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No. 51170-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER MAPHET, Appellant,

v.

CLARK COUNTY, Respondent.

BRIEF OF RESPONDENT

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I. RESPONDENT'S ASSIGNMENT OF ERROR
ON CROSS-APPEAL

Respondent's Assignment of Error

1. The trial court erred in entering its Order Regarding Motions in Limine, dated September 20, 2017, when it allowed the admission of evidence of authorization of medical treatment.

Issue Pertaining to Assignment of Error

1. Under Washington Evidence Rule 409, is evidence that the employer authorized or paid for medical treatment within an industrial injury claim admissible to show that the employer is legally responsible for the treatment or the medical condition treated?

II. STATEMENT OF THE CASE

Jennifer Maphet (worker) filed a claim for benefits for an injury occurring on November 8, 2009, while working for the self-insured employer (employer), Clark County. Certified Board Record (CBR), Decision and Order, at 7. This claim was assigned Claim No. SE37697. *Id.* at 3. During the course of processing this claim, six Department of Labor and Industries' (Department) orders were appealed to the Board of

Industrial Insurance Appeals (Board) and consolidated for a hearing before the Board. Among the appealed orders was a Department order dated September 25, 2015, which affirmed a prior Department order directing the employer to authorize and pay for a March 20, 2015, surgery performed by Dr. Greenleaf and to accept concussion as a condition under this claim. This particular appeal was assigned Board Docket No. 15 21036. During the course of litigation, the parties stipulated that the March 20, 2015, surgery was performed to address the condition of right knee patellofemoral instability and, further, that her concussion condition was the result of a fall caused by her right knee patellofemoral instability. CP, Order, at 199.

Within that appeal, the following testimony was presented to the Board: Ms. Maphet testified that she was working as a corrections officer for Clark County when she slipped off a ledge and fell into a stairwell injuring her right knee. CBR, Jennifer Maphet Testimony, at 14-15. The defendant indicated that she had numerous operations and after a December 2, 2010, surgery she began having intense lateral side pain. *Id.* at 16-17. This allegedly persisted into 2011 and 2012 resulting in further treatment by Dr. Greenleaf. *Id.* at 18, 23. The defendant reported her knee began to buckle more and more after a January 24, 2013, surgery by Dr. Greenleaf. *Id.* at 25. Despite this, she believed her issues with the

patella were from her original injury. *Id.* at 32. She too represented that she felt better after the March 20, 2015, surgery. *Id.* at 29.

On cross-examination, Ms. Maphet acknowledged that she has struggled with her memory since her concussion and conceded her memory regarding symptoms and treatment would have been better at the time she was treated by each particular doctor. *Id.* at 35-36. She testified that medial pain issues were always her number one problem and she did not know whether her lateral complaints would have been documented by providers. *Id.* at 41. She stated her falls were related to her patellofemoral instability and that her concussion was a result of one of those falls. *Id.* at 52. She further agreed that the January 24, 2013, surgery by Dr. Greenleaf leading up to the March 20, 2015, surgery was designed to correct her patellofemoral instability. *Id.* at 38.

Andrew Maphet testified he had been married to Ms. Maphet since 2006. CBR, Andrew Maphet Testimony, at 5. He explained that Ms. Maphet continued to fall even after the March 20, 2015, surgery but noted she would fall less than before. *Id.* at 7.

Dr. Greenleaf, an orthopedic surgeon, testified that Ms. Maphet had two prior operations before coming to Dr. Greenleaf. CBR, Greenleaf Dep., at 6, 9. Dr. Greenleaf performed the third operation on Ms. Maphet on August 25, 2011. This consisted of a chondroplasty of

the medial femoral condyle and patella. *Id.* at 12. The fourth operation soon followed on November 28, 2011, wherein Dr. Greenleaf attempted to reconstruct the medial collateral ligament. *Id.* at 12.

On September 19, 2012, Dr. Greenleaf documented that the knee looked stable but, nevertheless, he performed the fifth surgery on the knee on January 24, 2013. *Id.* at 14, 18. This procedure consisted of removal of scar tissue, a chondroplasty of the patella, and limited lateral retinacular release. *Id.* at 18. When operating, Dr. Greenleaf stated he observed that the patella was lateralized or pulled to the outside of the knee. *Id.* at 22. Dr. Greenleaf stated that he believed the patella shifted laterally due to scarring that pulled the kneecap over along with what he believed was an original injury to the medial patellofemoral ligament as well as the medial collateral ligament thereby allowing the scar tissue to cause a malalignment of the patellofemoral joint. *Id.* at 23. Dr. Greenleaf did not cite to atrophy when detailing his opinions pertaining to causation.

After the January 24, 2013, surgery, the doctor performed a number of other surgeries to address the patellofemoral joint leading up to the March 20, 2015, operation. *Id.* at 25-28. Dr. Greenleaf testified that Ms. Maphet continued to have instability as the prior interventions had not worked. The March 20, 2015, surgery was completed to prevent

her from further injury due to falling. *Id.* at 28. The doctor believed this March 20, 2015, surgery was due to the previous injury and surgeries. *Id.* at 29.

On cross-examination, Dr. Greenleaf agreed that having more information available to review is best when rendering opinions as to causation and he could not recall the materials he had reviewed. *Id.* at 31, 33. As for the medial patella ligament problem he related to the industrial injury, Dr. Greenleaf said the condition was identified after he first saw the patient but was present before he became involved. *Id.* at 34. Dr. Greenleaf agreed it is likely the medial patella ligament injury would have been documented on exam or diagnostic imaging film if it developed as he believed, which it was not. *Id.* at 34-35.

When asked about patellofemoral instability, Dr. Greenleaf stated this could occur for a variety of reasons and was multifactorial. *Id.* at 36. Dr. Greenleaf stated in the vast majority of cases there is some congenital component to it developing and further noted patients can acquire the condition without any corresponding trauma or injury. *Id.* at 37-38. At that point, Dr. Greenleaf conceded that prior to 2013, the patella was essentially normal. *Id.* at 39. In fact, Dr. Greenleaf confirmed that a variety of treatment and diagnostic records from the years following the industrial injury showed the patellofemoral joint was

stable and normal as documented by several orthopedic surgeons. *Id.* at 41-44. Dr. Greenleaf also explained that when he operated on August 25, 2011, nearly two years after the industrial injury, the patellofemoral joint was noted to be within normal limits. *Id.* at 44.

Dr. Greenleaf conceded that in order for his theory on causation to be correct, everyone, including himself, who had been inside the knee in the years after the industrial injury would have to have simply missed the patella ligament instability that subsequently warranted the March 20, 2015 surgery. *Id.* at 45. Knowing this was absurd, Dr. Greenleaf on redirect examination changed his opinion to suggest that a combination of Ms. Maphet's rehabilitation together with the subsequent scarring from surgeries caused the insufficiency of the patellofemoral ligament. *Id.* at 57-58. Apparently, the patella ligament injury that he previously opined had directly followed the industrial injury was no longer a viable theory. *Id.* at 47-48.

Dr. Greenleaf also agreed that people who develop medial compartment arthritis, like Ms. Maphet, do not develop patellofemoral instability and that there is no literature supporting such a correlation. *Id.* at 48. He too noted that if Ms. Maphet's patellofemoral instability is not found to be proximately related to the industrial injury, then as a matter of logic residuals resulting from her falls would not be related.

Id. at 48-49. He too agreed that if the patellar instability was not related to her injury, then the March 20, 2015, surgery would not constitute proper and necessary treatment. *Id.* at 59.

Dr. Greenleaf testified that he wanted a second opinion in September of 2012 as he did not know what was going on with Ms. Maphet's knee and confirmed making no clinical findings of lateralization of the patella leading up to the January 24, 2013, surgery. *Id.* at 51. The second opinion provided by Dr. Edelson on September 25, 2012, found only a mechanical problem in the medial compartment of the knee. *Id.* at 49. Dr. Greenleaf too noted that in the majority of cases one would expect to have clinical findings of lateralization of the patella leading up to the surgery performed on January 24, 2013. *Id.* at 51.

Dr. Kelly, a chiropractor, who has provided examinations at the request of defendant's counsel many times in the past, also testified. CBR, Kelly Testimony, at 60, 67. This doctor has never operated before in his life. *Id.* at 98. He noted when considering surgery he will refer patients to orthopedic surgeons to determine if surgery is necessary and to identify the pathology warranting surgical intervention. *Id.* at 100. Dr. Kelly in this case ultimately deferred to orthopedic surgeons as to the cause of the instability of the patella. *Id.* at 116.

Dr. Clyde Farris is an orthopedic surgeon who has performed similar knee operations to the ones at issue in this case. CBR, Farris Dep., at 5, 8. Dr. Farris testified that he completed an examination of Ms. Maphet on January 13, 2015, and also reviewed extensive medical records. *Id.* at 11-13. At the time of evaluation, Ms. Maphet complained of chronic pain in her knee that was made worse by an unstable patella that would occasionally sublux. *Id.* at 15. The records reviewed by Dr. Farris noted that after the November 8, 2009, industrial injury, her condition was limited to a small defect in the medial compartment as well as a tear of the lateral meniscus. *Id.* at 18. Dr. Farris observed that Dr. Brenneke found an entirely normal patellofemoral joint in his two surgeries leading up to Dr. Greenleaf assuming care of the defendant. *Id.* at 20. As well, Dr. Greenleaf on August 25, 2011, also found the patella to be tracking normally. *Id.* at 19.

Dr. Farris made it clear that he would expect Ms. Maphet to have issues with the patellofemoral joint following the industrial injury if that injury was a cause of her subsequent difficulties, which she did not. *Id.* at 20. It was not until after the January 24, 2013, operation by Dr. Greenleaf that Ms. Maphet's main complaint switched to patellofemoral issues. *Id.* at 23. Dr. Farris explained that Dr. Greenleaf

described quite a bit of lateralization of the patella and as a result performed a limited lateral retinacular release on January 24, 2013. *Id.* at 21. Prior to this surgery, Dr. Greenleaf did not know what was going on with the defendant and had sent her for a second opinion from Dr. Edelson. *Id.* at 22. On September 25, 2012, Dr. Edelson had found no patellofemoral issues and said her pain was over the medial compartment of the knee. *Id.* at 22. Dr. Farris testified there was no reasonable explanation as to why Dr. Greenleaf would perform the limited lateral retinacular release. *Id.* at 23. What's more, the defendant did not do well after surgery and further intervention was undertaken to address her patellofemoral instability. *Id.* at 23-26.

After placing the defendant through an examination where he noted minimal atrophy on the right compared to the left, Dr. Farris arrived at his conclusions pertaining to the March 20, 2015, surgery. *Id.* at 28. Dr. Farris stated that the March 20, 2015, surgery would not benefit the defendant and would only endanger her. *Id.* at 28. In review of records subsequent to this procedure, Dr. Farris stated he was proved correct. *Id.* at 28.

When turning to whether the patellofemoral problems were proximately related to the November 8, 2009, industrial injury, Dr. Farris stated they would not be as this pathology was cited as being

completely normal for a couple of years following the industrial injury. *Id.* at 29-30. Dr. Farris cited to the first two surgeries noting an entirely normal patellofemoral joint and further concluded that none of the surgical treatments would have affected the stability of the patellofemoral joint. *Id.* at 29. Finally, Dr. Farris testified that Ms. Maphet's falls were the result of her patellofemoral issues and since that was not related, the conditions she developed due to her falls would likewise be unrelated to the industrial injury. *Id.* at 32-33.

Dr. Eugene Toomey, an orthopedic surgeon with 28 years of experience in performing lower extremity surgeries, also testified. CBR, Toomey Dep., at 6, 9. Dr. Toomey evaluated Ms. Maphet on July 9, 2015. *Id.* at 13. Dr. Toomey conducted a thorough review of records. *Id.* at 14-15. He explained that Ms. Maphet had a normally tracking patella at the time of the August 25, 2011, surgery. *Id.* at 24-25. When Dr. Greenleaf operated again on January 24, 2013, the problem with the patellofemoral joint was diagnosed at the time of surgery. *Id.* at 26-27. Everything before this time was focused on the medial femoral chondral lesion. *Id.* at 29. When explaining how this new finding of instability of the patella noted in January of 2013 would come about, Dr. Toomey testified that in the absence of a new injury, it should not come about spontaneously. *Id.* at 29. He too confirmed that this finding would be

something that would be picked up on physical examination prior to surgery. *Id.* at 29.

Dr. Toomey testified that the March 20, 2015, surgery was performed due to medial subluxation of the patella. *Id.* at 33. Putting causation aside, Dr. Toomey said that the surgery would be proper so long as Ms. Maphet had medial instability of the patella. *Id.* at 34. Dr. Toomey stated that, in his opinion, the questionable procedure was the January 2013 surgery as there was no evidence that the defendant had an issue with subluxation of the patella. *Id.* at 35. Dr. Toomey testified that he has done numerous arthroscopic procedures and would not have done a spontaneous lateral release like the one performed by Dr. Greenleaf. *Id.* at 35. He explained that everything continued to get worse in the patellofemoral joint after the decision by Dr. Greenleaf to spontaneously perform the lateral release. *Id.* at 36.

Dr. Toomey testified that the subsequent March 20, 2015, surgery was not performed to address a condition that was proximately related to the November 8, 2009, industrial injury. *Id.* at 36. The doctor concluded that there was no correlation between a medial compartment injury and arthritis to the development of patellofemoral joint instability. *Id.* at 36. The doctor said that the literature would not support a correlation between the injury suffered within this industrial claim and the onset of

patellofemoral joint instability. *Id.* at 37. The medical records noted no patellofemoral joint pain or examinations showing subluxation in the couple of years immediately following the industrial injury. *Id.* at 37. Dr. Toomey agreed that Ms. Maphet's falls were due to the instability around the patellofemoral joint and since this was not related to the industrial injury, the residuals experienced from her falls, specifically the concussion, were also not related. *Id.* at 38-39.

