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No. 43837-2-II

STATE OF WASHINGTON

BY  DEPUTY

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

PILCHUCK CONTRACTORS, INC.,

Appellants,

v.

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

Respondents.

APPELLANT'S REPLY BRIEF

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ORIGINAL

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A. REPLY

1. THE TRIAL COURT ERRONEOUSLY DEPRIVED PILCHUCK OF ITS RIGHT TO HAVE THE WITNESS CREDIBILITY ISSUES AND RESULTING COMPETING INFERENCES DECIDED BY A JURY.

Throughout Berka's Response, Berka recites the facts that are most favorable to his case in an effort to have the Court pass on issues of witness credibility and weigh the competing inferences generated by the testimony in the record in his favor. In do so, he fails to argue his case under the controlling standard of review. 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). The non-moving party "is entitled to the benefit of all testimony in his favor, and of all reasonable inferences to be drawn therefrom." *Halder v. Dep't of Labor & Indus.*, 44 Wn.2d 537, 542, 268 P.2d 1020 (1954); *Omeitt v. Dep't of Labor & Indus.*, 21 Wn.2d 684, 685, 152 P.2d 973 (1944). The court will not weigh the evidence but will "search the entire record to find evidence which tends to support the verdict." *Halder*, 44 Wn.2d at 545-46; *Petersen v. Dep't of Labor & Indus.*, 40 Wn.2d 635, 245 P.2d 1161 (1952). If there is more than a mere scintilla of evidence to support a jury verdict, the court is required to deny the motion for

judgment as a matter of law. *Omeitt*, 21 Wn.2d at 686. When deciding the motion, the Court does not consider evidence negating the non-moving party's contentions, here the facts as recited by Berka. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 189 P.3d 178, *modified* at 144 Wn. App. 1028.

The Court's decision in *Halder v. Dep't of Labor & Indus.*, 44 Wn.2d 537, 268 P.2d 1020 (1954), is on point and illustrates the Superior Court's error. In *Halder*, the worker suffered a stroke and filed a workers' compensation claim contending the stroke was caused by an industrial injury. The Board of Industrial Insurance Appeals affirmed the Department's rejection of the claim. On appeal to Superior Court, the jury determined the claim should be allowed, but the Superior Court entered judgment n. o. v. for the Department, and the worker appealed. *Halder*, 44 Wn.2d at 538-539.

On review, the Court reviewed the testimony of treating physician Collins who testified on the workers' behalf and physicians Stafford and Phillips who testified on the Department's behalf, noting the internal inconsistencies in Dr. Collins' testimony. In reversing the judgment and remanding for trial, the Court stated as follows:

Respondent concedes that Dr. Collins, in response to the hypothetical question, testified that there was a causal connection between the blow on the head and appellant's

stroke. His answer to that question was, in effect, that in his opinion, based upon 'reasonable medical certainty,' it was probable that the blow caused the stroke. Respondent argues, however, that Dr. Collins' testimony, considered as a whole, is replete with inconsistencies and contradictions; that his explanations clearly show that his opinion was based upon speculation; that his opinion rested in part upon an erroneous assumption of fact; and, in effect, that it was outweighed by the testimony of respondent's medical witnesses.

In passing on a judgment n. o. v., the part[y] moved against is entitled to the benefit of all testimony in his favor, and of all reasonable inferences to be drawn therefrom. *Ehman v. Department of Labor and Industries*, 33 Wn.2d 584, 206 P.2d 787. If, however, indispensable testimony is, in effect, retracted or completely negated as a result of inconsistencies and contradictions in the other testimony of the same witness, that fact is to be considered in passing upon the motion.

We have examined each of the asserted inconsistencies and contradictions in Dr. Collins' testimony. None of them, nor all of them considered together amounts to a negation or retraction of his testimony upon which appellant relies. The witness remained firm in his opinion that the blow on the head was the probable cause of the stroke. **Such inconsistencies and contradictions as there were may have affected the weight to be accorded Dr. Collins' opinion testimony. But this was for the jury to determine-not the court.**

Halder, 44 Wn.2d at 542-43 (emphasis added). In this case, as in *Halder*, Pilchuck is entitled to have the inconsistencies in the testimony as between Berka and Waldron and as among Drs. Kopp, Brigham and McClure, decided by the jury. It was error for the Superior Court to issue the Order.

