

NO. 49246-6-II

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

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NEIL R. BECK,

Appellant,

v.

GLACIER NORTHWEST, INC.,

Respondent.

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**BRIEF OF RESPONDENT GLACIER NORTHWEST, INC.**

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## I. STATEMENT OF ISSUES

1. Whether the Appellant's Statement of the Case failed the pleading standards of RAP 10.3(a)(5) when it failed to fairly characterize testimony, presented facts in such a manner as to reargue the merits of his jury trial, and omitted critical and inconvenient facts.
2. Under existing law, is Dr. Earle the Appellant's "attending physician" when Dr. Earle satisfies all of the requirements set forth in WAC 296-20-01002 and relevant case law?
3. Under *Clark County v. McManus*, was Instruction No. 5 mandatory when the Appellant failed to present any articulable reasons why Dr. Earle's testimony was not acceptable?
4. Whether the Appellant failed to state grounds upon which he would have been prejudiced when he only argues that 1.) Appellant's only expert witness was not an attending physician and was not also given the attending physician instruction, and 2.) Counsel for Glacier Northwest accurately cited Instruction No. 5 during closing argument.

## II. STATEMENT OF THE CASE

### A. Procedural History of Claim No. W-854481.

On September 12, 2005, the Appellant's industrial injury claim was allowed by the Department of Labor and Industries ("Department"). On September 2, 2008, the Department issued an order closing the Appellant's claim, finding his condition stable, and awarding a permanent partial disability ("PPD") status of Category 2. This claim closure and award were issued at the direction of the Board of Industrial Insurance Appeals ("Board").

On June 23, 2009, the Appellant filed an aggravation application, seeking to reopen his claim. On October 27, 2009, the Department denied

the Appellant's reopening application, then affirmed the denial on January 7, 2010. However, the Board reversed the Department's denial and the claim was reopened on February 18, 2011.

On March 18, 2013, the Appellant's claim was once again closed with no award for PPD. On May 10, 2013, the Department affirmed its claim closure. On July 24, 2013, the Board granted the Appellant's appeal. The Board issued a Proposed Decision and Order (PD&O") affirming the Department's claim closure and held the Appellant to not be entitled to temporary total disability benefits, nor to be entitled to a pension/total permanent disability ("TPD"). On May 26, 2015, the three-member Board affirmed the PD&O and the Department Closing Order. The Appellant then appealed to the Superior Court of Cowlitz County.

On June 23, 2016, a Judgment and Order was entered with the Superior Court of Cowlitz County. The jury found that 1.) the Board was correct in determining that the Appellant was not temporarily totally disabled from June 15, 2009 through April 13, 2011; 2.) the Board was correct in determining that the Appellant was not temporarily totally disabled from December 4, 2012 through May 9, 2013; 3.) the Board was correct in determining that the Appellant did not require further necessary and proper treatment for any condition proximately caused by his May 17,

2005 industrial injury; and 4.) the Board was correct in determining that the Appellant was not entitled to a pension as of May 10, 2013.

(In addition to the citations provided above, the facts contained above are supported by Appendices A – D).

**B. Factual Context Supplementary to Appellant’s Statement of the Case.**

Appellant cites the testimony of his sole expert witness, Dr. Gritzka, for the propositions that “doctors do not know what is wrong with Mr. Beck’s mid back, and do not have objective data as to what his residual functions are,” “Mr. Beck has not reached maximum medical improvement,” that the Appellant “was probably unable to work,” and that the Appellant was unable to perform a variety of jobs for which he was approved. See Appellant’s Brief (“Brief”) at 8-11.

On June 30, August 9, August 11, September 7, and September 8 of 2012, surveillance was conducted of the Appellant for purposes of this claim. CP at 3, 346-348, 586-87, and 662-63. See also, CP at 728. Counsel for the Appellant adamantly refused to allow his witness, Dr. Gritzka, to view the surveillance video. See CP at 536-39. The surveillance video shows the Appellant hauling sheets of drywall (CP at 588, 664); lifting a bathroom vanity (CP at 589); loading heavy lumber on top of his van (CP at 588); kneeling, bending, and hammering whilst

building a porch (CP at 589, 664); and operating a tractor and backhoe (CP at 664). In short, the surveillance video showed that the Appellant was of normal function, clearly operating at least at a “medium capacity.” See CP at 663-65, 716. Throughout the surveillance video, the Appellant demonstrated fluid movement, normal body mechanics, with no painful posturing or movements. CP at 587-88.

When confronted by the surveillance video, the Appellant maintained that he was unable to work through May 10, 2013. CP at 421; see also, 413-418.

### **III. ARGUMENT**

There are four reasons why the Appellant’s brief fails and the Cowlitz County Superior Court decision must be affirmed. First, the Appellant’s brief fails the pleading requirements of RAP 10.3(a)(5). Second, Dr. Earle was the “attending physician” of the Appellant at the time of final claim closure. Third, Instruction No. 5 was mandatory, and therefore not a discretionary instruction. Thus, the Superior Court could not have abused its discretion by providing Instruction No. 5 to the jury. Finally, even if the Superior Court were deemed to have abused its discretion by providing Instruction No. 5, the Appellant has failed to allege any prejudice as a result of the instruction.

**A. The Appellant’s Statement of the Case is not a fair statement of the facts and improperly seeks to reargue the merits of this case.**

RAP 10.3(a)(5) provides that a “Statement of the Case” in an appellate brief ought to be “[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument.” The Appellant’s Statement of the Case fails the pleading standard provided by RAP 10.3(a)(5), as it is not a fair statement of the facts and is inherently argumentative in nature. Further, the Appellant’s Statement of the Case is almost wholly irrelevant to the issues presented for review.

The Appellant does not seek to expressly overturn the factual findings and evidentiary rulings of the Superior Court or the Board of Industrial Insurance Appeals. The Appellant’s account of the facts, however, runs contrary to the factual and legal determinations made by the Board and trial court, and are therefore improperly argumentative. *See* Brief at 1-12.

“We should overturn an agency's factual findings only if they are clearly erroneous...and we are ‘definitely and firmly convinced that a mistake has been made.’ We do not weigh the credibility of witnesses or substitute our judgment for the PCHB's with regard to findings of fact.” *Port of Seattle v. Pollution Control*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004).

The Appellant does not allege that the Department, Board, and Superior Court's factual findings are "clearly erroneous," nor does the Appellant indicate any mistakes in factual determinations by the Department, the Board, or the Superior Court. The Appellant has overtly cherry-picked testimony to paint a disingenuous picture of the factual context before the jury and the Board. Not only does the Appellant's Statement of Facts contradict three different tribunals' determinations, but it fails to do so according to the standard set by the Supreme Court in *Port of Seattle*. On this ground alone, the Appellant's Statement of the Case is improper and should be disregarded.

The Appellant's Statement of the Case is also improper because it is unhinged from the actual issues he invokes on appeal: Whether the trial court abused its discretion by giving Instruction No. 5, and whether the Appellant was prejudiced by the giving of Instruction No. 5 to the jury. Brief at 1. The Appellant's Statement of the Case is an eleven-page argument about how he was injured, the purported extent of those injuries, how the injury allegedly felt, Appellant's history of treatment, his work history, his allegedly related symptomology he continued to experience, and an extensive recounting of witness testimony (with an emphasis on Dr. Thomas Gritzka spanning three full pages).

The only relevant portions of the Statement of the case being the Appellant's recounting of Superior Court proceedings and facts related to Dr. Earle's relationship with the Claimant. However, the account of Dr. Earle is manifestly argumentative and misleading. Thus, the overwhelming majority of the Appellant's Statement of the Case is completely irrelevant to the issues he invokes on appeal.

As such, the Appellant's Statement of the Case should be summarily rejected insofar as the Appellant has asserted argumentative and irrelevant facts that run contrary to the factual and evidentiary rulings prior to this appeal. The Department, the Board, and the Superior Court have all weighed the testimony and other evidence offered in this case, and all have found that the preponderance of the credible evidence requires the Appellant's claim to remain closed.

**B. Dr. Earle was the Appellant's attending physician; therefore, Instruction No. 5 was appropriate.**

The Appellant concedes that he was unable to secure a treating physician on his own when he moved to Sequim, WA, so he relied on his nurse case manager's recommendation of Dr. Earle. *See* Brief at 5. Dr. Earle, an occupational and family practice physician (CP at 552-556), became the Appellant's attending physician. *See* WAC 296-20-01002; *see*

*also*, CP at 557. Dr. Earle maintained a doctor-patient relationship with the Appellant through at October 4, 2012.<sup>1</sup> *See* CP at 568.

Dr. Earle terminated the doctor-patient relationship with the Appellant after Mr. Beck became hostile and aggressive toward Dr. Earle. When questioned why he discharged the Appellant as a patient, Dr. Earle testified that, “I think it was a break down in trust...I try to treat everybody courteously and respectfully and I don’t like being the target of hostility. And I don’t like people trying to intimidate me when they don’t get their way.” CP at 608. The Appellant’s claim closure occurred on March 18, 2013, less than 6 months after Dr. Earle discharged the Appellant as a patient. *See* Appendix A.

The Appellant argues that the Superior Court abused its discretion by giving Instruction No. 5 because Dr. Earle was not the Appellant’s attending physician. The metes and bounds of the Appellant’s argument are that, “since Dr. Earl [*sic*] was no longer treating Mr. Beck as of October 4, 2012, the attending physician instruction should not have been given.” Brief at 14. This argument is mistaken because it is inconsistent with why the instruction is given in the first place, and the Appellant’s proposed rule would result in absurd gamesmanship by claimants seeking to diminish adverse testimony offered by their attending physicians.

