

No. 45305-3- II

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

CLIFFORD S. DANIELS,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES AND DHL CORPORATE

Respondents.

RESPONDENT DHL CORPORATE'S BRIEF

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I. INTRODUCTION

Clifford Daniels (“appellant”) is a 54-year-old, 345-pound male delivery driver for DHL Express (“employer”) who was injured December 21, 2010. He was processing packages at Sea-Tac Airport when a forklift hit an empty cart, causing the cart to hit the back of appellant’s legs. He was taken by ambulance to Harborview Medical Center where he had surgery for a deep laceration to his left leg below the knee. He only received treatment for his left leg laceration in connection with this claim.

Prior to the December 21, 2010 work injury, appellant suffered a knee injury in high school. He continued to have knee problems prior to the December 2010 work injury, receiving treatment for his knees up through 2009. By 2009, he required total knee replacements of both knees. He had pain in both knees prior to this work injury. Respondent’s references to the “knee” condition include all bilateral knee conditions.

II. STATEMENT OF THE CASE

A. Procedural Posture

On August 10, 2011, the Department of Labor and Industries (“Department”) issued an order finding employer not responsible for any aggravation or injury to both knees. Appellant requested reconsideration and on December 15, 2011, the Department issued a second order

affirming the August 10, 2011 order. Appellant appealed to the Board of Industrial Insurance Appeals (“Board”).

Industrial Appeals Judge Greg Duras presided over the hearing. Dr. H. Richard Johnson and Dr. Jeffrey Friedrich testified on behalf of appellant. 7-31-12 CP 137-183; 7-18-12 CP 195-220. Appellant also testified on his own behalf. CP 112-137. Respondent presented its case through the testimony of Dr. Carter Maurer, Dr. Patrick Bays, and Dr. Allen Jackson. 8-10-12 CP 221-268; 8-15-12 CP 269-322; 9-6-12 CP 323-347.

Judge Duras affirmed the December 15, 2011 Department order and made the following Findings of Fact: 1) appellant sustained an industrial injury on December 21, 2010 when he was struck by a cart that was hit by a forklift and his lower legs were pushed into a work table causing a deep laceration on his left leg and a puncture wound on his right leg; 2) appellant’s bilateral knee conditions were not proximately caused or aggravated by his industrial injury. CP 47. Judge Duras concluded that “[Appellant] had numerous knee injuries before [the 2010] incident and it involved areas below his knees. He had end stage osteoarthritis requiring total knee replacements of both knees prior to December 21, 2010, and with such a significant pre-existing condition it would be nearly impossible to determine that any aggravation might have occurred to his

knees when his lower legs were struck.” CP 47. Judge Duras also relied on appellant’s own witness Dr. Johnson, when determining appellant’s own weight could have caused a worsening of the pre-existing tricompartmental arthritis. CP 46. Therefore, Judge Duras determined the Department’s denial must be affirmed because the evidence did not establish that appellant sustained knee injuries during his 2010 accident. CP 47.

Honorable Linda CJ Lee of the Superior Court of Pierce County heard the appeal of Judge Duras’ decision on June 19, 2013. After hearing oral arguments, she affirmed the rulings from below. CP 394-395; RP 38. Judge Lee indicated that Dr. Johnson based his entire opinion on the belief that appellant sustained a significant blow to both knees. RP 35-36. Yet, Judge Lee correctly observed that the injury only impacted the lower leg. Not even appellant suggested his knees were hit in the accident. RP 36. Judge Lee concluded that a preponderance of the evidence does not exist to overturn the Board’s findings because Dr. Johnson’s inconsistent opinion is outweighed by the persuasive opinions of Drs. Bays, Maurer, Jackson, and Friedrich. RP 37-38.

Appellant appealed all findings of facts and legal conclusions of Judge Lee’s decision to Division II of the Court of Appeals. CP 398-399.

B. Statement of Facts

1. Testimony of Appellant

Appellant was injured on December 21, 2010 when a forklift hit an empty cart causing the cart to strike the back of his legs. CP 118. The force knocked him down and he landed on his back. CP 135.

Prior to the December 21, 2010 injury, appellant suffered a knee injury in high school. CP 131. He continued to receive treatment for the pain in his knees up through 2009. CP 131-133. Appellant made it clear in his testimony that there was no specific injury to his knees at the time of the December 2010 work incident. CP 134. He further clarified his use of the wheelchair and crutches were upon his own request, as the doctors did not request mechanical aids following the industrial injury. CP 135.

