

No. 45305-3-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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CLIFFORD S. DANIELS, Appellant,

V.

DEPARTMENT OF LABOR & INDUSTRIES and DHL CORPORATE,

Respondents.

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REPLY BRIEF OF APPELLANT

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## I. REPLY ARGUMENT

### A. STANDARD OF REVIEW

First, error of law is attributable to the application of the Industrial Insurance Act and relevant case law, which would be reviewed under a de novo standard. Court of Appeals reviews interpretation of Industrial Insurance Act by Board for Industrial Insurance Appeals de novo under “error of law” standard and may substitute its judgment for that of Board, although court must accord substantial weight to agency’s interpretation. *Littlejohn Const., Co. v. Department of Labor & Indus.*, 74 Wn. App. 420, 873, P.2d 583 (1994). Thus, the Appellant did and has assigned error to the Conclusion of Law of the Board’s Decision and Order of January 28, 2013 that adopted the Proposed Decision and Order of December 3, 2012, and the affirmation of said decision by the Trial Court in which additional error of law is and has been assigned by Appellant Mr. Daniels. CP 10-11.

As stated in the opening brief, a claimant in workers’ compensation cases need only establish probability of causal connection between the industrial injury and his disability; it is only when the claimant’s medical witness leaves nothing of an objective nature in the record upon which a jury could reasonably rely to find the necessary causation between injury and disability that challenge to sufficiency of evidence should succeed. *Zipp v. Seattle School District No. 1*, 36 Wn. App. 598, 676 P.2d 538 (1984),

review denied, 101 Wn.2d 1023 (1984). Furthermore, when reviewing workman's compensation case, the appellate court can evaluate written record to test conclusions that have been drawn from the facts, explore for sufficiency of the probative evidence to support findings of fact and analyze findings when the evidence is undisputed, uncontradicted and unimpeached. *Gilbertson v. Department of Labor & Industries*, 22 Wn. App. 813, 592 P.2d 665, (1979).

Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987).

**B. THE TRIAL COURT ERRED IN AFFIRMING THE BOARD'S DECISION BECAUSE SUBSTANTIAL EVIDENCE SUPPORTS A FINDING THAT THE INJURY WAS A PROXIMATE CAUSE AND AGGRAVATED THE BILATERAL KNEE CONDITION.**

Respondent argues that the physician testimony is substantial evidence that the work injury was not the proximate cause or aggravation of the preexisting knee condition because the doctors testified that there was no direct impact to the knees in the December 21, 2010 work injury. However, it is well established that under the Industrial Insurance Act, the industrial injury need only be "a" proximate cause not "the" proximate cause, of the condition complained of. *Wendt v. Department of Labor &*

*Indus.*, 18 Wn App. 674, 684, 571 P.2d 229 (1977) (Emphasis added).

Thus, it was only necessary that Mr. Clifford S. Daniels, Appellant, prove that it was more probable than not that the work injury was a proximate cause of the condition(s) to his knees following the December 21, 2010 work injury. Mr. Daniels met this burden with substantial evidence from the record, based on the well settled “lighting up” theory under the Industrial Insurance Act and relevant case law, and the agreement of all of the doctors that his condition was made progressively worse following the work injury.

Although Respondent points out that *Wendt* concerns entitlement to jury instructions, *Wendt* is instructive on the application of the “lighting up” theory where, as here, the evidence leads to a reasonable conclusion that the work injury resulted in an aggravation of his preexisting knee condition. *Id.* In this regard, the Respondent misinterprets the significance of the “lighting up” theory because despite the nature of arthritis as a progressive condition, nothing in the record shows that Mr. Daniels’s preexisting knee condition was debilitating prior to the injury. Mr. Daniels was working full time without any work restrictions prior to the December 21, 2010 industrial accident, and he has not been able to go back to work after said accident because of the residuals of his injuries, mainly that to his knees. CP 128.

Similarly, while Respondent would limit *Bennett* to a case involving jury instructions, the Court's holding applies to the facts of this case when the Court concluded that the medical testimony proved that the claimant had a preexisting back injury but did not prove that the condition was disabling prior to the work injury. *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 534, 627 P.2d 104 (1981). Here, the Respondent argues that the testimony of Drs. Maurer, Bays, Jackson and Friedrich, taken individually, were substantial evidence from which the Superior Court could conclude that the bilateral knee condition was not proximately caused or aggravated by the work injury. The Respondent points out that the testimony of each doctor demonstrated that Mr. Daniels had preexisting degenerative arthritis, there was no direct impact to the knees, the flexion contractures were not originally caused by the work injury, and the injury did not cause the original knee condition. However, like the testimony in *Bennett*, the medical testimony in this case, taken together and separately, *did not* prove that the preexisting knee condition was disabling prior to the work injury. And evidence was shown that after the accident the flexion contractures worsened, and X-rays dated December 21, 2010 showed a knee effusion and lipohemarthrosis (evidence of fat and blood within a joint generally caused by trauma to the knee joint itself). CP 152, 153, 181. Whether or not the crush injury was below the

knee or on the knee makes no difference as injuries were caused upon said knees from the velocity of the industrial injury, the subsequent crush injury and the fall, and the healing process that increased the flexion contractors significantly. CP 125-127, 142, 154-155, 147.

