

No. 43837-2-II

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

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PILCHUCK CONTRACTORS, INC.,

Appellants,

v.

DAVID BERKA AND THE  
DEPARTMENT OF LABOR & INDUS., STATE OF WASHINGTON

Respondents.

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COURT OF APPEALS,  
DIVISION II  
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APPELLANT'S BRIEF

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**APPENDIX A – ORDER GRANTING DEFENDANT’S MOTION  
FOR DIRECTED VERDICT**

**A. INTRODUCTION**

This case arises under RCW Title 51, the Industrial Insurance Act and involves an erroneous Order Granting Claimant Berka's (Berka) CR 50(a) motion pertaining to Employer Pilchuck Contractor Inc.'s (Pilchuck) appeal from the Board of Industrial Insurance Appeals (Board) decision granting Berka's Application to Reopen his workers' compensation claim filed with Pilchuck under Claim No. AE-39334 pursuant to RCW 51.32.160.

Berka had an allowed claim for May 2, 2007 left knee injury which occurred while he was employed by Pilchuck. This injury was superimposed on several prior left knee injuries and related arthroscopic procedures. Berka had two arthroscopic surgeries after the May 2, 2007 injury. The Department of Labor & Industries (Department) closed his claim on November 14, 2008. Berka's left knee remained symptomatic, and he had permanent functional impairment of the left knee as reflected by the eleven percent permanent partial disability rated as of the November 14, 2008 claim closure, which would presume Berka was symptomatic after claim closure and had some permanent loss of function. McClure, 43.

Berka was terminated from Pilchuck on January 27, 2009. He moved his family to Arizona in February 2009. On March 2, 2009, he

began working as a backhoe operator in Arizona for Northern Pipeline. A little over a month later, on April 7, 2009, he filed an Application to Reopen his claim with his prior employer, Pilchuck, rather than file a new claim with his new Arizona employer. The Department granted the reopening. Pilchuck protested and later appealed the decision to the Board. On appeal, Pilchuck contended Berka's worsened left knee pathology, including two completely new conditions or findings not present at the time of the November 14, 2008 claim closure, more probably than not were due to an unreported traumatic injury or repetitive overuse type trauma during Berka's employment with Northern Pipeline. The Board affirmed reopening. Pilchuck appealed to Pierce County Superior Court. BR 2-4; CP 2-3.<sup>1</sup>

Pilchuck appeals from the July 19, 2012 Pierce County Superior Court Order Granting Berka's CR 50(A) "Motion for Directed Verdict" issued after all of the evidence had been presented to a jury following the June 25 through June 27, 2012 trial before the Honorable Ronald E. Culpepper<sup>2</sup>. CP, 63-65, 66-72. The Superior Court erroneously found there was no legally sufficient evidentiary basis for a reasonable jury to conclude that the Board of Industrial Insurance Appeals (Board) was

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<sup>1</sup> Clerk's Papers are cited as "CP." The Verbatim Reports of Proceedings are cited "VRP." Perpetuation Deposition and Hearing Testimony of witnesses who testified in the Board proceedings is referenced by witness.

<sup>2</sup> The Superior Court's Order is attached as Appendix A.

incorrect in deciding that between November 14, 2008, and August 14, 2009, Berka's left knee condition **proximately caused** by the May 2, 2007 industrial injury, had objectively worsened and was in need of further treatment. CP, 64. As a result, the Superior Court erroneously found, "as a matter of law, that the October 19, 2010 decision of the Board of Industrial Insurance Appeals was correct in deciding that between November 14, 2008 and August 14, 2009 Mr. Berka's left knee condition, proximately caused by the May 2, 2007 industrial injury, had objectively worsened and was in need of further necessary and proper medical treatment." CP 64, ll. 18-22. The Superior Court erroneously dismissed Pilchuck's appeal from the Board's Decision and Order with prejudice and remanded the claim to the Department for further action. CP, 64, BR, 2-4.

This case involves circumstantial evidence and significant questions of witness credibility which Pilchuck was entitled to have weighed and decided by the jury. The standard of review is the threshold issue in this case: "[W]here, on controverted questions of fact, there is evidence, or there are justifiable inferences from evidence, upon which reasonable minds might reach different conclusions, the questions are for the jury, and not for the court to decide." 4 Wash. Prac., Rules Practice CR 50 (5th ed.), *citing, American Products Co. v. Villwock*, 7 Wn.2d 246, 109 P.2d 570 (1941).

Taking the evidence favorable to Pilchuck as true, a reasonable jury could have concluded Berka sustained a new injury to his knee, either repetitive overuse type of trauma or an unreported injury with his subsequent Arizona employer, after he was separated from his employment with Pilchuck. A reasonable jury could also conclude that Berka chose not to report a new injury or repetitive overuse type of trauma. A reasonable jury could conclude Berka's work in Arizona or an unreported injury caused the findings for which treatment was needed. Dr. Brigham's testimony, taken as a whole, rather than a handful of statements taken out of context during strident cross-examination, as well as the testimony of Berka's treating physician and the original contemporaneous history taken by Dr. Kopp at the time of his physical examination of Berka, amply supports the Employer's position that the Superior Court's granting of Berka's motion deprived the Employer of its statutory appeal rights, based on an erroneous understanding of the facts of this claim and the law surrounding applications to reopen, was error. At a minimum, the nuanced medical testimony was conflicting. However, in this appeal, Pilchuck is entitled to have only the evidence in its favor considered when reviewing the correctness of the Superior Court Order. Pilchuck respectfully submits the Order should be reversed and the claim remanded to Superior Court for a new jury trial with direction to instruct

the jury as proposed by Pilchuck at CP 29-54, including the supervening cause jury instruction proposed by Pilchuck at CP 53.

**B. ASSIGNMENTS OF ERROR**

The Employer assigns error to the following Superior Court's actions:

1. The Superior Court erroneously granted Berka's CR 50(a) Motion for Judgment as a Matter of Law (captioned Motion for Directed Verdict).
2. The Superior Court erroneously found no legally sufficient evidentiary basis exists for a reasonable jury to conclude that the Board of Industrial Insurance Appeals was incorrect in deciding that between November 14, 2008, and August 14, 2009, Berka's left knee condition, proximately caused by the May 2, 2007 industrial injury, had objectively worsened and was in need of further necessary and proper medical treatment, thereby erroneously affirming the October 19, 2010 Decision and Order of the Board and reopening Berka's workers' compensation claim.
3. The Superior Court erroneously found, as a matter of law, that the October 19, 2010 decision of the Board of Industrial Insurance Appeals was correct in deciding that between November 14, 2008, and August 14, 2009, Berka's left knee condition, proximately caused by the May 2, 2007

industrial injury, had objective worsened and was in need of further necessary and proper medical treatment.

4. The Superior Court erroneously dismissed Pilchuck's appeal with prejudice.

5. The Superior Court erroneously remanded Berka's claim to the Department for further action when the Application to Reopen pertaining to this claim should have been denied as not supported by the law and the facts.

6. The Superior Court erroneously ignored Berka's and the Department's waiver of Berka's CR 50(a) motion by their failure to challenge the sufficiency of the evidence during proceedings before the Board of Industrial Insurance Appeals.

7. The Superior Court erroneously failed to apply the correct CR 50(a) standard of review and erroneously weighed the evidence when ruling on Berka's motion.

8. The Superior Court erroneously afforded greater weight to the self-serving testimony of Berka over that of disinterested former Pilchuck employee Wauldron and the history Berka reported to Dr. Kopp.

9. The Superior Court erroneously usurped Pilchuck's statutory appeal right to a jury trial.

10. After impermissibly weighing the evidence, the Superior Court erroneously failed to properly apply the law on proximate cause and intervening cause to the facts most favorable to Pilchuck.

11. After impermissibly weighing the evidence, the Superior Court erroneously applied a burden of proof not appropriate for the standard of review. Even had application of a burden of proof been appropriate, the Superior Court erroneously applied the incorrect burden of proof.

12. The Superior Court erroneously failed to instruct the jury as proposed by Pilchuck, including Pilchuck's supervening/intervening cause instruction.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .**

1. The Superior Court did not have authority or jurisdiction to rule on Berka's motion because Berka and the Department waived challenges to sufficiency of the evidence by not bringing such motions before the Board. Although under RCW 51.52.115 the trial in Superior Court, a statutory right of appeal, is *de novo*, and the Superior Court has authority to rule on evidentiary objections and rulings made at the Board, the Superior Court acts only on the record made before the Board and does not have appellate authority or jurisdiction to entertain matters not raised before the Board and waived. (Assignments of Error 1-6, 9).