2. Testimony of Jeffrey B. Friedrich, M.D. – July 18, 2012

Dr. Friedrich is appellant's attending physician and testified on his behalf. CP 199; 202. He performed surgery on appellant's left leg on December 21, 2010. CP 202; 209. He described the injury as a soft tissue injury to the shin of the left leg. CP 202-203. As of January 20, 2011, he allowed appellant to bear weight on his left lower extremity and did not recommend any crutches or other assistive devices because appellant's wounds were healed. CP 209. He concluded the work injury did not directly cause any of appellant's knee problems. CP 213. Dr. Friedrich

reasoned that someone could sustain an injury to the tibia area without any impact on the knee area, which is similar to appellant's injury. CP 219. He testified no further treatment was needed for the work injury. CP 214.

Dr. Friedrich was unaware of appellant's preexisting bilateral knee condition until after the surgery. CP 214. He failed to review either prior diagnostic imaging studies or prior medical records. CP 215. He deferred to the opinion of an orthopedic surgeon when considering the cause and extent of appellant's knee condition. CP 216. In doing so, he concurred with Drs. Bays and Maurer's conclusions the injury did not cause or aggravate appellant's knee condition. CP 217.

3. Testimony of Patrick Bays, D.O. – August 15, 2012

Dr. Bays is a Board certified orthopedic surgeon who has a full-time active practice in Seattle, Washington. CP 272; 275. He examined appellant on June 24, 2011, and after reviewing all of appellant's medical records, prepared a written report. CP 276-277. During his examination, appellant reported that he had never had any problems with his knees prior the December 2010 injury, contrary to the medical records. CP 284.

After reviewing all of the medical records and examining appellant, Dr. Bays diagnosed a left pretibial lower extremity laceration due to the December 2010 work injury. CP 288. He also diagnosed end stage chronic severe degenerative arthritis involving all three

compartments of both knees, unrelated to the December 21, 2010 injury. CP 288-289. He concluded the arthritis was preexisting and unaffected by the December 2010 injury. CP 289. Dr. Bays reasoned that arthritis takes many years to reach end stage and “it would be literally physiologically impossible for any of those imaging studies showing severe end stage arthritis to have been in any way causally related to the work injury of December 21, 2010.” CP 289. Furthermore, he noted neither the SIF-2 claim form, nor the initial medical records make any mention of an injury to either knee on December 21, 2010. CP 290. The diagnostic imaging also showed no acute findings of knee impact. CP 294. Additionally, on examination there was no indication that appellant had traumatically induced flexion contractures due to the work injury. CP 296. Dr. Bays testified that appellant, in his mid twenties as well as a year and a half before the December 2010 injury, was already lacking 40 percent of his flexion. CP 298. He found no discrepancies between his pre-injury flexion contractures and his post-injury flexion contractures. CP 296-297. Thus, appellant’s current ranges of motion deficits are a result of the natural progression of the arthritic changes in his knees because the findings are “very consistent with a person who has end stage degenerative arthritis.” CP 297-298. Based on these findings, Dr. Bays testified that appellant’s work-related conditions had reached medical

fixity at the time he saw him in June 2011 and the December 2010 injury does not prevent him from returning to his job-at-injury. CP 295.

Due to chronic knee pain eighteen months prior to the work injury, it was recommended that appellant undergo bilateral knee replacements and that the need for the surgery was due to the natural progression of his preexisting arthritic condition. CP 300-301. Dr. Bays testified that appellant was the one who decided not to go forward with the recommended surgery at that time, even though it was predicted that over time his condition would continue to deteriorate and he would eventually have significant restrictions and pain. CP 301.

Dr. Bays noted that several doctors have reviewed job analyses and concluded that he is able to work. CP 301. He testified that appellant is capable of gainful employment based on the December 2010 work injury, and appellant is even capable of gainful employment with respect to his preexisting unrelated arthritic condition. CP 302. The fact that appellant has not returned to work does not indicate his knee conditions are due to the work injury. Appellant is the one who is making the decision not to work despite being released to work by several doctors. CP 301-302.