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<sup>1</sup> The Appellant alleges this date to be “October 4, 2011,” presumably resulting from a typographical error. Brief at 7.

WAC 296-20-01002 provides that, “For these rules, [“attending provider”] means a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry; and advanced registered nurse practitioner. An attending provider actively treats an injured or ill worker.” It is uncontroverted that Dr. Earle had a doctor-patient relationship with the Appellant until less than 6 months prior to the final claim closure. It is also uncontroverted that Dr. Earle “actively treated” the Appellant.

The Courts of Appeals have explained why the attending physician instruction is appropriate to begin with. “[T]he court must give special consideration to the opinion of the attending physician...This is because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case.” *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 654, 833 P.2d 390 (Div. I 1992). The attending physician instruction is also given because the attending physician “is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once.” *Young v. Labor & Industries*, 81 Wn. App. 123, 128, 913 P.2d 402 (Div. III 1996).

Here, Dr. Earle was not an expert hired to give a particular opinion consistent with one party's view of the case. Dr. Earle was hired as the Appellant's attending physician and the relationship only deteriorated and ceased on account of the Appellant's hostile and aggressive behavior toward Dr. Earle. It was only after the Appellant had chosen to hire Dr. Earle as an attending physician that Dr. Earle performed the evaluation, treatment, and examinations of the Appellant that formed the foundation and basis of his testimony.

Additionally, it is uncontroverted that Dr. Earle was "better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once." A cursory review of Dr. Earle's deposition makes this abundantly clear. CP at 547-610. Indeed, the Appellant makes zero attempt to argue otherwise.

The Appellant's entire argument necessarily hinges upon whether an attending physician is still entitled to Instruction No. 5 if the doctor-patient relationship was terminated less than six months prior to the claim closure on appeal. The Appellant disingenuously argues that "Dr. Earl [*sic*] was not happy about the prospect of laser surgery. Dr. Earle then terminated the doctor/patient relationship with Mr. Beck." Brief at 7. The Appellant brazenly mischaracterizes the evidence and advances an

improper insinuation that Dr. Earle was somehow biased against the appellant. This, however, is untenable for two reasons.

First, Dr. Earle explicitly testified that the reason he “terminated the doctor/patient relationship” was because the Appellant became hostile and aggressive when Dr. Earle refused to consent to the laser surgery the Appellant had dug out of the internet. CP at 569-572. Dr. Earle addressed this argument squarely during his deposition:

Q. I want you to assume that Mr. Beck testified that you told him that you would wash your hands of this whole thing if he pursued the laser surgery. Is that true?

A. No. That’s an inaccurate statement. I have patients who have done this kind of thing before. And I don’t discharge them for that kind of thing. I give them my best advice, but in the end, everybody’s responsible for their own health care decisions. So that is not the reason I discharged them.

CP at 572.

Second, whether or not a witness has any bias is not a question of admissibility, but goes to the weight afforded to the testimony by the jury. There are simply no rules of evidence that allow for exclusion of testimony on grounds of alleged bias. Given the testimony provided by Dr. Earle, it is clear that the Superior Court did not abuse its discretion in admitting the testimony of Dr. Earle. This errant suggestion of bias by the Appellant has zero bearing on the attending physician instruction.

Lastly, the Appellant's argument that termination of the doctor-patient relationship, and the lapse of less than six months, should render the attending physician instruction an abuse of discretion is corrosive to reason and existing law.

Were the Court to endorse the Appellant's proposed exception to the mandatory instruction rule, absurdity would ensue and just results would become increasingly elusive. Every claimant represented by competent counsel whose attending physician discovered evidence exculpatory of employer liability would terminate his or her attending physician and object to any testimony by that expert. The attending physicians, who are more reliable and unbiased as a matter of law, would be denied the attending physician instruction and therefore deemed *equally* as reliable and *equally* as prone to bias as any other expert witness. The "parade of horrors" would involve not only unjust evidentiary issues, but would also lead to less continuity of care for injured workers. The Appellant's argument must simply fail.

**C. Giving Instruction No. 5 was mandatory and therefore could not have been an abuse of discretion.**

The Appellant errantly begins his Argument by stating that, "Generally the trial court has discretion as to whether to give a particular jury instruction...[and] abuses its discretion if it based its ruling on an

erroneous view of the law.” Brief at 12. This statement of the applicable law is, at best, glaringly incomplete and misleading for two predominate reasons. First, it is settled law that Instruction No. 5 is an accurate statement of the law. Second, the giving of Instruction No. 5 is *mandatory*, with only a very narrow exception recognized at law.

Jury Instruction No. 5 is identical to WPI 155.13.01, which provides that, “You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.” *See* Appendix E; *see also*, *Clark County v. McManus*, 185 Wn.2d 466, 477 at footnote 3, 372 P.3d 764 (2016).

While the Appellant did stipulate to Jury Instruction No. 5 being an accurate statement of the law (*see* Brief at 14), this fact has been unequivocally established as a matter of law. *See*, *Clark County*, 185 Wn.2d at 471-74 (holding “the instruction is an accurate statement of the law in workers' compensation cases); *see also*, *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1998).

Next, the Appellant suggests that giving Instruction No. 5 was a discretionary decision by the Superior Court. *See* Brief at 12, *see also*

Brief at 13 (stating “the attending physician instruction should be given...”). This is flatly misguided, however.

“While perhaps correct in other circumstances, in workers' compensation cases we have determined the [attending physician] instruction is required.” Emphasis added. *Clark County v. McManus*, 185 Wn.2d 466, 473, 372 P.3d 764 (2016); *see also, Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1998). “The rule requires that where an attending physician testifies, the trial court must give the attending physician instruction.” *Clark County*, 185 Wn.2d at 475.

However, the Supreme Court created an exceedingly narrow exception to the otherwise-absolute requirement to give the attending physician instruction. In *Clark County*, the Court addressed the failure to provide the attending physician instruction in *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 968 P.2d 14 (1998). *See Clark County*, 185 Wn.2d at 474-75. Here, the Court stated,

*Harker-Lott* is factually distinguishable from the present case because the claimant there had four attending physicians who did not agree the claimant was injured as a result of an on-the-job accident. Because the testimony of the attending physicians was in conflict, and because the general instructions given allowed the claimant to argue that the supporting testimony of two of her attending physicians should be given special consideration, refusal to give the special consideration instruction was not an abuse

of discretion by the trial court. In *Harker-Lott*, the situation was somewhat unique and the jury could not give special consideration to multiple, conflicting attending physicians' testimony. Here, those circumstances do not exist.

*Id.* at 474. Emphasis added.

The Court continued,

The analysis in *Harker-Lott* also overlooks a key aspect of *Hamilton*. While this court may not have used the term “mandatory” when discussing the special consideration instruction, we did describe the special consideration rule as a “rule of law” and stated that refusing to give the instruction “would convert the rule of law into no more than the opinion of the claimant's attorney.” *Hamilton*, 111 Wn.2d at 572. *Hamilton* thus recognizes a requirement for providing the special consideration instruction, except in those cases where there are articulable reasons for not accepting the attending physician's or physicians' testimony.

*Id.* at 475. Emphasis added.

The Court in *Clark County* also remarked on the implications of attending physician testimony having adequate foundation or proof to support that testimony. “[T]he court in *McClelland* affirmed a summary judgment upholding denial of benefits where the attending physician's opinion lacked the requisite objective proof required for the particular occupational disease claim. The opinion did not implicate the special consideration rule in resolving the appeal because of the failure of proof.”

*Id.* at 473.

Though he does not provide a pin cite, the Appellant appears to poorly and selectively paraphrase the attending physician instruction rule provided in *Clark County*. See Brief at 13. However, reading the Court's analysis in *Clark County* makes the rule quite clear: the attending physician instruction is mandatory, unless the physician's or physicians' *testimony* is unacceptable for articulable reasons.

Here, the Appellant does not argue that Dr. Earle's testimony is unreliable, because it *is* reliable. The Appellant does not argue that Dr. Earle's testimony lacked foundation, because Dr. Earle's testimony was rooted to a solid foundation. And the jury was not at risk of confusion due to multiple attending physicians testifying. In fact, the Appellant stipulates that Dr. Earle "was the only doctor who testified who could be considered an attending physician." Brief at 13.

The reliability of Dr. Earle's testimony is further supported by the Department's claim closure being affirmed at each and every level of appeal. Indeed, the Appellant also stipulated that "the jury returned a unanimous verdict in favor of Glacier Northwest." Brief at 12. There were simply no articulable reasons for rejecting Dr. Earle's testimony.

The Appellant's policy argument that because the Industrial Insurance Act is "remedial in nature, and...should be liberally construed in favor of the injured worker" (Brief at 14) is insufficient justification for

contradicting the unequivocal and straightforward rule outlined by the Supreme Court, and the clear language of the Instruction.

The Appellant's policy argument also fails to explain why the Court should carve out a new exception to the mandatory nature of the presently-unbiased attending physician instruction. To do so would be contrary to established Supreme Court precedent, and result in manifestly unjust prejudice to employers. Either attending physicians are entitled to "special consideration," or they are not. This does not depend on whether their opinions favor the employers or the claimants. The Appellant's argument is untenable and manifestly unreasonable.