In *Halder*, the Court went on to note:

Opinion testimony as to causation is insufficient to support a judgment if it is expressed in terms of speculation or surmise, or if it is patently based upon speculation or surmise. This, we think, is the substance of the holdings in *Anton v. Chicago, M. & St. P. R. Co.*, 92 Wn. 305, 159 P. 115 (1916); *Boyer v. Department of Labor and Industries*, 160 Wn. 557, 295 P. 737 (1931); *Tonkovich v. Department of Labor and Industries*, 31 Wn.2d 220, 195 P.2d 638 (1948); and *Ehman v. Department of Labor and Industries*, [33 Wn. 2d 584, 206 P.2d 787 (1949)], cited by respondent. On the other hand, *Hubert v. Department of Labor and Industries*, 39 Wn.2d 531, 236 P.2d 1042 (1951), cited by appellant, stands for the proposition that one having the affirmative of an issue does not have to make proof to an absolute certainty. As was said in the latter case:

‘* * * it is sufficient if the evidence affords room reasonably to conclude that there is a greater probability that an injury caused an existing condition to accelerate and result in additional disability than that such disability followed the natural and ordinary progress of the disease or condition with which the person was afflicted.’ 39 Wn.2d at page 535, 236 P.2d at page 1044.

Halder, 44 Wn.2d at 542-43. In this case, there are reasonable inferences to be made from lay and expert testimony and the circumstantial evidence to support Pilchuck’s case that Berka sustained a new injury, whether by a single event or repetitive overuse, after he left Pilchuck’s employ and/or during his employment in Arizona. Such permissible reasonable inferences are not speculation; cases sometimes turn on circumstantial evidence where there are disputed questions of fact as to witness credibility. Berka, as the Department did in *Halder*, provides a detailed recitation of the evidence in **his** favor to argue the Court’s decision was

correct. This Court, as the Court did in *Halder*, should reject this improper burden shifting and application of an erroneous standard of review:

In our view, this testimony does not warrant the court in saying, as a matter of law, that Dr. Collins' opinion as to causal relationship was based upon speculation or surmise. The cases are not many where a medical expert can describe, in positive and categorical terms, the precise bodily reactions whereby a particular trauma has produced a specific disability. **Here the doctor expressed his opinion that such a result did occur, and explained one way in which this could have been brought about. We think this is sufficient to take the issue to the jury. ...**

Finally, it is contended by respondent that Dr. Collins' testimony as to causal relationship is outweighed by that of respondent's medical witnesses. **We are thus asked to look at the whole record and weigh Dr. Collins' testimony in the light of all the other evidence. If we did so, we would not be giving appellant the benefit of all testimony in his favor and of all reasonable inferences to be drawn from such favorable testimony.** In urging us to consider respondent's medical testimony, *Petersen v. Department of Labor and Industries*, 40 Wash.2d 635, 245 P.2d 1161, is cited for the rule that in a case of this kind we will consider the entire record. As that decision reveals, however, **we will only search the entire record to find evidence which tends to support the verdict.**

Halder, 44 Wn.2d at 545-46 (emphasis added, citation omitted). In this case, the Superior Court's error is further illustrated by the Court's decision in *Vasquez v. Dep't of Labor & Indus.*, 44 Wn. App. 379, 722 P.2d 854 (1986). In *Vasquez*, the Court held as follows:

Here, Am-Fac's challenge goes to the medical testimony of Dr. Starkweather who used the word "possible" at one point to describe the connection between the workplace accident and Mr. Vasquez' injury. ... **[T]he evidence is**

sufficient if a reasonable person can infer from all the facts and circumstances that the causal connection exists. *Bennett*[v. *Dep't of Labor & Indus.*, 95 Wn. 2d 531, 533, 627 P.2d 104 (1981)]. Moreover, it is generally held that: 'The distinction between probability and possibility should not follow too slavishly the witnesses' choice of words, as sometimes happens in respect to medical testimony. A doctor's use of such words as "might," "could," "likely," "possible" and "may have," particularly when coupled with other credible evidence of a non-medical character, such as a sequence of symptoms or events corroborating the opinion, is ... sufficient to sustain an award.'