4. Testimony of Carter Maurer, M.D. – August 10, 2012

Dr. Maurer is a Board certified orthopedic surgeon who is licensed in both Washington and California with an active practice at the Naval

Hospital in Bremerton. CP 223-224. He examined appellant on October 12, 2011, reviewed his medical records, and prepared a written report. CP 226. In preparation for his testimony, he reviewed pre-injury records, and updated medical records and reports since his examination. CP 229; 231. After review of the records and examination of appellant, he diagnosed a left leg soft tissue laceration due to the December 2010 industrial injury, preexisting severe bilateral tricompartmental knee osteoarthritis, unrelated bilateral hip range of motion deficit with possible hip osteoarthritis, and morbid obesity. CP 240-241.

Dr. Maurer explained the bilateral knee arthritis both predated the work injury and was not permanently worsened by the work injury. CP 242. Additionally, he testified the work injury did not cause or worsen appellant's flexion contractures. CP 242-243.

Dr. Maurer discussed the mechanics of the injury and determined there is no medical evidence that the work injury caused appellant to sustain injury to the back of the knees as the records diagnosed a laceration and failed to diagnose impact to the knees. CP 244. Dr. Maurer testified there was no direct impact to the knees and he was in a good position to assess direct impact because he examined appellant five days after the injury. CP 245. Moreover, the mechanism of injury as described

by the appellant would not result in increased flexion contractures.

CP 244.

Based on his work-related conditions, appellant is employable. CP 248. Whether or not he had prior permanent work restrictions has no bearing on whether the December 2010 work injury caused or aggravated his underlying bilateral knee condition. CP 265-266. Dr. Maurer explained the natural progression of osteoarthritis is that it progressively worsens over time. CP 266.

5. Testimony of Allen Jackson, M.D. – September 6, 2012

Dr. Jackson is an orthopedic surgeon who is licensed to practice in Washington. CP 326-327. He evaluated appellant on June 5, 2009 in conjunction with a request to reopen a closed claim for prior unrelated 2007 bilateral knee injuries. CP 328. He examined both knees in 2009, reviewed the medical records, and prepared a written report. CP 328-329. He also reviewed additional updated records in preparation for his testimony. CP 329. During the 2009 examination, appellant complained of pain in the inside and outside of his knees, with the right worse than left. CP 331. Appellant also reported a lack of motion with less range in his right knee. CP 331. In 2009, Dr. Jackson diagnosed bilateral knee osteoarthritis, and a sprain of the right knee and right calf due to a 2007 work injury. CP 333.

After reviewing updated records, Dr. Jackson testified that no medical records supported direct injury to appellant's knees as a result of the December 2010 work incident. CP 334. Dr. Jackson explained that appellant's current knee condition is about the same now as it was during his examination in 2009. CP 335. In 2009 he had end stage bone-on-bone osteoarthritis, which he still has. CP 335. He reasoned the fluid in appellant's knee is expected of someone with osteoarthritis. CP 336. Dr. Jackson concluded appellant's current bilateral knee condition is the natural progression of the osteoarthritis present during his 2009 examination. CP 336-337. The absence of a direct injury to appellant's knees supports the diagnosis of a slow worsening of appellant's preexisting condition that was not aggravated by the December 2010 work injury. CP 337.

6. Testimony of H. Richard Johnson, M.D. – July 31, 2012

Dr. Johnson is an orthopedic surgeon who examined appellant on January 12, 2012 in appellant's attorney's office at the request of appellant's attorney. CP 138; 141; 176. Dr. Johnson is not authorized by the Department to perform independent medical examinations. CP 177.

He testified appellant's right knee had severe degenerative joint disease with cartilage loss resulting in narrowing of the lateral joint space in 2007, indicating the development of arthritic changes prior to the work

injury. CP 143-144. On examination, he noted bone spurs off both the medial and lateral joint lines of both knees consistent with degenerative joint disease. CP 155-156.

Dr. Johnson testified appellant had significant arthritis in both knees prior to the December 2010 work injury, which would have progressed regardless of the work injury. CP 161. However, the speed of progression depends on the weight placed on the knees; appellant's weight of 345 pounds would cause more rapid progression of the arthritis in his knees than if he weighed 150 pounds. CP 162. Dr. Johnson reviewed appellant's prior injuries and noted a meniscus repair in high school. Medical literature establishes that a meniscectomy can cause a more rapid progression of arthritis. CP 171. Dr. Johnson also testified that appellant had work restrictions on and off prior to 2010 due to his knee problems. CP 179.