When asked about scar tissue causing the patella tracking issue, Dr. Toomey was clear that the presence of scar tissue did not cause the patellofemoral instability. *Id.* at 52-54. First, Dr. Toomey again pointed out that this issue was nonexistent for a long period of time after the industrial injury and that the defendant's problems following the industrial injury were confined to the medial femoral condyle. *Id.* at 52-53. He too noted that nothing from the mechanism of injury supported an injury to the patellofemoral joint. *Id.* at 62. Second, the medical literature did not support the correlation between medial condyle disease and the development of patellofemoral joint instability. *Id.* at 52-53. Most importantly, Dr. Toomey pointed out that if the tracking issue was the result of scar tissue from prior procedures, then removal of the scar tissue by Dr. Greenleaf would have not led to patellofemoral joint instability. *Id.* at 54. In other words, if the scarring was problematic, as

opined by Dr. Greenleaf, then the patella should stabilize and not subluxate following removal of the scar tissue. *Id.* at 54. Dr. Toomey testified that this was a case where the actions of a surgeon, independent of the November 8, 2009, industrial injury, altered the mechanics of the knee resulting in further issues and problems with the patellofemoral joint. *Id.* at 56.

Several orders assessing penalties against the employer for delay in payment of benefits were among those consolidated with Board Docket No. 15 21036 over the employer's objection. CBR, Proposed Decision and Order, 86. As a result, the testimony of Katie DeFrang, the third-party claims adjuster at Gallagher Bassett for Clark County, became a part of the Board record regarding the issue of medical treatment solely because her testimony was necessary to challenge the penalty orders. The employer repeatedly objected to the consolidation of these issues because her testimony was irrelevant to the medical questions regarding surgery. CBR, Proposed Decision and Order, at 86. Ms. DeFrang testified that Gallagher Bassett authorized and paid for multiple surgeries under this claim, including surgeries on April 29, 2010; December 16, 2010; August 25, 2011; November 28, 2011; January 24, 2013; May 14, 2013; December 27, 2013; and August 8, 2014. CBR, DeFrang Dep., at 42-43. The March 20, 2015, surgery was not authorized. Ms. DeFrang

testified that in her understanding the fact that the County authorizes a surgery does not have any bearing on the determination of whether that procedure is reasonable and necessary to address a condition that would be proximately related to the industrial injury. *Id.* at 47.

Following the presentation of evidence, the Board of Industrial Insurance Appeals issued a Decision and Order dated March 8, 2017, affirming the Department of Labor and Industries' order dated September 25, 2015, that directed the employer to authorize and pay for the March 20, 2015, surgery performed by Dr. Greenleaf and to accept concussion as a condition under this industrial claim.

The employer then appealed the Board's decision in Docket No. 15 21036 to Clark County Superior Court. Prior to the presentation of evidence before the Board, the employer had raised a *motion in limine* to preclude all questions and testimony referring to administratively accepted conditions and/or authorized treatment, which included evidence pertaining to the payment or authorization for prior procedures, for the purpose of showing that the March 20, 2015, surgery was proper and necessary to treat a condition related to the claim. Within the December 13, 2016, Proposed Decision and Order, the Board granted the motion to preclude testimony as to payment/authorization pursuant to ER 409 and 401. Certified Board Record (CBR), at 86. Within the Board's

final March 8, 2017, Decision and Order, the Board adopted the ruling of the industrial appeals judge with regard to this evidence and did not consider it as part of its decision when finding that the defendant's patellofemoral instability was proximately caused by the November 8, 2009, industrial injury. CBR, at 7, 11. At trial in Superior Court, the employer renewed the motion to preclude such testimony. In turn, Ms. Maphet moved the trial court to allow evidence regarding authorization of medical treatment and payment for services. CP, Defendant's Motion in Limine, at 84.

Ms. Maphet and the Department of Labor and Industries (Department) jointly moved the trial court for a directed verdict arguing that as a matter of law Clark County is responsible for the condition of patellofemoral instability because it authorized the May 14, 2013, and December 27, 2013, surgeries. CP, Defendant's Motion for Directed Verdict, at 95; CP, Department's Trial Brief and CR 50 Motion, at 105.

Clark County Superior Court Judge Daniel Stahnke denied the Motions for Directed Verdict due to a genuine issue of material fact. CP, Order Denying Department and Defense Motion for Directed Verdict, at 165. With regard to the motions in limine, Judge Stahnke ruled that evidence of authorization of treatment was not excluded under Evidence Rule 409, but that evidence of the employer paying Ms. Maphet's medical

bills was excluded. CP, Order Regarding Motions in Limine, at 169. In reading the deposition of Katie DeFrang to the jury at trial, Judge Stahnke ruled that where the transcript said “paid” the reader would substitute the word, “authorized.” Report of Proceedings (RP), at 214-19.

At trial, Ms. Maphet’s Proposed Jury Instructions No. 10 and 16 were not given by the trial judge. The full text of Ms. Maphet’s Proposed Instruction 16 is not included in the partial record she has provided to this Court. Her Proposed Instruction No. 10 stated:

When a self-insured employer through its qualified representative authorizes specific curative treatment, such authorization can only be given for medical conditions for which the self-insured employer has accepted responsibility under the workers’ compensation claim. Where treatment is authorized, the consequences of that authorized treatment are part of the claim, as if those consequences were originally caused by the industrial injury.

WAC 296-20-01002 (“Acceptance, accepted condition: Determined by a qualified representative of the Department or self-insurer that reimbursement for the diagnosis and curative or rehabilitative treatment of a claimant’s medical conditions is the responsibility of the Department or self-insurer. The condition being accepted must be specified by one or more diagnosis codes from the current edition of the International Classification of Diseases, Clinically Modified (ICD-CM).” Authorization: Notification by a qualified representative of the Department or self-insurer that specific proper and necessary treatment, services, or equipment provided for the diagnosis and curative or rehabilitative treatment of an accepted condition will be reimbursed by the Department or self-insurer.”) *In re Arvid Anderson*, BIIA Dec., 65,107 (1986). (“It is, of course, settled law that the consequences of treatment for an industrial injury are considered to be part and parcel of

the injury itself.” Relying upon *Anderson v. Allison*, 12 Wn.2d 487 (1942) and *Ross v. Erickson Construction Co.*, 89 Wash. 634 (1916)).

CP, Defendant’s Proposed Jury Instructions, at 65. The Court’s Instruction to the Jury No. 14 stated: “If you find that Mr. Maphet’s right knee patellofemoral instability was proximately caused by her November 8, 2009, industrial injury, and/or was the result of treatment provided to address a condition proximately caused by the November 8, 2009, industrial injury, then the downstream consequences are the responsibility of Clark County.” CP, Court’s Instructions to the Jury, at 187. Ms. Maphet has challenged the giving of this instruction in this appeal.

The matter was tried to a jury of six from September 18 through September 21, 2017. Two questions were posed to the jury through the verdict form. First, was the Board of Industrial Insurance Appeals correct in concluding that Jennifer Maphet’s patellofemoral instability was proximately caused by the November 8, 2009, industrial injury and/or residuals therefrom? Second, was the Board of Industrial Insurance Appeals correct in deciding that Jennifer Maphet’s March 20, 2015, surgery was proper and necessary treatment? The jury answered, “No” to both questions. CP, Order, at 201; CP, Verdict Form, at 190. On October 6, 2017, Judge Stahnke issued an order consistent with the jury’s

decision, that the Board decision of March 8, 2017, with regard to Docket No. 15 21036 is reversed and as such the Department order of September 25, 2015, is reversed. *Id.* at 202.

After the evidence was presented to the jury, Ms. Maphet renewed her motion for partial directed verdict on the issue of causation. Judge Stahnke denied the motion. CP, Order Denying Defendant's Motion for Partial Directed Verdict, at 167. This appeal of the trial court orders by Ms. Maphet and cross-appeal by the employer now follow.

III. ARGUMENT IN SUPPORT OF RESPONDENT'S
ASSIGNMENT OF ERROR ON CROSS-APPEAL

1. In response to the employer's motion in limine, the trial court erred when it found that evidence of authorization of medical treatment by the employer's third-party claims administrator is not excluded under Evidence Rule 409.

Any reference to payment by the employer for any benefits under a workers' compensation claim or authorization of treatment during the processing of the claim is inadmissible in court to show that the employer is legally responsible for a specific condition or treatment. Such evidence is inadmissible under Evidence Rule (ER) 409 and is irrelevant to the question of whether treatment is necessary and proper to treat a condition proximately related to an industrial injury.

The theory of Ms. Maphet's case is that the employer is automatically responsible for the March 20, 2015, surgery because it authorized/paid for prior surgeries which treated the same condition. Over the employer's objection, Judge Stahnke allowed the jury to hear evidence that the third-party claims administrator for the employer "authorized" several of Ms. Maphet's knee surgeries prior to denying the March 20, 2015, surgery. However, in her mind, there was no difference between "authorization" and a mere willingness by the employer to pay for the requested treatment. DeFrang Dep., at 46-47. She received a bill and agreed to pay for it. She was not legally binding the employer forever to all conditions treated.

Even with this evidence, the jury ultimately found for the employer at trial. However, given Ms. Maphet's appeal and her corresponding argument that, not only is this evidence admissible, but also that it entitles Ms. Maphet to a ruling as a matter of law, the employer has preserved its objection through this cross-appeal to any consideration of "authorization" evidence by this Court. The employer is aggrieved by Judge Stahnke's ruling if this Court considers "authorization" evidence in addressing Ms. Maphet's arguments in this appeal. The employer's objection to consideration of this "authorization" evidence and Ms. Maphet's assignments of error are

closely intertwined. As a result, the employer will provide detailed legal argument on this specific issue in conjunction with its responses to Ms. Maphet's assignments of error below.

IV. ARGUMENT IN RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

As a preliminary matter, the appellant has submitted a partial trial court record to this Court which is permitted under court rule. However, based upon a review of the Clerk's Papers and the Designation of Clerk's Papers submitted by the appellant, Ms. Maphet, it appears that Defendant's Proposed Instruction 16 and Department's Proposed Instructions 1 and 2 are not included in the record submitted to this Court. See, CP, Designation of Clerk's Papers, at 204. Yet, Ms. Maphet has attached instructions with these titles to the Appendix of her briefing and made arguments based on these documents. Brief of Appellant, Appendix C, D, and F. This is a violation of Washington Court Rule of Appellate Procedure (RAP) 10.3(a)(8). Ms. Maphet is asking this Court to review for prejudicial error specific instructions that were supposedly reviewed and rejected by the trial court, yet the full text of these instructions is not included in the partial record provided by the appellant. The employer asks this Court not to consider these attachments to the Appellant's Brief

which provide content not included in the partial record submitted by the appellant.

Additionally, Ms. Maphet provides significant argument regarding the employer's "concessions." Appellant's Brief at 43. This is based entirely on statements made during legal argument outside the presence of the jury during trial or during closing arguments. It is well established that lawyers' arguments are not evidence. The jury was instructed as such and ordered to disregard any remarks by the lawyers not consistent with the evidence. CP, Court's Instructions to the Jury, at 173. There is absolutely no basis for this Court to consider Ms. Maphet's arguments in her brief regarding "concessions" by the employer unless she can point to a formal stipulation to support each of her assertions. She cannot and does not. This issue is particularly pertinent to Ms. Maphet's request for relief. She argues that the employer has conceded the March 20, 2015, surgery was curative. As a result, it is her position that if this Court finds that the issue of causation is settled by the authorization of prior surgeries as a matter of law, Ms. Maphet is entitled to a complete affirmation of the Board order on both issues of causation and the appropriateness of the treatment provided. Appellant's Brief, at 49. This is erroneous and this Court should not presume that the only issue at trial was causation. The employer asks this Court to disregard discussion in Ms. Maphet's brief

regarding “concessions” through counsel’s trial arguments and focus on the actual evidence presented to the jury.

Though Ms. Maphet identifies five assignments of error, her arguments are distilled to two umbrella issues. First, she argues that the trial court erred in refusing to grant partial directed verdict as a matter of law on the issue of causation based on undisputed facts. Second, she argues that the trial court failed to properly instruct the jury on the law. Appellant’s Brief, at 18-19. However, these arguments fail and the trial verdict should be affirmed.

1. The trial court did not err in denying Ms. Maphet’s Motion for Partial Directed Verdict.

The reviewing Court employs the same standard as the trial court in reviewing the denial of a motion for directed verdict. *Pederson’s Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn.App. 432, 437, 922 P.2d 126 (Div. 2, 1996). A directed verdict is only appropriate when viewing the material evidence most favorable to the nonmoving party. The Court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the non-moving party. *Id.*

At trial, Ms. Maphet moved the trial court for partial directed verdict on the issue of proximate cause. She asked the Court to find that the Board was correct as a matter of law when it found that the claimant’s

patellofemoral instability and concussion conditions were proximately caused by the November 8, 2009, industrial injury and/or residuals therefrom. Appellant's Brief, at 23. Ms. Maphet argues that the claimant's patellofemoral instability and concussion conditions were proximately caused by the November 8, 2009, industrial injury as a matter of law under the Compensable Consequences Doctrine and based on undisputed facts. Appellant's Brief, at 19. This argument fails.