Vasquez, 44 Wn. App. at 385 (citing 2 A. Larson, *Workmen's Compensation* § 80.30, at 15-86-87 (1986)).

Contrary to Berka's contention that there are no real issues of witness credibility for the jury, the testimony of Berka and former Pilchuck safety and return to work administrator Brad Wauldron is diametrically opposed. In this litigation and in his Response Brief, and contrary to what he previously reported to Dr. Kopp before the claim was in litigation, Berka, based solely on his self-serving testimony, attempted to paint the picture that his left knee condition continued on a relatively constant progression of worsening from the time his claim was closed on November 14, 2008, and that his employment at Northern Pipeline was not a factor in his worsened knee condition. Respondent Berka's Brief, 42-43. Even a cursory review of the testimony defeats this premise.

There is no “overwhelming proof” that Berka’s condition was being worsened all along by daily activities. Respondent Berka’s Brief, 45. The only examination and MRI which reflected objective findings did not occur until after Berka had been working for Northern Pipeline for a number of months. Berka, 44, 49; Torvick, 41-43. Berka’s 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 was not missing work on a regular basis. Berka, 86-88.

When Brad Wauldron testified, he was no longer Pilchuck’s employee due to a reduction in force. Wauldron, 4-6, 16. He testified that in Berka’s position of walking foreman, 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 on level job sites. Wauldron, 7-8, 10, 17-18. As of January 27, 2009, Berka did not have any complaints about his knee, reported his knee was “as good as it could be[,]” and he was doing the job on a daily basis, although Berka’s doctor was recommending he find alternative work. Wauldron 8-10, 22 22; Berka, 24.

Berka found his own position with Northern, and told Wauldron he was being brought on as a superintendent. Wauldron, 12. Berka was

excited to not be doing the physical day-to-day work. He wanted to move into management. Wauldron, 12-13. Between November 14, 2008, when the claim was closed, and March 2, 2009, when Berka started working for Northern, Wauldron spoke with Berka 50 or 60 times. Wauldron, 26.

Wauldron testified that after Berka moved to Arizona, 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 Wauldron he was getting on and off equipment, operating foot pedals, and getting in and out of holes. Wauldron, 13, 20, 25. Berka also told Wauldron the equipment at Northern was not as good as at Pilchuck, and it was much more demanding. Wauldron, 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 Wauldron he was doing a lot more very physical work than he was used to, and he could not continue to do it. Berka 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. Wauldron, 14-15, 27-29.

Berka falsely asserts that the only opinion Dr. Brigham expressed on a more probable than not basis “was his reluctant admission that the

May 2, 2007 industrial [injury] was certainly a proximate cause of that worsening.” Respondent Berka’s Brief, 39. Contrary to Berka’s argument that Dr. Brigham’s testimony requires the Superior Court Order to stand, Pilchuck respectfully submits Dr. Brigham’s testimony requires reversal of the Superior Court’s Order. Respondent Berka’s Brief, 26, 35. As the Department correctly points out, Dr. Brigham’s testimony that the 2007 injury was a part of Berka’s “overall picture” does not equate to an opinion that the 2007 injury and subsequent surgeries were a **proximate cause of Berka’s worsened knee condition and new findings.** Respondent Department’s Brief, 27 **Rather, 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. He noted that by Berka’s own description to Dr. Kopp in June 2009 (before the claim was in litigation) and consistent with Berka’s reports to Wauldron, Berka’s work in Arizona was significantly different. He was working as a heavy equipment operator and jumping in and out of ditches, contraindicated by his treating physician, which he said increased his pain. Brigham, 16-18. Dr. Brigham explicitly testified that

Berka's work in Arizona caused a worsening of his left knee condition in 2009 on a more-probable-than-not basis. Brigham, 18. He also 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, 79-80. The work activity Berka described to Dr. Kopp (and reported to Wauldron) of jumping in and out of ditches would have played a role in the development of that new pathology. Brigham, 79.