Dr. Johnson expressed an expectation that appellant's first medical visit would have documented the location of trauma. CP 165. Despite the absence of knee injuries in Dr. Freidrich's initial report, Dr. Johnson suggested the injury caused appellant's knee problems. CP 159-161; 165. He based his findings on a direct blow mechanism of injury, when he stated, "Lost in this history of injury is the fact that [appellant] sustained a significant blow to the posterior aspect of both knees when he was pushed

into the fixed podium.” CP 164-165. He reported the laceration on appellant’s leg was four to six inches below the knee joint. CP 169.

III. SUMMARY OF ARGUMENT

Absent an error of law, this court’s review is limited to determining whether there is substantial evidence to support the decision below. Appellant does not establish an error of law and the record demonstrates substantial evidence to support the decision that the 2010 injury did not cause and did not worsen appellant’s preexisting bilateral knee condition.

Appellant’s factual challenges are not meritorious as the Superior Court’s conclusions that the December 2010 injury neither caused nor aggravated the bilateral knee condition are supported by substantial evidence. The Court of Appeals should affirm the Superior Court’s determination.

Appellant’s arguments are that he either sustained injuries to both knees as a result of the December 21, 2010 injury or this injury caused or aggravated his bilateral knee condition. Substantial evidence supports both conclusions to the contrary. The record soundly establishes the December 21, 2010 injury did not cause or aggravate appellant’s preexisting bilateral knee condition as appellant did not suffer a direct blow to the knee.

IV. ARGUMENT

A. Response to Appellant's First Assignment of Error: The Appellant Does Not Present An Issue Of Law.

1. Scope of Review: Factual determinations are reviewed under a substantial evidence standard.

A Superior Court's legal determinations are reviewed under an error of law standard. *Energy Northwest v. Harje*, 148 Wn. App. 454, 199 P.3d 1043 (2009). However, whether a disability is the result of an injury or solely of a preexisting infirmity condition is a question of fact. *Brittain v. Dep't of Labor & Indus.*, 178 Wash. 499, 35 P.2d 49 (1934).

Challenges to a Superior Court's decisions are reviewed under the ordinary standard of review for civil cases. RCW 51.52.140. The Court of Appeals reviews whether "substantial evidence supports the trial court's factual findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor and Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor and Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). "Substantial evidence" is "evidence of such a character and substance as to convince an unprejudiced, thinking mind of the truth of that to which the evidence is directed." *Ehman v. Dep't of Labor and Indus.*, 33 Wn.2d 584, 597, 206 P.2d 787 (1949) (internal citations omitted). The evidence must be sufficient to convince a rational fact

finder that an assertion is true. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008). The Court of Appeals should uphold the Pierce County Superior Court judgment because Judge Lee relied on substantial evidence when finding the knee conditions unrelated to the injury. *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 507, 215 P.3d 1043 (2009).

2. Appellant advances many theories appropriate for a trial court, but none that address substantial evidence review.

The majority of appellant's brief addresses policy and presumptions pertinent to the fact finding process. Here the Superior Court found: 1) appellant sustained an industrial injury on December 21, 2010 when he was struck by a cart that was hit by a forklift and his lower legs were pushed into a work table causing a deep laceration on his left leg and a puncture wound on his right leg and; 2) appellant's bilateral knee conditions were not proximately caused or aggravated by the December 2010 injury. CP 401-402. On review, the proper inquiry is neither a policy nor a presumptions argument because these are not considered under the substantial evidence review standard.

The fact that he did not suffer a prior work injury that caused permanent impairment is merely a red herring to distract the Court from

the fact that his bilateral knee conditions continued to naturally progress over the years and would have done so despite the December 2010 work injury. CP 266; 297-298; 336-337.

Wendt v. Dep't of Labor and Indus., 18 Wn. App. 674, 682-683, 571 P.2d 229 (1977) does not support reversal because *Wendt* addresses entitlement to a jury instruction on the lighting up theory. Here, Judge Lee accepted all of appellant's arguments about lighting up. RP 11; 21; 31. She found them unpersuasive.

Similarly, appellant's reliance on *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 627 P.2d 104 (1981), is unfounded. *Bennett* addressed apportionment of permanent disability between a 1959 injury and a 1973 injury. The appeal focused on whether the evidence supported a lighting up jury instruction. The present appeal does not involve jury instructions. Moreover, this appellant was permitted to argue there was a lighting up. The court weighed the evidence and disagreed. RP 11; 21; 31.