The failure of this argument rests on two inaccurate premises relied on by Ms. Maphet. First, evidence that the employer paid for or authorized certain treatment under the claim is not admissible to prove the necessary causal link between the injury and the medical condition or treatment at issue. Such evidence should not have been submitted to the jury and should not be considered by this Court. Second, Ms. Maphet's description of the Compensable Consequences Doctrine is incorrect. She argues, "The rule that self-insured employers are responsible for the consequences of its authorized treatment is called the Compensable Consequences Doctrine." Appellant's Brief, at 19. That is a misstatement of the law. The Compensable Consequences Doctrine does not resolve or remove the question of fact for the jury that exists in this case.

a. In reviewing the trial court's denial of the motion for directed verdict, this Court must analyze the medical evidence and may not consider evidence that the employer chose to pay for or authorize prior treatment.

Ms. Maphet wants this Court to find that as a matter of law proximate cause between the industrial injury and the condition of patellofemoral instability is automatic simply because the employer paid for a prior surgery that treated the same condition. However, evidence of the payment of medical bills by an employer or the authorization of any medical treatment by the employer is inadmissible to prove that the underlying medical condition was proximately related to the industrial injury. Any and all evidence that the employer in this case authorized or paid for any of the claimant's prior treatment should be excluded as it is irrelevant and inadmissible to prove the medical question of causation.

ER 409 states that evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability. While workers' compensation in Washington State is a no-fault system, that is with regard to the occurrence of an industrial injury itself. Specifically, the employer does not have to have fault or negligence when it comes to liability for an injury

occurring on the job. However, liability is still an issue throughout the processing of the claim in terms of whether an employer is responsible for a specific condition or specific treatment related to that industrial injury. Legal responsibility for a medical condition cannot be shown simply by pointing to the fact that an employer agreed to pay for treatment requested by the claimant's doctor. A proximate cause analysis is required when determining whether an employer is legally responsible for medical conditions or treatment. Proximate cause is defined as a cause which in a direct sequence, unbroken by any new independent cause, produces the disability complained of and without which such disability would not have occurred. *Wendt v. Department of Labor and Industries*, 18 Wn.App. 674, 683-84, 571 P.2d 229 (1977). This is the bedrock of workers' compensation law in Washington. The causal connection between a claimant's physical condition and her employment must be established by competent medical testimony. *Dennis v. Dept. of Labor and Industries*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987). Evidence of the payment/authorization of medical bills by an employer is inadmissible to prove the *medical question* of whether the underlying medical condition was proximately caused by the industrial injury.

ER 401 states that relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more or less probable than it would be without the evidence. Evidence of payment or authorization of a procedure by a third-party claim processor does not have any tendency to make any fact of consequence to this appeal more or less probable because such evidence has absolutely nothing to do with the medical question of the causal connection between the industrial exposure and the condition treated by the March 20, 2015, surgery. It is irrelevant and this Court should not consider it.

The Board's decision in *In re: Eric J. Somawang*, BIIA Decision 14 16324 (2015) (Appendix 13), is informative. In that case, the Board adopted the Proposed Decision and Order of Judge Mitchell Harada. The employer had challenged an order from the Department finding the employer responsible for left hip arthroplasty. Prior to the total hip replacement, the employer had paid for a left hip arthroscopic procedure. At hearing, the medical testimony supported the conclusion that the arthroscopic procedure did not lead to the need for the left hip replacement surgery and the evidence was insufficient to show that the hip replacement was proximately related to the claimant's industrial injury. *Id.* at 2-3. The Board did a proximate cause analysis affirming the rationale that the employer's payment for treatment is not relevant.

Washington Superior Courts and the Court of Appeals of Washington, Division I, have weighed in on this issue as well. In *PeaceHealth v. Loriann Hull*, the Whatcom County Superior Court ruled that the Board erred in admitting evidence regarding payment of services associated with the medical condition at issue in that case. In that case, the employer challenged several Department orders directing it to accept specific medical conditions. The Board had improperly admitted evidence that the employer paid for services associated with the condition of thoracic outlet syndrome in deciding the issue of whether that condition arose naturally and proximately out of the distinctive conditions of the claimant's employment. The trial court excluded consideration of this evidence. On review, the Court of Appeals, Division I, in an unpublished decision affirmed that the trial court correctly excluded evidence that the employer paid for surgeries under ER 409. *Hull v. PeaceHealth Med. Group*, No 74413-5-1, Wash. App. (September 26, 2016, Div. 1); CBR, at 140-158. The Court of Appeals gave no consideration to this evidence in rendering its decision. The Court's decision in *Hull* emphasizes the fact that there is no rule of law that stands for the proposition that if the employer pays for or authorizes certain treatment, that employer is responsible for the condition treated, regardless of proximate cause. When there is a dispute as to liability for certain treatment or conditions, the

Board and the courts are required to do an analysis of proximate causation on a more-probable-than-not basis, regardless of what treatment the employer has paid for in the past. *See, Id.* Washington courts and the Board have ruled it inappropriate to even consider evidence of payment in determining whether the employer was responsible for a specific condition and corresponding treatment.

In light of Ms. Maphet's arguments, the specific facts of *Hull* that provide the context for the Court's exclusion of payment evidence are of special importance to this present case. In *Hull*, the Department issued orders directing the employer to pay for post-surgery complications that it claimed resulted from an authorized surgery. *Hull v. PeaceHealth Med. Group*, No 74413-5-1, Wash. App. (September 26, 2016, Div. 1). The employer appealed those orders. On review of the Board decision, the Superior Court found that payment for medical treatment or services for a condition does not remove the requirement that such condition, medical treatment, or services be proximately related to the industrial injury or occupational disease. While the Court of Appeals ultimately reversed the trial court, it was on the basis of causation supported by medical evidence. The Court of Appeals expressly affirmed the Superior Court judge's exclusion of payment evidence. *Id.* The proximate cause analysis relating the need for treatment back to the original injury is the foundation of the

workers' compensation system. *Hull* supports this. In analyzing whether Ms. Maphet is entitled to a judgment as a matter of law on the issue of proximate cause, this Court must analyze the medical evidence and may not consider evidence that the employer chose to pay for a surgery that her doctor said she needed.

b. The Compensable Consequences Doctrine still requires a causal link between the condition treated and the industrial injury.

The Compensable Consequences Doctrine does not apply to the facts of this case as argued by Ms. Maphet. The claimant has cited *In Re: Arvid Anderson*, BIIA Dec. 65,170 (1986) to support her contention that the employer is automatically responsible as a matter of law for the condition of patellofemoral instability and all necessary and proper treatment for that condition under this claim simply because it paid for a prior surgery to treat that condition. However, *In Re: Anderson* does not govern the issue presented here. In that case, the undisputed *medical evidence* showed that the claimant's cardiac arrhythmia was a direct result of the stress attendant to his industrially related neck surgery. The neck surgery was related to the injury and the cardiac condition was related to the surgery. As a result, the self-insured employer was responsible for the claimant's heart condition. The *Anderson* case deals with the

responsibility for medical conditions that are proximately caused by the treatment of a condition proximately related to the industrial exposure. The claimant now asks the Court to use this precedent to justify a complete disregard of the proximate cause analysis. The claimant is asking this Court to find that it has established as a matter of law that the employer is automatically responsible for a medical condition if it furnished payment for any treatment related to that condition, even if that condition was not caused by the industrial exposure. This proposition is nowhere near the rule established in the *Anderson* decision.

The Compensable Consequences Doctrine from *Anderson* stems from *Ross v. Erickson*, 89 Wash. 634, 155 P. 153 (1916). In *Ross*, the Court addressed the issue of medical malpractice committed in the course of treatment for an industrial injury in light of the exclusive remedy statute, Revised Code of Washington (RCW) 51.04.010. The Court found that the employer is responsible for results of treatment that are proximately related to the original injury. In that circumstance, the employer would be responsible for the “downstream consequences” of related treatment. However, the treatment that caused any downstream consequences must be for a condition that is proximately related to the original injury. This is the key distinction to this present case. According to *Ross*, if a doctor commits malpractice while treating a condition

proximately related to the industrial injury on a more-probable-than-not basis, the consequences to the worker of the malpractice fall within the bounds of liability for conditions proximately related to the industrial injury and the employer is responsible for those consequences. *Ross*, 89 Wash. at 648; *See also, In re: David R. Green*, BIIA Decision and Order 13 11951 & 13 119510-A (2014) (Discussing *Ross v. Erickson*). What Ms. Maphet wants this Court to ignore is that under the Compensable Consequences Doctrine, there is still a requirement that the underlying condition being treated at the time “downstream consequences” are incurred is proximately related to the original industrial injury.

It is important to contrast this present case with the Board decision of *In re: David R. Green*. In that case, the Department issued two orders directing the employer to authorize two specific surgeries. The employer never challenged these orders in any way and both became final and binding. *Id.* at 2-3. The employer then authorized and paid for the surgeries. The orders did not direct the employer to accept any specific conditions. Notably, the Board found that the employer was not precluded from challenging causation of any specific medical conditions on appeal in *Green*, including conditions treated by the surgeries that were the subject of the Department’s prior orders that had become final and binding. *Id.* at 3. In fact, the Board found that the evidence failed to establish a causal

connection between the industrial injury and any condition treated by the surgeries. *Id.* at 4. However, since the employer failed to protest or appeal the orders directing it to authorize the two surgeries and those orders had become final and binding, any consequences of the surgeries were the employer's responsibility and would be considered on the issue of employability and permanent partial disability. *Id.* In stark contrast, in this present case there was never a Department order issued directing the employer to authorize or pay for treatment of the patella condition at issue that was not appealed. The employer simply chose to pay for treatment that Ms. Maphet's doctor said she needed. The unchallenged final and binding authorization orders from the Department were vital to the Board's analysis in *Green* and that fact does not exist in this present case.

Now comparing *Green* to *Hull*, the Court of Appeals in *Hull* acknowledged and stood by the premise from *Green* and *Ross* that if a specific medical condition is allowed as proximately related to an occupational disease or an industrial injury, the downstream complications of treatment for that allowed condition are also allowed. *Hull v. PeaceHealth Med. Group*, No 74413-5-1, Wash. App. (September 26, 2016, Div. 1); CBR, at 140-158. Yet, the *Hull* Court still required a showing of a causal connection between the underlying conditions being treated that led to the complications and the original industrial exposure.

See, Id. Specifically, thoracic outlet surgery led to the complications at issue in *Hull*. In order for the employer to be responsible for those complications, there had to be a causal connection between thoracic outlet syndrome and the industrial injury shown by competent medical evidence. And, the *Hull* Court excluded all evidence of payment for medical treatment or services to prove that connection. In *Hull*, the employer was ultimately found responsible for the complications flowing from the authorized surgery, but it was not because the employer paid for the surgery. That evidence was excluded. It was because, based on the medical evidence, the surgery was found to be proximately related to the industrial exposure and the subsequent complications were found to be proximately related to the surgery. *Id.* Ms. Maphet argues that the issue in *Hull* was whether the conditions arising out of the thoracic outlet surgery were related to that authorized surgery. Appellant's Brief, at 42. That is incorrect. The issue was whether thoracic outlet syndrome was proximately related to the original occupational disease because if so, the employer is responsible for the consequences of thoracic outlet surgery. With respect, the appellant's reading of *Hull* is wrong.

In applying the governing law to the facts of this present case, Ms. Maphet has agreed that the January 24, 2013, surgery by Dr. Greenleaf leading up to the March 20, 2015, surgery was designed to

correct her patellofemoral instability. Jennifer Maphet Testimony, at 38. On September 19, 2012, Dr. Greenleaf documented that the knee looked stable but, nevertheless, he performed the fifth surgery on the knee on January 24, 2013. *Id.* at 14, 18. The Collateral Consequences Doctrine says that when a doctor is performing a necessary and proper surgery for a condition related to an industrial injury, then the employer is responsible for any consequences of that treatment. Dr. Greenleaf choosing to perform a surgery for a condition wholly unrelated to a workers' compensation claim in the treatment of his patient is not what is contemplated by the Collateral Consequences Doctrine. The employer is responsible for downstream consequences of treatment related to the injury. Whether the patellofemoral instability treated by the January 24, 2013, surgery and the subsequent March 20, 2015, surgery for the same condition is necessary and proper treatment for a condition related to the injury is a question of fact for the jury and is in dispute based on the medical evidence. The fact that the employer authorized the surgery recommended by her doctor does not have any legal effect on that medical question.

The statutory scheme also supports the concept that payment of benefits does not bind parties to industrial injury claims. These statutes are contrary to the appellant's reading of the Collateral Consequences

Doctrine. Under Revised Code of Washington (RCW) 51.32.190, the payment of compensation prior to the entry of an order by the Department shall not be considered a binding determination of the obligations of the self-insurer. The acceptance of compensation by the worker prior to such order is likewise not considered a binding determination of their rights. Similarly, RCW 51.32.210 states that the payment of temporary disability compensation or any other benefits, which would include medical benefits, prior to the entry of an order by the Department is not binding on the Department or the worker in a State Fund case either. Ms. Maphet argues that these statutes treat self-insured employers and those insured through the State Fund differently in terms of the binding effect of benefits. She argues that in the self-insurance context, only payment of time loss benefits, as opposed to medical benefits, are non-binding. Her stated basis for this position is that the legislature uses the word “compensation” in the self-insured statute rather than the broader phrase of “any other benefits” in the statute governing the State Fund. Appellant’s Brief at 34-35. At the same time, she argues throughout her brief that when a self-insured employer makes a decision to authorize medical treatment, which is essentially agreement to pay a bill, the self-insured employer’s actions are as binding on their legal obligations as a formal Department order.