2. Per CR 50(a) and well-established case law, there is no discretion involved when considering a party's motion for judgment as a matter of law. Further there is no weighing of competing evidence and inferences. The Superior Court must take the facts most favorable to the non-moving party as true and decide whether a reasonable jury could find in the non-moving party's favor. Based on the facts and inferences in the Certified Appeal Board Record most favorable to Pilchuck, the Superior Court ignored or improperly applied this standard when granting Berka's motion. The Superior Court further erroneously placed an erroneous burden of proof on Pilchuck, seemingly requiring Pilchuck to present direct evidence of exact proof of an industrial injury in Arizona when Pilchuck is entitled to rely on circumstantial evidence and all evidence and reasonable inferences in its favor from all witnesses to establish its *prima facie* case, at which point the burden of proof shifted to Berka to establish his entitlement to benefits based on a preponderance of the evidence, all questions of fact for the jury. The Superior Court's error in granting the motion is illustrated by its weighing of the evidence and application of an erroneous burden of proof as illustrated in the Verbatim Report of Proceedings. The Superior Court's decision that Berka's left knee condition, **proximately caused by the May 2, 2007**, did not objectively worsen between November 14, 2008 and August 14, 2009, **as a matter of**

**law**, is not supported by the record and is based on application of an erroneous standard of review and improper placing of the burden of proof. (Assignments of Error 1-5, 7-8, 10-11).

3. The Superior Court issued a declaratory ruling that if this case were to go to the jury, the Court would not give Pilchuck's proposed "supervening/intervening cause" instruction. Given the issue has been ruled upon by the Superior Court, Pilchuck respectfully request this Court review its Proposed Instruction and on remand, direct that it be given. CP 53. In the alternative, Pilchuck requests that the Court be directed to give WPI 155.06 and the instruction approved by the Court in *McDonald v. Dep't of Labor & Indus.* (Assignments of Error 12).

**D. STATEMENT OF THE CASE**

When reviewing whether the Superior Court erroneously granted Berka's Motion for Directed Verdict, this Court accepts the evidence most favorable to the non-moving party Pilchuck as true. *Wold v. Jones*, 60 Wn.2d 327, 373 P.2d 805 (1962); *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 36 P.3d 1065 (2001). As such, what follows is not a complete recitation of the evidence.

Berka testified that prior to the May 2, 2007 industrial injury claim filed with Pilchuck, he had prior left knee injuries, one in 1993 while working for Mid Mountain Contractors, and prior left knee injuries in

1997 and on March 25, 1999, while working for Pilchuck. Berka, 3-6, 7. He had arthroscopic surgery for a meniscus tear following the 1993 injury. Berka, 7. He also had knee surgeries after the 1997 and 1999 injuries. Berka, 7-8. He returned to work in 1999 after the injury. Berka, 8-9.

Berka sustained an industrial injury to his left knee on May 2, 2007, while working as an operator foreman for Pilchuck. Berka, 12-14. He felt immediate pain on the inside of his leg and knee, the same location as the pain from his earlier injuries. He finished the work day and went to US Healthworks, which referred him back to his knee surgeon, Steven Yamamota, who performed all of his knee surgeries up until his January 2010 knee surgery. BR, 14-16, 61. This injury became the subject of this claim on appeal, which was allowed and eventually closed on November 14, 2008. Wauldren, 26.

Berka has worked in natural gas construction and underground utilities since 1995, first as a laborer and later as an operator foreman and truck driver installing underground natural gas pipeline. Berka, 5, 12. Human Resources Manager Jennifer Torvik testified that Berka worked for Pilchuck from September 24, 2001, to March 7, 2002, from August 16, 2002, to September 9, 2005, when he quit, then from June 27, 2006 to January 27, 2009, when he was terminated based on his performance and

for reasons unrelated to his left knee injury and his ability to work as it pertained to that injury. Torvik, 41-43.

Berka had two knee surgeries and physical therapy after the 2007 injury. Berka, 14. After the first surgery on May 30, 2007, his left knee continued to be sore and swollen. Berka, 16, 18. He had a knee brace and a limp. His knee would give out. Berka, 23. He had his second surgery on July 30, 2008, after working as a walking foreman for approximately one year, and returned to work at Pilchuck in September 2008 doing pre-inspections and filling in for foremen, the type of position he held until he left Pilchuck in January 2009. Berka, 21, 28, 35. Berka's claim closed on November 14, 2008. He testified that his knee was still sore and swollen at that time. It never got better. Berka, 38.

Berka moved to Arizona and started working for Northern Pipeline on March 2, 2009. Berka, 44, 49. He did not inform his new employer that he was having problems with his knees or request accommodation. Berka, 69-70, 72. He last worked for Northern on September 14, 2009. Berka, 54. Berka was first seen in Arizona by Dr. McClure on April 15, 2009. Dr. McClure performed arthroscopic surgery on January 8, 2010. 48-49.

As to the history recorded by Dr. Kopp, Berka testified that Dr. Kopp recorded the history incorrectly. However, he conceded that after his 2008 surgery when he returned doing pre-inspection work, he was not on

his knees or going in and out of ditches a great deal, which was consistent with Dr. Kopp's summary. Berka, 74-75. Working in the ditches was inconsistent with the restrictions placed by Dr. Yamamoto, and both Mr. Wauldron and Superintendent Healey told him to get out when they found him there on two occasions. Berka, 77-78. After his surgery in 2008, Dr. Yamamoto advised Berka to think about finding different work in line with his restrictions. Berka, 63.

Berka's left knee condition was worsening over time up to the point that he had the 2010 surgery. Berka, 82-83. He missed approximately one week of work at Northern because of his knee. Berka, 86. Prior to his last day at Pilchuck on January 27, 2009, he had not been missing work on a regular basis. Berka, 86-88. He testified his knee got progressively worse from the time he started working for Northern up until the surgery of 2010 because he had been active on it, walking and shopping with his wife, and working at Northern. Berka, 88-90.

Brad Wauldren worked in the safety department of Pilchuck Contractors during the relevant time period, was the point of contact for all injuries, and administered the Pilchuck's return-to-work program. At the time of his testimony, he was no longer employed due to a reduction in force. Wauldren, 4-6, 16. From the time Berka first reported the May 2, 2007 industrial injury until he was terminated, Wauldren had almost daily

contact with Berka about the claim and his knee, including putting him on light duty so he would not further aggravate it. Wauldren, 6-7. After Berka's injury and when he reported he was having an issue with his knee, Pilchuck immediately moved him into the light duty position of walking foreman, a position created for him, so he could get out of the office situation. Berka spent quite of bit of time in his vehicle doing paperwork, running the crews, and watching the jobsites. As a walking foreman, Berka was not required to do the physical aspects of the job as the other foremen were. The position was further restricted so the jobs to which he was assigned were level job sites so he stayed on level ground, an accommodation Wauldren had never seen; the company was trying to help Berka and not put him at further risk. Wauldren, 7-8, 10, 17-18. Berka was not to be getting into trenches or holes assisting in actual completion of the work. Wauldren, 8.

Berka was on light duty from the time of the May 2, 2007 injury until the claim was closed in November 2008. Wauldren, 19. As of January 27, 2009, Berka did not have any complaints about his knee, Berka reported his knee was "as good as it could be," and he was doing the job on a daily basis. Wauldren 8-10. Before the claim closed in November 2008 and while he was working as a walking foreman, he reported his knee was doing well. Wauldren, 22. Berka's doctor was

recommended he find alternative work. Berka, 24. Berka found his own position with Northern, and told Wauldren he was being brought on as a superintendent. Wauldren, 12. Berka reported he was excited because he would not be doing the physical day-to-day work, and he wanted to move into management. Wauldren, 12-13.

Between November 14, 2008, when the claim was closed, and March 2, 2009, when Berka started working for Northern, Wauldren recalled speaking with Berka 50 or 60 times; Berka was calling him regularly. Wauldren, 26. Wauldren recalled during one of these conversations that Berka asked Wauldren what he would need to do to reopen his claim. Wauldren advised him to see his doctor, and the doctor would handle the reopening. Wauldren, 20, 26. Wauldren recalled Berka telling him he wanted to get a new brace for his knee, but did not recall Berka expressing pain complaints to him between November 2008 and March 2, 2009. Wauldren, 26-27. Berka told Wauldren in January 2009 that he needed a new knee brace because he had damaged the old one or it was getting worn out. Wauldren, 15-16, 20, 29.