Likewise, *Boeing Co. v. Hansen*, 97 Wn. App. 553, 554, 985 P.2d 421 (1999) is not on point. *Boeing* concerned what was necessary to make a prima facie case of a preexisting injury/disability to reduce a permanent partial disability award. In the present matter, there is no issue regarding a reduction of permanent partial disability. The court required objective

findings of a preexisting impairment rating to offset the current impairment rating. Here, the Superior Court was charged with assessing causation, not permanent impairment. Judge Lee reasonably accepted the opinion of an expert who had seen appellant prior to the injury and relied on objective findings to conclude the injury did not cause or worsen the knee condition. CP 333-336.

Appellant also misconstrues *Miller v. Dep't of Labor and Indus.*, 200 Wn. 674, 94 P.2d 764 (1934), which is limited to determining the extent of permanent partial disability and is irrelevant when the only issue is allowance of the preexisting condition. Moreover, the *Miller* test is whether the preexisting condition was symptomatic or quiescent prior to the injury. *Goehring v. Dep't of Labor & Indus.*, 40 Wn.2d 701, 246 P.2d 462 (1952). Here, there is abundant evidence that the knee condition was symptomatic prior to the injury based on the recommendations for total knee replacement. CP 300-301.

The Superior Court had substantial evidence that the knee condition was unaffected by the injury. CP 266; 297-298; 336-337. Multiple doctors testified that the bilateral knee osteoarthritis preexisted and was unrelated to appellant's prior work injuries. CP 240-241; 333; 336-337. Eighteen months before the December 2010 injury Dr. Bays told appellant he needed to undergo bilateral knee replacement due to the

natural progression of his arthritic condition, which predated his 2007 knee injuries. CP 300-301. Appellant simply chose to live with his severe preexisting condition and delay the required knee surgery. CP 301. It is disingenuous to assert that he had no symptoms prior to the injury. The evidence shows appellant's already-severe osteoarthritis naturally continued to progress independent of his injury. In 2009, Dr. Bays even advised appellant that electing not to go forward with surgery would cause continued long term pain and restrictions. CP 301.

The arguments appellant makes on appeal are misguided as he was allowed to submit his evidence and advance these arguments before the superior court. Judge Lee was not persuaded by his evidence. RP 38. Substantial evidence review limits this court to examining the findings of fact and conclusions of law that flow from these findings. *Nelson v. Dep't of Labor & Indus.*, 175 Wn. App. 718, 308 P.3d 686 (2013).

**B. Response to Appellant's Second Assignment of Error:
Appellant's bilateral knee conditions was neither caused nor worsened by the December 21, 2010 injury.**

1. Scope of Review: Factual determinations are reviewed under a substantial evidence standard.

Challenges to a Superior Court's decisions are reviewed under the ordinary standard of review for civil cases. RCW 51.52.140. The Court of Appeals reviews whether "substantial evidence supports the trial court's

factual findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Ruse*, 138 Wn.2d at 5, 977 P.2d 570 (quoting *Young*, 81 Wn. App. at 128, 913 P.2d 402). "Substantial evidence" is "evidence of such a character and substance as to convince an unprejudiced, thinking mind of the truth of that to which the evidence is directed." *Ehman*, 33 Wn.2d at 597, 206 P.2d 787 (internal citations omitted). The evidence must be sufficient to convince a rational fact finder that an assertion is true. *Jenkins*, 143 Wn. at 254, 177 P.3d 180. The Court of Appeals should uphold the Pierce County Superior Court judgment because there is no substantial evidence of direct impact to appellant's knees. *Cascade Valley Hosp.*, 152 Wn. App. at 507, 215 P.3d 1043.

2. Substantial evidence supports a finding that the injury neither caused nor aggravated appellant's bilateral knee condition.

A finding that appellant's bilateral knee condition was not caused by the injury is supported by substantial evidence. The Superior Court correctly found appellant's knee condition was not due to, "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100.

