testimony did not establish that the available medical literature supports his assertion that a needle stick is capable of triggering Reiter's syndrome, nor did Dr. Mohai testify that it is generally accepted within the medical community that a needle stick is capable of triggering Reiter's syndrome. An independent review of the medical literature reveals that Reiter's-triggering bacteria may be transmitted to the body through—at most—three pathways: the gastrointestinal tract, the genitourinary tract, and, possibly, via the respiratory tract. *See* discussion *supra* Part III.B.1. The medical literature does not reveal any substantiated instance of a needle stick triggering Reiter's syndrome.

**2. The Cases Of *Ruff v. Department* And *Grant v. Boccia* Are Squarely Applicable To The Present Case**

Mr. Hollis argues that *Ruff* and *Grant v. Boccia*, 133 Wn. App. 176, 137 P.3d 20 (2006), do not apply to this case. He reasons that they do not apply because the defendants in those cases argued that the plaintiffs' conditions could not have been caused by exposure to an external cause and because the Department here acknowledges that

Reiter's syndrome can be caused by exposure to an external cause. RB at 13. This is a nonsensical basis for distinction. The Department acknowledges that Reiter's syndrome is a form of reactive arthritis triggered by certain types of exposure to certain types of pathogens, but that fact does not undermine the relevance of *Ruff* and *Grant* to this case.

The central issue in this case, as in both *Ruff* and *Grant*, is whether the claimant's (or plaintiff's, in *Grant*) theory of causation is admissible under *Frye*. In *Grant*, the expert's theory was that fibromyalgia can be caused by external trauma, such as a motor vehicle accident. *Grant* at 178. In *Ruff*, the expert's theory was that porphyria can be caused by exposure to low levels of volatile organic compounds. *Ruff* at 293. In both cases, the Court of Appeals held that the expert's testimony was inadmissible under *Frye* because, in both cases, the expert causation conclusions were based on *theories* and *principles* that were novel and not generally accepted in the medical community. *Grant* at 183; *Ruff* at 306.

Neither *Grant* nor *Ruff* restricted the scope of their holdings to cases in which the dispute centers on the narrow issue of whether the plaintiff's condition can be caused by an external source. Rather, the cases stand for the conclusion that when an expert offers a causation opinion of any sort, that opinion is inadmissible if it is based on a novel

and unaccepted scientific theory. Since Dr. Mohai's testimony falls within that description, those cases are relevant to this appeal.

*Ruff* and *Grant* also show that in his conclusory argument regarding *Frye* novelty, RB at 11, Mr. Hollis has misplaced his reliance on *Bruns v. PACCAR*, 77 Wn. App. 201, 890 P.2d 469 (1995), and *Kaech v. Lewis County PUD*, 106 Wn. App. 260, 23 P.3d 529 (2001). Mr. Hollis cites *Bruns* and *Kaech* for the proposition that conclusions based on established scientific techniques are not subject to *Frye* scrutiny. RB at 11. In *Kaech*, the expert's theory was that stray electrical voltage can escape from a leaky insulator. *Kaech* at 272. In *Bruns*, the experts' theory was that low levels of certain chemicals could produce symptoms consistent with those experienced by the plaintiffs. *Bruns* at 204-05.

But both cases are distinguishable from the present case because in neither *Bruns* nor *Kaech* was the novelty of an expert's causation opinion at issue. The defendant in *Bruns* did not squarely attack the causation theory as "novel," but instead sought to exclude the theory on grounds that it was not supported by human or animal studies. *Bruns* at 215 (PACCAR attacked the experts' opinions "because they [did] not rely on any human epidemiological studies or animal studies.").<sup>5</sup> And the defendant in *Kaech*

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<sup>5</sup> *Ruff* and *Grant* each expressly distinguished *Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282 (1995) on the ground that the novelty of a causation theory was not directly at issue in *Reese*, noting that the central issue in *Reese* was whether certain types of

likewise did not attack the causation theory as “novel”, but instead argued that the would-be causative agent—stray voltage—could not have escaped from an insulator. *Kaech* at 272-73. Such factual disputes with an expert’s conclusion go to the weight of the expert’s testimony, not its admissibility, and do not implicate the *Frye* analysis.