Dr. Brigham noted 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 testified that Berka 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 Berka's discovery deposition. 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” caused by his work load in Arizona. Brigham, 60-62, 63, l. 18- 64, l. 5, 67, l. 14-68, l. 2; 77.

When Dr. Kopp evaluated Berka on June 4, 2009, he 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, 10, 17, 37, l. 11-38, l. 1. Dr. Kopp dictated this history in front of Berka. Berka did not correct him. Kopp, 32, ll. 12-19. Further, 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 the thigh atrophy to the May 2007 injury because he had no measurements before Berka began work with Northern Pipeline.

Dr. Kopp conceded that even without the 2007 injury, it is probable Berka’s knee conditions would have progressed over time. Kopp 47-48. He also conceded that if during Dr. McClure’s surgical evaluation

there was a radial tear in the mid-portion of the lateral meniscus in addition to the new horizontal cleavage tear in the posterior horn of the 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, the lateral compartment was essentially normal. Kopp, 42.

In addition, 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. For Dr. McClure to support Berka's case for causation, he would have to assume Berka's testimony, compared to his earlier report and Wauldron's testimony, was true. McClure, 53, ll. 7-24; 55, ll. 4-5. This is an issue of credibility for the jury.

Berka also suggests that the Superior Court's Order was based on the Superior Court Judge's detailed review of the evidence, stating the Judge had read each page of the record. Respondent's Brief, 32. However,

a review of the Verbatim Report of Proceedings and the Superior Court's statements during argument leading up to the Court's ruling suggest that the Superior Court Judge did not have the opportunity to perform a detailed review of the testimony regarding these complicated medical facts and medical questions of causation and did not apply the correct standard of review in deciding the motion. VRP, 6-27-12, 64, 66, 70, 74-77, 80-88. In fact, the Superior Court indicated the Court had reviewed Berka's brief and cases and had done a very quick reading of the decisions provided by Pilchuck regarding Berka's Motion. VRP, 6-27-12, 40, 51.

Of course, Berka could be expected in this litigation to deny any new injuries or there were increased physical activities and demands with his new job in Arizona. Respondent Berka's Response, 37. Dr. Kopp's testimony regarding Berka's job duties also present questions of fact and credibility. Respondent Berka's Brief, 38. However, **taking these facts in a light most favorable to Pilchuck**, the Superior Court's error in granting the Berka's Motion is patent; a reasonable juror could find Berka's left knee condition and new findings were more probably than not unrelated to his 2007 injury, but due to an intervening cause.

2. THE PRESUMPTION OF CORRECTNESS OF THE BOARD'S DECISION DOES NOT APPLY AT THIS STAGE OF THE PROCEEDINGS UNDER THE CONTROLLING STANDARD OF REVIEW.

When arguing that the Board's decision is presumed correct and substantial evidence supports the trial court's judgment as a matter of law, Berka fails to present his arguments under the controlling standard of review. Respondent Berka's Brief, 30-31. The presumption of correctness is an evidentiary presumption applied where the evidence is evenly balanced under the preponderance of evidence standard. It does not apply here where the Court is required to accept the evidence most favorable to the non-moving party Pilchuck as true, where Pilchuck is entitled to the benefit of all of the testimony in its favor and the reasonable inferences therefrom, and where the Court is searching the record only for evidence which could support a verdict for Pilchuck.