There is substantial evidence that the December 2010 injury was not the proximate cause of appellant's bilateral knee condition. Proximate cause requires a work event be a cause-in-fact. *Jenkins*, 143 Wn. App. at 254, 177 P.3d 180. A "cause-in-fact" means the injury event produced the condition in an unbroken sequence such that it would not have resulted without the injury. *Id.* Appellant must establish that the event produced the injury in an unbroken sequence such that it would not have resulted without the industrial accident. *Id.* This is not a case where lay witnesses or uninformed expert can establish a causal link between an accident and injury. *See e.g. Bennett*, 95 Wn.2d at 531, 627 P.2d 104. Appellant had no observable accident or signs of injury to his knees at the time of the industrial injury. CP 290, 294, 335. Instead, he had to establish, through expert testimony that it is more probable than not that the industrial event caused the disability. *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 601, 676 P.2d 538 (1984).

Here, the evidence allows a reasonable conclusion that appellant's work was not the natural and proximate cause or aggravation of his bilateral knee condition. Dr. Bays, Dr. Maurer, and Dr. Jackson provided reliable, persuasive testimony that appellant's bilateral knee condition is not related to his work activities. These opinions rest on solid factual foundations and consider potential causes within the context of medical

science. Appellant's own attending physician provided substantial evidence to support the Superior Court's finding. CP 217. The only expert who found the injury either caused or aggravated appellant's knee condition based his opinion on direct impact to the knees. CP 159; 164-165. Appellant testified there was no direct impact to his knees. CP 134. He also testified the force caused him to fall on his back and not on his knees. CP 135. The testimony of each witness, even if considered alone, is sufficient to persuade a rational fact finder that appellant's knee condition was neither caused nor aggravated by the December 2010 injury.

a) *Vast weight of medical opinion shows condition did not proximately cause appellant's bilateral knee condition.*

A rational fact finder concluded the December 2010 injury was not a proximate cause of appellant's condition. Stated differently, for appellant, he must establish that his current bilateral knee conditions would not have resulted had he not been injured. *Energy Northwest*, 148 Wn. App. at 468-469, 199 P3d 1043. Judge Lee found appellant's evidence inadequate to sustain this burden. The Superior Court had substantial evidence to conclude appellant's bilateral knee condition was not proximately caused by the December 2010 injury. This courts review is 'limited to examining the record to see whether substantial evidence

supports the findings of fact the superior court made after its de novo review of the case, and whether the superior court's conclusions of law flow from these findings." *Nelson*, 175 Wn. App. at 723, 308 P.3d 686.

The Superior Court relied on substantial evidence even if only considering Dr. Maurer's testimony. Dr. Maurer is a Board certified orthopedic surgeon who examined appellant on October 12, 2011, and reviewed pre-injury records in preparation of his testimony. CP 223-226. Dr. Maurer testified the December 2010 injury did not cause appellant's knee condition bilateral knee condition. CP 242. He relied on the absence of objective evidence when determining the injury was not a proximate cause of appellant's condition. First, appellant had no direct impact injury to his knees. CP 244-245. This testimony contradicts Dr. Johnson's entire foundation for his opinion. CP 159; 164-165. Second, Dr. Maurer concluded appellant's flexion contractures were neither caused nor worsened by the work injury because the flexion numbers are within the measurement of error. CP 242-243. These objective findings refute Dr. Johnson's opinion that there must be a direct/crush injury due to increased flexion numbers. CP 154-155. In addition, Dr. Johnson testified that the earlier medical providers would have been in the best position to document the location of trauma. CP 165. Dr. Maurer, who examined the appellant five days after the injury, diagnosed a left leg soft

tissue laceration with no direct impact to appellant's knees. CP 240-241; 245. Therefore, Dr. Maurer's testimony provides substantial evidence from which to affirm the Superior Court's findings.

The Superior Court relied on substantial evidence even if relying only on Dr. Bays. Dr. Bays is a Board certified surgeon who examined appellant on June 24, 2011, and reviewed all of his medical records. CP 276-277. Dr. Bays diagnosed a left pretibial lower extremity laceration due to the December 2010 work injury and chronic severe degenerative arthritis involving all three compartments of both knees that is unrelated to the December 2010 injury. CP 288-289. He reasoned the mechanics, SIF-2, and medical records do not support appellant's injury being the proximate cause of his knee condition. CP 290. His findings negate Dr. Johnson's causation argument because Dr. Bays concluded there was no direct impact to appellant's knees. CP 290. During his examination, he concluded there was no indication appellant had traumatically induced flexion contractures due to the work injury. CP 296. Therefore, Dr. Bays' testimony provides substantial evidence from which to affirm the Superior Court's findings.