**D. There is zero reason to believe that the Appellant would have been prejudiced by Instruction No. 5.**

If a jury instruction is deemed by the court to be erroneous, the court is then to determine whether that error was harmless. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). An erroneous instruction is "harmless if it is not prejudicial to the substantial rights of the part[ies] . . . , and in no way affected the final outcome of the case." *Id.* Internal quotations omitted.

The Appellant only advances two arguments for why he was ostensibly prejudiced by Instruction No. 5. First, the Appellant argues that he was prejudiced because Glacier Northwest relied "upon instruction No.

5 arguing their case to the jury.” Brief at 16; *see also*, Brief at 15. Second, the Appellant argues that “Mr. Beck’s one expert witness was Thomas Gritzka, MD...Dr. Gritzka was not an attending physician, and there was no contention that the court’s instruction No. 5 applied to him.” Brief at 16. In essence, Appellant argues that he was prejudiced because Dr. Gritzka was not also an attending physician. These arguments are irrelevant and misguided.

The Appellant’s contention that he was prejudiced by Instruction No. 5 because Glacier Northwest cited the rule in closing argument is peculiar and irrelevant. The Appellant’s concern here is peculiar because a claimant who is entitled to the same instruction would almost certainly bring out the attending physician instruction during his or her own closing arguments. This does nothing to demonstrate that the Appellant would have won his Superior Court trial, were it not for Glacier Northwest mentioning the Instruction during closing argument. Nor is this an improper argument before the jury.

The Appellant’s concern about the attending physician instruction being mentioned during the defense’s closing argument also fails to account for the fact that Counsel for Glacier Northwest accurately stated the law: “you don’t give more weight or credibility – but you have to listen to their opinions.” Brief at 15 (citing Report of Proceedings). How

this could have been *prejudicial* to the Appellant is a mystery, and one that the Appellant does not bother trying to explain. Indeed, the surveillance video of the appellant provides more than ample reason for the jury to doubt the veracity of the Appellant's claims that were inconsistent with Dr. Earle's testimony. *See* CP at 3,

The Appellant's apparent distress about Dr. Gritzka not being entitled to the attending physician instruction is flatly irrelevant. Dr. Gritzka was not an attending physician. Just because Dr. Gritzka was the sole expert witness called by the Appellant does not entitle Dr. Gritzka to the attending physician instruction. This is an obvious legal truism. Further, there is no rule regarding the attending physician Instruction that states that both parties to a case are entitled to the Instruction. This is also an obvious legal truism.

Lastly, it is firmly established law that the court does not consider arguments raised and argued for the first time in the reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012).

The Appellant failed to cite the applicable law for what constitutes prejudicial and/or harmless error. Even if the Appellant *had* cited the applicable law, he plainly failed to argue any facts or law that would even

suggest that he had been prejudiced by Instruction No. 5. The Appellant's argument regarding prejudice resulting from Instruction No. 5 must simply fail.

#### IV. CONCLUSION

For the reasons stated above, Glacier Northwest respectfully requests the Court of Appeals to Affirm the Superior Court decision affirming the Appellant's claim closure. Glacier Northwest, further, requests the Court to deny the Appellant's request for attorney fees as premature and unfounded.

RESPECTFULLY SUBMITTED this 15 day of November,  
2016.

A handwritten signature in cursive script that reads "miller". The signature is written in black ink and is positioned to the right of a large, faint, circular stamp or watermark.

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### JURISDICTIONAL HISTORY

Please review the Jurisdictional History and note any errors or additions. This is a summary of Department actions relevant to this appeal. The summary may not include every action taken by the Department. At the initial conference you will be asked to stipulate to the correctness of these facts for the purposes of establishing the Board's jurisdiction to hear the case and determine the issues to be resolved.

IN RE: NEIL R. BECK

CLAIM NO: W-854481

DOCKET NO: 13 10388

Jurisdictional Stipulation	
I certify that the parties have agreed to include this history in the Board record for jurisdictional purposes only.	
<input checked="" type="checkbox"/> As Amended	P. 5
Dated <u>9/16/13</u>	at <u>Seattle</u>
<div style="text-align: center;">             _____            Judge's Signature         </div>	
<b>FOR BOARD USE ONLY</b>	

MFP	DATE DOC/ ACTION	DOCUMENT NAME	ACTION/RESULT
Mf1	06/28/05	AB	DOI 5/18/05 – Back – Lone Star Northwest, Inc. (Glacier Northwest, Inc.) (DOI 5/17/05) (As stipulated by the parties on 4/20/10: Docket No. 10 12183)
	07/13/05	DO	Claim allowed for the injury on 11/23/05 and the SIE will pay all medical and TLC benefits as may be indicated in accordance with the industrial insurance laws. (DET)
Mf8	06/05/06	DEPT LETTER	Based on the EAR, your employer shows you are able to work. You are not eligible for vocational services.
Mf9	06/15/06	DO	On 2/9/06, Neil Beck requested a penalty against the SIE alleging an unreasonable delay in payment of TLC benefits effective 9/26/05 through 12/14/05. The SIE is not in receipt of certification with objective medical findings to substantiate payment of TLC benefits for 9/26/05 through 12/14/05. There is medical and legal doubt as to claimant's entitlement to TLC benefits from 9/16/05 through 12/14/05. The request for a penalty is denied.
	06/21/06	DISPUTE	Claimant (Workman-Atty) Dept. Letter 6/5/06
	06/21/06	DEPT LETTER	Your dispute has been accepted.

	08/11/06	DIR LETTER	The Director has reviewed the facts of this case and has decided that vocational services are not necessary to assist claimant in returning to work. Claimant is able to return to the job he held at the time of his injury. The Director's decision is based on the enclosed summary of facts and findings.
Mf 10	01/11/07	DO	TLC is ended as paid to 4/14/06. Claim is closed without further award for TLC or PPD. The SIE cannot pay for medical services or treatment after the date of closure. Claimant is directed to pay the SIE the overpaid TLC benefits from 4/14/06 through 5/19/06 in the amount of \$434.29. Claim closed.
	01/22/07	NA (07 10602)	Claimant (Workman-Atty) DO 1/11/07
Mf 11	01/26/07	DO	DO 1/11/07 is held in abeyance.
	02/06/07	BD O (07 10602)	Order Returning Case to Department for Further Action.
	04/25/07	DO	DO 1/11/07 has been determined to be correct and is affirmed. (APPEALABLE ONLY)
	05/07/07	NA (07 15007)	Claimant (Workman-Atty) DO 4/25/07
	06/06/07	BD O (07 15007)	Order extending time to act on appeal an additional 10 days.
	06/16/07	BD O (07 15007)	Order extending time to act on appeal an additional 10 days.
	06/26/07	BD OGA (07 15007)	DO 4/25/07
06/26/07-clt			
Orio 2	06/17/08	PD&O (07 15007)	Proposed Decision and Order/Conclusions of Law  No. 4: The Department order under appeal is incorrect and is reversed and this matter is remanded to the Department with direction to issue an order directing claimant to pay the SIE the overpaid TLC benefits from 4/14/06 through 5/19/06, in the amount of \$434.29, and requiring the SIE, Glacier Northwest, Inc. (formerly Lone Star Northwest, Inc.), to pay claimant a PPD award equal to Category 2 of WAC 296-20-260 and to close the claim.
	07/31/08	PFR (07 15007)	Employer (Atwood-Atty) Petition For Review (PD&O

6/17/08)

	08/14/08	BD O (07 15007)	Order Denying Petition for Review
	09/02/08	DO	In accordance with the decision of the BIIA dated 8/14/08, the following action is taken: DO 4/25/07 is canceled and the following action is taken: The Department is closing this claim because the covered medical condition is stable. The SIE is directed to pay you a PPD award of Category 2, permanent dorsal region impairments. Less an overpayment in the amount of \$434.29 for TLC paid from 4/14/06 through 5/19/06. Claim is closed.
	06/23/09	<del>AA</del>	
Orio 3	09/15/09	DO	The Department is extending the decision period until 11/20/09.
	10/27/09	DO	The Department received an application to reopen this claim. The medical record shows the condition(s) caused by the injury have not objectively worsened since the final claim closure. The application to reopen your claim is denied and the claim will remain closed.
	12/02/09	PRR	Claimant (Karmy-Atty) Any adverse orders to claimant (DO 10/27/09)
	01/07/10	DO	DO 10/27/09 has been determined to be correct and is affirmed. (APPEALABLE ONLY)
	03/03/10	NA (10 12183)	Claimant (Karmy-Atty) DO 1/7/10
	03/16/10	BD OGA (10 12183)	DO 1/7/10
	3/16/10 ctt AMENDED 7/24/13 taf		
	11/16/10	PD&O (10 12183)	Proposed Decision & Order: The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal. During the period between September 2, 2008, and January 7, 2010, Neil R. Beck's condition, proximately caused by his May 17, 2005 industrial injury, objectively worsened and became aggravated, as contemplated by RCW 51.32.160. As of January 7, 2010, Neil R. Beck's condition, proximately caused by his May 17, 2005 industrial injury, required further proper and necessary medical treatment, within

the meaning of RCW 51.36.010. The Department order dated January 7, 2010, is incorrect and it is reversed and remanded with direction to issue an order that reopens the claim, provides the claimant with further proper and necessary medical treatment, and which takes other action consistent with the law and the facts.