RCW 51.52.115 provides authority for appeals from the Board to Superior Court. The findings and decision of the Board are presumed correct, and the burden of proof is on the party challenging the Board's findings and decision. RCW 51.52.115. As the Court in *Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 268, 401 P.2d 982 (1965), noted:

The relevant portion of RCW 51.52.115 provides:

‘* * * In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. * * *’

In this context, ‘prima facie’ means that there is a presumption on appeal that the findings and decision of the board, based upon the facts presented to it, are correct until the **trier of fact finds from a fair preponderance of the evidence** that such findings and decision of the board are incorrect. It must be a preponderance of the credible evidence. If the trier of fact finds the evidence to be equally balanced then the findings of the board must stand.

Id. (emphasis added). In fact, the presumption is set forth in a Pattern Jury Instruction as follows:

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable, and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on (name of appellant) to establish by a preponderance of the evidence that the decision is incorrect.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case [*bearing on the question*], that the proposition on which that party has the burden of proof is more probably true than not true.

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 155.03 (6th ed.).

Hence, this evidentiary presumption is for the trier-of-fact, not appellate review of an order granting judgment as a matter of law.

3. **OBJECTIONS TO THE SUFFICIENCY OF THE EVIDENCE NOT RAISED AT THE BOARD ARE DEEMED WAIVED.**

Respondents are correct that the Board, which conducts its hearings as bench trials, does not entertain motions under CR 50(a)(1). However, the Board does entertain and grant challenges to the sufficiency of the evidence. *See, In re: James L. Vasey*, Dckt. No. 11 21692 (October 23, 2012) (Board judge erroneously dismissed appeal per CR 50(a)(1) as a result of Department's Motion for Directed Verdict where appeal should have been dismissed under CR (41)(b)(3); *In re: L. Darlene Amos*, 05 11567 (April 24, 2006) ("The quantum of evidence that must be presented by the self-insured employer to meet its burden of presenting a prima facie case is essentially the same as that necessary to defeat CR 41(b)(3) or CR 50 motions."); *In re: Alan B. Herdon*, Dckt Nos. 06 17577 & 06 18269, June 30, 2008)).

In fact, challenges to the sufficiency of the evidence not made before the Board are deemed waived. In a decision deemed a Significant Decision by the Board, *In re: William Shumate*, BIIA Dec. 863503 (1988), the Board stated as follows:

At the outset we find it necessary to correct a misstatement of law as contained in the claimant's Petition for Review. The claimant alleges that 'the burden of proof was on the employer at all times.' It is true that as the appealing party the employer had the burden of going forward with the evidence to establish a prima facie case that the claim

should have been rejected. RCW 51.52.050. We believe that through the testimony of Mr. Wilson, Dr. Theodore Pasquesi, Dr. Kevin F. Connolly, Dr. Wade K. Randall, and the claimant himself, the employer presented a prima facie case upon which a fact finder could conclude that the claimant did not suffer any condition as a result of any injury which allegedly occurred on or about December 12, 1985. **Moreover, by failing to make a motion to dismiss the appeal at the conclusion of the employer's case and presenting evidence, the claimant assumed the burden of proving that he sustained an industrial injury.** *In re Russell D. Ford*, Dckt. No. 66,217 (July 6, 1987); *Olympia Brewing Company v. Department of Labor and Industries*, 34 Wn.2d 498 (1949). Considering the evidence in its entirety we, like our Industrial Appeals Judge, are not convinced that the claimant has sustained an 'injury' within the meaning of RCW 51.08.100.

In re: William Shumate, BIIA Dec. 863503 (1988) (emphasis added).¹ In *In re: Russell D. Ford*, Dckt No. 66217 (July 6, 1987), on remand from King County Superior Court remanded to the Board with direction to decide the appeal based on the burden of proof provisions set forth in RCW 51.52.050 and RCW 51.52.102. Following the remand, the Board in *Ford* determined that the claimant, who did not move to dismiss at the close of the employer's case, conceded any challenge to the sufficiency of the evidence. The Board noted as follows:

¹ Pilchuck in its opening brief cited to *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 663, 833 P.2d 390 (1992) for the proposition that only evidentiary objections made before the Board can be considered on appeal. The Court in *Intalco* did not address a waiver issue because the parties in that case may not have recognized and did not argue the issue.