The Superior Court relied on substantial evidence even when considering Dr. Jackson's testimony. He is an orthopedic surgeon who evaluated appellant on June 5, 2009 and reviewed updated medical records

prior to his testimony. CP 326-328. Dr. Jackson testified there is neither medical evidence nor medical records supporting a direct injury to appellant's knees as a result of the December 2010 work incident. CP 334. His testimony controverts appellant's lone expert who based causation on a direct impact mechanism of injury. CP 154-155; 159; 164-165. Dr. Jackson concluded the injury did not cause appellant's current bilateral knee condition because the condition is a natural progression of the osteoarthritis present when he saw Dr. Jackson in 2009. CP 336-337. Therefore, Dr. Jackson's testimony provides substantial evidence from which to affirm the Superior Court's findings.

Even appellant's treating physician, Dr. Friedrich, provides substantial evidence to support the Superior Court's findings. He says an injury could affect the tibia without any impact on the knee. CP 219. Based on his examination and review of records, he concluded that the injury did not cause appellant's knee condition. CP 213. Therefore, Dr. Friedrich's testimony provides substantial evidence to affirm the Superior Court's finding.

The evidence shows appellant's current bilateral knee condition is the result of the natural progression of his preexisting osteoarthritis. The Superior Court's findings should be upheld because a rational fact finder

relied on substantial evidence when concluding the December 2010 injury was not the proximate cause of appellant's bilateral knee condition.

b) There is substantial evidence to show the injury did not aggravate or worsen appellant's bilateral knee condition.

Dr. Bays, Dr. Maurer, Dr. Jackson, and Dr. Friedrich, appellant's own attending physician, all agree his preexisting knee conditions were neither aggravated nor worsened by the injury. The Superior Court correctly identifies "we have one expert saying one thing and we have three experts saying something else." RP 38. Substantial evidence supports the Superior Court's findings and it would exist even if Judge Lee only relied on one of these experts.

Dr. Bays' testified the need for surgery is due to the natural progression of appellant's preexisting arthritis. CP 300-301. He explained that a year and a half before the injury appellant was lacking 40 percent of his flexion. CP 298. During his 2011 examination, he found range of motion deficient in both extension and flexion in the bilateral knees, which is consistent with the pre-injury findings. CP 298. These findings support end stage degenerative arthritis because the loss of cartilage causes the leg to become shorter, which contracts the muscles and ligaments causing a reduced range of motion in the knee. CP 298. Dr. Bays concluded the December 2010 injury did not aggravate or

worsen the preexisting arthritis because the differential in flexion numbers was *de minimis*. CP 296-297. Moreover, the severity of appellant's preexisting knee condition is evidenced by his need for a total knee replacement 18 months before the December 2010 injury. CP 300-301. Dr. Bays' rationale alone provides substantial evidence for a rational fact finder to conclude the injury did not aggravate or worsen appellant's preexisting bilateral knee condition.

Dr. Maurer testified the December 2010 injury did not aggravate or worsen appellant's preexisting condition. CP 242. He too explained the injury did not worsen the flexion contractures and any difference in numbers is due to appellant's obesity and his varus alignment. CP 242. There is substantial evidence considering only Dr. Maurer's testimony.

Dr. Jackson concluded appellant's knee condition—end stage bone-on-bone osteoarthritis—is the same now as it was in 2009. CP 335. He reasoned the December 2010 injury did not cause direct impact to appellant's knees. CP 334. The mechanism of injury did not worsen or aggravate his preexisting condition. CP 337. Instead, the worsening was due to the natural arthritic progression causing cartilage to wear off, which results in more contractures and reduced range of motion. CP 336-337. He is in the best position to assess appellant's pre- and post-injury status because he evaluated him in 2009. CP 328. Dr. Jackson's testimony

provides substantial evidence for the Superior Court to base their findings on.

Dr. Friedrich testified that he would defer to the opinion of an orthopedic surgeon when considering the severity of appellant's preexisting conditions because they are the best equipped to address appellant's knees. CP 216. He also testified that he concurred with Drs. Bays and Maurer's findings that the injury did not result in an aggravation of the bilateral knee condition. CP 217. Thus, the Superior Court relied on substantial evidence when they affirmed the Board's decision. RP 38.