She conveniently asks this Court to treat the self-insured employer exactly like the adjudicative body of the Department when it suits her and to treat the two differently when it does not suit her.

Also informative is RCW 51.32.240. This statute provides for recoupment of benefits erroneously paid. It also allows recoupment of paid benefits by the employer for adjudicator error when a Department order on that issue is not final and binding. RCW 51.32.240(1)(b). Adjudicator error includes failure to consider information in the claim file, failure to secure adequate information, or an error in judgment. *Id.* In light of this, it is completely disingenuous to say that a decision to pay for treatment while a claim is being processed forever binds the self-insured employer, who is not an adjudicative body like the Department, when a Department order that is not final and binding does not even bind the employer. The statute contemplates the fact that erroneous payments for treatment would be made and provides a remedy.

Washington Administrative Code (WAC) 296-15-266(1)(c)(i) has been raised in support of the contention that the employer is automatically responsible for any condition that it pays to treat. Reliance on this rule is misplaced. WAC 296-15-266(1)(c)(i) governs penalties for unreasonable delay and places a procedural requirement on the employer if it is going to choose to deny payment of a bill. It

certainly does not say that if the employer chooses to pay for a bill, it will be held responsible for any medical conditions associated with that bill.

Additionally, Ms. Maphet cites the Department's definition of "Authorization" and "Acceptance" to support her position that because the employer authorized/paid for three surgeries to fix the claimant's kneecap, the employer accepted full, and essentially eternal, responsibility for the kneecap condition. Appellant's Brief at 38-40. However, there is no difference between authorizing and paying from the claim processor's perspective. The employer would direct this Court to the deposition of Katie DeFrang. Counsel for the employer asked Ms. DeFrang, "Is it your understanding that the bills for services that we have identified and discussed within this present appeal would be related to either the subluxation patella issue that was attempted to be repaired in the March 20, 2015, surgery as well as falls that resulted in a consequence of that particular issue?" Claimant's counsel, Mr. Palmer, responded, "Objection. It calls for medical opinion." DeFrang Dep. at 31. This excerpt from the testimony illustrates the employer's exact point. The third-party administrator processing the claim is making decisions in conjunction with the employer as to whether to pay for treatment that an injured worker's doctor has recommended. They do

not render medical opinions. For the claimant's counsel to object to Ms. DeFrang testifying as to the medical connection between the condition treated and the treatment requested, but then base this entire appeal on a position that Ms. DeFrang's choice to authorize treatment is binding upon that very same medical question is absurd.

The policy implications of the use of payment evidence against an employer cannot be overstated. If it was the rule that if an employer pays a treatment benefit, they are forever saddled with the condition treated by that benefit, it will paralyze employers. By extension, injured workers will ultimately suffer the consequences. This rule would incentivize employers to error on the side of caution in difficult or questionable cases by denying or disputing treatment benefits because if they pay for the wrong procedure, the financial consequences could be massive. This will encourage litigation ultimately delaying treatment for the worker.

This rule advocated by Ms. Maphet is completely unworkable and not in the best interest of a worker when considering the time it takes to obtain a thorough medical opinion in the industrial insurance context. An employer whose default is to cover the cost of medical treatment for one of its workers with the expectation that the legal and adjudicative process will work itself out in due time is an employer who takes the humane approach toward the worker's treatment. The claimant wants this Court to

tell that employer that if they take this humane approach, they will be denied any subsequent adjudicative due process on that issue. Employers agree every single day to pay for treatment that they should not technically be required to pay for, either because it is more cost effective than fighting the worker, doctor, and Department on the issue, or because it simply seems like the right thing to do for a loyal employee. If the payment for treatment by an employer's third-party administrator automatically places liability on the employer for any condition that such treatment could be associated with, this workers' compensation process can neither be efficient nor fair for any party involved.

Under the Compensable Consequences Doctrine, the relevant question is not whether the surgeries of January 24, 2013, and May 14, 2013, were the proximate cause of the need for the March 20, 2015,e surgery, as Ms. Maphet argues. Appellant's Brief at 19. She states, "When the plaintiff authorized surgeries to attempt to fix Ms. Maphet's kneecap instability, that kneecap instability is now related to the original industrial injury." However, as detailed above, that is not what the Compensable Consequences Doctrine stands for. The relevant question under the Compensable Consequences Doctrine has nothing to do with whether the employer agreed to pay for a surgery. The question is whether the kneecap instability was caused by a treatment procedure

related to the original injury. Those facts were disputed at trial and were properly presented to a jury to render a decision. The claimant cannot cite any legal support for the contention that the employer is not entitled to a decision on the merits of the actual medical evidence with regard to causation. Thus, the trial judge properly denied the claimant's motion.

2. The trial court properly instructed the jury on the governing law.

Jury instructions given by a trial court are reviewed de novo, and an instruction that contains an erroneous statement of the law is reversible error when it prejudices a party. Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury, and when taken as a whole properly inform the jury of the law to be applied. *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). This Court is to review a trial court's rejection of a party's proposed jury instruction for an abuse of discretion. *City of Seattle v. Pearson*, 192 Wn.App. 802, 820, 369 P.3d 194 (Div. I, 2016).

Ms. Maphet argues that the instructions of the trial court did not accurately instruct the jury on the law of compensable consequences. Specifically, she argues that the jury was not accurately instructed as to the legal effects of the authorized prior surgeries or whether

Dr. Greenleaf's actions during the January 24, 2013, surgery constitute an intervening cause of the kneecap instability. Appellant's Brief, at 44.

Ms. Maphet has taken issue with the trial court's Instruction 14 and argued that several proposed instructions should have been included in the Court's instructions. Appellant's Brief at 45. Again, the employer asks this Court not to consider the failure to give the proposed instructions at issue because the text of Department's Proposed Instructions 1 and 2 and Ms. Maphet's Proposed Instruction 16 are not included in the record provided to this Court. When the appellant chose to submit a partial record, she had an obligation to include all of the relevant court documents. She cannot now supplement her own copies of proposed instructions by attaching them to the appendix of her brief. Without the ability to review the text of proposed instructions in the official trial court record, this Court is rendered incapable of ruling on whether the trial judge abused his discretion in denying those instructions.

The appellant's argument regarding the jury instructions continues to revolve around her erroneous interpretation of the law of compensable consequences. Her position regarding what the Compensable Consequences Doctrine stands for is the crux of every assignment of error alleged in this appeal, including her challenge to the jury instructions. She argues that the jury should have been instructed that if the employer

authorizes a surgery, it must be responsible for any subsequent surgeries to address the same condition. Appellant's Brief at 46. That is not the law, as discussed in great detail above. The governing law is, if the condition at issue, patellofemoral instability, was the proximate result of treatment provided to address a condition proximately caused by the industrial injury, then the employer is responsible for that condition, which is precisely how the jury was instructed in Instruction 14.

The Compensable Consequences Doctrine does not stand for the proposition that if the employer's third-party claims administrator agrees to pay for a surgery, the employer is forever responsible for every condition treated by that surgery. In fact, such evidence of payment and authorization is inadmissible. The doctrine also does not stand for the proposition that payment for a surgery by an employer's third-party claims administrator is a substitute for the proximate cause analysis based on competent medical testimony, the bedrock of workers' compensation law. As a result, all of Ms. Maphet's arguments fail.

V. CONCLUSION

Based on the argument set forth above, the employer asks this Court to AFFIRM the trial verdict as commemorated in the order of Judge Stahnke issued on October 6, 2017. CP, Order, at 199. That order reversed the Board of Industrial Insurance Appeals' Decision and Order dated March 8,

2017, with regard to Board Docket No. 15 21036. As such, the jury found that the Department's September 25, 2015, order is reversed with fees and costs awarded to the plaintiff as the prevailing party. The employer further asks this Court in accordance with its cross-appeal to specifically find that evidence of authorizing or paying for treatment within an industrial claim is inadmissible to show that the employer is responsible for a medical condition or specific treatment.

June 12, 2018

Respectfully Submitted,

A handwritten signature in cursive script, reading "Brett B. Schoepper", is written over a horizontal line.

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VI. APPENDIX

Revised Code of Washington 51.04.010

Declaration of police power—Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

Revised Code of Washington 51.32.190

Self-insurers—Notice of denial of claim, reasons—Procedure—Powers and duties of director.

(1) If the self-insurer denies a claim for compensation, written notice of such denial, clearly informing the claimant of the reasons therefor and that the director will rule on the matter shall be mailed or given to the claimant and the director within thirty days after the self-insurer has notice of the claim.

(2) Until such time as the department has entered an order in a disputed case acceptance of compensation by the claimant shall not be considered a binding determination of his or her rights under this title. Likewise the payment of compensation shall not be considered a binding determination of the obligations of the self-insurer as to future compensation payments.

(3) Upon making the first payment of income benefits, the self-insurer shall immediately notify the director in accordance with a form to be

prescribed by the director. Upon request of the department on a form prescribed by the department, the self-insurer shall submit a record of the payment of income benefits including initial, termination or terminations, and change or changes to the benefits. Where temporary disability compensation is payable, the first payment thereof shall be made within fourteen days after notice of claim and shall continue at regular semimonthly or biweekly intervals.

(4) If, after the payment of compensation without an award, the self-insurer elects to controvert the right to compensation, the payment of compensation shall not be considered a binding determination of the obligations of the self-insurer as to future compensation payments. The acceptance of compensation by the worker or his or her beneficiaries shall not be considered a binding determination of their rights under this title.

(5) The director: (a) May, upon his or her own initiative at any time in a case in which payments are being made without an award; and (b) shall, upon receipt of information from any person claiming to be entitled to compensation, from the self-insurer, or otherwise that the right to compensation is controverted, or that payment of compensation has been opposed, stopped or changed, whether or not claim has been filed, promptly make such inquiry as circumstances require, cause such medical examinations to be made, hold such hearings, require the submission of further information, make such orders, decisions or awards, and take such further action as he or she considers will properly determine the matter and protect the rights of all parties.

(6) The director, upon his or her own initiative, may make such inquiry as circumstances require or is necessary to protect the rights of all the parties and he or she may enact rules and regulations providing for procedures to ensure fair and prompt handling by self-insurers of the claims of workers and beneficiaries.

Revised Code of Washington 51.32.210

Claims of injured workers, prompt action—Payment—Acceptance—Effect.

Claims of injured workers of employers who have secured the payment of compensation by insuring with the department shall be promptly acted upon by the department. Where temporary disability compensation is payable, the first payment thereof shall be mailed within fourteen days after receipt of the claim at the department's offices in Olympia and shall continue at regular semimonthly intervals. The payment of this or any other benefits under this title, prior to the entry of an order

by the department in accordance with RCW 51.52.050 as now or hereafter amended, shall be not considered a binding determination of the obligations of the department under this title. The acceptance of compensation by the worker or his or her beneficiaries prior to such order shall likewise not be considered a binding determination of their rights under this title.

Revised Code of Washington 51.32.240

Erroneous payments—Payments induced by willful misrepresentation—Adjustment for self-insurer's failure to pay benefits—Recoupment of overpayments by self-insurer—Penalty—Appeal—Enforcement of orders.

(1)(a) Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by willful misrepresentation, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived.

(b) Except as provided in subsections (3), (4), and (5) of this section, the department may only assess an overpayment of benefits because of adjudicator error when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

(c) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his or her discretion to waive, in whole or in part, the amount of any such timely claim where the recovery would be against equity and good conscience.

(2) Whenever the department or self-insurer fails to pay benefits because of clerical error, mistake of identity, or innocent misrepresentation, all not induced by recipient willful misrepresentation, the recipient may request an adjustment of benefits to be paid from the state fund or by the self-insurer, as the case may be, subject to the following:

(a) The recipient must request an adjustment in benefits within one year from the date of the incorrect payment or it will be deemed any claim therefore has been waived.

(b) The recipient may not seek an adjustment of benefits because of adjudicator error. Adjustments due to adjudicator error are addressed by the filing of a written request for reconsideration with the department of labor and industries or an appeal with the board of industrial insurance appeals within sixty days from the date the order is communicated as provided in RCW 51.52.050. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

(3) Whenever the department issues an order rejecting a claim for benefits paid pursuant to RCW 51.32.190 or 51.32.210, after payment for temporary disability benefits has been paid by a self-insurer pursuant to RCW 51.32.190(3) or by the department pursuant to RCW 51.32.210, the recipient thereof shall repay such benefits and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The director, under rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience.

(4) Whenever any payment of benefits under this title has been made pursuant to an adjudication by the department or by order of the board or any court and timely appeal therefrom has been made where the final decision is that any such payment was made pursuant to an erroneous adjudication, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim whether state fund or self-insured.

(a) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience. However, if the director waives in whole or in part any such payments due a self-insurer, the self-insurer shall be reimbursed the amount waived from the self-insured employer overpayment reimbursement fund.

(b) The department shall collect information regarding self-insured claim overpayments resulting from final decisions of the board and the courts, and recoup such overpayments on behalf of the self-insurer from any open, new, or reopened state fund or self-insured claims. The

department shall forward the amounts collected to the self-insurer to whom the payment is owed. The department may provide information as needed to any self-insurers from whom payments may be collected on behalf of the department or another self-insurer. Notwithstanding RCW 51.32.040, any self-insurer requested by the department to forward payments to the department pursuant to this subsection shall pay the department directly. The department shall credit the amounts recovered to the appropriate fund, or forward amounts collected to the appropriate self-insurer, as the case may be.