Those statutory provisions [RCW 51.52.050 and RCW 51.52.102] 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. Department of Labor and Industries*, 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). As the Court noted in *Vasquez*:

Am-Fac next contends the evidence is not legally sufficient to support the verdict. Following the denial of its motion to dismiss, Am-Fac proceeded to present its case to the jury. Generally, this constitutes a waiver of a defendant's challenge to the sufficiency of the evidence. *Heinz v. Blagen Timber Co.*, 71 Wn.2d 728, 730, 431 P.2d 173 (1967); accord, *Goodman v. Bethel Sch. Dist.* 403, 84

Wn.2d 120, 524 P.2d 918 (1974). Although Am-Fac cites CR 41(b)(3) for the contrary result, that rule applies to bench trials only. Here, the case was tried to a jury; thus, Am-Fac has waived this issue.

Vasquez, 44 Wn. App. at 384. As such, in addition to the arguments and authorities set forth in Pilchuck's opening brief, Pilchuck further submits that not only did Berka waive the evidentiary challenge by not bringing a Motion for Directed Verdict before the Board, Berka also waived his challenge to the sufficiency of the evidence by proceeding with his case after the Superior Court initially denied his Motion at the close of Pilchuck's case.

Finally, the Department argues for an expansive reading of the civil rules as applied to judgments as a matter of law. Respondent Department's Brief, 23. The Court in *Thompson v. Grays Harbor Cmty. Hosp.*, 36 Wn. App. 300, 307-08, 675 P.2d 239 (1983), rejected this proposition as follows:

However broad this discretion may be, it is not without limits. It is also well-established that discretion does not permit the trial court to weigh the evidence and substitute its judgment for that of the jury simply because it disagrees with the verdict. Cases dealing with this issue repeatedly emphasize that:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on

both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

Further, it has been said that “[t]o warrant and justify the exercise of the permitted discretion, the verdict must be so manifestly inconsistent and irreconcilable with the total evidentiary composition—viewed in the favorable light required—as to compel the conclusion that the moving party has been deprived of a fair trial.”

Thompson, 36 Wn. App. at 307-08 (citations omitted).

4. THE COURT SHOULD PROVIDE DIRECTION TO THE SUPERIOR COURT AS TO APPROPRIATE JURY INSTRUCTIONS IN THE INTEREST OF JUDICIAL ECONOMY.

Respondent Department also incorrectly asserts Pilchuck did not cite to its intervening cause instruction. Respondent Department’s Brief, 36. The instruction, found at CP 53 of the record, is cited on pages 5, 9, and 49 of Appellant’s Brief. A copy of the instruction is attached as Appendix A for ease of reference.

Berka and the Department also incorrectly contend that Pilchuck’s request for an intervening cause instruction is premature and a request for an advisory opinion. Respondent Berka’s Brief, 38-45; Respondent Department’s Brief, 36-39. The Court issued a declaratory ruling on Pilchuck’s proposed instruction. 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. Berka and Pilchuck agreed on the record that they almost had an agreed-upon set of instructions:

Court: Can I ask about instructions? Is there much dispute other than intervening/supervening cause about (sic) instructions?

Mr. Stubbs: I don't think so.

Mr. Peterson: I think we almost have an agreed-upon set, and that was the one we kind of held out to have this discussion with.

VRP, 6-27-12, 77, ll. 4-10. Argument regarding the instruction followed. VRP, 6-27-12, 77-87. Pilchuck is not requesting the Court to direct that all of its proposed instructions be given. Rather, Pilchuck is simply requesting the Court to direct the Superior Court to give its supervening cause instruction, the instruction upon which argument was received and a declaratory ruling issued. The parties are free to propose and argue the remaining instructions to be given.