Furthermore, even if the impact was not to his knees directly, the evidence supports a reasonable conclusion that the recovery period involved deconditioning that permanently aggravated the preexisting condition. As Dr. Johnson testified, it is necessary for patients to significantly limit their activity level when recovering from a skin graft to prevent failure of the wound healing and displacement of the skin and muscle graft. CP 146. It was also noted that Mr. Daniels had been sitting and limiting his activity that resulted in development of significant flexion contractures, and there was evidence of significant degenerative joint changes in the knees. CP 147. Those flexion contractors increased to a fairly significant level throughout his follow-up and did impact Mr. Daniels's ability to ultimately improve his overall functional status. CP 147. Since such time, the trauma from the industrial accident manifested in chronic swelling in the distal portion of the leg distal to the graft of 2+ intensity, in other words, there was edema, chronic fluid collection in the soft tissue which were evidence of the residuals of his injury and the need for surgery. CP 157. Moreover, Dr. Friedrich testified that the symptoms

of the knee condition were likely aggravated by the work injury. CP 212. But for the industrial accident, it is reasonable to conclude that Mr. Daniels would have continued to work without restrictions as he did prior to the industrial accident. Any treatment, disability, or impairment resulting from the “lighting up” of a pre-existing, but latent or asymptomatic condition, is covered under the industrial injury claim. *Miller v. Department of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939); *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 627 P.2d 104 (1981). It is also well settled that additional injury caused by treatment for an industrial injury is compensable under the original claim. See *In Re Arvid Anderson*, BIIA Dec., 65, 170 (1986). The courts have similarly ruled that “the consequences of treatment for an industrial injury are considered to be part and parcel of the injury itself.” *Anderson v. Allison*, 12 Wn.2d 487, 122 P.2d 484 (1942). Dr. Johnson testified that the damage to Mr. Daniels’s knees and proximal legs resulted in significant soft tissue damage in that healing process, with the result of the development of contractures, and the need for protecting the left lower extremity for an extended period of time involved in that healing process of his large graft also contributed to the development of flexion contractures. CP 155. Therefore, it would reason and is supported by medical testimony that the permanent aggravation of Mr. Daniels’s knee

conditions post injury while recovering from his surgery and hospital stay from December 21, 2010 to January 3, 2011 would be causally related to the industrial injury, and thus should be compensable under the Industrial Insurance Act.

Additionally, the record also demonstrates that Mr. Daniels was not actively seeking treatment for his knee condition prior to the December 21, 2010 work injury, he was not under any work restrictions, and his condition was not disabling nor causing him any loss of function.

Respondent argues that there was no substantial evidence the work injury caused the bilateral knee condition because the condition was a natural progression of the osteoarthritis present in 2009. Again, Mr. Daniels contends that this is not true, and not the correct legal standard as the aggravation of his preexisting knee condition need only be “a” proximate cause and not “the” proximate cause. See *Wendt*, 18 Wn App. 674, 684, 571 P.2d 229 (1977).

The Respondent also argues that Mr. Daniels bilateral knee conditions would continue to naturally progress over time despite the December 2010 industrial injury. This is not disputed. However, this progression was accelerated and permanently aggravated because of the industrial injury, and thus the resulting aggravation of his injury is to be attributed to the industrial injury and not to the preexisting condition. See

*Miller v. Department of Labor & Indus.*, 200 Wash. 674, 682-3, 94 P.2d 764 (1939). It would seem highly improbable that a natural progression would worsen from a non-disabling injury one day to disabling the next absent any intervening accident (i.e. the December 21, 2010 industrial injury), especially when there were no signs of a loss of function. Even more so, it would seem to be more improbable that this long-term natural progression would manifest itself on the same day as a major industrial injury that required hospitalization at Harborview Medical Center. With this in mind, it is paramount to note that the Court has previously stated that employers take their employees as they find them and a work injury cannot be denied because the worker suffered from preexisting degenerative arthritic disease. See *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 116, 206 P.3d 657 (2009); *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 471, 745 P.2d 1295 (1987).

Likewise, the Court has held that preexisting conditions do not qualify as permanently disabling unless they have a substantial and permanent impact on function; a showing of an intermittent impact on function is insufficient. *Tomlinson*, 166 Wn.2d at 117-18. Mere film studies, MRI's or x-rays showing degenerative changes are insufficient to establish a pre-existing disability. In *Tomlinson*, the Court noted that the

Board of Industrial Insurance Appeals itself has held in a series of cases that a preexisting disability “is more than a mere preexisting medical condition and must, in some fashion, permanently impact on the worker’s physical and/or mental functioning.” *Id.* (quoting *In Re Leonard Norgren*, BIIA Dec., 04 18211 (2006) at 7 (quoting *In Re Pate*, No. 90 4055, at 4-6 (Wash. Bd. Of Indus. Ins. Appeals May 7, 1992)). *Tomlinson* is also correct that employers take their injured employees as they find them. Thus employers are not entitled to seek a reduction in benefits when industrial injuries “light up” previous injuries or when workers have a condition that does not qualify as PPD (“Permanent Partial Disability”) but makes them more vulnerable to injuries. *Tomlinson*, 166 Wn.2d 105, 206 P.3d 657, 662-663, (2009), citing *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981) (citing *Miller*, 200 Wash. at 683, 94 P.2d 764).