(c) If a self-insurer is not fully reimbursed within twenty-four months of the first attempt at recovery through the collection process pursuant to this subsection and by means of processes pursuant to subsection (6) of this section, the self-insurer shall be reimbursed for the remainder of the amount due from the self-insured employer overpayment reimbursement fund.

(d) For purposes of this subsection, "recipient" does not include health service providers whose treatment or services were authorized by the department or self-insurer.

(e) The department or self-insurer shall first attempt recovery of overpayments for health services from any entity that provided health insurance to the worker to the extent that the health insurance entity would have provided health insurance benefits but for workers' compensation coverage.

(5)(a) Whenever any payment of benefits under this title has been induced by willful misrepresentation the recipient thereof shall repay any such payment together with a penalty of fifty percent of the total of any such payments and the amount of such total sum may be recouped from any future payments due to the recipient on any claim with the state fund or self-insurer against whom the willful misrepresentation was committed, as the case may be, and the amount of such penalty shall be placed in the supplemental pension fund. Such repayment or recoupment must be demanded or ordered within three years of the discovery of the willful misrepresentation.

(b) For purposes of this subsection (5), it is willful misrepresentation for a person to obtain payments or other benefits under this title in an amount greater than that to which the person otherwise would be entitled. Willful misrepresentation includes:

- (i) Willful false statement; or
- (ii) Willful misrepresentation, omission, or concealment of any material fact.

(c) For purposes of this subsection (5), "willful" means a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing benefits under this title.

(d) For purposes of this subsection (5), failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred.

(e) For purposes of this subsection (5), a material fact is one which would result in additional, increased, or continued benefits, including but not limited to facts about physical restrictions, or work-type activities which either result in wages or income or would be reasonably expected to do so. Wages or income include the receipt of any goods or services. For a work-type activity to be reasonably expected to result in wages or income, a pattern of repeated activity must exist. For those activities that would reasonably be expected to result in wages or produce income, but for which actual wage or income information cannot be reasonably determined, the department shall impute wages pursuant to RCW 51.08.178(4).

(6) The worker, beneficiary, or other person affected thereby shall have the right to contest an order assessing an overpayment pursuant to this section in the same manner and to the same extent as provided under RCW 51.52.050 and 51.52.060. In the event such an order becomes final under chapter 51.52 RCW and notwithstanding the provisions of subsections (1) through (5) of this section, the director, director's designee, or self-insurer may file with the clerk in any county within the state a warrant in the amount of the sum representing the unpaid overpayment and/or penalty plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of the worker, beneficiary, or other person mentioned in the warrant, the amount of the unpaid overpayment and/or penalty plus interest accrued, and the date the warrant was filed. The amount of the warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the worker, beneficiary, or other person against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department or self-insurer in the manner provided by law in

the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the worker, beneficiary, or other person within three days of filing with the clerk.

The director, director's designee, or self-insurer may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice to withhold and deliver property of any kind if there is reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property that is due, owing, or belonging to any worker, beneficiary, or other person upon whom a warrant has been served for payments due the department or self-insurer. The notice and order to withhold and deliver shall be served by a method for which receipt can be confirmed or tracked accompanied by an affidavit of service by mailing or served by the sheriff of the county, or by the sheriff's deputy, or by any authorized representative of the director, director's designee, or self-insurer. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired or in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property that may be subject to the claim of the department or self-insurer, such property shall be delivered forthwith to the director, the director's authorized representative, or self-insurer upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount, plus costs, claimed by the director, director's designee, or self-insurer in the notice. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

This subsection shall only apply to orders assessing an overpayment which are issued on or after July 28, 1991: PROVIDED, That this subsection shall apply retroactively to all orders assessing an overpayment resulting from fraud, civil or criminal.

(7) Orders assessing an overpayment which are issued on or after July 28, 1991, shall include a conspicuous notice of the collection methods available to the department or self-insurer.

Washington Administrative Code 296-15-266(1)(c)(i)

(1) Under what circumstances will the department consider assessing a penalty for an unreasonable delay of benefits, when requested by a worker? Upon a worker's request, the department will consider assessment of an unreasonable delay of benefits penalty for:

(a) Time loss compensation benefits: The department will issue an unreasonable delay order, and assess associated penalties based on the unreasonably delayed time loss as determined by the department, if a self-insurer:

(i) Has written medical certification based on objective findings from the attending medical provider authorized to treat that the claimant is unable to work because of conditions proximately caused by the industrial injury or occupational disease, or the claimant is participating in a department-approved vocational plan; and

(ii) Fails to make the first time loss payment to the claimant within fourteen calendar days of notice that there is a claim*, or fails to continue time loss payments on regular intervals as required by RCW 51.32.190(3); and

(iii) Fails to request, with supporting medical evidence and within thirty days of receiving written notice of a newly contended medical condition related to the industrial injury or occupational disease, that the department settle a dispute about the covered conditions or eligibility for time loss compensation. For good cause, in the department's sole discretion, a sixty-day extension may be granted.

* Notice of claim is provided to the self-insured employer when all the elements of a claim are met. The elements of a claim are:

- Description of incident. Examples: Self-Insurance Form 2 (SIF-2), physician's initial report (PIR), employer incident report.
- Diagnosis of the medical condition. Examples: PIR, on-site medical facility records if supervised by provider qualified to diagnose.
- Treatment provided or treatment recommendations. Examples: PIR, on-site medical facility records if supervised by provider qualified to treat.
- Application for benefits. Examples: SIF-2, PIR, or other signed written communication that evinces intent to apply.

(b) Unreasonable delays of loss of earning power compensation payments or permanent partial disability award payments will also be subject to penalty.

(c) Payment of medical treatment benefits: The department will issue an unreasonable delay order, and assess associated penalties based on the department's fee schedule, order, and accrued principal and interest, if a self-insurer fails to pay all fees and medical charges within sixty days of receiving a proper billing, as defined in WAC 296-20-125 through 296-20-17004, or sixty days after the claim is allowed per RCW 51.36.080.

(i) If the self-insurer believes that it should not pay the billing, or if the self-insurer believes that the treatment is not for a condition proximately caused by the industrial injury or occupational disease, the self-insurer must, within sixty calendar days of receiving a billing, clearly state in writing to the worker and the medical provider why the payment is denied.

(ii) If a denial is disputed by the worker or medical provider and the self-insurer does not allow the bill, the self-insurer must notify the department within thirty days, and the department will review the reasons provided by the self-insurer and will make a decision by order within thirty days.

(d) Authorization of emergent or life-saving medical treatment benefits: The department will issue an unreasonable delay order, and assess associated penalties, based on the department's fee schedule, order, and accrued principal and interest, if a self-insurer fails to respond to requests to authorize emergent or life-saving treatment within fourteen days after receiving written notice of the request for treatment.

(i) If the request is denied, the self-insured employer must clearly tell the medical provider and the claimant, in writing, why the request is being denied.

(ii) If the medical provider or claimant disagrees with the self-insurer's decision, either of them may file a dispute with the department.

(e) Failure to pay benefits without cause: The department will issue an order determining an unreasonable refusal to pay benefits, and assess associated penalties, based on the department's calculation of benefits or fee schedule, if a self-insurer fails to pay a benefit such as time loss compensation, loss-of-earning-power compensation, permanent partial disability award payments, or medical treatment when there is no medical, vocational, or legal doubt about whether the self-insurer should pay the benefit. Accrued principal and interest will apply to nonpayment of medical benefits.

(f) Paying benefits during an appeal to the board of industrial insurance appeals: The department will issue an unreasonable delay order,

and assess associated penalties, based on the department's calculation of benefits or fee schedule, if a self-insurer appeals a department order to the board of industrial insurance appeals, and fails to provide the benefits required by the order on appeal within fourteen calendar days of the date of the order, and thereafter at regular fourteen day or semi-monthly intervals, as applicable, until or unless the board of industrial insurance appeals grants a stay of the department order, or until and unless the department reassumes jurisdiction and places the order on appeal in abeyance, or until the claimant returns to work, or the department issues a subsequent order terminating the benefits under appeal.

(g) Benefits will not be considered unreasonably delayed if paid within three calendar days of the statutory due date.

(2) How is a penalty request created and processed?

(a) An injured worker may request a penalty against his or her self-insured employer by:

(i) Completing the appropriate self-insurance form or sending a written request providing the reasons for requesting the penalty;

(ii) Attaching supporting documents (optional).

(b) Within ten working days of receipt of a certified request, the self-insured employer must send its claim file to the department. Failure to timely respond may subject the self-insured employer to a rule violation penalty under RCW 51.48.080. The employer may attach supporting documents, or indicate, in writing, if the employer will be providing further supporting documents, which must be received by the department within five additional working days. If the employer fails to timely respond to the penalty request, the department will issue an order in response to the injured worker's request based on the available information.

(c) The department will issue an order within thirty days after receiving a complete written request for penalty per (a) of this subsection. The department's review during the thirty-day period for responding to the injured worker's request will include only the claim file records and supporting documents provided by the worker and the employer per (a) and (b) of this subsection.

(d) In deciding whether to assess a penalty, the department will consider only the underlying record and supporting documents at the time of the request which will include documents listed in (a) and (b) of this subsection, if timely available, to determine if the alleged untimely benefit was appropriately requested and if the employer timely responded.

(e) The department order issued under (c) of this subsection is subject to request for reconsideration or appeal under the provisions of RCW 51.52.050 and 51.52.060.

Washington State Court Evidence Rule 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Washington State Court Evidence Rule 409

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Washington State Court Rules of Appellate Procedure 10.3(a)(8)

(8) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

Appendix 12

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

LORIANN HULL,)
)
 Appellant,) No. 74413-5-1
)
 v.) DIVISION ONE
)
 PEACEHEALTH MEDICAL GROUP,) UNPUBLISHED OPINION
)
 Respondent.) FILED: September 26, 2016

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COURT OF APPEALS
STATE OF WASHINGTON

SPEARMAN, J. — While employed at St. Joseph Hospital PeaceHealth Medical Group (PeaceHealth) or shortly thereafter, LoriAnn Hull began to feel pain in her shoulders. This led to surgeries for thoracic outlet syndrome which resulted in significant complications that continue to plague her. Four years after the surgeries, PeaceHealth challenged the Department of Labor and Industries' (Department) determination that Hull's employment caused thoracic outlet syndrome. The trial court found that Hull's condition was not caused by her employment. On appeal, Hull contends the trial court's finding is not supported by substantial evidence. We agree and reverse.¹

¹ Subsequent to withdrawal of her counsel, appellant submitted a number of documents including a letter, email exchanges between her and PeaceHealth, medical records, and other documents. To the extent these documents were not already a part of the record on appeal, we do not consider them because they are untimely.

FACTS

Appellant LoriAnn Hull worked for St. Joseph Hospital PeaceHealth for 20 years as an admitting representative in the emergency room. Her duties included gathering patient information, inputting information, pulling forms and patient charts, affixing labels to documents, assembling and breaking down charts, sorting and stacking documents in piles, and cleaning name badges. These duties involved reaching over an arm-length away at waist level, reaching for items at or above her forehead, writing on paper, and typing on a computer.

Hull filed a worker's compensation claim on October 23, 2006 after experiencing elbow discomfort, aggravated by repetitive motion at work. She had difficulty bending and extending her arms. The Department issued an order allowing her claim on December 3, 2007. It did not specify the conditions allowed.²

On November 7, 2006, Hull saw her primary care provider, Dr. Hughes, who diagnosed her with left and right medial epicondylitis, a condition of the tendons in the elbow. Dr. Hughes saw Hull again on January 12, 2007. The elbow diagnosis remained the same and she was referred for electrodiagnostic studies. These were performed on February 9, 2007 and were normal.³

² The record does not include Hull's claim or the Department's order. However, a jurisdictional history to which the parties stipulated at hearing "for jurisdictional purposes only" includes information about the Department's December 3, 2007 order. Clerk's Papers (CP) at 94.

³ A normal electrodiagnostic test does not rule out thoracic outlet syndrome. Thoracic outlet syndrome potentially shows up on an electrodiagnostic test only if it is serious. Intermittent thoracic outlet syndrome can result in a normal study. While an electrodiagnostic test is frequently used in the diagnostic process for thoracic outlet syndrome, it is not, by itself, helpful in ruling in or out the diagnosis.

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Hull continued to work. To avoid pain, she adjusted her motions. To reach for something, she twisted her shoulder towards it so to avoid extending her arm fully. Hull began to feel pain in her left shoulder in March 2007. She continued to work at PeaceHealth at least through that date.

Hull saw Dr. Hughes again on July 9 and 26, 2007, reporting that she had pain in her left shoulder. Hull was referred to an orthopedic surgeon for the shoulder problem. She tried non-invasive treatment such as physical therapy, but ultimately had acromioplasty surgery on her left shoulder in October, 2007.⁴ It did not resolve the problem. Hull attempted to return to work after that surgery.⁵ With her left side immobilized from the surgery, she began feeling pain in her right shoulder.

Because acromioplasty surgery did not resolve her pain, Hull was referred to a thoracic outlet syndrome specialist. Thoracic outlet syndrome refers to three separate types of conditions in which either the artery, the veins, or the nerve are compressed at one of several sites in the body. Neurogenic thoracic outlet syndrome, Hull's condition, arises where the nerves that pass through from the spinal cord and the neck out to the arms are compressed. Neurogenic thoracic outlet syndrome is characterized by steadily worsening pain, numbness, tingling, and weakness in the shoulder, neck, arm, and hand.

⁴ The record does not explain the nature of this procedure.

⁵ Hull's full work history is not in the record.