2/15/11 D&O (10 12183)

Decision & Order: The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals. Between April 25, 2007 and January 7, 2010, the claimant's condition, proximately caused or aggravated by the industrial injury of ~~May~~ <sup>May</sup> 17, 2005, worsened as contemplated by RCW 51.32.160, and required treatment as contemplated by RCW 51.36.010. The Department order dated January 7, 2010 is incorrect. The claim is reversed and remanded to the Department with direction to reopen the claim and require the self-insured employer to provide proper and necessary medical treatment and other benefits as required by the laws and the facts.

2/18/11 DO

On 2/15/11, the Board of Industrial Insurance Appeals made the following decision on your appeal: The order and notice dated 1/7/10 is canceled and the following action taken: This claim is reopened effective 6/15/09 for authorized treatment and action as indicated. The self-insured employer is directed to provide proper and necessary medical treatment and other benefits as required by the law and the facts. It is so ordered.

3/22/11 Superior Court  
Appeal

Cowlitz County Superior Court, Cause No. 11-2-00310-9

3/22/12 Superior Court

Cowlitz County Superior Court, Cause No. 11-2-00310-9, The Superior Court for Cowlitz County has jurisdiction over the parties and the subject matter of this appeal to the Decision and Order of the Board of Industrial Insurance Appeals dated February 15, 2001. Between April 25, 2007 and January 7, 2010, Neil Beck's condition proximately caused or aggravated by the industrial injury of May 17, 2005, worsened as contemplated by RCW 51.32.160, and required treatment as contemplated by RCW 51.36.010. The claim should be reopened for aggravation effective April 23, 2009, 60 days prior to filing of the reopening application for aggravation, for further necessary and proper medical treatment and other benefits as indicated. Pursuant to RCW 51.52.130, defendant Neil Beck is entitled to recover from the plaintiff, Glacier Northwest, Inc., the fees of the medical witness in the sum of \$1,187.50 and the reasonable

attorney's fees payable to Steven L. Busick of Busick Hamrick, PLLC in the sum of \$10,000.00. The Department of Labor and Industries order dated January 7, 2010, is incorrect, and is reversed and remanded to the Department with directions to reopen the claim effective April 23, 2009, and require the self-insured employer, Glacier Northwest, Inc., to provide proper and necessary medical treatment and other benefits s required by law and the facts. Judgment should be in favor of the defendant Neil Beck for the medical witness fee before the Board in the sum of \$1,187.50, and reasonable attorney fees payable to Steven L. Busick of Busick Hamrick, PLLC for representation in Superior Court in the sum of \$10,000.00.

3/15/13 DO —

Time loss benefits are denied form 6/15/09 through 4/13/11. (DET)

3/18/13 DO —

Time loss benefits are ended as paid through 12/3/12. Medical record shows treatment is no longer necessary and there is no PPD. The SIE will not pay for medical services or treatment after the closure date. This claim is closed. (DET)

3/22/13 P&RR

Claimant (Steven L. Busick – Atty) DO 3/15/13

3/25/13 P&RR

Claimant (Steven L. Busick – Atty) DO 3/18/13

4/19/13 DO

DO 3/18/13 is being reconsidered.

5/10/13 DO —  
~~Claimant (Steven L. Busick – Atty)~~

DO's 3/15/13 and 3/18/13 are affirmed. (Appealable only) /

7/10/13 NA (13 10388)  
mtd 7/8/13

Claimant (Steven L. Busick – Atty) DO 5/10/13

7/24/13 BD OGA  
(13 10388)

DO 5/10/13

7/24/13 taf

## INDUSTRIAL INSURANCE AND CRIME VICTIM ABBREVIATION CODES

(T)	Subject to Proof of Timeliness
AA	Aggravation Application
AB	Application for Benefits
AP	Attending Physician
BD O	Board Order
BD OGA	Board Order Granting Appeal
BD ODA	Board Order Denying Appeal or Dismissing Appeal
BIIA	Board of Industrial Insurance Appeals
CLMT	Claimant
DET	Determinative
DIF/MFP	Department Imaging Fiche/Microfiche Page
DLI	Department of Labor and Industries
DO	Department Order
DOI/OD	Date of Injury/Occupational Disease
EAR	Employability Assessment Report
EROA	Employer's Report of Accident
Ind Ins	Industrial Insurance
INT	Interlocutory
LEP	Loss of Earning Power
NA	Notice of Appeal
OAP	Order on Agreement of Parties
ORION	Electronic Claims Record from the Dept
P & RR	Protest & Request for Reconsideration
PD & O	Proposed Decision and Order
PFR	Petition for Review
PPD	Permanent Partial Disability
SIE	Self-Insured Employer
SIO	Self-Insured Employer Order
TLC	Time-loss Compensation
VDRO	Vocational Dispute Resolution Office



BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: NEIL R. BECK ) DOCKET NO. 13 10388  
2 )  
3 CLAIM NO. W-854481 ) PROPOSED DECISION AND ORDER  
4

5 INDUSTRIAL APPEALS JUDGE: Dominique' L. Jinhong  
6

7 APPEARANCES:

8 Claimant, Neil R. Beck, by  
9 Busick Hamrick, PLLC, per  
10 Steven L. Busick  
11

12 Self-Insured Employer, Glacier Northwest, Inc., by  
13 Thomas Hall & Associates, per  
14 Ryan S. Miller and Thomas G. Hall  
15

16 Department of Labor and Industries, by  
17 The Office of the Attorney General, per  
18 None  
19

20 The claimant, Neil R. Beck, filed an appeal with the Board of Industrial Insurance Appeals on  
21 July 10, 2013 (mailed on July 8, 2013), from an order of the Department of Labor and Industries  
22 dated May 10, 2013. In this order, the Department affirmed two prior orders dated March 15, 2013  
23 and March 18, 2013. In the March 15, 2013 order, the Department denied time-loss compensation  
24 for the period of June 15, 2009, through April 13, 2011. In the March 18, 2013 order, the  
25 Department closed the claim with no award for permanent impairment and with time-loss  
26 compensation ended as paid through December 3, 2012. The Department order is **AFFIRMED**.  
27  
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29  
30

31 **PROCEDURAL AND EVIDENTIARY MATTERS**

32 On September 16, 2013, the parties agreed to include the Jurisdictional History, as  
33 amended, in the Board's record. Mediation Judge Zimmie Caner certified the stipulation. That  
34 history establishes the timeliness of the appeal and the Board's jurisdiction to hear this appeal.  
35

36 The *Perpetuation Deposition Upon Oral Examination of Thomas L. Gritzka, M.D.*, taken on  
37 June 19, 2014, was published in accordance with WAC 263-12-117(2). All objections are overruled  
38 and all motions are denied except the objections at pages 34, lines 11 and 22; page 50, lines 2-3;  
39 page 51, lines 3-7; page 54, line 11; page 57, lines 23-25; and page 67, lines 12-14, which are  
40 sustained. The following testimony is stricken: page 34, lines 5-10, 14-21, 23-24; page 48,  
41 lines 17-25; page 49, lines 1-8, 13-25; page 50, lines 1, 4-5, 8-25; page 53, lines 10-25; page 54,  
42 lines 1-3; page 57, lines 20-22 beginning with "It doesn't leave"; and page 58, lines 7-8, 15-16.  
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1 The *Perpetuation Deposition Upon Oral Examination of Guy Earle, M.D.*, taken on July 22,  
2 2014, was published in accordance with WAC 263-12-117(2). All objections are overruled and all  
3 motions are denied.

4  
5 The *Perpetuation Deposition Upon Oral Examination of James F. Harris, M.D.*, taken on  
6 July 22, 2014, was published in accordance with WAC 263-12-117(2). All objections are overruled  
7 and all motions are denied.

8  
9  
10 The *Perpetuation Deposition Upon Oral Examination of Douglas Bald, M.D.*, taken on  
11 July 23, 2014, was published in accordance with WAC 263-12-117(2). All objections are overruled  
12 and all motions are denied.

13  
14 The *Perpetuation Deposition Upon Oral Examination of Katherine Turner, M.A., C.R.C.*,  
15 taken on August 18, 2014, was published in accordance with WAC 263-12-117(2). All objections  
16 are overruled and all motions are denied.

#### 17 18 19 ISSUES

- 20  
21 1. Is Mr. Beck entitled to further treatment, as provided by  
22 RCW 51.36.010?  
23  
24 2. Was Mr. Beck a totally and temporarily disabled worker as a proximate  
25 result of his industrial injury, during the periods of June 15, 2009 through  
26 April 13, 2011, and December 4, 2012 through May 10, 2013, as  
27 contemplated by RCW 51.32.090?  
28  
29 3. In the alternative, as of May 10, 2013, was Mr. Beck a totally and  
30 permanently disabled worker, within the meaning of RCW 51.08.160,  
31 and therefore entitled to a worker's compensation pension?

32 I note that there is a sub-issue related to pension relief that wasn't specifically listed in the  
33 initial list of issues, yet the law requires me to decide. The sub-issue is whether the worker's  
34 condition proximately caused by the industrial injury permanently and objectively worsened  
35 between the date his claim originally closed September 2, 2008, and the date of the closing order  
36 under appeal, May 10, 2013.<sup>1</sup>

37  
38  
39 At the scheduling phase of this appeal, the worker initially indicated he would seek an award  
40 for permanent partial impairment of his low back. But at the hearing on May 29, 2013, the worker  
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43  
44 <sup>1</sup> Where, as here, the Department has reopened a claim for further treatment in response to an application to reopen,  
45 and then the Department closes the claim again without an additional permanent partial disability award, and the  
closing order is appealed, the claimant must prove objective worsening between the terminal dates to be entitled to a  
greater disability award. *Dinnis v. Department of Labor & Indus.*, 67 Wn.2d 654 (1965). The award of pension pleaded  
by the worker in this appeal is a greater disability award, so *Dinnis* applies.