From November 2008 up through the point Berka left for Arizona, Wauldren recalled only that Berka said his knee was doing okay. Wauldren testified that during this period there was never any medical evidence given to him or told to him other than that Berka's knee was

doing okay. Wauldren, 35. Wauldren testified that the conversation he had with Berka about claim reopening occurred after Berka had moved himself and his family to Arizona and six weeks to two months after Berka started working for Northern. Wauldren, 35, 39-40. While Berka was still working for Pilchuck, he asked generically what would be required to reopen a claim. Wauldren recalled no discussions about claim reopening between these two periods. Wauldren, 39.

Wauldren testified he had contact with Berka after he moved to Arizona in February 2009. Berka told him things had changed, and Northern did not have a position as a superintendent; he would have to work in the field as an equipment operator, very physical work. Berka told Wauldren he was having to get on and off equipment, operate foot pedals, and get in and out of holes. Wauldren, 13, 20, 25. Berka told Wauldren the equipment at Northern was not as good as at Pilchuck, and it was much more demanding. Wauldren, 24-25. Berka was also concerned that he had to take time off work because his knee was bothering him, particularly the level at which he was having to work, a level he had not done in years at Pilchuck. In April or May 2009, Berka told Wauldren he was doing a lot more physical work than he was used to, was doing very physical work, and he could not continue to do it. He told Wauldren he did not want to let Northern know he had a knee injury or file a claim because he did not

want to appear as if he was the new guy coming into a company and getting injured. Wauldren, 14-15, 27-29. He was using his old knee brace, icing his knee and using ibuprofen. Wauldren told Berka that if the work he was doing at Northern was different than what he had been doing at Pilchuck, he should file a claim with Northern. Wauldren, 28.

Orthopedic surgeon Lance Brigham, M.D., whose practice included knee injuries and surgeries, reviewed a comprehensive set of Berka's medical records dating back to the pre-injury January 24, 2000 evaluation of Douglas Hassan, M.D., up through the September 14, 2009 evaluation by Dr. McClure. Brigham, 5, 10-13. He testified that the medical records he reviews as part of an independent evaluation are very important, "because medical records usually don't lie, and those closest to an event are the most accurate." Brigham, 8, ll. 16-20. Dr. Brigham testified that when addressing questions of causation, a current physical examination is not helpful at all because he is looking at history trying to put the pieces together, not current events. Brigham, 9-10.

Based on these records, Dr. Brigham testified that even before the May 2007 industrial injury, Berka's left knee was not good; he had already had three surgeries and continued to operate heavy equipment and do construction work. Brigham, 13. He noted on May 2, 2007, Berka stepped in a hole and twisted his knee. However, it is very difficult to say

whether that event had any impact on his knee pathology. Brigham, 13. Dr. Brigham understood that up to the time the Department closed the claim in November 2008, Berka had two partial medial meniscectomies, and it was determined there was articular cartilage damage to the medial femoral condyle. It appeared the left knee condition was at maximum medical improvement when the claim was closed although Berka continued to use an unloader brace, and he was still being treated for some pain on the medial side of the knee. Brigham, 15-16.

Dr. Brigham felt Dr. Kopp best described Berka's course after the November 2008 claim closure and move to Arizona, where he did a lot more work on his knees. Brigham, 16-17. By Berka's own description to Dr. Kopp in June 2009 (before the claim was in litigation) and consistent with Berka's reports to Wauldren, Berka's work in Arizona was significantly different. He was working as a heavy equipment operator running heavy equipment and jumping in and out of ditches, contraindicated by his treating physician, which he said increased his pain. Brigham, 16-18. In Dr. Brigham's opinion, Berka's work in Arizona caused a worsening of his left knee condition in 2009 on a more-probable-than-not basis. Brigham, 18. Dr. Brigham testified that the August 26, 2009 MRI showed a horizontal tear in the posterior body of the medial

meniscus, a new finding, small joint effusion, and chondromalacia, and something had to cause the new finding. Brigham, 18.

Dr. Brigham opined that he agreed with Dr. Thorson, who did the examination on October 27, 2008, that Berka's left knee condition causally related to the May 2, 2007 injury was at maximum medical improvement; there was no curative treatment at that time that would make him better. Brigham, 24, 34. Dr. Brigham agreed Berka had injuries to his meniscus dating back to 1993, with resulting surgeries in 1993, 1995, and 1999. Brigham, 24-25. The pathology identified and operated on previously and resulting from the May 2, 2007 injury with two further surgeries involved the posterior horn and midportion of the medial meniscus. Brigham, 25-26.

Dr. Brigham testified that although Berka had subjective pain complaints at the time of Dr. Thorson's 2008 evaluation, the only objective test performed was the McMurray's test, which was negative bilaterally. Dr. Brigham noted Berka had a lot of subjective complaints with very few objective findings. Brigham, 40-43. He also reviewed Dr. Kopp's IME report dated June 4, 2009. Although Dr. Kopp measured two centimeters of thigh atrophy, a change from Dr. Thorson's measurement one-half centimeter, Dr. Brigham could not ascribe a cause to the atrophy, especially because Dr. Kopp noted Berka was walking normally. Further,

Dr. Brigham testified one does not get atrophy from pain but from bad mechanics. He sees professional athletes with no meniscus, with swelling, and giving way, who do not have atrophy. Brigham, 39, 45, 46, 47.

Berka's McMurray's test, a quasi-objective test where the examiner pushes down on the tibia against the fibia to try to impinge the meniscus, was positive in Dr. Kopp's evaluation in contrast with Dr. Thorson's negative finding. Brigham, 47-48. A positive test usually reflects a mensical tear. Brigham, 47-48. However, Berka's most recent MRI, which reflected only a horizontal tear of the posterior horn of the medial meniscus, was not consistent with that finding because one would not get a positive McMurray's test with that kind of tear. Brigham, 48-49.

Dr. Brigham agreed that Berka's overall left knee was worse than it was in 2009 than it was in November 2008. The question is what caused the worsening. Brigham, 49-50. He testified the atrophy is not related to the knee and, the positive McMurray's test was not documented by the MRI. Brigham, 51-52. Dr. Brigham testified that Berka has a horizontal degenerative tear, which is usually not painful, and such a tear is one Dr. Brigham would not even treat. Brigham, 51. Further, **Dr. Brigham testified that he could not say one way or the other whether the arthritic condition of Berka's knee and meniscus is related to the 1993 injury, the subsequent injuries, or the May 2, 2007 injury. He testified**

**Berka is going to have progression of his arthritis. Dr. Brigham could not say whether the 2007 injury caused the arthritis, sped it up, or slowed it down.** Brigham, 56-57. Dr. Brigham noted he has many patients he has followed for many years who have had part of their meniscus taken out, but who have no degenerative changes. Brigham, 57.

Dr. Brigham testified that he considered Berka's own statement, taken from Dr. Kopp's evaluation, that the work he was doing in Arizona was more strenuous work than the work he had been doing at Pilchuck, noting when Berka went to work in Arizona in March 2009, he was no longer working as a foreman, but solely as a heavy equipment operator. Brigham, 59-60.

Dr. Brigham identified the crux of the issue when he noted that Burka knows the system and there was a difference in truth between what Berka testified to regarding his work demands in his deposition and what he told Dr. Kopp. Berka's testimony regarding his work in Arizona and at Pilchuck was inconsistent with the records. There was either a misrepresentation to Dr. Kopp or a misrepresentation in the discovery deposition of Berka. Brigham, 78. Dr. Brigham testified that he stated in his report that the "work load in Arizona has been a primary aggravator of his knees his left knee in particular, and this would (by definition) be considered a new injury or aggravation[.]" and that Berka had an injury,

whether a single injury or repetitive use, “but I would definitely say it is repetitive.” Brigham, 60-62, 63, l. 18- 64, l. 5, 67, l. 14-68, l. 2; 77. He definitely had, at a minimum a new repetitive injury, if not a new single injury, caused by his work load in Arizona. Brigham, 67-68

The Superior Court’s error in granting the Claimant’s Motion is further elucidated by the exchange between Dr. Brigham and Berka’s Counsel regarding the cause of Berka’s worsening:

Q: You make the conclusion that the basis of the application to reopen the claim, page 6 of your report, quote ‘appears to be part muscular and part joint line pain, again secondary to the aggravation of the work as a laborer/equipment operator in Arizona.’

A: Correct.

Q: Is that your opinion?

A: Correct.

...

Q: But you’re tying this increase in pain, this aggravation, solely to his work in Arizona.

A: By his report to Dr. Kopp, yes.

Q: So that’s all there is that you’re going by.

A: That’s all there is to go by.

...

Q: Is that aging of the meniscus that has occurred in this man in any way causally related to the May 2, ’07 injury?