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Hull saw a thoracic outlet specialist, Dr. Johansen, on March 24, 2009. She reported steadily worsening pain, numbness, tingling, and weakness in her left arm and described her working conditions and onset of symptoms. Dr. Johansen reviewed prior testing and did a physical examination. One of the prior tests that he considered was a scalene block – an anesthetic procedure that temporarily relieved Hull's symptoms - which is an accurate and specific test for thoracic outlet syndrome. The effectiveness of the scalene block demonstrated that Hull had thoracic outlet syndrome. Dr. Johansen diagnosed Hull with neurogenic thoracic outlet syndrome based on workplace repetitive motion injury, appropriate story, symptoms, physical examination findings, and a strongly positive scalene block.

On April 22, 2009, Dr. Johansen performed surgery on Hull to correct the thoracic outlet syndrome. It did not resolve the symptoms. He performed a second surgery on December 21, 2009. This surgery resulted in significant complications, including balance problems, breathing problems, difficulty swallowing, dry heaving, and emotional problems including adjustment disorder with depressed mood.

In 2013, the Department issued three orders that directed PeaceHealth to pay for complications from Hull's thoracic outlet syndrome surgery. Those orders, which are the subject of this litigation directed PeaceHealth to pay for post-surgery complications including pulmonary conditions, balance problems, dysphasia, cricopharyngeal spasms, and adjustment disorder with depressed mood. They also directed PeaceHealth to pay for the psychiatric medication

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Cymbalta. PeaceHealth appealed these orders to the Board of Industrial Insurance Appeals (Board).

The appeal proceeded to an evidentiary hearing before an Industrial Appeals Judge (IAJ) on May 23, 2014. Hull's attending physician, Dr. Johansen, testified in support of Hull's claim. PeaceHealth presented testimony by several physicians, including Dr. Kremer, a retired vascular surgeon. He reviewed Hull's medical records and performed a one-time partial evaluation of Hull in September 2012, nearly three years after her second thoracic outlet syndrome surgery. Dr. Kremer testified that Hull never had thoracic outlet syndrome and even if she did, it was not caused by her working conditions.

The IAJ issued a proposed decision and order on October 6, 2014 upholding the Department's orders directing PeaceHealth to pay for complications from Hull's thoracic outlet syndrome. PeaceHealth filed a petition for review. The Board denied the petition for review and adopted the IAJ's proposed decision. The decision and order upheld the Department's determination that Hull's thoracic outlet syndrome arose naturally and proximately out of the distinctive conditions of her employment with PeaceHealth, thereby allowing the downstream consequences of her surgeries.

PeaceHealth appealed this decision to Whatcom County Superior Court, which held a bench trial on August 25, 2015 and issued a memorandum decision

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overturning the Board and finding in favor of PeaceHealth.⁶ The court issued an order on December 2, 2015 which included the following "Conclusion of Law":

1. The Board of Industrial Insurance Appeals erred in admitting evidence regarding payment of services associated with defendant's thoracic outlet syndrome under Evidence Rule 409 and as such evidence regarding payment of such services is stricken from the record.
3. Defendant was subsequently diagnosed with a condition of thoracic outlet syndrome for which surgery was recommended and performed April 22, 2009 and December 21, 2009. Defendant's thoracic outlet syndrome did not arise naturally and proximately from the distinctive conditions of her employment with PeaceHealth Medical Group.
8. The Board of Industrial Insurance Appeals' decision dated December 8, 2014, is reversed.

CP at 823-30. Hull appeals.

DISCUSSION

The Industrial Insurance Act includes judicial review provisions that are specific to workers' compensation determinations. The superior court's review of a Board determination is de novo. RCW 51.52.115. The Board's decision is prima facie correct, and a party attacking the decision must support its challenge by a preponderance of the evidence. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180, 210 P.3d 355 (2009) (citing Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999)). By contrast, this court reviews the superior court's decision under the ordinary standard of review for civil cases. "We review whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the

⁶ The memorandum decision is not in the record.

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findings." Watson v. Dep't of Labor & Indus., 133 Wn. App. 903, 909, 138 P.3d 177 (2006) (citing Ruse, 138 Wn.2d at 5; RCW 51.52.115).

The Industrial Insurance Act (IIA) provides that a worker suffering disability from an occupational disease shall receive benefits under the Act. RCW 51.32.180. An occupational disease is defined as "such disease or infection as arises naturally and proximately out of employment." RCW 51.08.140. "[A] worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment." Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). "The causal connection between a claimant's physical condition and his or her employment must be established by competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment." Id. at 477 (citing Ehman v. Dep't of Labor & Indus., 33 Wn.2d 584, 206 P.2d 787 (1949)). The disease is not "proximate" if there is an intervening, independent and sufficient cause for disease, so that it would not have been contracted but for working conditions. Simpson Logging Co. v. Dep't of Labor & Indus., 32 Wn.2d 472, 202 P.2d 448 (1949). "A physician's opinion as to the cause of the claimant's disease is sufficient when it is based on reasonable medical certainty even though the doctor cannot rule out all other possible causes. . . ." Intalco Aluminum v. Dep't of Labor & Indus., 66 Wn. App. 644, 654-55, 833 P.2d 390 (1992) (citing Halder v. Dep't of Labor & Indus., 44 Wn.2d 537, 543-45, 268 P.2d 1020 (1954)). "The evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given, a reasonable

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person can infer that a causal connection exists." Id. at 655 (citing Douglas v. Freeman, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991)). In a worker's compensation dispute, special consideration should be given to the opinion of a worker's attending physician. Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 761 P.2d 618 (1988). The trier of fact needn't give more weight or credibility to the attending physician's testimony, but must give it careful thought. Id. at 571.

[In this case, the record shows that Hull began feeling symptoms of what was eventually diagnosed as thoracic outlet syndrome either during, or immediately following, her employment with PeaceHealth. She testified that she began feeling pain in her shoulder about five months after filing the claim for her elbow condition and that in those five months she continued to work.⁷ During this time at work, she used her shoulders more in order to reduce the pain in her elbows caused by extending her arms. Expert medical testimony confirms that Hull should feel thoracic outlet syndrome symptoms concurrently with the work activity that caused the condition. There is no evidence of an intervening cause of her shoulder pain.]

Hull's attending physician, Dr. Johansen, explained how Hull's particular job duties caused thoracic outlet syndrome.⁸ He testified that repetitive out in front use of her arms and overhead work such as that performed by Hull is a

⁷ Hull's work history is incomplete in the record. She testified that she worked for St Joseph's starting in 1990 or 1991, and worked there for 19 years and 11 months. Therefore, she was an employee of St. Joseph's until 2010 or 2011. Once she started feeling symptoms in her shoulder, there is no information in the record about whether she worked continuously.

⁸ Dr. Johansen performs the majority of thoracic outlet syndrome surgeries in Washington State and authored chapters in a medical textbook on neurogenic thoracic outlet syndrome.

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cause of thoracic outlet syndrome. Hull's body habitus and height made her more susceptible to injury in these work conditions. Her elbow problems indicated that her work activities were causing repetitive motion injuries. Under Hamilton, "special consideration" should be given to Dr. Johansen's testimony as Hull's attending physician. There is no indication that the trial court gave such special consideration. It did not make a finding that PeaceHealth's experts were persuasive or that Dr. Johansen was not credible.

PeaceHealth offered testimony by forensic physicians that does not provide substantial evidence that Hull's thoracic outlet syndrome was not caused by her work activity. One expert, Dr. Madhani, deferred on the cause of Hull's thoracic outlet syndrome. Another expert, Dr. Kremer, testified that the working conditions of hairdressers and carpenters would cause thoracic outlet syndrome, but he denied that Hull's out in front and overhead use of her arms caused it. Dr. Kremer points to electrodiagnostic testing from February 2007 that was negative for thoracic outlet syndrome. However, this test was before Hull reported shoulder pain, and is not reliable to rule out intermittent thoracic outlet syndrome.⁹

If thoracic outlet syndrome is an allowed occupational disease, then the downstream complications of Hull's surgeries, the sequelae, are also allowed. Claimants must be reimbursed "[u]pon the occurrence of any injury to a worker

⁹ PeaceHealth also argues that Hull's injury must have occurred prior to when the claim was allowed by the Department, but they erroneously cite December 3, 2006 as the date the claim was allowed. In fact, it was allowed on December 3, 2007 and Hull did complain of shoulder problems prior to that date.

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entitled to compensation. . . .” RCW 51.36.010(2)(a). Compensation is required for all “proper and necessary medical and surgical services. . . .” Id. Proper and necessary treatment encompasses conditions secondary to the occupational disease, such as complications from surgery. See Anderson v. Allison, 12 Wn.2d 487, 122 P.2d 484 (1942).

PeaceHealth concedes that Hull’s balance problems, pulmonary condition, dysphagia, and cricopharyngeal spasms are proximately related to treatment for her thoracic outlet syndrome, and as conditions secondary to thoracic outlet syndrome, they are allowed. PeaceHealth does argue that Hull’s adjustment disorder with depressed mood is not proximately related to her surgeries. They support this argument with Dr. Friedman’s testimony. However, Dr. Friedman testified that Hull’s mental health conditions were not caused by her elbow condition. That is not at issue. The issue is whether her mental health condition was secondary to thoracic outlet syndrome, which is well supported by expert medical testimony. All of Hull’s downstream conditions listed in the orders appealed to the Department are allowed.

Lastly, Hull argued that the trial court erred by excluding evidence that PeaceHealth paid for Hull’s surgeries. The trial court correctly excluded evidence of payment under ER 409 and our analysis does not incorporate this fact.

[We conclude that there is not substantial evidence to support the trial court’s finding that Hull’s thoracic outlet syndrome and its sequelae did not arise naturally and proximately from her employment with PeaceHealth.] As discussed above, the opinions of PeaceHealth’s experts are insufficient to support the trial

No. 74413-5-1/11

court's conclusion. In addition, the timeline of Hull's symptoms, her work history and the testimony of her attending physicians strongly support the conclusion that her work activities caused thoracic outlet syndrome. And because the thoracic outlet syndrome was proximately caused by Hull's working conditions, the downstream consequences of her surgery are also covered.

The trial court's order is reversed, the Board's Decision and Order is affirmed and the case is remanded.

Sperms, J.

WE CONCUR:

Trickey, AJ

J. Leibel, J.

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COUNTY
WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHATCOM

PEACEHEALTH,

Plaintiff,

v.

LORIANN HULL,

Defendant.

No.: 15-2-00002-7

PROPOSED ORDER

§ 30

This matter was brought on appeal from an order denying Petition for Review issued by the Board of Industrial Insurance Appeals December 8, 2014. The Board of Industrial Insurance Appeals on that date issued an order denying the Petition for Review filed by plaintiff and therefore adopted a Proposed Decision and Order issued October 6, 2014. The plaintiff, PeaceHealth Medical Group, was represented by its attorney James L. Gress. The defendant, LoriAnn Hull, was represented by Nathan T. Dwyer. The Department of Labor and Industries through The Office of Assistant Attorney General Penny L. Allen declined to participate.

The defendant, LoriAnn Hull, filed an application for benefits on or about October 23, 2006, which was allowed by the Department of Labor and Industries as an occupational disease

1 December 3, 2007. The Department of Labor and Industries ultimately issued an order dated
2 May 1, 2013, which directed the employer to allow an adjustment disorder with depressed
3 mood condition as part of this industrial injury/occupational disease. Following a protest, that
4 order was affirmed July 18, 2013. The employer challenged that order to the Board of
5 Industrial Insurance Appeals which was assigned Docket No. 13 19412. The Department of
6 Labor and Industries issued additional orders. On September 13, 2013, the Department of
7 Labor and Industries directed the employer to accept the condition diagnosed as thoracic outlet
8 syndrome on this claim. The employer challenged this order and the Department issued a new
9 order October 17, 2013, which changed the September 13, 2013, order and directed the
10 employer to accept the pulmonary condition (s), balance problems, dysphagia, cricopharyngeal
11 spasms as a sequela from the April 22, 2009 and December 21, 2009 surgeries. The employer
12 challenged this order which was assigned Docket No. 13 22919. The Department of Labor and
13 Industries by order dated October 2, 2013, directed the employer to authorize and pay for the
14 prescription medication Cymbalta as prescribed by Dr. Thang Do, MD. The employer
15 challenged this decision to the Board of Industrial Insurance Appeals which was assigned
16 Docket No. 13 22918.
17
18
19

20 Evidence was taken before the Board of Industrial Insurance Appeals and hearings were
21 held by the Board of Industrial Insurance Appeals. By Proposed Decision and Order dated
22 October 6, 2014, Industrial Appeals Judge Sara M. Dannen issued an order with the following
23 findings of fact and conclusions of law:
24
25

///

1 FINDINGS OF FACT

2 1. On September 30, 2013 (Docket No. 13 19412) and on December 17, 2013

3 (Docket Nos. 13 22918 and 13 22919), an industrial appeals judge certified that the

4 parties agreed to include the jurisdictional histories in the Board record solely for
5 jurisdictional purposes.

6
7 2. Docket Nos. 13 19412, 13 22918, and 13 22919: LoriAnn Hull worked as an

8 Emergency Department Registration Specialist for 20 years. Her job duties included

9 gathering patient information (sometimes from over an arm's length away); inputting

10 patient information (first on paper, then into a computer using her non-dominant hand

11 for one-third of her shift); helping patients put on arm bands; assisting patients in their

12 wheelchairs; pulling forms and patient charges from at or above chest and head level;

13 affixing labels to multiple pages; assembling and breaking down patient charts;

14 separating, sorting, and stacking papers (sometimes to piles that were a full arm's

15 length away); gathering and manually cleaning multiple name badges before placing

16 them in a high cupboard to dry.