1 withdrew this as a form of relief sought in this appeal. He seeks only a worker's compensation  
2 pension and doesn't seek an alternative award of permanent partial disability.

### 4 EVIDENCE

5 In rendering this proposed decision, I considered evidence and testimony from the following  
6 witnesses:

- 7 1. Neil Beck – The worker;
- 8 2. Stacy Beck - The worker's wife;
- 9 3. Thomas L. Gritzka, M.D. - Orthopedic surgeon called by Mr. Beck;
- 10 4. Guy Earle, M.D. - The worker's former treating family and occupational medicine  
11 specialist called by Glacier Northwest;
- 12 5. James Harris, M.D. - Orthopedic Surgeon called by Glacier Northwest;
- 13 6. Douglas Bald, M.D. - Orthopedic surgeon called by Glacier Northwest;
- 14 7. Katherine Turner, M.A., C.R.C. - Vocational expert called by Glacier Northwest;
- 15 8. Tracey Schira - Private investigator called by Glacier Northwest; and
- 16 9. Exhibit Nos. 2, 3, and 4 containing video surveillance of the worker on June 30, 2012;  
17 August 9, and 11, 2012; and September 7, and 8, 2012; and Exhibit Nos. 5, 6, and 7,  
18 which are photographs of Ms. Schira's van.

### 26 DISCUSSION

27 Neil R. Beck was born in March 1963. He's a high school graduate and former U.S. Army  
28 soldier, serving on active duty from 1982–1986, plus two years of inactive duty following that period.  
29 In the Army he worked as a lightweight power generator mechanic, prior to his work at Glacier  
30 Northwest, Mr. Beck was a parts manager for 18 years. At the time of his injury, he worked as a  
31 concrete truck driver for Glacier Northwest for about a year. He suffered an injury in the course of  
32 employment there in May 2005. While sitting on a high stool with his legs wrapped around the legs  
33 of the stool, a co-worker bear-hugged Mr. Beck from behind, turned him to the right, and took him  
34 down toward the ground. On the way down, Mr. Beck caught his left hand on a counter, and  
35 twisted his torso back and to the left. He felt as if he had been punched in the gut. Between  
36 April 13, 2011, and December 4, 2012, Mr. Beck attempted returning to work as an appliance  
37 delivery person, a truck driver for a seafood company, a crane operator, and a hotel handy man.  
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1       **A. Treatment.**

2       The Department closed Mr. Beck's claim. When it did so, it implicitly determined his industrially  
3 related condition was fixed and stable. Before a claim can be closed the medical condition must be  
4 "fixed." If a claimant's condition has stabilized to the point where no further medical treatment is  
5 required, the condition is 'fixed' for purposes of closing the claim and determining the disability award.<sup>2</sup>  
6  
7 Maximum medical improvement or fixity occurs when no fundamental or marked change in an  
8 accepted condition can be expected, with or without treatment.<sup>3</sup> Maximum medical improvement may  
9 be present though there may be fluctuations in levels of pain and function.<sup>4</sup> A worker's condition may  
10 have reached maximum medical improvement though it might be expected to improve or deteriorate  
11 with the passage of time.<sup>5</sup> Once a worker's condition has reached maximum medical improvement,  
12 treatment that results only in temporary or transient changes is not proper and necessary.<sup>6</sup> The term  
13 *maximum medical improvement* is equivalent to *fixed and stable*.<sup>7</sup>  
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19       Mr. Beck presented the testimony of Dr. Gritzka, an orthopedic surgeon who examined him on  
20 three separate occasions: October 10, 2006, December 22, 2009, and February 12, 2014. The  
21 worker's primary complaint on all three occasions was back pain focused at or about the mid  
22 portion of his thoracic spine at T5-6 and T6-7 level, some neck pain, pain at the junction between  
23 his thoracic and cervical spines, some deep-seated sternal pain in his breast bone that he  
24 perceived as if it were coming from his mid-thoracic area, and numbness involving the fourth and  
25 fifth digits of his fingers bilaterally.  
26  
27

28       At the first independent medical examination in October 2006, Dr. Gritzka diagnosed chronic  
29 thoracic sprain because the worker had some subjective findings on exam, but no objective  
30 neurological findings. MRI studies, albeit of poor quality, appeared to identify derangement of some  
31 sort in the mid-thoracic spin at T5-6 and T6-7.  
32  
33

34       On the second examination in December 2009, Mr. Beck had positive findings for clonus in  
35 his ankle and fecal urgency, but no abnormal urinary retention or incontinence, or erectile  
36 dysfunction. Rating Mr. Beck's thoracic condition pursuant to Department guidelines, the worker's  
37 permanent dorso-lumber impairment was equal to a Category 3. MRI studies taken in June 2009  
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43 <sup>2</sup> *Pybus Steel v. Department of Labor & Indus.*, 12 Wn. App. 436, 439 (1975).

44 <sup>3</sup> WAC 296-20-01002(3).

45 <sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* WAC 296-20-01002(3).

1 showed a disc protrusion or herniation at T6-7 impinging on the front part of the thoracic cord on the  
2 left causing mild flattening, but no abnormality of cord signal. In lay terms, the worker had no  
3 evidence of myelomalacia (multi-level spinal cord compression) at that level. The MRI also showed  
4 a small right paracentral disc protrusion or herniation at T11-12, but no contact with the thoracic  
5 cord and other abnormalities. The MRI taken of Mr. Beck's lumbar spine, while not involved in the  
6 industrial injury of 2005, showed degenerative disc disease, a small annular tear at L3-4, and facet  
7 hypertrophy at L5-S1. Dr. Gritzka put the lumbar findings in context, describing them as "relatively  
8 benign" and "consistent with [Mr. Beck's] age."<sup>8</sup>  
9

10 MRI studies taken from April 2013, prior to Dr. Gritzka's third examination showed disc  
11 degeneration at T5-6 and T6-7, disc herniations at T4-5, which was considered a shallow protrusion  
12 one level up. There was a disc herniation at T5-6 with some osteophytes pressing on the thecal  
13 sac. At T6-7 was a small left paracentral disc protrusion with mild mass effect on the thecal sac.  
14 Dr. Gritzka explained the 2013 MRI essentially showed progression of the worker's spinal disease,  
15 which now involved the T4-5 level. The worker had developed adjacent level disease of T4-5. At  
16 the T5-6 level, Mr. Beck had developed some bony spurring. But overall, according to Dr. Gritzka,  
17 Mr. Beck's objective findings as compared from 2009-2014, improved. MRI studies no longer  
18 showed any nerve root or spinal cord involvement and he no longer had any objective findings on  
19 examination. By 2014, Dr. Gritzka reduced his rating of the worker's permanent dorso-lumbar  
20 impairment to Category 2.  
21

22 When asked if Mr. Beck had reached maximum medical improvement, Dr. Gritzka was a bit  
23 cagey. He said, "Oh, I don't think so, because we don't really -- his thoracic -- cause of his thoracic  
24 spine totally identified . . . . If we had a better -- if we had a more specific exact diagnosis, then our  
25 treatment could be directed towards something other than covering up the pain."<sup>9</sup> He  
26 recommended, flexion/extension X-rays or some stress X-rays of the thoracic spine, a  
27 performance-based physical capacities evaluation by a qualified physical capacity examiner with  
28 built-in validity checks, and evaluation by a psychiatrist. While Mr. Beck was not capable of  
29 returning to his past work as a concrete driver from June 15, 2009 through April 13, 2011, and  
30 December 4, 2012 through May 10, 2013, Dr. Gritzka could not say whether the worker was unable  
31 to perform any continuous, gainful employment during these discrete periods of time.  
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<sup>8</sup> Gritzka Dep. at 27.

<sup>9</sup> Gritzka Dep. at 46-47.

1 The testimony of Drs. Harris, Earle, and Bald establish the worker's industrially related  
2 conditions are fixed and stable and no longer in need of proper and necessary treatment. Dr. Gritzka  
3 admitted that near the time of Mr. Beck's original industrial injury in 2005, the worker had some  
4 findings. When Dr. Gritzka saw him again in 2009, Mr. Beck looked worse. Then, the last time the  
5 doctor saw the worker in 2014, he looked a little bit better. Dr. Gritzka's categories for permanent  
6 impairment ratings dropped from Category 3 in 2009 to Category 2 in 2014. Frankly, the only  
7 reason the doctor could not say that the claimant was at maximum medical improvement was  
8 because he couldn't definitively identify what was actually wrong with Mr. Beck. The worker had  
9 been afforded a myriad of diagnostic imaging studies, at least three series of MRIs between 2006-  
10 2013, x-rays, three rounds of electrodiagnostic studies, and treatment modalities, which included  
11 numerous epidural steroid injections, numerous facet blocks, and multiple rounds of physical  
12 therapy, over the last ten years, all stemming from a simple strain/sprain to his thoracic spine.

13 Dr. Bald, an orthopedic surgeon, performed an independent medical examination of  
14 Mr. Beck at the employer's request and expense in Alaska on October 9, 2009. In Dr. Bald's  
15 opinion, as a result of the industrial injury of May 2005, Mr. Beck suffered a muscular type strain  
16 injury without any structural injury to his spine, such as a disc herniation, ligament injury, or  
17 anything else, as confirmed by MRI. Physical examination was effectively normal save persistent  
18 subjective pain complaints. At the time of Dr. Bald's examination in 2009, he was recommending  
19 additional self-directed home conditioning to preserve the worker's fitness and tone, but no other  
20 formal necessary and proper treatment.