A: No, it’s probably related to his original injury. I mean, we have genetics that make up the quality of the meniscus. Some tear much easier than others. Some are pretty doggone tough. Some are going to tear no matter what condition they’re in.

Brigham, 69, l. 1-70, l. 25.

Dr. Brigham noted, per his review of Dr. Marcus's notes from April 2009 at least through September 2009, that Berka had new pathology per the MRI of chondromalacia (softening of the articular cartilage) of the patella, which correlated with his medial joint line pain and increased global pain complaints. If the horizontal tear was the cause of pain, it would only be tender in the very small portion of the posterior joint line. Brigham, 79-80. The work activity Berka described to Dr. Kopp of jumping in and out of ditches would have played a role in the development of that new pathology. Brigham, 79. The small horizontal tear was insignificant, probably secondary to aging of the meniscus, and not related to the July 23, 2008 surgery. Brigham, 81-82.

James Kopp, M.D., evaluated Berka on June 4, 2009. Kopp, 10, 17. Dr. Kopp recorded the history Berka provided to him at the time of the evaluation as follows:

He has since moved to Arizona and was doing reasonably well. However, the Arizona job is a little bit different than his job here. He is an operator and a foreman. Here in Washington, he mostly operated heavy equipment. In Arizona, he does a lot of groundwork, being in and out of ditches, and he does a lot more work on his knees. Although the job title is the same, the natural description is totally different. So he has had an increase in his pain and he sought advice with a physician in Arizona who had indicated that x-rays showed moderate joint space narrowing.

Kopp, 37, l. 11-38, l. 1. He agreed that as an independent medical examiner with only one opportunity to examine the patient and interview the patient as to his or her history, the history he obtains from the worker is a critical component to his overall assessment of a case, particularly where issues of causation are involved. Kopp, 35. Notwithstanding this admission, when questioned about the disparity between the history he took and Berka's subsequent testimony, he testified the difference in history did not really matter, "I am presuming I got the history wrong. And although **I did dictate it in front of him**, he must have heard it wrong, too." Kopp, 32, ll. 12-19, *emphasis added*.

Prior to the May 2007 injury, Dr. Kopp noted Berka had a left knee injury in 1993 followed by two arthroscopic surgeries in 1993 including a medial meniscectomy, another left knee injury in 1997 and another medical meniscectomy and perhaps a third industrial injury to the left knee on March 25, 1999 followed by a partial medial mensicectomy, and claim closure in 1999 with 9 percent impairment. Kopp, 19-20.<sup>3</sup> *See also*, Agreed Modification of Portion of Transcript, CP 26.

In performing his evaluation, Dr. Kopp utilized the October 27, 2008 IME report of Dr. Thorson, performed just seventeen days before the

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<sup>3</sup> It is unclear in the undersigned's copy of the record what was stricken by the parties, not because of any objection, but to prepare the record for reading to the jury. It appears this statement as to the prior impairment award at Kopp, 19 lines 13-16, was not stricken.

November 14, 2008 claim closure. Kopp, 17-18. Dr. Kopp's findings, **compared with those of Dr. Thorson in October 2008 after Berka had already returned to work for Pilchuck**, were a two to three degree difference in range of motion testing, and two centimeters of thigh atrophy, a one and one-half centimeter increase. Kopp, 25-26. Dr. Kopp initially testified it takes several weeks to several months for thigh atrophy to develop. Kopp, 25-26. **Notably, Dr. Kopp's evaluation did not take place until approximately three months after Berka commenced work with Northern Pipeline. Hence, there is no credible way he can attribute that atrophy to the May 2007 injury because he had no measurements before Berka began work with Northern Pipeline.**

Dr. Kopp conceded that the progression of Berka's arthritic knee, the changes in his knee, were begun initially by the 1993 injury. Even without the intervening 2007 injury, it is probable those knee conditions would have progressed over time. Kopp 47-48. He conceded that if during the surgical evaluation, done later by Dr. McClure, in addition to the new horizontal cleavage tear in the posterior horn of the meniscus, there was also a radial tear in the mid-portion of the lateral meniscus, that could be evidence of an intervening traumatic injury because radial tears are typically associated with traumatic injury. Per his review of Dr. Yamamoto's surgical report from July 2008 before claim closure, the

lateral compartment at that time was determined to be essentially normal. Kopp, 42.

Dr. Stacey Dale McClure saw Berka in August 2009 and ultimately performed left knee arthroscopy with partial medial meniscectomy and partial lateral meniscectomy on January 8, 2010, and observed new findings. McClure 7, 19. Dr. McClure found a horizontal cleavage tear in the posterior horn of the medial meniscus, which can be a degenerative finding, an acute finding or both (often difficult to discern) and mild chondromalacia (wearing of the cartilage) in the medial compartment. McClure, 13, 19, 20. Dr. McClure also found a small radial tear in the lateral meniscus and well-preserved cartilage. McClure, 20, 21. When asked about the cause of the horizontal cleavage tear in the medial meniscus, Dr. McClure testified as follows:

Given the fact that he did not relay any history of a new trauma to his knee, **I would have to speculate** that more likely than not the new tear in his medial meniscus occurred from poor body mechanics with walking. So **possibly** due to his, you know, limping, the mechanics is (sic) thrown off. He's not striking the ground with the proper foot position. There is a mechanical twisting load through the knee and probably sheared the meniscus in that respect.

McClure, 21, ll. 14-22, *emphasis added*. As to the potential cause of the radial tear in the mid portion of the lateral meniscus, a new finding in a new area, Dr. McClure testified as follows:

My opinion of how he **could** obtain a lateral meniscus tear in addition to the medial meniscus tear is there is pain on the medial compartment from whatever source. Because of that pain on the medial compartment, he attempts to do what's called an avoidance pattern to keep from putting pressure on that medial compartment, therefore, loading the lateral compartment of, you know, trying to keep weight off the medial compartment; and more-probable-than-not **in absence of new trauma**, that's how he acquired the lateral meniscus tear. **You do not - - a tear in the meniscus, whether it's medial, lateral, or whatever, does not require an exorbitant amount of force. You can tear it just walking down the street.**

McClure, 22, ll. 12-24, *emphasis added*. Despite this speculation, Dr. McClure testified that Berka's worsened knee condition was related to the 2007 injury "[b]ased on the fact that the patient has - - did not report any new injuries." McClure, 26, 33, ll. 5-6. Dr. McClure admitted when he started seeing Berka, he did not have a thorough history of his prior left knee problems. McClure, 39. When presented with Berka's report to Dr. Kopp of doing a lot of groundwork and being in and out of ditches in Arizona with a lot more work on his knees with increased pain, Dr. McClure testified **that type of activity can** aggravate and actually **cause** a re-tear of a medial and/or lateral meniscus. McClure, 43. He further testified that assuming Berka's knee symptoms became worse while working for Northern Pipeline in Arizona, **the work in Arizona could be a cause of the lateral and medial meniscal tears he observed and corrected in his January 2010 surgery of Berka's knee.** McClure, 44.

Notably, Dr. McClure provided this testimony even absent a report by Berka of an injury. He observed Berka was able to work full-time in Washington. However, when he was working in Arizona, he was having difficulty working full-time and was frequently taking days off. McClure, 44-45. He testified any previous arthroscopies, meniscectomies, or surgeries, **including the injury and surgery dating back to 1993**, play into the progression of Berka's overall knee condition McClure, 45-46. However, despite these multiple surgeries, there was not a great deal of degenerative change in the articular surfaces of the medial compartment when Dr. McClure performed his surgery in 2010; there was not a great deal of wear and tear. McClure, 48.

Finally, when asked whether the discrepancy between the history Dr. Kopp obtained from Berka at the time he evaluated him versus the history Berka provided during testimony in this litigation mattered, Dr. McClure testified as follows:

In my opinion, it matters to me if the previous surgeon did do a really good job as far as getting out the torn meniscus and the time he spent at his new job in Arizona involved a lot of crawling around on his knees, getting up and down, and a lot of harsh walking, it matters to me because that could cause a new tear in his meniscus. If he did not have a tear in his meniscus prior to that job the, yes, it does matter. Because if he didn't have a torn meniscus prior to that job, then that type of activity, if that's what he was doing at his job in Arizona, could definitely cause a tear in his

meniscus. ... If you assume that what he said is correct, then I - - more probable than not, is from the 2007 injury.