Respondent Department also asserts Pilchuck is requesting direction on a moot matter. Respondent Department's Brief, 37. It is axiomatic that if the claim is remanded for a new jury trial, the intervening cause instruction issue would not be moot. Pilchuck presumes that if the

Court affirms the Superior Court, the Court will not reach the issue of the jury instruction,

Respondents are also incorrect that the Court does not direct the nature of instructions to be given or offer other direction to the trial court on remand. Respondent Berka's Brief, 43-44. For example, the Court in *Billington v. Schaal*, 42 Wn. 2d 878, 881, 259 P.2d 634 (1953), held as follows:

On the new trial, that instruction should be modified to make clear that, if the jury finds that appellant stopped in obedience to the traffic signal, he was not required to indicate his intention so to do, and that respondent would be negligent if his vehicle was traveling in too close proximity to the car ahead, due to failure on his part to exercise reasonable care. This would correctly correlate instruction No. 20 1/2 with proposed instruction No. 10. The one remaining assignment of error relates to the exclusion of certain evidence offered by appellant. As this question may arise again on the new trial, we will consider the matter at this time.

Id.; see also, *State v. Goebel*, 36 Wn.2d 367, 380, 218 P.2d 300 (1950) (directing that cautionary instructions be given if certain evidence admitted at new trial following remand).

In this case, working in the ditches was inconsistent with the restrictions placed by Dr. Yamamota. Berka, 77-78. After his surgery in 2008, Dr. Yamamoto advised Berka to think about finding different work in line within his restrictions. Berka, 63. According to Waldron's

testimony regarding Berka's contemporaneous reports and given Berka's restrictions, Berka was performing work he should not reasonably have expected to be doing after he left Pilchuck. As such and per the authorities set forth in Pilchuck's opening brief, Pilchuck respectfully submits it is entitled this case decided by a jury and to have the jury instructed on intervening cause.

B. CONCLUSION AND REQUEST FOR FEES AND COSTS PER RAP 14.2 AND RAP 14.3.

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 intervening cause instruction.

Pilchuck also respectfully requests it be awarded its statutory fees and costs to be established by Cost Bill. RAP 14.2 provides that "[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review." Pilchuck requests an award of all costs available to it under RAP 14.3 to be set forth by Cost Bill if Pilchuck prevails. Finally, Pilchuck respectfully requests that Berka's request for

fees under RAP 18.1 be denied because the issue is not briefed as required
by rule. *See* RAP 18.1(b)

RESPECTFULLY SUBMITTED this 20th day of May, 2013.

PRATT, DAY & STRATTON,
PLLC

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APPENDIX A

PLAINTIFF'S INSTRUCTION NO _____

Aggravation and new injury are not mutually exclusive. This means that a new injury event or events can also constitute an aggravation of a preexisting condition. Although a prior injury condition may be a cause of the condition for which an aggravation reopening application is made, whether a prior industrial injury claim should be reopened for aggravation or not depends on whether the new injury event or events constitute a supervening cause such that reopening of the prior claim should be denied.

McDougle v Department of Labor & Industries, 64 Wn.2d 640 (1964)
In Re. Robert D Tracy, BIIA Dec., 88 1695 (1990)
In Re. Richard J Davies, Dckt No 07 11118 & 07 11119 (March 17, 2008)
In Re. William R Dowd, BIIA Dec., 61,310 (1983.)
In Re. Joseph B Scott, Dckt No. 05 20699 & 06 16536 (March 6, 2008)

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

PILCHUCK CONTRACTORS,
INC.,

Appellant,

v.

DAVID BERKA & THE DEPT OF
LABOR & INDUSTRIES, STATE
OF WA,

Respondent.

No. 43837-2-II

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of May, 2013, I filed and served the **Employer Pilchuck Contractor, Inc.'s Appellant's Reply Brief** and this **Certificate of Service** upon the following parties, addressed as follows:

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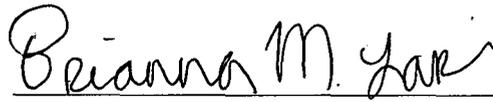
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