21 Dr. Harris examined Mr. Beck on November 15, 2012, and interpreted the objective  
22 diagnostic imaging studies and overall medical record differently than Dr. Gritzka. In Dr. Harris'  
23 opinion, the only thing ever identified on Mr. Beck's MRIs were some age-appropriate degenerative  
24 changes. He was unable to identify any actual anatomic injury to the worker's cervical, thoracic, or  
25 lumbar spine. In support of his opinion, Dr. Harris reviewed the worker's entire medical record.

26 Mr. Beck's February 2006 MRI showed some very mild, age-appropriate, and unrelated  
27 degenerative conditions. The MRI did not show any actual injury. No fractures, no trauma, no disc  
28 herniations. No significant soft tissue swelling or inflammation, and was essentially normal.  
29 Electrodiagnostic testing results from February 28, 2006, showed some evidence of some mild  
30 carpal tunnel syndrome in the right hand.

1 A second series of MRIs obtained on June 23, 2009, of the worker's cervical spine continued  
2 to show degenerative disease at the multiple cervical levels, C3-4 through C6-7. The MRI of his  
3 thoracic spine showed a small protrusion at the T6-7 level that was touching the eventual side of  
4 the thoracic spinal cord and caused some mild flattening of the cord, but did not show any abnormal  
5 signal in the spinal cord itself. If there was mechanical compression on either the exiting nerve root  
6 at the neural foramina (opening where the nerve roots come out), it could cause pain, possibly  
7 weakness, and possibly a loss of sensation in a specific area of the body called the dermatome or a  
8 myotome, respectively, for sensation and muscle strength. But in lay terms, while Mr. Beck's 2009  
9 MRI identified some bulging in the disc, it resulted in nothing of clinical significance in terms of  
10 compressing the spinal cord.  
11

12 Mr. Beck was afforded a third series of MRIs obtained on March 14, 2011, both of the  
13 thoracic spine and the cervical spine. Both continued to show degenerative conditions at multiple  
14 levels in the thoracic and cervical spine. X-rays taken around the same period in May 2011,  
15 showed normal alignment and no evidence of any destructive process involving the bones of the  
16 spinal column, and no evidence of any significant joint or soft tissue abnormalities.  
17

18 In March 2011, Mr. Beck was evaluated for decompressive surgery of the cervical spine at  
19 the Department of Orthopedic Surgery at Harborview Medical Center, which is affiliated with the  
20 University of Washington. Dana Pruitt, P.A.-C., in conjunction with orthopedic spine surgeon  
21 Dr. Jens Chapman, concluded Mr. Beck was not a surgical candidate. The spine specialists could  
22 not identify any neurological abnormalities on physical exam, but did recommend some attempts to  
23 control pain with selective nerve root blocks at the T6 level, which were given to the worker.  
24 Mr. Beck was given additional injections and physical therapy later in 2011.  
25

26 By October 2011, Mr. Beck was given a discogram, which is best described as a (now  
27 disfavored) procedure designed around the premise that if the disc itself was the source of pain, the  
28 discogram would be a way to localize that particular level in the spine responsible for the pain and  
29 predict whether a good surgical outcome was possible. The problem with the procedure is that it  
30 was later found to be unreliable, so most surgeons considered the test of limited or no diagnostic  
31 value. Throughout the fall of 2011 and into the winter of 2012, Mr. Beck continued to complain of  
32 significant thoracic spine pain. In response to the worker's subjective complaints, his physicians  
33 continued to recommend further steroid injections at different levels in the thoracic spine.  
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1 After visiting another orthopedic spine surgeon, Dr. Zhang, in February 2012, Mr. Beck was  
2 still not considered a candidate for surgical intervention. Instead, additional recommendations were  
3 made for a third round of physical therapy and further pain management. Mr. Beck underwent a  
4 third round of electrodiagnostic testing of his thoracic spine April 2012. Like all previous testing,  
5 this round of electrodiagnostic testing did not identify any specific pathology or abnormality.  
6  
7

8 In terms of social habits, Mr. Beck affirmed he was a half-a-pack-a-day smoker, which was  
9 relevant because, for reasons not completely understood, smokers typically have more pain, both  
10 more severe in character and more frequent and of longer duration than nonsmokers. All told,  
11 Dr. Harris' physical examination of Mr. Beck was entirely normal. Anecdotally, the worker's hands  
12 had calluses and a little bit of grime underneath his fingernails consistent with somebody doing at  
13 least some degree of repetitive manual labor.  
14  
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16 Dr. Harris diagnosed thoracic spine strain related that to the industrial injury of May 18, 2005.  
17 (Spine strain is a descriptive diagnosis that acknowledges the onset of some soft tissue pain, but it  
18 does not indicate any actual anatomic injury to the thoracic spine.) Dr. Harris was unable to render  
19 a more serious diagnosis because no actual anatomic injury was ever identified. He gave a second  
20 diagnosis of multilevel degenerative disc disease throughout Mr. Beck's thoracic spine. The  
21 degenerative conditions were not caused by the industrial injury of May 18, 2005, because there  
22 was no evidence that they were aggravated or accelerated in any way by the injury. By definition,  
23 Mr. Beck's degenerative conditions were progressing as expected, based on his increasing age of  
24 seven years since the time of his exam in 2012. Dr. Harris found no evidence of thoracic  
25 radiculopathy or pathology involving the exiting nerve roots, or evidence of any spinal cord  
26 pathology.  
27  
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29 Dr. Harris found Mr. Beck's spinal condition fixed and stable because the worker had years  
30 of non-operative treatment. He was not a surgical candidate. He had these persistent, subjective  
31 pain complaints with no significant abnormalities on serial imaging or repetitive electrodiagnostic  
32 testing. There was no additional proper and necessary treatment that could be considered curative.  
33 This was considering the fact that Mr. Beck may have valid pain complaints. But functionally  
34 speaking, Mr. Beck had no condition that could plausibly benefit from any further treatment.  
35  
36

37 Dr. Earle was Mr. Beck's attending physician for a short period beginning September 6,  
38 2012. Dr. Earle summarized the worker's treatment as having included a series of MRI studies  
39 showing some abnormality of the discs at T5-6 and T6-7. Earlier studies had shown disc herniation  
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1 at those levels. But the most recent study in March 2011 had shown an annular tear, (a tear in the  
2 covering of the disc without material protruding from it). Mr. Beck had a discogram performed in  
3 October 2011 that found injection of the T5-6 level reproduced his pain with equivocal results at the  
4 T6-7 level. He had four epidural steroid injections, the earlier of which gave him more relief, and  
5 the later, little to no relief. He had been through a number of trials of physical therapy, but  
6 described plateauing due to back pain. Mr. Beck was using the narcotic medication, hydrocodone,  
7 for pain control as well as a numbing patch.  
8  
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10  
11 Dr. Earle's overall treatment plan as the worker's attending physician, was to strengthen  
12 Mr. Beck's back, taper him off narcotics, and get him back to work. After relatively normal  
13 examinations with limited to no objective findings, Dr. Earle recommended a specific type of bone  
14 scan, SPECT, (a computerized type of bone scan capable of detecting damage to bones or joints),  
15 which was performed on September 11, 2012. The SPECT returned essentially normal. In light of  
16 the highly sensitive SPECT and serial MRIs, Dr. Earle did not see the need for any additional  
17 diagnostic testing recommended by Dr. Gritzka. The stress view or flexion/extension view studies  
18 would not add anything to the Mr. Beck's treatment and would be of no additional diagnostic value.  
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22  
23 When Mr. Beck insisted Dr. Earle provide him further referrals for MRIs and laser disc  
24 surgery, the doctor excused himself as the worker's treating physician. He did not believe the laser  
25 disc surgery proposed by Mr. Beck to be either mainstream therapy likely to have long- or short-  
26 term positive results, and it was not the type of procedure approved by the Department of Labor  
27 and Industries.  
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31 Ultimately, Dr. Earle concurred with Dr. Harris' independent medical exam and findings from  
32 November 28, 2012. The worker already had extensive treatment over a long period of time, with  
33 physical therapy, interventional pain services, and appropriate diagnostic imaging. In Dr. Earle's  
34 opinion, there was no reasonable and necessary treatment left to potentially help the worker.  
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37 The preponderance of objective medical evidence supports a finding that the worker has  
38 reached maximum medical improvement as of May 10, 2013, when the Department closed  
39 Mr. Beck's claim for a second time. As noted by every doctor but Dr. Gritzka, Mr. Beck has been  
40 afforded every reasonable diagnostic study, treatment modality, and pain control measure available  
41 over the last 10 years. Unfortunately, his condition is not going to improve with additional  
42 reasonable and necessary treatment. Additionally, Dr. Gritzka's passing recommendation for a  
43 psychiatric evaluation is not supported by the record. Mr. Beck has never been diagnosed with any  
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1 mental health disorder. There was no indication from any testifying medical expert that a  
2 psychiatric evaluation could offer any curative benefit for Mr. Beck's physical conditions. The  
3 Department order dated May 10, 2013, is CORRECT.