McClure, 53, ll. 7-24; 55, ll. 4-5. To state it another way, for Dr. McClure to support Berka's case for causation, he would have to assume that what Berka testified to, compared to his earlier report and Wauldren's testimony, was true, **an issue of credibility for the jury**. Finally, Dr. McClure testified that regardless of Berka's prior injuries and surgeries it was very possible for Berka to sustain new injuries resulting in new pathology to the knee as a result of either an intervening occupational exposure or injury event. McClure, 59. Taking the facts most favorable to Pilchuck as true, Pilchuck respectfully submits a reasonable juror could find Berka's left knee condition and new findings were more probably than not related to his pre-2007 history and his activities after he was terminated by Pilchuck.

## **E. ARGUMENT**

### **1. SCOPE AND STANDARD OF REVIEW.**

RCW 51.52.115 provides superior and appellate courts with the statutory authority to review decisions of the Board. Although the superior courts review the Board's decisions *de novo*, the superior courts act in an appellate capacity. RCW 51.52.115; *Boone v. Dep't of Labor & Indus.*, 174 Wash. 123, 24 P.2d 454 (1933); *Ivey v. Dep't of Labor & Indus.*, 4

Wn.2d 162, 102 P.2d 683 (1940). As the Court in *Sepich v. Dep't of Labor & Indus.*, explained when reversing the trial court's erroneous rulings:

Each party is required to present all of its evidence at the Board level when appealing from an order of the Supervisor. See RCW 51.52.102. The testimony is transcribed and filed in the record on appeal. See RCW 51.52.100. The trial court is not permitted to receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board. See RCW 51.52.115.

The trial is de novo and the trial court is entitled to independently resolve questions relating to the admissibility of evidence. Nevertheless, the trial court has no original jurisdiction in such cases; it acts only in an appellate capacity. The only evidence presented on appeal is that contained in the Board record. **Thus, even though the trial court may rule independently on evidentiary questions, as an appellate tribunal, it can only pass upon those matters that have first been presented to the Board and preserved in the Board's record for review. As a court of review, it cannot consider matters outside the record or presented for the first time on appeal.** Objections to evidence can be considered only upon the specific grounds made before the Board.

*Sepich v. Dep't of Labor & Indus.*, 75 Wn. 2d 312, 316, 450 P.2d 940 (1969) (emphasis added, citations omitted).

2. **BERKA AND THE DEPARTMENT WAIVED ANY CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE BY NOT BRINGING A MOTION CHALLENGING THE SUFFICIENCY OF PILCHUCK EVIDENCE AT THE BOARD.**

Only issues of law or fact that were included in the Notice of Appeal to the Board or in the Board's record of proceedings may be

decided on further review. RCW 51.52.115; *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 445-446, 213 P.3d 44 (2009). Further, only objections to evidence on the specific grounds made before the Board can be considered on appeal. *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 663, 833 P.2d 390 (1992), citing *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969). Issues not raised before the Board are waived and cannot be raised on appeal. *Wilbur v. Dep't of Labor & Indus.*, 38 Wn. App. 553, 559, 686 P.2d 509 (1984), citing, *Homemakers Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983); *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 580 P.2d 636 (1978) (claimant's failure to raise claimed conflict of Board Chairman in Board proceedings deemed waiver); *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 790 P.2d 201 (1990).

The Board in *In Re: Russell D. Ford*, Dckt. No. 66217 (July 6, 1987), explained the procedure and burdens of proof in employer appeals before the Board as follows:

[RCW 51.52.050 and .102] place the 'burden of proceeding with the evidence to establish a prima facie case for the relief sought' on the appealing party, the employer here. If the employer makes a prima facie case, the burden then shifts to the claimant to establish entitlement to benefits by a preponderance of the evidence. *Olympia Brewing Company v. Dep't of Labor & Indus.*, 34 Wn.2d 498 (1949); *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).

**Mr. Ford and the Department have conceded that the employer has met its burden since they did not move to dismiss for failure to make a prima facie case at the conclusion of the employer's case-in-chief. Thus, the question of whether the employer made a prima facie case is not properly before us.** Even if it were, we would conclude that the employer had satisfied its threshold burden by presenting the testimony of Drs. Phillip J. Suver and Michael Bidgood to the effect that any worsening in Mr. Ford's preexisting degenerative osteoarthritic condition between the two terminal dates was due to the natural progression of that condition, not proximately caused by the industrial injury. **At any rate, because Mr. Ford and the Department elected not to challenge the sufficiency of the employer's evidence and because they presented countervailing evidence, Mr. Ford assumed the ultimate burden under Olympia Brewing of establishing the correctness of the Department order by a preponderance of the evidence. We weigh the evidence accordingly.**

*In Re: Russell D. Ford*, Dckt. No. 66217 (July 6, 1987), (emphasis added);  
*see also, In Re: Michael J. Bell*, Dckt. No. 11 15598 (June 11, 2012).

At the Board, neither the Berka nor the Department made motions challenging the sufficiency of the evidence at the conclusion of the Employer's case or the conclusion of Berka's and the Department's case. BR, Colloquy 4/14/10, 45, l. 1-46, l. 4; Brigham, 88-90; Berka, 92, l. 12-94, l. 8; Kopp, 52; McClure, 57-58. The Board issued its Decision and Order based on a preponderance of the evidence following Pilchuck's Petition for Review and Berka's Response in which Berka argued his testimony was credible, and the weight of the evidence supported the

Board's Proposed Decision and Order. BR, 2-4, 6-20, 23-30. Berka explicitly noted in his response, "The industrial appeals judge's assessment of the credibility and weight to be given to all witnesses testimony in this case is soundly based and absolutely supported by the evidence." BR, 20, ll. 15-18. Neither Berka nor the Department asserted at the Board that Pilchuck failed to present a *prima facie* case, and the Industrial Appeals Judge who issued the Proposed Decision and Order did not decide that case on that basis, but on the basis of witness credibility. BR, 44-55. Hence, these motions were waived at the Board level and were improperly brought, considered and granted by the Superior Court. The Employer requests the Order Granting Directed Verdict be reversed and the claim remanded to the Superior Court for a new trial on this basis.

3. **WITNESS CREDIBILITY ISSUES DICTATE REVERSAL OF THE ORDER GRANTING 'DIRECTED VERDICT' WHEN THE PROPER STANDARD OF REVIEW IS APPLIED.**

In the alternative, this Court's review of the Superior Court's judgment as a matter of law made by way of Order Granting 'Directed Verdict' made pursuant to CR 50(a) is *de novo*. *Weber Const., Inc. v. County of Spokane*, 124 Wn. App. 29, 98 P.3d 60 (2004). In this appeal, there are numerous instances of issues of witness credibility such as between Berka's contemporaneous history provided to Dr. Kopp versus

his testimony. There are also issues of credibility between the testimony of Wauldron and Berka, and the weight to be given to Drs. Brigham, McClure and Kopp with this medically-nuanced set of facts. Issues of witness credibility are for the jury to decide. *Morse v. Antonellis*, 149 Wn.2d 572, 70 P.3d 125 (2003) (Supreme Court reversed Court of Appeals reinstating trial court's denial of motion). Hence, it was error for the Superior Court to grant Berka's motion.

In addition, it is clear by the Superior Court's statements and questions during oral argument of Berka's motion that the Superior Court erroneously engaged in a weighing of the evidence. VRP 6/27/12, 59-88. However, there is no exercise of discretion when ruling on a CR 50(a) motion for judgment as a matter of law. Rather, the motion may **only** be granted where, as a matter of law, there is **no** evidence or reasonable inference therefrom to support the non-moving party's position when viewing the evidence and the reasonable inferences therefrom most favorably to the non-moving party. *Thompson v. Grays Harbor Community Hosp.*, 36 Wn. App. 300, 675 P.2d 239 (1983); *Martin v. Insurance Co. of North America*, 1 Wn. App. 218, 460 P.2d 682 (1969); *Wold v. Jones*, 60 Wn.2d 327, 373 P.2d 805 (1962). The Superior Court is not permitted to weigh evidence and substitute her or his judgment for that of the jury. *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998

(1981); *see also*, *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 36 P.3d 1065 (2001) (when ruling on motion for judgment notwithstanding verdict (JNOV), court accepts truth of the nonmoving party's evidence and all reasonable inferences; motion granted only if no justifiable evidence to sustain verdict). “Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.” 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (6th ed.).