By contrast with *Bruns* and *Kaech*, *Ruff* and *Grant* both involved challenges to the novelty of the methods and principles underlying the experts’ causation theories, and both held that the experts’ causation theories were insufficiently accepted in the medical community to be admissible in court. *Ruff* at 306; *Grant* at 183. Because the Department’s challenge here goes directly toward Dr. Mohai’s theory that a needle stick is capable of triggering Reiter’s syndrome, this Court should find, like *Ruff* and *Grant*, that Dr. Mohai’s theory is novel, unaccepted, unsupported, and therefore inadmissible.

**3. Whether Mr. Hollis Contracted An Infection From The Needle Stick Is Irrelevant Because There Is No Support In The Medical Literature, Nor Acceptance In The Medical Community, For Dr. Mohai’s Novel Theory That A Needle Stick Is Capable Of Triggering Reiter’s Syndrome**

Mr. Hollis suggests there is no question that he suffered from an infection caused by the needle stick. RB at 13. But the issue of whether

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human or animal studies were needed to support an expert’s theories. *Ruff* at 301; *Grant* at 180-81. The same distinction applies to Mr. Hollis’s reliance on *Bruns*.

Mr. Hollis suffered an infection from the needle, like the issue of whether the needle was dirty, has no bearing on whether Dr. Mohai's novel causation theory is generally accepted within the medical community. There is no support either in the medical literature or in the medical community for Dr. Mohai's novel theory that a needle stick is capable of triggering Reiter's syndrome. Without such support, Dr. Mohai's theory is barred by *Frye* and his causation testimony should have been excluded.

**4. This Court's Recent Decision In *Moore v. Harley-Davidson* Supports The Conclusion That Dr. Mohai's Novel Causation Theory Is Subject To *Frye* Scrutiny**

The crux of Mr. Hollis's argument seems to be that because certain elements of Reiter's syndrome are well-established—for example, the presence of the HLA-B27 antigen and the onset of conjunctivitis—then Dr. Mohai's incorporation of those elements into his opinion on causation is similarly non-novel, and thus, as a matter of law, not subject to a *Frye* inquiry. *See, e.g.*, RB at 12. In addition to being illogical and unsupported by any legal authority, this argument fails because it is contrary to this Court's recent decision in *Moore v. Harley-Davidson Company Group, Inc.*, \_\_ Wn. App. \_\_, 241 P.3d 808 (2010).

In *Moore*, Mrs. Moore and the estate of her late husband sued Harley-Davidson after their motorcycle crashed and Mr. Moore died. *Moore* at 811. Mrs. Moore argued that the motorcycle had a defective

circuit breaker that caused the motorcycle's engine to quit during operation. *Id.* at 810-11. To support her case, Mrs. Moore proposed to call an expert witness with a background in electrical and metallurgical engineering. *Id.* at 811. The witness intended to disassemble the circuit breaker and examine the interior for signs of molten metal spatters. *Id.* The witness's theory was that because the triggering of a circuit breaker creates an electrical arc that causes pitting and a spattering of molten metal, these metal spatters produce distinct patterns in the same way that blood spatters produce distinct patterns. *Id.* The expert reasoned that he would be able to determine the exact number of times the circuit breaker had opened by applying blood spatter analysis to the metal spatters in the circuit breaker. *Id.*

This Court held that where an expert proposed to apply an accepted scientific theory to a different material, in a new area of science, and in a new context, the technique must undergo controlled testing that conforms to the scientific method. *Id.* at 813. *Moore* further held that when techniques are applied to a significantly different field, they must still satisfy *Frye*. *Id.* at 814. And *Moore* concluded that the expert's spatter analysis was a novel technique that had not yet gained general acceptance by the relevant scientific community. *Id.* Accordingly, *Moore* ruled that the expert's testimony was properly excluded. *Id.*

Here, it is well-accepted in the world of medicine that exposure to certain pathogens via the gastrointestinal tract or the genitourinary tract, in the presence of the HLA-B27 antigen, can lead to Reiter's syndrome, just as blood spatter analysis is well-accepted in the world of forensic science. The Moores' expert sought to apply the well-accepted technique of blood spatter analysis to the new application of metal spatters, just as Dr. Mohai sought to apply generally-accepted means of triggering Reiter's syndrome to an entirely new pathway, a needle stick in the skin. The Moores were unable to point to any studies that could substantiate the acceptance or reliability of metal spatter analysis, just as Dr. Mohai was unable to point to any studies to substantiate his claim that a needle stick is capable of triggering Reiter's syndrome.