17
18 3. Docket Nos. 13 19412, 13 22918, and 13 22919: Gathering patient information

19 (sometimes from over an arm's length away); inputting patient information (first on

20 paper, then into a computer using her non-dominant hand for one-third of her shift);

21 helping patients put on arm bands; assisting patients in their wheelchairs; pulling forms

22 and patient charges from at or above chest and head level; affixing labels to multiple

23 pages; assembling and breaking down patient charts; separating, sorting, and stacking

24 papers (sometimes to piles that were a full arm's length away); gathering and manually

1 cleaning multiple name badges before placing them in a high cupboard to dry constitute
2 distinctive conditions of employment.

3 4. Docket Nos. 13 19412, 13 22918, and 13 22919: LoriAnn Hull's conditions diagnosed
4 as right and left medial epicondylitis and thoracic outlet syndrome arose naturally and
5 proximately out of distinctive conditions of her employment with PeaceHealth.

6
7 5. Docket No. 13 19412: LoriAnn Hull's adjustment disorder with depressed mood was
8 proximately caused and aggravated by her right and left medial epicondylitis and
9 thoracic outlet syndrome occupational disease.

10 6. Docket No. 13 22919: LoriAnn Hull's diaphragmatic dysfunction (weakness), balance
11 problems, dysphagia, and cricopharyngeal spasms were complications of surgical
12 treatment and therefore proximately caused by the occupational disease known as
13 thoracic outlet syndrome.

14
15 7. Docket No. 13 22918: As of October 2, 2013, LoriAnn Hull's adjustment disorder with
16 depressed mood condition was not fixed and stable and needed further proper and
17 necessary treatment, to wit: the prescription medication known as Cymbalta.

18
19
20 **CONCLUSIONS OF LAW**

21 1. Docket Nos. 13 19412, 13 22918, and 13 22919: The Board of Industrial Insurance
22 Appeals has jurisdiction over the parties and subject matter of these appeals.

23 2. Docket Nos. 13 19412, 13 22918, and 13 22919: LoriAnn Hull's right and left medial
24 epicondylitis and thoracic outlet syndrome are occupational diseases within the meaning
25 of RCW 51.08.140.

1 3. Docket No. 13 22918: LoriAnn Hull's adjustment disorder with depressed mood

2 proximately caused and aggravated by her occupational diseases was not fixed and
3 stable as of October 2, 2013, and she is entitled to further treatment, to wit: the

4 prescription medication known as Cymbalta. RCW 51.36.010.

5
6 4. The Department orders dated July 18, 2013, October 2, 2013, and October 17, 2013, are
7 correct and are affirmed.

8 Plaintiff filed a Petition for Review to the Board of Industrial Insurance Appeals and
9 the Board of Industrial Insurance Appeals on December 8, 2014, issued an order denying the
10 Petition for Review and indicating the Proposed Decision and Order became the Decision and
11 Order of the Board. Plaintiff filed an appeal to Whatcom County Superior Court which was
12 assigned Cause No. 15-2-00002-7.

13
14 This matter was tried as a bench trial before Superior Court Judge Ira Uhrig August 25,
15 2015. The parties provided oral argument and written briefs as well as the certified record
16 before the Board of Industrial Insurance Appeals. A memorandum decision was issued by the
17 Superior Court August 26, 2015. Within the memorandum decision, the following conclusions
18 of law were reached:

19
20 **CONCLUSIONS OF LAW**

21 1. The Board of Industrial Insurance Appeals erred in admitting evidence regarding
22 payment of services associated with defendant's thoracic outlet syndrome under
23 Evidence Rule 409 and as such evidence regarding payment of such services is stricken
24 from the record.
25

- 1 2. Defendant, LoriAnn Hull, filed a claim for occupational disease on or about October 23,
2 2006, which was allowed by the Department of Labor and Industries December 3, 2007.
3 As a result of the distinctive conditions of her employment, defendant developed a
4 condition that was appropriately diagnosed and treated as bilateral medial epicondylitis.
5
6 3. Defendant was subsequently diagnosed with a condition of thoracic outlet syndrome for
7 which surgery was recommended and performed April 22, 2009 and December 21,
8 2009. Defendant's thoracic outlet syndrome did not arise naturally and proximately
9 from the distinctive conditions of her employment with PeaceHealth Medical Group.
10
11 4. Defendant's subsequently developing thoracic outlet syndrome was not proximately
12 related to her bilateral medial epicondylitis.
13
14 5. Defendant's mental health condition, including but not limited to, adjustment disorder
15 with depressed mood, pulmonary conditions, balance problems, dysphagia,
16 cricopharyngeal spasms along with her need for the prescription medication Cymbalta
17 arose directly from the thoracic outlet syndrome procedures performed April 22, 2009
18 and December 21, 2009. These conditions and sequela were not proximately related to
19 defendant's bilateral medial epicondylitis.
20
21 6. Even had evidence regarding payment of the thoracic outlet syndrome procedures been
22 admissible, the Board of Industrial Insurance Appeals erred in concluding the thoracic
23 outlet syndrome surgeries and sequela were allowable and the responsibility of the
24 plaintiff based upon the aforementioned reasons.
25
7. The payment for medical treatment or service for a condition does not remove the
requirement that such condition, medical treatment or service be proximately related to

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the industrial injury/occupational disease and the employer is not estopped from challenging ultimate responsibility for such condition, medical treatment or service where such previous payment has occurred.

8. The Board of Industrial Insurance Appeals' decision dated December 8, 2014, is reversed.

Based upon the foregoing, the Court enters judgment as follows:

JUDGMENT

The Board of Industrial Insurance Appeals' decision dated December 8, 2014, is hereby reversed. To the extent the Board's decision affirmed orders issued by the Department of Labor and Industries dated July 18, 2013, October 2, 2013, and October 17, 2013, those orders are similarly reversed. The Department of Labor and Industries is directed to issue an order with the following terms and conditions:

- 1. The self-insured employer is directed to deny the condition of thoracic outlet syndrome.
- 2. The self-insured employer is directed to deny adjustment disorder with depressed mood, pulmonary conditions, balance problems, dysphagia, cricopharyngeal spasms.
- 3. The Department of Labor and Industries is directed to take such further action as indicated by the law and the facts.

W/23/15
DATE

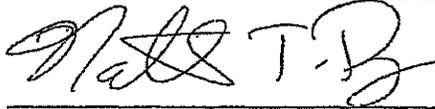

JAMES L. GRESS, WSBA #25731
Of Attorney for Plaintiff

1 APPROVED AS TO FORM AND NOTICE OF PRESENTATION WAIVED:

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4/16/15



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DATE

Nathan T. Dwyer, WSBA #34006
Of Attorney for Defendant

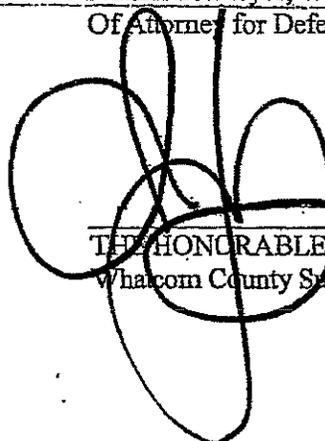
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IT IS SO ORDERED:

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12/2/15



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DATE

THE HONORABLE IRA UHRIG
Whatcom County Superior Court Judge

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Appendix 13

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: ERIC J. SOMAWANG) DOCKET NO. 14 16324
2)
3 CLAIM NO. SE-61564) PROPOSED DECISION AND ORDER
4

5 INDUSTRIAL APPEALS JUDGE: Mitchell T. Harada
6

7 APPEARANCES:
8

9 Claimant, Eric J. Somawang, by
10 Robinson & Kole PS, Inc., per
11 Dennis A. Kole
12

13 Self-Insured Employer, Peacehealth, by
14 Law Office of Gress & Clark, LLC, per
15 James L. Gress
16

17 Department of Labor and Industries, by
18 The Office of the Attorney General, per
19 Richard Becker
20

21 The employer, Peacehealth, filed an appeal with the Board of Industrial Insurance Appeals
22 on July 21, 2014, from an order of the Department of Labor and Industries dated June 5, 2014.
23 This order affirmed the April 9, 2014 Department order that determined self-insured employer is
24 responsible for left hip arthroplasty performed on May 16, 2011. The April 9, 2014 Department
25 order is **REVERSED AND REMANDED**.
26
27

28 PROCEDURAL AND EVIDENTIARY MATTERS
29

30 On September 22, 2014, the parties agreed to include the Jurisdictional History in the
31 Board's record. That history establishes the Board's jurisdiction in this appeal.
32

33 PRELIMINARY MATTERS
34

35 The transcript from the deposition of Joel Hoekema, M.D., taken at the behest of the self-
36 insured employer on February 10, 2015, is hereby published. All objections are overruled and all
37 motions are denied, except for the following: the objection on line 13, page 25 is sustained; and the
38 objection on line 23, page 25 is sustained.
39

40 The transcript from the deposition of Timothy Daly, M.D., taken at the behest of the self-
41 insured employer on March 6, 2015, is hereby published. All objections are overruled and all
42 motions are denied, except for the following: the objection on line 10, page 33 is sustained; the
43 objection on line 11, page 34 is sustained; the objection on line 20, page 35 is sustained; the
44 objection on line 12, page 36 is sustained; the objection on line 19, page 45 is sustained; the
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1 objection on line 21, page 46 is sustained; and the motion to strike on line 23, page 67 is granted
2 and all portions of the answer except for "perhaps five or six months ago" on line 9, page 67 is
3 stricken.
4

5 The transcript from the deposition of Christopher Van Hofwagen, M.D., taken at the behest
6 of the claimant on April 28, 2015, is hereby published. All objections are overruled and all motions
7 are denied, except for the following: the objection on line 5, page 7 is sustained; the objection on
8 line 20, page 28 is sustained.
9

10 The transcript from the deposition of Joseph Robin, M.D., taken at the behest of the claimant
11 on May 12, 2015, is hereby published. All objections are overruled and all motions are denied,
12 except for the following: objection on line 23, page 17 is sustained.
13
14

15 ISSUE

16 Whether the Department of Labor and Industries was correct to order
17 the self-insured employer to be responsible for the May 16, 2011
18 arthroplasty (total replacement) of the claimant's left hip?
19
20

21 RELIEF REQUESTED

22 The self-insured employer seeks an order denying the employer's responsibility for the left
23 hip arthroplasty performed by Dr. Hoekema on May 16, 2011.
24

25 EVIDENCE PRESENTED

26 The employer, Peacehealth, presented Joel Hoekema; M.D., a certified orthopedic surgeon
27 with an emphasis on spine surgeries and hip and knee replacements, as a witness during its case
28 in chief. Dr. Hoekema, a partner of another surgeon who earlier had performed a left hip
29 arthroscopic procedure on Mr. Somawang, Dr. Van Hofwagen, first met with the claimant on
30 April 11, 2015.
31
32

33 During his testimony Dr. Hoekema described the records he reviewed and the particular
34 studies he relied on prior to the time he performed a left hip arthroplasty (total hip replacement) on
35 Mr. Somawang on May 16, 2011. Dr. Hoekema described the surgery in detail and the findings
36 from his surgery.
37
38

39 From his review of the records, Dr. Hoekema also noted findings of Dr. Van Hofwagen of a
40 degenerative frayed tear and a chondral flap during the arthroscopic procedure. Dr. Hoekema
41 testified that there is no way of knowing whether these findings pre-existed the industrial injury of
42 August 9, 2010. Likewise, Dr. Hoekema was of the opinion that the left hip arthroscopic procedure
43 did not lead to the need for the left hip replacement surgery. Overall, Dr. Hoekema testified that he
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1 was not able to say whether or not the need for the left hip replacement would have been
2 proximately related to the claimant's industrial injury.

3
4 While the claimant originally did well after the hip replacement surgery, a few months after
5 the surgery the claimant presented with pain behavior that Dr. Hoekema felt was unusual,
6 abnormal, and a bit out of proportion to the findings on examination.

7
8 The employer also presented the testimony of Timothy Daly, M.D., a certified orthopedic
9 surgeon, who retired from an active clinical and surgical orthopedic practice in 2012. On May 9,
10 2013, along with Dr. Joseph Robin, he performed an independent medical evaluation as requested
11 by a claims administration firm. Dr. Daly provided a synopsis of the procedure of the evaluation
12 and, specifically, of the records he relied on for the examination portion of the evaluation and in
13 preparation for his testimony. Dr. Daly also provided testimony on hip anatomy and the specific
14 findings during Dr. Van Hofwagen's arthroscopic left hip surgery and during Dr. Hoekema's left hip
15 arthroplasty surgery.

16
17 As for the cause of the left hip problems sustained by Mr. Somawang, Dr. Daly stated that he
18 is of the opinion that at the time of his evaluation of Mr. Somawang, the pathology identified was
19 mild in nature. Given his knowledge of the history of the injury, Dr. Daly believed the claimant did
20 not sustain a hip dislocation at the time of the injury event. Furthermore, Dr. Daly was unequivocal
21 in his opinion that the injury incident of August 9, 2010 was not the cause of the total hip
22 replacement performed by Dr. Hoekema.

23
24 During cross-examination Dr. Daly testified that at the conclusion of the independent medical
25 evaluation performed on May 9, 2013, it was his opinion that the left hip arthroplasty was related to
26 the industrial injury. Dr. Daly further testified that his opinion changed to the opposite on causation
27 after he received and reviewed more substantial records that included information to question the
28 claimant's veracity about how the injury occurred and the nature and scope of his symptoms.