This strict standard applies equally in workers’ compensation law. *Sutherland v. Dep’t of Labor and Indus.*, 4 Wn. App. 333, 337-338, 481 P.2d 453 (1971); *Johnson v. Dep’t of Labor & Indus.*, 46 Wn.2d 463, 466, 281 P.2d 994 (1955); *Halder v. Dep’t of Labor & Indus.*, 44 Wn.2d 537, 268 P.2d 1020, and *Kemalyan v. Henderson*, 45 Wn.2d 693, 277 P.2d 372; *Preston Mill Co. v. Dep’t of Labor & Indus.*, 44 Wn.2d 532, 268 P.2d 1017 (1954) (when testimony presents questions on which reasonable people may differ, matter is for jury to decide); *Woods v. Dep’t of Labor & Indus.*, 62 Wash.2d 389, 396, 382 P.2d 1012 (1963) (Supreme Court reversed and remanded for trial stating testimony offered room for reasonable difference of opinion). As in the above-cited cases, taking the facts most favorable to Pilchuck as true, at a minimum, Pilchuck respectfully submits reasonable people could conclude the worsened condition for which the Department ordered the claim reopened was due

to a subsequent intervening cause stemming from Berka's work or activities in Arizona.

4. **IN RULING ON BERKA'S UNTIMELY MOTION, THE SUPERIOR COURT APPLIED AN ERRONEOUS BURDEN OF PROOF AND ERRONEOUSLY WEIGHED BERKA'S TESTIMONY AND DR. KOPP'S TESTIMONY, WHICH WAS BASED ON BERKA'S TESTIMONY RATHER THAN CONTEMPORANEOUS REPORT.**

With the Board's procedure and burden shifting in *In Re: Russell D. Ford*, Dckt. No. 66217 (July 6, 1987) and *In Re: Michael J. Bell*, Dckt. No. 11 15598 (June 11, 2012), cases involving applications to reopen, and the scope and standard of review in mind, it is well-established that in any workers' compensation appeal where the issue is a workers' entitlement to benefits, the ultimate burden of proof is at all times with the worker. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Dept. of Labor & Indus.*, 52 Wn. 2d 33, 323 P.2d 241 (1958). This is so regardless of which party has brought the appeal and regardless of the doctrine of liberal construction. *Stafford v. Dep't of Labor & Indus.*, 33 Wn. App. 231, 235, 653 P.2d 1350 (1982) (despite liberal construction in favor of those who come within terms of a remedial statute, persons who claim rights and benefits thereunder should be held to strict proof of their right to receive benefits), *citing*, *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286

P.2d 1038 (1955) and *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498.

The Superior Court noted that the Employer did not present evidence of a new injury with the Arizona employer, and it was the Superior Court's "understanding of [Berka's] testimony is it's an easier job." VRP 6/27/12, 73, ll. 1-6. Notably, the Superior Court further inquired regarding questions of fact to be decided by the jury, which if decided as a matter of law, would preclude an injury or occupational exposure from ever being determined to being a supervening cause, e.g., VRP 6/27/12, 74, ll. 10-12. ("Can't those all just be the results of daily activity and getting older and a bad knee to begin with?"); VRP 6/27/12, 85, ll. 15-20 ("Well, in the *McDougle* case, they kind of say if things just occur, and I forget their phrase, in the regular course of living your life, that's not a supervening cause. People have to live their life. Mr. Berka has to work to support his family, doesn't he?"); VRP 6/27/12, 74, l. 20-77, l. 10.

In granting Berka's motion, the Superior Court stated: "It's possible that something happened. It's possible that he wasn't candid and didn't report something, but it's always the case that there are possibilities. There's no evidence of that." VRP, 87, ll. 16-19. These questions and comments by the Court illustrate that the Court misapplied the law

regarding the burden of proof and standard of review. Because the ultimate burden was on Berka to prove his worsened knee condition was related to the industrial injury, the employer was not required to offer such an explanation. Further, the Superior Court's comment when granting the motion ignores Dr. McClure's and Dr. Brigham's testimony that Berka's work in Arizona as originally reported to Dr. Kopp and per Wauldron's testimony could have caused Berka's new findings.

Berka's suggestion before the trial court that the Employer was required to establish the cause of Berka's condition and essentially disprove a negative (Berka's statement that he was not injured in Arizona) is incorrect. The Employer submits Berka's new objective findings of a horizontal tear of the medial meniscus, a new radial tear of the lateral meniscus, and chondromalacia behind the patella are not related to the 2007 injury but to some other cause, a question of fact for the jury to decide considering the evidence in this case. The Employer is not required to prove a negative. The Employer is entitled to rely on the circumstantial evidence that Berka is not being forthright in his testimony at hearings regarding his job duties in Arizona, which are contrary to his contemporaneous reporting to Dr. Kopp before this litigation commenced, and whether he sustained a new injury or repetitive overuse type of injury.

Likewise, during oral argument of Berka's motion, the trial court decision noted that the Employer did not present evidence of a new injury with the Arizona employer. VRP, 87, ll. 16-19. This comment by the Court illustrates that the Court misapplied the law regarding the burden of proof. As the burden was on Berka to prove his worsened knee condition was related to the industrial injury, the employer was not required to offer such an explanation.

There is no such requirement in Washington workers' compensation law that an employer or the Department must prove what caused a claimant's condition when proving a condition is not work-related. Rather, the worker must prove that a claimed condition is work related based on expert medical evidence on a more probable than not basis. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 977 P.2d 570 (1999).

It is further well-established that a physician may not base an opinion as to causation of a physical condition on subjective symptoms and self-serving statements. *Cooper v. Dep't of Labor & Indus.*, 20 Wn.2d 429, 147 P.2d 522 (1944). The Court cannot rely on only the subjective and self-serving statements of an injured worker, statements directly contrary to earlier less interested reports, to grant a worker's motion for judgment as a matter of law. Rather, the injured worker must prove proximate cause with competent evidence. The law is clear that an expert

medical opinion concerning causal relationship between an industrial event and a subsequent disability must be based upon full knowledge of all material facts. *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966). The Washington Supreme Court in *Sayler* addressed the value of an expert medical opinion based on incomplete information, stating:

An expert medical opinion concerning causal relationship between an industrial injury and a subsequent disability must be based upon full knowledge of all material facts. An expert opinion given in response to a hypothetical question is without probative value if it is based upon the existence of conditions or facts not included in the question or established by the evidence and not necessarily inferable therefrom. *Berndt v. Dep't of Labor & Indus.*, 44 Wn.2d 138, 265 P.2d 1037 (1954); *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d [92]. The same rule applies to medical opinions based upon incomplete or inaccurate medical history. *Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 278 P.2d 666 (1955). If the doctor has not been advised of a vital element bearing upon causal relationship, his conclusion or opinion does not have sufficient probative value to support an award.

*Id.* at 896.

Here, the history Berka originally provided to Dr. Kopp differed from his hearing testimony, the contradictory testimony which formed the basis for Dr. Kopp's causation testimony. Dr. Kopp's suggestion that Berka's history was immaterial in his assessment of causation is unsupported and unsupportable. Kopp, 32-33. It is axiomatic that expert

medical opinion regarding assessment of cause and effect (causation) requires an accurate history of cause. An inaccurate or incomplete history negates or discounts the causation opinion regardless of the expert's testimony to the contrary.

There is no basis to afford the opinions of an attending physician greater weight when dealing with questions of causation. As the Board noted in *In re: Iva N. Jennings*, Dckt. No. 01 11763 (2004):

In this appeal, the medical opinions were required in order to decide whether Ms. Jennings exposure to household cleaning chemicals caused her interstitial pneumonitis. ... **In most instances, an attending physician is not in a better position to determine causation than an examining physician because they both must rely almost entirely on the history of the exposure and the claimant's prior medical history to make such a determination.** Dr. Huseby's testimony did not demonstrate that he had a better understanding of the exposure to chemicals or the claimant's medical history than Dr. Ostrow. ... We were not persuaded by Dr. Huseby and after providing his opinion special consideration we, nevertheless, find the opinion of Dr. Ostrow persuasive.

*Id.* (emphasis added). In *Chalmers v. Dep't of Labor and Indus.*, 72 Wn.2d 595, 434 P.2d 720 (1967), the Court also noted that a treating physician's opinion, which is based on an erroneous factual basis, is insufficient to establish causal relationship despite the status of 'treating physician.' *Id.* at 601. The Board's analysis in *In re: Natasha M. Powell*, Dckt No. 00 16728 (October 1, 2005), is also instructive:

Our industrial appeals judge accepted the opinions of Drs. Burrup and Kontogianis on the issue of causation based, in part, on their status as attending physicians. He cited *Hamilton vs. Department of Labor & Indus.*, 111 Wn.2d 569 (1988) for the proposition that their opinions should be given special consideration. We disagree. **In most instances, an attending physician is not in a better position to determine causation than an examining physician because they both must rely almost entirely on the history of an injury or disease and the claimant's prior medical history to make such a determination.** In fact, both attending physicians in this case admitted that they knew very little about Ms. Powell's medical history, her sewing and crocheting activities, or the particular work activity she performed as a janitor, all of which are material facts on the issue of causation. As a result, their expert opinions on causation lack sufficient foundation to be probative. *Saylor v. Department of Labor & Indus.*, 69 Wn.2d 893.