4  
5 **B. Temporary and Permanent Total Disability**  
6

7 The next issue presented is whether Mr. Beck a totally and temporarily disabled worker as a  
8 proximate result of his industrial injury, during the periods of June 15, 2009 through April 13, 2011,  
9 and December 4, 2014 through May 10, 2013, as contemplated by RCW 51.32.090? Alternatively,  
10 is Mr. Beck permanently totally disabled as of May 10, 2013, and entitled to an industrial insurance  
11 pension? (Recall on May 29, 2013, the worker withdrew his request for an alternative award of  
12 permanent partial disability.) Injured workers whose work-related injuries or illnesses are fixed and  
13 stable who result in conditions that permanently prevent them from performing or obtaining work on a  
14 reasonably continuous basis are owed an industrial insurance pension. Total disability does not mean  
15 that the worker must have become physically or mentally helpless.<sup>10</sup> Rather, total disability is an  
16 impairment of mind or body, proximately caused by an industrial injury or occupational disease or its  
17 residuals, which renders a worker unable to perform or obtain reasonably continuous, gainful  
18 employment.<sup>11</sup> In determining whether a worker is permanently and totally disabled it is appropriate  
19 to study the whole person - weaknesses, strengths, age, education, training, experience, and any  
20 other relevant factors which contribute to the ultimate conclusion as to whether the person is  
21 disqualified from substantial gainful employment generally available in the labor market.<sup>12</sup>  
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23  
24 This is a *Dinnis* type aggravation case. The Department closed the claim on September 2,  
25 2008, with a permanent partial disability award equal to Category 2 for dorsal impairments. After a  
26 subsequent aggravation application, the claim reopened effective June 15, 2009. In situations,  
27 such as here, where the Department has reopened a claim for further treatment in response to an  
28 application to reopen, and then the Department closes the claim again without an additional  
29 permanent partial disability award, and the closing order is appealed, the claimant must prove  
30 objective worsening between the terminal dates of September 2, 2008 and May 10, 2013, to be  
31 entitled to a greater disability award such as the pension Mr. Beck seeks in this appeal.<sup>13</sup> Based on  
32 the preponderance of objective evidence, Mr. Beck was neither a temporarily disabled worker as a  
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45 <sup>10</sup> WPI 155.07 (3d ed. 1989); see also *Kuhnle v. Department of Labor & Indus.*, 12 Wn.2d 191 (1942).

<sup>11</sup> RCW 51.32.090; *Bonko v. Department of Labor & Indus.*, 2 Wn. App. 22, 25 (1970).

<sup>12</sup> *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286, 292, 499 P.2d 255 (1972).

<sup>13</sup> *Dinnis v. Department of Labor & Indus.*, 67 Wn.2d 654 (1965).

1 proximate result of his industrial injury during the periods of June 15, 2009 through April 13, 2011,  
2 and December 4, 2014 through May 10, 2013, or entitled to a worker's compensation pension  
3 effective May 10, 2013.

4  
5 Dr. Bald opined that back in 2009 through 2013, Mr. Beck had no physical capacity  
6 restrictions based on his normal exams and diagnostic studies. He also noted that during all  
7 relevant periods on appeal, the worker was fully capable of sustained gainful employment.  
8

9  
10 Dr. Harris similarly testified Mr. Beck had no objective basis for any work related restrictions  
11 and could return to his past relevant work as a concrete truck driver, an automobile parts counter  
12 clerk, a lot attendant, general merchandise salesman, cleaner/housekeeper, parts order/stock clerk,  
13 shipping order clerk, and rental car delivery driver during all relevant periods under appeal.  
14 Dr. Earle agreed and added that based on his observations of Mr. Beck on video, the worker was  
15 capable of at least medium level work.  
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18  
19 Dr. Gritzka loosely stated Mr. Beck could not perform medium to heavy lifting, and at a  
20 minimum, could not return to his job of injury as a concrete truck driver for Glacier Northwest. But,  
21 without a performance-based physical capacities evaluation by a qualified physical capacity  
22 examiner with built-in validity checks, he could not say with any reasonable degree of medical  
23 certainty what the worker's physical capacities were.  
24

25  
26 Lastly, video surveillance of Mr. Beck was probative. On multiple occasions, the videos  
27 show Mr. Beck capable of normal function and physical activity, including repetitive motion,  
28 repetitive lifting of heavy objects, and normal activities consistent with employment, such as lifting  
29 boards overhead, operating industrial equipment, and using hand tools. It shows him moving about  
30 easily and smoothly without any apparent significant pain or any obvious deficits of motion or  
31 strength. The videos essentially confirm what the serial MRI imaging studies, physical exams, and  
32 other medical records show: that while Mr. Beck does have some reported subjective pain  
33 complaints, he has consistently normal physical exams and normal ability to move and perform  
34 physical activities consistent with a demonstrated ability to perform medium level work. The  
35 Department order dated May 10, 2013, is CORRECT and is AFFIRMED.  
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#### 41 FINDINGS OF FACT

- 42  
43 1. On September 16, 2013, Judge Caner certified that the parties agreed  
44 to include the Jurisdictional History, as amended, in the Board record  
45 solely for jurisdictional purposes.  
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2. Neil R. Beck sustained an industrial injury on May 18, 2005, when he was sitting on a stool and a co-worker attempted to knock him off the stool causing a twisting injury to the worker's thoracic spine, which was diagnosed as thoracic strain/sprain.
3. As of May 10, 2013, Mr. Beck's thoracic strain/sprain condition proximately caused by the industrial injury was fixed and stable and did not need further proper and necessary treatment.
4. At the time of his industrial injury in 2005, Mr. Beck was 42-years-old with a high school education, and past relevant work experience as a concrete truck driver, parts manager, appliance delivery person, seafood delivery person, and hotel handy man. He had preexisting cervical disc disease resulting from an unrelated motor vehicle accident in the 1990s.
5. During the relevant time period of June 15, 2009 through April 13, 2011, and December 4, 2014 through May 10, 2013, Mr. Beck had cervical and thoracic degenerative disc disease unrelated to the industrial injury. Mr. Beck had no physical capacity restrictions caused by the industrial injury for the periods of June 15, 2009 through April 13, 2011, and December 4, 2014 through May 10, 2013.
6. Mr. Beck was able to perform medium level work from June 15, 2009 through April 13, 2011, and December 4, 2014 through May 10, 2013.
7. Mr. Beck was able to perform and obtain gainful employment on a reasonably continuous basis from June 15, 2009 through April 13, 2011, and December 4, 2014 through May 10, 2013.
8. As of May 10, 2013, Mr. Beck's conditions proximately caused by the industrial injury were fixed and stable.
9. As noted above, Mr. Beck was capable of performing medium level work and specifically the jobs of concrete truck driver, an automobile parts counter clerk, a lot attendant, general merchandise salesman, cleaner/housekeeper, parts order/stock clerk, shipping order clerk, and rental car delivery driver.
10. Mr. Beck was able to perform and obtain gainful employment on a reasonably continuous basis as of May 10, 2010.

**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.
2. Mr. Beck's thoracic strain/sprain condition proximately caused by the industrial injury was fixed and stable as of May 10, 2013, and he was not entitled to further treatment. RCW 51.36.010.

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3. Mr. Beck was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from June 15, 2009 through April 13, 2011, and December 4, 2014 through May 10, 2013.
4. Mr. Beck was not a permanently totally disabled worker within the meaning of RCW 51.08.160, as of May 10, 2013.
5. The Department order dated May 10, 2013, is correct and is affirmed.

DATED: January 29, 2015.



**DOMINIQUE L. JINHONG**  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals



BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: NEIL R. BECK ) DOCKET NO. 13 10388  
2 )  
3 CLAIM NO. W-854481 ) DECISION AND ORDER  
4

5 APPEARANCES:  
6

7 Claimant, Neil R. Beck, by  
8 Busick Hamrick, PLLC, per  
9 Steven L. Busick  
10

11 Self-Insured Employer, Glacier Northwest, Inc., by  
12 Thomas Hall & Associates, per  
13 Ryan S. Miller and Thomas G. Hall  
14

15 The claimant, Neil R. Beck, filed an appeal with the Board of Industrial Insurance Appeals on  
16 July 10, 2013, from an order of the Department of Labor and Industries dated May 10, 2013. In this  
17 order, the Department affirmed the provisions of its orders dated March 15, 2013, and March 18,  
18 2013. In the March 15, 2013 order, the Department denied payment of time-loss compensation  
19 benefits to Mr. Beck for the period from June 15, 2009, through April 13, 2011. In its March 18,  
20 2013 order the Department reclosed Mr. Beck's claim with time-loss compensation benefits as paid  
21 through December 3, 2012, without compensation for additional permanent partial disability. The  
22 Department order is **AFFIRMED**.  
23  
26

27 DECISION  
28

29 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
30 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and  
31 Order issued on January 29, 2015, in which the industrial appeals judge affirmed the Department  
32 order dated May 10, 2013. On May 6, 2015, the self-insured employer filed a response to the  
33 claimant's Petition for Review.  
34  
35

36 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
37 no prejudicial error was committed. The rulings are affirmed.  
38

39 We agree with our industrial appeals judge that the May 10, 2013 Department order is  
40 correct. We have granted review to rule on Mr. Beck's motion to admit an exhibit identified in a  
41 deposition and to add a finding of fact and a conclusion of law.  
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1 In the deposition of Guy Earle, M.D., Mr. Beck moved to admit a copy of a letter that  
2 Dr. Earle wrote on October 4, 2012. The proposed exhibit, which was identified as Deposition  
3 Exhibit No. 1, is identical to Exhibit No. 1, which was properly rejected. The deposition exhibit is  
4 renumbered Exhibit No. 8 and it is rejected.  
5  
6