**D. Under *Intalco* And Its Progeny, A Claimant Must Prove That He Or She Was Exposed To At Least *One* Agent Capable Of Causing The Claimant's Condition As A Result Of An Injury In Order To Make A Prima Facie Case For A Causal Relationship Between The Injury And The Disease**

Mr. Hollis cites *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), for the proposition that a claimant need not identify the "precise" toxic agent in the workplace that caused the worker's condition. RB at 16. Based on *Intalco*, Mr. Hollis reasons that a claimant need only show that "conditions in the workplace" more probably than not caused the worker's condition. RB at 16. Mr. Hollis

interprets *Intalco* too broadly, and he ignores the cases decided since *Intalco* that clarify that although a claimant need not identify the precise causal agent in order to establish a link between the injury and the claimant's condition, the claimant does bear the burden of proving that he or she was exposed to at least *one* agent as a result of that injury that was capable of causing the condition.

As an initial matter, it is important to note that *Intalco* involved an occupational disease claim, whereas Mr. Hollis's case involves an industrial injury. In an occupational disease claim, the issue is whether a worker developed a condition as a proximate result of distinctive conditions of employment. In an industrial injury case, the worker must show that he or she developed a condition as a proximate result of a specific, traumatic event. Because Mr. Hollis incurred an industrial injury, he must establish a proximate causal connection between *that specific injury* and Reiter's syndrome in order for that condition to be part of the claim, and it would not suffice for him to simply show that the conditions of his employment, generally speaking, played some role in the development of that disease.

Although *Intalco* held that the injured workers did not need to identify the precise chemical they were exposed to in order to establish that their condition was caused by their workplace exposure, *Intalco* so

held only after the workers established that they had been exposed to *multiple* chemicals in the workplace, *any one of which* was capable of causing their conditions. *Intalco* at 658. Mr. Hollis has not simply failed to identify the precise agent that was present on the needle that allegedly caused his disease; he has failed to prove that he was exposed to *any* pathogen as a result of the injury that was capable of causing him to develop that disease. *Intalco* does not help Mr. Hollis's argument because the evidence he has presented falls far short of that produced in *Intalco*.

Subsequent Court of Appeals cases have stated explicitly what *Intalco* implied: although plaintiffs with medical conditions caused by alleged exposure to harmful substances need not identify the precise agent that caused their condition, they must establish that they were exposed to at least one agent capable of causing their condition. For example, *Bruns* held that the plaintiffs did not need to prove precisely which chemical had caused their injuries. *Id.* at 213. But that holding came only after the Court concluded that the plaintiffs had established they were exposed to a variety of chemicals capable of causing their condition. *Id.*

*Ruff* ruled against the claimant on the basis that she had failed to identify even a single chemical to which she was exposed at work. 107 Wn. App. at 306. The Court distinguished Ms. Ruff's case from *Intalco* on the basis that in *Intalco* the Court "declined to require proof of the

precise chemical that caused the claimants' disease because several known neurotoxins were identified" in the workplace. *Id.*

In *Lewis v. Simpson Timber Company*, 145 Wn. App. 302, 323, 189 P.3d 178 (2008), this Court ruled in favor of a worker who had been injured by exposure to a fungicide while at work. The claimant established that she had been exposed to a number of different chemicals at work, but she was unable to identify the precise chemical that had harmed her. *Lewis* held that "although the precise chemical need not be identified, testimony must establish that the presence of a toxin or combination of toxins in [the] work environment more probably than not caused [the worker's] medical condition." *Id.*

Here, Mr. Hollis did not identify a single pathogen to which he was exposed as a result of his injury that was capable of triggering Reiter's syndrome. Under the line of cases beginning with *Intalco* and continuing through *Lewis*, this is insufficient as a matter of law to establish that there was a causal connection between Mr. Hollis's industrial injury and the condition of Reiter's syndrome, even assuming that Dr. Mohai's testimony were determined to be admissible.

#### IV. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court reverse the superior court's decision and rule that the Department is entitled to judgment as a matter of law.

RESPECTFULLY SUBMITTED this 6<sup>TH</sup> day of January, 2011.

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

DEPARTMENT OF LABOR AND  
INDUSTRIES FOR THE STATE OF  
WASHINGTON,

Appellant,

v.

GARY D. HOLLIS, SR.,

Respondent.

DECLARATION OF  
MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Appellant' Reply Brief to counsel for Respondent on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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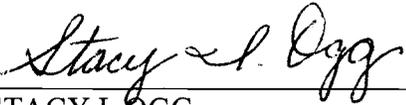
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