As noted above, Drs. Adams and Reese both gave a well-reasoned explanation of the basis for their opinions on causation. Further, the material facts that they were aware of and considered on the issue of causation provided an adequate foundation for their opinions. Given the facts in this record, we are persuaded that their opinions are well-founded and preponderate.

*Id.*

At a minimum, Dr. Kopp's testimony that he must have erroneously dictated Berka's testimony, despite Berka's presence during the dictation to permit correction, creates credibility issues to be decided by the jury; that is, which of Berka's self-serving statements are more credible, those made at the time of physical examination or those made during litigation in his testimony. The disputed questions of fact pertaining

the Berka's history regarding when and why Berka sought to reopen his claim, Berka's work at Pilchuck, his separation, his discussions with Wauldren regarding his employment and medical status, and his move to Arizona and his employment there are material questions of fact to be decided by the jury.

**5. APPLICATION OF MCDUGLE V. DEP'T OF LABOR & INDUS. AND RELATED BOARD DECISIONS TO THE FACTS MOST FAVORABLE TO PILCHUCK REQUIRE THIS CASE BE DECIDED BY THE JURY FOLLOWING INSTRUCTION ON SUPERVENING CAUSE.**

Pursuant to RCW 51.32.160, a claim may be reopened for aggravation of a condition proximately caused by an industrial injury. RCW 51.32.160(1)(a). As stated by the Court of Appeals in *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 219 P.3d 711 (2009):

Workers seeking to reopen their claims under this provision must establish the following elements:

- (1) The causal relationship between the injury and the subsequent disability must be established by medical testimony.
- (2) The claimant must prove by medical testimony, some of it based on objective symptoms, that an aggravation of the injury resulted in increased disability.
- (3) The medical testimony must show that the increased aggravation occurred between the terminal dates of the aggravation period.
- (4) A claimant must prove by medical testimony, some of it based on objective symptoms which existed prior to the closing date, that his disability on the date of the closing order was greater than the supervisor found it to be.

*Id.* at 657-58, citing *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). As the Court of Appeals explained in *Eastwood*, a worker seeking to reopen a closed claim for additional benefits “must provide a medical opinion that reflected an actual comparison to the baseline condition at the time of the first terminal date, that is based, at least in part, on objective medical findings.” *Eastwood*, 152 Wn. App. at 661 citing *Phillips*, 49 Wn.2d at 197.

To prove entitlement for the claimed conditions as a result of an industrial injury, a claimant is obligated to prove by medical evidence that his industrial injury was the proximate cause of such conditions. In a workers' compensation case, an injury is compensable “if it occurs in the course of employment and a causal connection between the injury and the condition for which compensation is sought is established by **sufficient medical testimony.**” *Goyne v. Quincy-Columbia Basin Irr. Dist.*, 80 Wn. App. 676, 682, 910 P.2d 1321 (1996)(emphasis in original).

While an industrial injury or occupational disease need not be the sole cause of a worker's disability, the industrial injury or occupational disease must still meet the definition of a “proximate” cause. 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. 155.06 (5<sup>th</sup> Ed.) states:

The term “proximate cause” means a cause which in a direct sequence [, unbroken by any new independent cause,] produces the [condition] [disability] [death]

complained of and without which such a [condition] [disability] [death] would not have happened.

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

*Id.*.

In Berka's case, it is undisputed that his left knee generically speaking is worse. The material questions of fact which the Superior Court erroneously decided as a matter of law include identification of his increased and new objective findings and the proximate cause of those findings.

*McDougle v. Dep't of Labor & Indus.*, 64 Wn.2d 640, 393 P.2d 631 (1964), and *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968), are presently the leading published appellate authorities on the test used to determine when causal relationship between the original industrial injury and the alleged condition has been broken by subsequent events in the context of applications to reopen workers' compensation claims under RCW 51.32.160. In *McDougle*, the claimant had a work-related back strain, the claim for which was allowed and closed two years later with a 30 percent permanent impairment award. 64

Wn.2d at 641. Later, he suffered paid after helping a family member load sacks of feed. *Id.* He received treatment and applied to reopen his claim. *Id.* at 642. The Department rejected the application asserting the condition was due to a new injury. The Board and Superior Court affirmed. *Id.* at 642-43. The Supreme Court reversed stating,

The test to be applied, in cases such as the present, is whether the activity which caused the aggravation is something that the claimant might reasonably be expected to be doing, or whether it is something that one with his disability would not reasonably be expected to be doing. See 1 [Arthur] Larson, Workmen's Compensation Law, 183 § 13.11.

*McDougle*, 64 Wn.2d at 645. The court reversed with direction to consider the application with this test. *Id.* at 646. The matter returned to the Supreme Court as *Scott Paper*, wherein the Court confirmed the *McDougle* Court's "reasonably expected conduct" test and clarified the test to be applied considered "a man with his [Department-established] disability," not the claimant's "subjective personally known condition as of the date of the aggravation[.]" *Scott Paper*, 73 Wn.2d at 841, 848.

The Board has often been called upon to apply the *McDougle* test. The Board's interpretation of the Industrial Insurance Act, although not binding upon this Court, is entitled to great deference. *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). In *In re: Jim A. Marker*, Dckt. No. 97 8104 (July 5, 2000), a drywall hanger sustained a

left shoulder injury and was determined to have a 14 percent permanent partial disability. He asserted because he was unable to work as a drywall hanger, he took a newspaper delivery job result in a repetitive stress injury to his right shoulder. Citing *McDougle*, the Board determined “[t]he right shoulder condition did not arise from compensatory physical actions in the course of ordinary daily activities, but from the direct requirements of lifting and throwing newspapers in the delivery process. It is at best a new injury related to the new employment.” *Id.*

In a decision deemed a Significant Decision by the Board, *In re: Robert D. Tracy*, BIIA Dec., 88 1695 (1990), the Board determined the claimant sustained a both a new injury and an aggravation of his prior work injury, and provided a further means of testing the facts of a case and determining compensability:

Frequently a dichotomy is established between a new injury and an aggravation for purposes of providing a framework for analyzing cases like Mr. McDougle's and like the appeal before us. But this is merely a shorthand way of determining the real questions -- but for the original industrial injury, would the worker have sustained the subsequent condition? Or, in the alternative, did some subsequent event or events constitute a supervening cause, independent of his industrial injury?

*Id.* The Board determined, **based on lay and expert testimony**, that Mr. Tracy, who had a closed injury claim for a low back condition with continued residuals preventing his return to work in his job of injury, as

with Berka, sustained a supervening cause of his condition while waxing his van at home and denied his application to reopen his claim for aggravation.

Further, the Board explained the analysis when parsing out pathology of an overall generically described condition such as Berka's 'left knee condition:'

If a condition proximately caused by an industrial injury is made worse by ordinary activity, the worsening is compensable because it is attributed to the underlying injury. *McDougle v. Department of Labor & Indus.*, 64 Wn.2d 640. **We believe this requires a showing of a causal connection between the condition that is identified as the worsened portion of the worker's condition and the underlying industrially related condition. If the worsening cannot be related to the industrial injury, then the worsening is considered a new condition and not an aggravation of the prior work-related condition.** As we said in *In re Robert Tracy*, BIIA Dec., 88 1695 (1990), the real question is one of proximate cause. Would the claimant have sustained the subsequent condition if the industrial injury had not occurred?

*In re: Susan T. Walker*, Dckt. No. 95 2763 (May 15, 1996).

More recently, the Board in *In re: Joseph B. Scott*, Dckt. Nos. 0520699 & 06 16536 (March 6, 2008) stated "[a]ggravation can have two meanings in this context: (1) the statutorily mandated "aggravation of disability" described in RCW 51.32.160 that supports reopening of a claim; or (2) the purely factual worsening of a pre-existing condition that

would be compensable under a new claim.” In *Scott*, the claimant had an allowed and closed low back claim which he applied to reopen. *Id.* He originally described increased pain over several months buffing automobile engines, but later described a specific event. *Id.* Significantly as it pertains to this appeal, the claimant’s complaints included new complaints and new objective findings of pathology not present prior to his engine buffing work. *Id.* The Board, relying on medical testimony finding a link between the later work and the condition for which the claimant sought reopening, denied reopening even though the buffer exposure acted upon the underlying low back condition which was most certainly a **cause** of the claimant’s overall, generically labeled “back condition.” *Id.*

At a minimum, these decisions illustrate that this class of cases involving supervening cause, as in Berka’s case, turn on the weighing of very fact-specific lay and expert medical testimony. In this case, the Superior Court erroneously engaged in an impermissible weighing of that testimony and then proceeded to erroneously grant Berka’s motion.