7 The Department first closed Mr. Beck's claim on April 25, 2007, with compensation for  
8 permanent partial disability consistent with the degree of disability represented by Category 2 of  
9 WAC 296-20-260 for a permanent dorsal impairment. In this appeal, Mr. Beck contended that the  
10 condition proximately caused by his May 17, 2005 industrial injury required further proper and  
11 necessary treatment as of May 10, 2013. Our industrial appeals judge correctly concluded that  
12 Mr. Beck did not produce persuasive medical evidence to support his contention.  
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16 As an alternative for relief, Mr. Beck asserted that if a fact finder determined that his work-  
17 related condition had reached maximum medical improvement as of May 10, 2013, the condition  
18 had rendered him permanently totally disabled. In order to be eligible for such relief, Mr. Beck first  
19 had to prove that a condition caused by his May 17, 2005 industrial injury permanently worsened  
20 between April 25, 2007, and May 10, 2013,<sup>1</sup> as shown by objective medical findings. The Proposed  
21 Decision and Order correctly concluded that he did not do so. Our Findings of Fact and  
22 Conclusions of Law reflect Mr. Beck's failure to sustain his burden of proof.  
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#### 27 FINDINGS OF FACT

- 28 1. On September 16, 2013, an industrial appeals judge certified that the  
29 parties agreed to include the Jurisdictional History, as amended, in the  
30 Board record solely for jurisdictional purposes.
- 31 2. Neil R. Beck was born on March 16, 1963. He graduated from high  
32 school and served in the United States Army for four years. Mr. Beck  
33 has subsequently worked as the parts manager for Poulsbo RV; as a  
34 delivery and heavy truck driver; and as a janitor for a hotel. Glacier  
35 Northwest, Inc., hired Mr. Beck as a cement truck driver in 2004.  
36
- 37 3. Mr. Beck was injured during the course of his employment with Glacier  
38 Northwest, Inc., on May 17, 2005, when a co-worker grabbed him in a  
39 bear hug and twisted him while Mr. Beck was sitting on a stool on which  
40 his legs were wrapped around the stool's braces.  
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<sup>1</sup> *Dinnis v. Department of Labor & Indus.*, 67 Wn.2d 654 (1965).

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4. Mr. Beck's May 17, 2005 industrial injury proximately caused a condition described as a thoracic strain/sprain.
5. Mr. Beck's industrially related condition was fixed and stable as of April 25, 2007, and resulted in permanent partial disability represented by Category 2 of WAC 296-20-260, categories of permanent dorsal impairment.
6. The condition proximately caused by Mr. Beck's May 17, 2005 industrial injury did not permanently worsen or become aggravated, as demonstrated by objective medical findings, between April 25, 2007, and May 10, 2013.
7. As of May 10, 2013, Mr. Beck's work-related condition had reached maximum medical improvement and it did not require further proper and necessary treatment.
8. Mr. Beck was capable of obtaining and performing reasonably continuous gainful employment from June 19, 2009, through April 13, 2011, and from December 4, 2012, through May 9, 2013.
9. Mr. Beck was capable of obtaining and performing reasonably continuous gainful employment as of May 10, 2013.

**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. As of May 10, 2013, Mr. Beck did not require proper and necessary treatment within the meaning of RCW 51.36.010 for any condition proximately caused by his May 17, 2005 industrial injury.
3. Mr. Beck was not temporarily totally disabled within the meaning of RCW 51.32.090 from June 19, 2009, through April 13, 2011, and from December 4, 2002, through May 9, 2013, because of any condition proximately caused by his May 17, 2005 industrial injury.
4. There is no condition proximately caused by Mr. Beck's May 17, 2005 industrial injury that permanently worsened or became aggravated within the meaning of RCW 51.32.160 between April 25, 2007, and May 10, 2013.
5. Mr. Beck was not permanently totally disabled within the meaning of RCW 51.08.160 as of May 10, 2013.

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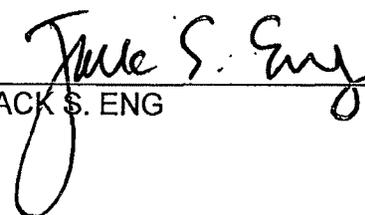
6. The May 10, 2013 order of the Department of Labor and Industries is correct and is affirmed.

Dated: May 26, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

  
\_\_\_\_\_  
DAVID E. THREEDY Chairperson

  
\_\_\_\_\_  
FRANK E. FENNERTY, JR. Member

  
\_\_\_\_\_  
JACK S. ENG Member



RECEIVED

JUN 27 2016

FILED  
SUPERIOR COURT

Thomas G. Hall & Associates

2016 JUN 23 P 3:05

COWLITZ COUNTY  
STACI L. MYKLEBUST, CLERK

STATE OF WASHINGTON  
COWLITZ COUNTY SUPERIOR COURT

1  
2  
3 NEIL R. BECK,

NO. 15-2-00691-7

4 Plaintiff,

JUDGMENT AND ORDER

BY \_\_\_\_\_

5 v.

6 GLACIER NORTHWEST, INC.,

Clerk's Action Required

7 Defendant.

8 JUDGMENT SUMMARY (RCW 4.64.030)

- 9 1. Judgment Creditor: Glacier Northwest, Inc.
- 10 2. Judgment Debtor: Neil R. Beck
- 11 3. Principal Amount of Judgment: \$0
- 12 4. Interest to Date of Judgment: \$0
- 13 5. Statutory Attorney Fees: \$0
- 14 6. Costs: \$0
- 15 7. Other Recovery Amounts: \$0
- 16 8. Principal Judgment Amount shall bear interest at 0% per annum.
- 17 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.
- 18 10. Attorney for Judgment Creditor: Ryan Miller
- 19 11. Attorney for Judgment Debtor: Steven Busick

20 This matter came on regularly for jury trial on May 3, 2016 before the Honorable  
 21 Stephen M. Warning, a judge in the above-entitled Court. The Plaintiff was represented by  
 22 Steven Busick; the Defendant was represented by Ryan Miller. A six-person jury was  
 23 impaneled and sworn to try the cause, and evidence in the form of the Certified Appeal Board  
 24 Record was read to the jury. Arguments of counsel were made, the Court instructed the jury,  
 25 and the jury retired to consider its verdict. Thereafter, the jury returned as its verdict the  
 26 following answers to the following questions:

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QUESTION NO. 1:

Was the Board of Industrial Insurance Appeals correct in determining that Mr. Beck was not temporarily totally disabled from June 15, 2009 through April 13, 2011?

ANSWER: YES

QUESTION NO. 2:

Was the Board of Industrial Insurance Appeals correct in determining that Mr. Beck was not temporarily totally disabled from December 4, 2012 through May 9, 2013?

ANSWER: YES

QUESTION NO. 3:

Was the Board of Industrial Insurance Appeals correct in determining that Mr. Beck did not require proper and necessary treatment as of May 10, 2013 for any condition proximately caused by his May 17, 2005 industrial injury?

ANSWER: YES

QUESTION NO. 4:

Was the Board of Industrial Insurance Appeals correct in determining that Mr. Beck was not permanently totally disabled as of May 10, 2013?

ANSWER: YES

JUDGMENT AND ORDER

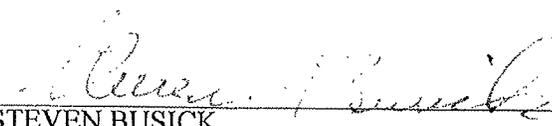
No post-trial motions having been interposed, and the court being fully advised, NOW, THEREFORE,

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the May 26, 2015  
2 Decision and Order is hereby AFFIRMED. The Department of Labor & Industries Order  
3 dated May 10, 2013 is hereby AFFIRMED.

4  
5 DONE IN OPEN COURT this 23 day of June, 2016.

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9 JUDGE STEPHEN M. WARNING

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12   
13 RYAN MILLER  
14 WSBA # 40026  
15 Attorney for Plaintiff

16  
17   
18 STEVEN BUSICK  
19 WSBA # 1643  
20 Attorney for Defendant  
21 (Approved To Form, Notice of Presentation Waived)

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INSTRUCTION NO. 5

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve such testimony. It does require that you give any such testimony careful thought in your deliberations.

NO. 49246-6-II

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

NEIL R. BECK,

Appellant,

v.

GLACIER NORTHWEST, INC.,

Respondent.

CERTIFICATE OF SERVICE

I, Angeline Welch, under penalty of perjury pursuant to the laws of the State of Washington, declares that on November 16, 2016, she caused to be served Brief of Respondent Glacier Northwest, Inc. and Certificate of Service in the below described manner:

**Via electronic mail, per Court Rules:**

Derek Byrne, Court Administrator/Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402  
[coa2.filings@courts.wa.gov](mailto:coa2.filings@courts.wa.gov)

**Via US Mail, First-Class, Postage Prepaid:**

Steven Busick  
Busick Hamrick Palmer PLLC  
PO Box 1385  
Vancouver, WA 98666

Attorney General's Office  
Attn: Docket Manager  
PO Box 40121  
Olympia, WA 98501

Eberle Vivian  
206 Railroad Ave N  
Kent, WA 98032

DATED this 16 day of November, 2016.

A handwritten signature in black ink, appearing to read "Angelina Welch". The signature is fluid and cursive, with the first name "Angelina" written in a larger, more prominent script than the last name "Welch".

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