The functionality evaluation related to the presence or absence of pre-existing disability has long been a fixture of the case law. See *Rehberger*, where the court refused to offset previous permanent partial disability of claimant’s leg because the claimant engaged in “continuous heavy labor and physical activities wholly inconsistent with the theory of a 70 per. cent [sic] or any appreciable permanent partial disability.” See *Rehberger v. Department of Labor & Indus.*, 154 Wash. 659, 283 P. 185

(1929). The record is totally void of credible evidence that Mr. Daniels had pre-existing *functional* disability of his knees up until the industrial injury of December 21, 2010.

Here, the evidence the trial court relied upon was insufficient to show that the preexisting knee condition caused a substantial and permanent impact on Mr. Daniels function prior to the December 21, 2010 work injury.

While the physician testimony and the medical documentation in the record established that Mr. Daniels had a preexisting arthritic knee condition, it failed to show that Mr. Daniels was undergoing any form of medical attention or that he was experiencing symptoms that substantially impaired his function immediately before the industrial injury. Rather, there is substantial evidence showing that he continued to engage in full-time, labor-intensive work without restriction or functional impairment up until the time of the work injury. Furthermore, assuming *arguendo*, even if the knee condition caused intermittent impairment, this was not sufficient evidence to establish that his knee condition was disabling prior to the work injury. See *Hurwitz v. Department of Labor & Indus.*, 38 Wn.2d 332, 229 P.2d 505 (1951).

Compensability in the circumstances of this case is consistent with the remedial purpose of the Industrial Insurance Act, which requires all

benefit of the doubt to be resolved in favor of the injured worker. See *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801, 882, 16 P.3d 583 (2001).

## II. CONCLUSION

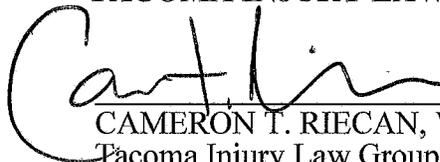
For the reasons stated above and in the Appellant's opening brief filed on January 31, 2014, Mr. Daniels respectfully requests that the Court reverse the trial court's June 19, 2013 order reaffirming the Decision and Order of the Board dated December 3, 2012.

Mr. Daniels also respectfully asks this Court to grant him an award for attorney's fees for the work done before this Court under the provisions of RAP 18.1 and RCW 51.52.130.

This matter should be reversed and remanded for the Department of Labor and Industries to take all proper and necessary actions consistent with the Court's findings and conclusions.

Respectfully submitted this 28<sup>th</sup> day of March, 2014.

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8 **COURT OF APPEALS, DIVISION II**  
9 **IN AND FOR THE STATE OF WASHINGTON**

10 CLIFFORD S. DANIELS,

11 Plaintiff/Appellant,

12 v.

13 DEPARTMENT OF LABOR &  
14 INDUSTRIES and DHL EXPRESS  
15 CORPORATE,

16 Defendants/Respondents.

COURT OF APPEALS,  
DIVISION II,  
CASE NO. 45305-3-II

AFFIDAVIT OF SERVICE

17  
18 STATE OF WASHINGTON )  
19 COUNTY OF PIERCE ) ss.

20 CAMERON T. RIECAN, being first duly sworn on oath, deposes and says:

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22 attorneys for Appellant in the above-entitled matter, and that on the 28<sup>st</sup> day of March, 2014,  
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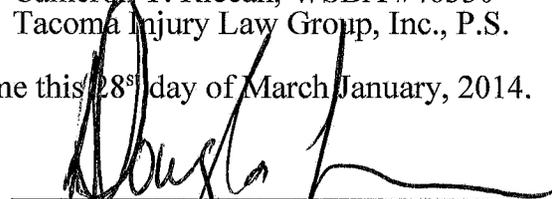
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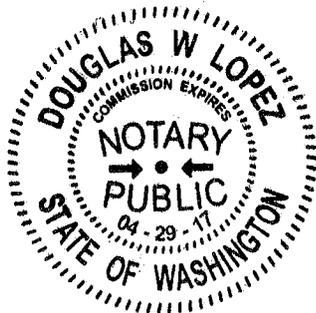


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13 SUBSCRIBED AND SWORN to before me this 28<sup>th</sup> day of March January, 2014.



14 NOTARY PUBLIC in and for the  
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16 at Thruston. My Commission  
17 expires 4-29-17.



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