29
30 The claimant, Eric Somawang, is 43 years old and lives with his wife and four children in
31 Ferndale, Washington. Mr. Somawang earned a licensed practical nurse's credentials in 2002, and
32 is one-quarter shy of graduating with a registered nursing degree.

33
34 On August 9, 2010 as he was providing nursing care services for Peacehealth,
35 Mr. Somawang attempted to move and clean an elderly patient. As he did do, the patient stiffened
36 and Mr. Somawang's left leg stayed planted with him feeling a pop in his left hip. Mr. Somawang
37 testified that after the injury he collected himself, completed the task at hand, and he sat through
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1 the balance of his shift. Soon after arriving home, upon the urging of others, he went to Northwest
2 Urgent Care Clinic for the left hip pain he was experiencing. After that clinic visit Mr. Somawang's
3 left hip symptoms of pain and stiffness continued and worsened. Approximately three months after
4 the injury Dr. Van Hofwagen performed arthroscopic surgery on his left hip. Mr. Somawang stated
5 that his symptoms improved after that surgery; however, after a regimen of physical therapy his
6 symptoms of acute pain and hip joint clicking did not subside. Mr. Somawang added that between
7 the time of his injury and the time of the arthroscopic surgery his duties had changed at work and in
8 general his activities away from work declined.
9

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11
12 Six months after the arthroscopic surgery Mr. Somawang underwent a left total hip
13 replacement (arthroplasty), which was performed by Dr. Hoekema. Prior to the arthroplasty
14 Mr. Somawang's activities continued to be impacted. He described an increase in limping and
15 swelling, and a decrease in his sleeping abilities and in his physical activities in general.
16 Mr. Somawang testified that prior to the industrial injury, he was very active with rollerblading,
17 bicycling, and training for a marathon with his daughter.
18

19
20
21 On cross-examination, employer's counsel inquired in depth about Mr. Somawang's ability to
22 recall somewhat detailed information during the time of his testimony at trial compared to that ability
23 at the time of Mr. Somawang's discovery deposition approximately six months earlier. The claimant
24 also provided a more detailed account of the industrial injury; this included information on where he
25 was located and how the injury occurred as he was attempting to reposition a patient for whom he
26 was providing care.
27

28
29
30 The claimant presented the testimony of Joseph Robin, M.D., a certified neurologist whose
31 practice is divided among teaching, a clinical practice, and a forensic examination practice. On
32 May 9, 2013, Dr. Robin performed an independent medical evaluation at the request of a third-party
33 administrator of Mr. Somawang. The evaluation was conducted with Dr. Timothy Daly, an
34 orthopedic surgeon.
35

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37
38 As part of the evaluation process, Dr. Robin reviewed records and conducted an interview of
39 the claimant to learn more about the injury of August 9, 2010 and about his symptoms and any
40 treatments he received. Dr. Robin learned of the claimant's injury as the claimant worked as a
41 nurse, and how he injured his left hip. Dr. Robin also learned of the claimant's left hip arthroscopic
42 surgery and later left hip arthroplasty performed by Dr. Hoekema.
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1 Dr. Robin noted that before the left hip injury, the claimant had no left hip problems and was
2 able to participate in all desirable activities without physical limitations. Dr. Robin provided a list of
3 his findings from physical examination. Dr. Robin further testified that he arrived at four diagnoses:
4 1) a left hip strain, related to the August 9, 2010 injury; 2) a dislocation of the left hip, related; 3) a
5 left hip arthroplasty, related; and 4) status post-operation from a loosening of the distal tip of the left
6 femoral head, related.
7

8
9
10 On cross-examination Dr. Robin testified that the claimant exhibited a fair amount of pain
11 behavior, a rapid speech pattern, and leaned to his right when extending his left leg, which
12 Dr. Robin believed were demonstrations of pain embellishment. He further testified that he would
13 defer to Dr. Daly in regards to opinions on causation of the claimant's left hip conditions and the
14 ongoing issue of treatment.
15

16
17 The claimant presented Christopher Van Hofwagen, M.D., a certified orthopedic surgeon
18 with additional training and emphasis on sports medicine. Dr. Van Hofwagen first met with the
19 claimant on October 27, 2010, from a referral from Dr. Thorpe. The evaluation of Mr. Somawang
20 focused on the left hip, from which Dr. Van Hofwagen diagnosed the claimant with an underlying
21 labral tear versus an osteochondral defect.
22

23
24 On November 11, 2010, Dr. Van Hofwagen performed a left hip arthroscopy with
25 debridement on Mr. Somawang. In describing the procedure Dr. Van Hofwagen stated that upon
26 entering the joint with the arthroscope, he noticed an anterior and superior degenerative labral tear
27 with a chondral flap on the superior portion of the weight-bearing dome. The doctor testified that it
28 was difficult to determine the timing of when the tear occurred as there were several unknowns as
29 to the claimant's activities and movements that preceded the tear. Likewise, Dr. Van Hofwagen
30 stated that the presence of the chondral flap did not assist in providing an opinion on when the flap
31 presented itself as there are no temporal markers on the chondral flap.
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36
37 Post surgery Mr. Somawang was healing well until a visit with Dr. Hofwagen on January 11,
38 2011, when Mr. Somawang reported a significant increase in pain with weight-bearing.
39 Mr. Somawang continued with pain in his hip and on March 14, 2011, Mr. Somawang underwent a
40 left hip arthrogram at the request of Dr. Hofwagen. Eventually Dr. Hofwagen referred
41 Mr. Somawang to Dr. Hoekema, another orthopedist in Dr. Hofwagen's clinic. Dr. Hofwagen made
42 the referral because Dr. Hoekema performs hip arthroplasty procedures.
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1 Dr. Hofwagen testified that on a more probable than not basis, the injury of August 9, 2010,
2 as described by Mr. Somawang, was a proximate cause of the development of left hip difficulties
3 that eventually resulted in a left hip arthroplasty procedure. Dr. Hofwagen felt it significant that the
4 claimant was quite active prior to the injury event.
5

6
7 On cross-examination employer's counsel pointedly inquired about Dr. Hofwagen's credibility
8 and his opinions that would lead one to believe his opinion on causation over that offered by
9 Dr. Hoekema. On the topic of whether the hip arthroscopy led to the need for a hip replacement,
10 Dr. Hofwagen would defer to Dr. Hoekema's opinion. Dr. Van Hofwagen also testified that it was
11 probably unlikely that Mr. Somawang popped back into place his left hip that Mr. Somawang
12 claimed had popped out of place at the time of the injury. The doctor also testified that the claimant
13 demonstrated pain behavior slightly out of proportion to the pathology that existed.
14
15

16 DECISION

17
18 In this appeal the employer contends the Department was incorrect in its order in which it
19 held the self-insured employer responsible for the left hip replacement surgery performed by
20 Dr. Hoekema on May 16, 2011. In an employer appeal, the employer must first present evidence
21 sufficient to make a prima facie case. The burden then shifts to the worker (or in this case, the
22 Department of Labor and Industries as well) to establish his entitlement to benefits by a
23 preponderance of the evidence.¹
24
25

26
27 This interesting case included testimony from two attending physicians who not only
28 attended to Mr. Somawang, but also operated on Mr. Somawang. Despite the advantage of
29 meeting with Mr. Somawang on several occasions each, both Dr. Hoekema and Dr. Van Hofwagen
30 were equivocal and less than committed in their opinions on the ultimate issue of the cause of the
31 need for Mr. Somawang's May 16, 2011 left total hip replacement surgery.
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34
35 While initially Dr. Van Hofwagen ventured to testify that he was of the opinion that the
36 claimant's left hip replacement was proximately caused by the industrial injury, on cross-
37 examination he essentially capitulated on his earlier testimony regarding the cause of the hip
38 arthroplasty. In the end, Dr. Von Hofwagen testified that he would defer to Dr. Hoekema in regards
39 to an opinion on the proximate cause of the left his replacement.
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47 ¹ *In re Christine Gurtromson*, BIA Dec., 55,804 (1981).

1 Dr. Hoekema, who on May 16, 2011 performed the procedure that is the central issue in this
2 appeal, testified in a manner that was the epitome of "sitting on the fence." He could not say
3 whether or not the need for the arthroplasty was proximately caused by the industrial injury.
4

5 The other two expert witnesses who testified in this matter were the two examiners that
6 formed the "panel" of examiners who evaluated Mr. Somawang on May 9, 2013. While Dr. Robin
7 and Dr. Daly initially were of the opinion that the arthroplasty was related to the industrial injury as
8 indicated in their respective collective report, their testimony provided a different viewpoint.
9

10 Dr. Robin's opinion on the need for left hip replacement ultimately, stated during his cross-
11 examination, was that he would defer to the orthopedic surgeon in the panel, Dr. Daly to provide an
12 opinion on such an issue.
13

14 Dr. Daly, while no longer providing orthopedic surgical services, possesses the training and
15 experience sufficient to find him to be a credible witness. Counsel for the self-insured employer
16 dug deeply, and poked and prodded sufficiently, to approach and request Dr. Daly to re-consider
17 his initial opinion on causation of the left hip replacement. Between the time of his independent
18 evaluation and the time of his testimony in this case, Dr. Daly reviewed several additional records
19 that neither he nor Dr. Robin considered at the time of the IME. The additional information included
20 additional information on the veracity of Mr. Somawang about the mechanism of injury and the level
21 and frequency of his pain complaints. With this information, Dr. Daly explained why he now was of
22 the opinion that Mr. Somawang's left hip replacement was not caused by the industrial injury of
23 August 9, 2010.
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30 Dr. Daly's ultimate opinion was supported by his awareness of information related to
31 Mr. Somawang that was relevant to the formation of Dr. Daly's opinion. Additionally, Dr. Daly's
32 opinion was not refuted during claimant's case in chief, and there was no rebuttal offered to refute
33 Dr. Daly's opinion.
34
35

36 Given the record before me I find that the employer met its burden to make a prima facie
37 case that the claimant's left hip replacement was not proximately caused by the industrial injury.
38 Furthermore, there was no persuasive evidence offered that directly refuted Dr. Daly's ultimate
39 opinion on the issue involved in this litigation. The Department of Labor and Industries order dated
40 June 5, 2014 is reversed.
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FINDINGS OF FACT

1. On September 22, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Eric Somawang sustained an industrial injury on August 9, 2010 when he was attempting to move a patient who had caused a mess to be made in the patient's bed. When lifting a portion of the patient and turning simultaneously, Mr. Somawang felt a pop in his left hip. He felt pain in his left hip but completed the balance of his shift doing nothing but sitting. The industrial injury caused claimant to sustain a left labral tear and chondral flap of the left hip, for which he received surgical attention and repair.
3. Eric Somawang's left total hip replacement (arthroplasty) performed on May 16, 2011 by Dr. Hoekema, was not proximately caused or aggravated by his industrial injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.
2. The Department order dated June 5, 2014, is incorrect and is reversed. This matter is remanded to the Department to issue an order denying the left total hip replacement (arthroplasty) procedure under this claim.

Dated: August 24, 2015.



Mitchell T. Harada
Industrial Appeals Judge
Board of Industrial Insurance Appeals

FYB 2-8

RECEIVED OCT 16 2015

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.bia.wa.gov
(360) 753-6823

In re: **ERIC J. SOMAWANG**

Docket No. 14 16324

Claim No. SE-61564

**ORDER DENYING PETITION
FOR REVIEW**

A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **MITCHELL T. HARADA** on **August 26, 2015**. Copies were mailed to the parties of record.

A Petition for Review was filed by the **Claimant** on **September 24, 2015**, as provided by RCW 51.52.104.

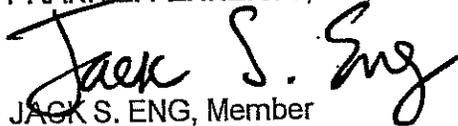
The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated: October 14, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS


DAVID E. THREEDY, Chairperson


FRANK E. FENNERTY, JR., Member


JACK S. ENG, Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

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

JENNIFER MAPHET,)	No. 51170-3
)	
Appellant,)	
)	
v.)	
)	
CLARK COUNTY,)	PROOF OF MAILING
)	BRIEF OF RESPONDENT
)	
Respondent.)	
)	
)	

The undersigned states that on June 11, 2018, I deposited in the United States mail, with proper postage prepaid, Brief of Respondent as attached, addressed as follows:

Douglas M. Palmer
 Busick Hamrick, PLLC
 PO Box 1385
 Vancouver, WA 98666

Paul M. Crisalli
 Attorney General of Washington
 Assistant Attorney General
 800 Fifth Avenue, Suite 2000
 Seattle, WA 98104

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

JENNIFER MAPHET,)	No. 51170-3
)	
Appellant,)	
)	
v.)	
)	
CLARK COUNTY,)	PROOF OF MAILING
)	BRIEF OF RESPONDENT
)	
Respondent.)	
)	
)	

The undersigned states that on June 12, 2018, I deposited in the United States mail, with proper postage prepaid, Brief of Respondent as attached, addressed as follows:

Douglas M. Palmer
 Busick Hamrick, PLLC
 PO Box 1385
 Vancouver, WA 98666

Paul M. Crisalli
 Attorney General of Washington
 Assistant Attorney General
 800 Fifth Avenue, Suite 2000
 Seattle, WA 98104

GRESS, CLARK, YOUNG & SCHOEPPER

June 12, 2018 - 2:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51170-3
Appellate Court Case Title: Clark County, et al., Res./Cross-Appellants v. Jennifer Maphet, App./Cross Respondent
Superior Court Case Number: 17-2-00719-0

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