The only support for aggravation comes from a hired expert who is not approved by the Department to see injured workers and who saw appellant six months after the issue had been resolved by the Department. CP 177. Dr. Johnson did not understand the mechanism of injury and failed to account for the fact that the "worsened" flexion contractures are not actually much different from his pre-injury condition. CP 155; 159, 164; 165. The Superior Court discredited Dr. Johnson's testimony because appellant's testimony and medical records provide no indication that appellant was hit in the knees. RP 36. Moreover, the court correctly identified his reliance on flexion contractures is suspect because the numbers do not support Dr. Johnson's rationale. RP 36. The Superior

Court instead relied on Dr. Bays' testimony that methodically explained how the flexion numbers from 2007 onward evidence end stage degenerative arthritis and not a crush injury. CP 296-298, RP 36-37. Dr. Bays' finding was corroborated by Dr. Maurer who found similar pre and post flexion numbers and explained that any difference is due to obesity and varus alignment. CP 242. Thus, the inconsistencies alone in Dr. Johnson's testimony provided substantial evidence to support the Superior Court's finding.

Drs. Bays, Maurer, Jackson, and Friedrich all agree the December 2010 injury did not aggravate his preexisting knee conditions. In addition, his own expert witness even acknowledged his condition would have worsened without the work injury due to his morbid obesity. CP 161-162. Each individual expert's opinion, taken in a vacuum, let alone in their totality, provides substantial evidence to support the Superior Court's findings.

**C. Response to Appellant's Second Assignment of Error:
Opposing Counsel is Not Entitled to Attorney Fees.**

Opposing counsel is only entitled to attorney fees if the "decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to

relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.” RCW 51.52.130. Opposing counsel is not entitled to attorney fees if there is a modification to the Department order without a subsequent increase in claimant’s benefits. *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 692, 175 P.3d 1117 (2008), *aff'd on other grounds*, 169 Wn. 2d 81, 233 P.3d 853 (2010). Opposing counsel is not entitled to attorney fees because substantial evidence supports the Superior Court’s findings. By affirming the Superior Court’s decision, appellant is awarded no additional relief, thereby precluding opposing counsel from attorney fees. RCW 51.52.130.

V. CONCLUSION

The Superior Court relied on substantial evidence when denying the compensability of appellant’s bilateral knee conditions. Substantial evidence established the bilateral knee conditions preexisted the December

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2010 industrial injury and were neither caused nor aggravated by the industrial injury. As such, the employer requests the Court affirm the Pierce County Superior Court's order and judgment.

Dated: February 27, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Bass', written over a horizontal line.

Aaron J. Bass, WSBA No. 39073
Of Attorneys for Respondent, DHL Corporate

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the original and one copy of **RESPONDENT DHL CORPORATE'S S BRIEF** via efileing to the following:

Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

I further certify that on this date, I mailed a copy of the foregoing **RESPONDENT DHL CORPORATE'S BRIEF** via email and first class mail, postage prepaid, with the United States Postal Service to the following:

Cameron T. Riecan *via email and first class mail*
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DATED: February 27, 2014



Aaron J. Bass, WSBA No. 39073
Of Attorneys for Respondent DHL Corporate



SATHER BYERLY & HOLLOWAY LLP
ATTORNEYS

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February 27, 2014

Via First Class Mail and Email

Cameron Riecan
Tacoma Injury Law Group
PO Box 1113
Tacoma, WA 98401

Re: Claimant: Clifford Daniels
Employer: DPWN Holdings, Inc. (DHL Express)
Claim No.: 1147095970001
D/Injury: December 21, 2010
CA No.: 45305-3-II

Dear Mr. Riecan:

Enclosed is a copy of Respondent, DHL Corporate's Brief that was efiled in the Court of Appeals, Division II today in the above-named matter. A copy will also be served via email.

Copies have been served on all parties of record.

Sincerely,

Aaron J. Bass

AJB:SMS:tab

Enclosure

cc (w/encl.): Anastasia Sandstrom, AAG – via first class mail and email
Steven Hurley, Sedgwick - via fax
Albert Francis, DHL - via email

SATHER BYERLY & HOLLOWAY

February 27, 2014 - 9:39 AM

Transmittal Letter

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Case Name: Clifford S. Daniels v. Department of Labor & Industries and DHL Corporate

Court of Appeals Case Number: 45305-3

Is this a Personal Restraint Petition? Yes No

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Personal Restraint Petition (PRP)

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Petition for Review (PRV)

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Comments:

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Sender Name: Aaron J Bass - Email: abass@sbhlegal.com

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