Taking Berka’s and the Superior Court’s analysis to its logical conclusion, if a worker had any pre-existing symptomatic condition from prior industrial injuries or occupational diseases, those prior claims would always be reopened instead of new claims filed to place the responsibility

with the appropriate employer. An argument can sometimes be made that prior injuries and diseases are a cause; the issue remains under any given set of facts whether the prior injury or disease should be considered a **proximate** cause. As illustrated above, Berka has the burden of proving that, when the record is examined in the light most favorable to the Employer, it contains **no evidence** that contradicts or impeaches his credibility or supports Pilchuck's position of supervening cause. He cannot meet this burden and, as a result, the Superior Court erred in granting his Motion for Directed Verdict.

If the Court determines the Superior Court erred and reverses and remands the claim for a new trial, Pilchuck respectfully requests the Court also reverse the Superior Court's ruling on Pilchuck's proposed intervening cause instruction. CP 53. "Instructions are sufficient if they correctly state the law, they are not misleading, and they permit the parties to argue their respective theories of the case." *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 625, 17 P.3d 1195 (2001). In this case, the Superior Court explicitly stated, "I would not, if this were to go to the jury, give a "supervening/intervening cause" instruction, the one [Pilchuck's Counsel] proposed." VRP 6/27/12, 88, ll. 14-21. Hence, the Superior Court has already ruled on Pilchuck's proposed instruction. Pilchuck respectfully requests this erroneous ruling be reversed and the

Superior court be ordered to give the instruction, which Pilchuck requires to argue its theory of the case, or a similar supervening cause instruction, as approved by the Court in *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. at 624-25.

**F. CONCLUSION**

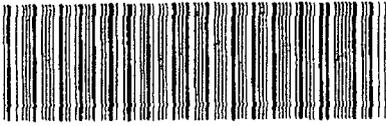
Based on the foregoing points and authorities, the Employer respectfully requests that the Court reverse the Superior Court's erroneous Order Granting Defendant's Motion for Directed Verdict as a Matter of Law and remand the claim to Superior Court for a new trial with Pilchuck's supervening cause instruction and permitting the jury to weigh the evidence and render a verdict.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of January, 2013.

PRATT, DAY & STRATTON,  
PLLC

By Marré J. Horstman  
Marré J. Horstman, #27339  
Attorneys for Appellant,  
Pilchuck Contractors, Inc.

# APPENDIX A



10-2-14998-3 38862031 ORRMD 07-19-12

The Honorable Ronald Culpepper

FILED  
IN COUNTY CLERK'S OFFICE

A.M. JUL 19 2012 P.M.

IN THE SUPERIOR COURT OF WASHINGTON COUNTY, WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE  
BY KEVIN STOCK, County Clerk DEPUTY

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8 PILCHUCK CONTRACTORS, INC., )

9 Plaintiff, )

10 v. )

11 )  
12 DAVID D. BERKA AND THE )  
13 DEPARTMENT OF LABOR )  
14 AND INDUSTRIES OF THE )  
15 STATE OF WASHINGTON, )

16 Defendants. )

CAUSE NO. 10-2-14998-3

ORDER GRANTING DEFENDANT'S  
MOTION FOR DIRECTED VERDICT

17 THIS MATTER HAVING DULY COME BEFORE THE COURT on the Defendant's  
18 Motion for Directed Verdict pursuant to CR 50(a) on the Plaintiff's appeal of an order of the  
19 Board of Industrial Insurance Appeals dated October 19, 2010. The parties indicated their  
20 readiness for trial and the jury was duly empanelled to hear said appeal. The trial occurred on  
21 June 25, 26, 27, 2012, before this court. The motion for a directed verdict was made pursuant to  
22 CR 50(a) on June 26, 2012 at the close of the evidence presented by the Plaintiff on the case, and  
23 was based on the specific grounds that the evidence presented by the Plaintiff was insufficient  
24 evidence to support a favorable finding for the Plaintiff on the issue at trial.

25 The Court heard the oral argument of counsel for the Defendant, Berka, and counsel for  
26 the Plaintiff, Pilchuck Contractors, Inc., and deferred ruling on the motion until after it had heard  
27 all of the evidence presented by the Defendant in its case-in-chief. After the close of the  
28 evidence presented by the Defendant on the case, the Defendant's renewed its oral Motion for

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1 Directed Verdict.

2       Thereafter, the Court heard further argument by counsel for both parties on the motion  
3 the Court having considered the following:

- 4       1. Defendant's Motion for Directed Verdict;
- 5       2. The complete Certified Appeal Board Record of Testimony from the Board of  
6       Industrial Insurance Appeals herein and having all of the testimony fully  
7       presented at trial;
- 8       3. And the Court having heard the arguments of counsel.

9  
10 Now, therefore,

11 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

12       1. Defendant's Motion for Directed Verdict is GRANTED, and the Court finds that no  
13 legally sufficient evidentiary basis exists for a reasonable jury to conclude that the Board of  
14 Industrial Insurance Appeals was incorrect in deciding that between November 14, 2008 and  
15 August 14, 2009 Mr. Berka's left knee condition, proximately caused by the May 2, 2007  
16 industrial injury, had objectively worsened and was in need of further necessary and proper  
17 medical treatment.

18       2. The Court finds, as a matter of law, that the October 19, 2010 decision of the Board  
19 of Industrial Insurance Appeals was correct in deciding that between November 14, 2008 and  
20 August 14, 2009 Mr. Berka's left knee condition, proximately caused by the May 2, 2007  
21 industrial injury, had objectively worsened and was in need of further necessary and proper  
22 medical treatment.

23       3. That the Plaintiff's appeal of the October 19, 2010 decision of the Board of Industrial  
24 Insurance Appeals is dismissed with prejudice.

25       4. That this matter is remanded to the Department of Labor and Industries to take such  
26 further action as indicated by this decision.

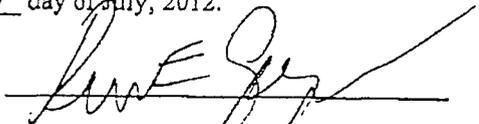
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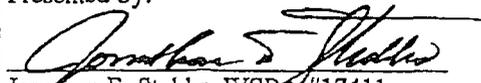
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5. The Court reserves ruling on any award of costs or fees associated with this dismissal of the Plaintiff's appeal until entry of the final judgment in the action.

DONE IN OPEN COURT this 19<sup>th</sup> day of July, 2012.

  
The Honorable Ronald Culpepper  
Superior Court Judge

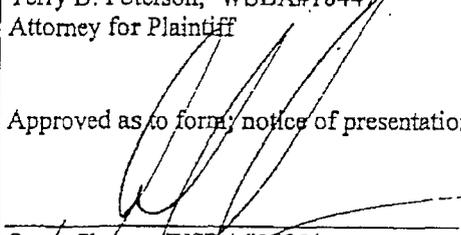
Presented by:

  
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Attorney for Defendant Berka

Approved as to form; notice of presentation waived.

  
Terry D. Peterson, WSBA#18447  
Attorney for Plaintiff

Approved as to form; notice of presentation waived.

  
Oscar Chaves, WSBA#34951  
Assistant Attorney General  
Attorney for the State of Washington,  
Department of Labor and Industries

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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION II

PILCHUCK CONTRACTORS,  
INC.,

Appellant,

v.

DAVID BERKA AND THE  
DEPARTMENT OF LABOR &  
INDUS., STATE OF  
WASHINGTON,

Respondents.

No. 43837-2-II

CERTIFICATE OF SERVICE

I hereby certify that on the 31<sup>st</sup> day of January, 2013, I filed and served the **Employer Pilchuck Contractor, Inc.'s Appellant's Brief and this Certificate of Service** upon the following parties, addressed as follows:

**ORIGINAL AND ONE COPY VIA PRIORITY MAIL/DELIVERY CONFIRMATION:**

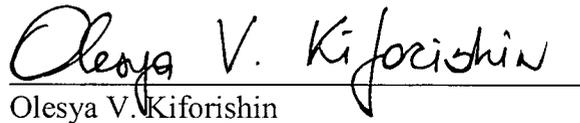
David C. Ponzoha  
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Tacoma, WA 98402  
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DATED this 31<sup>st</sup> day of January, 2013, at Tacoma, Washington.

  
\_\_\_\_\_  
Olesya V. Kiforishin