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**COURT OF APPEALS, DIVISION 11  
OF THE STATE OF WASHINGTON**

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CLARK COUNTY,

Appellant,

v.

JENNIFER MAPHET,

Respondent.

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**DEPARTMENT OF LABOR & INDUSTRIES BRIEF OF  
RESPONDENT/CROSS APPELLANT**

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## I. INTRODUCTION

Injured workers are to receive sure and certain relief, whether from the Department of Labor & Industries or a self-insured employer. When self-insured employers authorize surgery for conditions caused by an industrial injury, they accept responsibility to treat that condition and later complications caused by the treatment itself. A doctor's mistake during surgery does not relieve the employer from the responsibility to cover the later treatment.

Clark County authorized eight surgeries on Jennifer Maphet's knee because of her industrial injury. But a doctor made a mistake during one surgery and Clark County refused to authorize the needed ninth surgery to treat the same knee conditions as before. Since Clark County authorized Maphet's knee surgeries, it accepted responsibility for treating the conditions caused by those surgeries, despite a doctor's mistake. Clark County is responsible for those conditions as a matter of law. And Clark County is responsible as a matter of law under the compensable consequences doctrine for all problems arising out of the authorized surgeries. This Court should reverse the superior court's decision that Maphet and the Department were not entitled to judgment as a matter of law.

## II. COUNTER-ASSIGNMENTS OF ERROR

1. The superior court erred when it failed to grant the Department's and Maphet's Motions for Judgment as a Matter of Law (CP 105-20, 165, 167-68; RP 2-155, 272-77).
2. The superior court erred when it rejected the Department's proposed verdict form and instead gave a verdict form stating, "Was the Board of Industrial Insurance Appeals correct in deciding that Jennifer Maphet's March 20, 2015 surgery was proper and necessary treatment?" (CP 108, 190-91).
3. The superior court erred because, after Clark County conceded during closing argument that the surgery was medically necessary and proper, there is no substantial evidence to support the jury's verdict answering "no" to the question "Was the Board of Industrial Insurance Appeals correct in deciding that Jennifer Maphet's March 20, 2015 surgery was proper and necessary treatment?" (CP 191).

## III. ISSUES

1. Self-insured employers must pay for all proper and necessary treatment for injured workers. RCW 51.36.010. WAC 296-20-03001 requires authorization to perform a surgery. WAC 296-20-01002's definition of authorization provides that a self-insured employer provides authorization for accepted conditions only. Clark County authorized three surgeries that treated patellofemoral instability. Can Clark County now claim patellofemoral instability is not an accepted condition? (Assignments of Error 1- 2).
2. The consequences of surgery—including negligence or mistakes by the doctor—are covered by self-insured employers under the compensable consequences doctrine. If the employer authorized the surgery and the worker relied on that authorization to undergo the surgery, is the employer responsible for the consequences of the surgery covered under the claim, even if the doctor made a mistake? (Assignments of Error 1-2).

3. During closing argument, Clark County conceded that the jury should find that the evidence established that the March 2015 was proper and necessary. But the jury's verdict answered "no" to the question "Was the Board of Industrial Insurance Appeals correct in deciding that Jennifer Maphet's March 20, 2015 surgery was proper and necessary treatment?" Does substantial evidence support the jury's finding? (Assignments of Error 3).

#### **IV. STATEMENT OF THE CASE**

##### **A. Overview of Applicable Workers' Compensation Principles**

When a worker is injured at work, the worker may file an industrial injury claim for benefits. RCW 51.32.010. The Department administers the state fund to pay for treatment and other benefits. But employers may choose to be self-insured rather than be insured through the state fund. RCW 51.14.010. Employers who choose to self-insure must provide injured workers with all medical and disability benefits they are entitled to under the Industrial Insurance Act. *See Boeing v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015); RCW 51.14.010; RCW 51.36.085; WAC 296-15-330. By choosing to self-insure, employers also take on the responsibility to comply with various regulations governing such employers. *Doss*, 183 Wn.2d at 58.

The Department is involved in self-insured cases by issuing orders relating to allowing and closing claims, and by issuing orders if the self-insured employer and the worker disagree over claims-related issues, including disputes over treatment. RCW 51.32.055(6); RCW 51.52.050;

WAC 296-15-420; WAC 296-15-330. Without a dispute, self-insured employers may act without Department orders on matters such as treatment. WAC 296-15-330.

RCW 51.36.010 provides that workers are entitled to proper and necessary treatment for “accepted” conditions proximately caused by the industrial injury. WAC 296-20-01002 (definition of “[a]cceptance, accepted condition”). In workers’ compensation parlance, a condition is “accepted” if the self-insured employer or Department determines that the industrial injury proximately caused the condition. Workers are eligible to receive treatment for accepted conditions. WAC 296-20-01002 (definition of “[a]cceptance, accepted condition”). Unrelated, preexisting conditions do not receive treatment unless they are pre-existing conditions retarding treatment of the accepted condition. WAC 296-20-055.

A self-insured employer must “[a]uthorize treatment and pay bills in accordance with Title 51 RCW and the medical aid rules and fee schedules of the state of Washington.” WAC 296-15-330(1). It must decide whether to authorize surgery before it is performed. WAC 296-20-03001. But a self-insured employer has recourse if it does not believe an industrial injury caused the condition: it may deny authorization of the treatment, allowing the worker to dispute that decision to the Department. RCW 51.32.055(6).

**B. Maphet Suffered an Industrial Injury to Her Knee**

Maphet suffered an industrial injury while working for Clark County in 2009. AR 7.<sup>1</sup> She slipped on a piece of paper and fell in a stairwell, breaking her wrist and injuring her right knee. AR 76, AR Maphet 14, 21. Clark County, as a self-insured employer, became responsible for administering the claim, including authorizing treatment and paying treatment bills and other worker benefits. AR 105; *Doss*, 183 Wn.2d at 58; RCW 51.14.010; RCW 51.36.085; WAC 296-15-330. Clark County provided treatment for Maphet's knee under the claim. AR DeFrang 41-43.

**C. After Authorizing Eight Surgeries on Maphet's Knee, Clark County Rejected the Ninth Surgery, Which Treated the Same Condition as in the Last Three Surgeries**

Over several years, Maphet underwent eight surgeries on her knee. AR 76; AR Greenleaf 8-28. Clark County authorized all the surgeries. AR DeFrang 41-43.

The first through fourth surgeries treated Maphet's knee instability, including surgeries on her meniscus, her medial femoral condyle, and her patella. *See, e.g.*, AR Greenleaf 6, 9, 12, 18, 22-23, 225-28; AR DeFrang 42-43. During her fifth authorized surgery to remove scar tissue, Jonathan

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<sup>1</sup>This brief cites the certified appeal board record as "AR." The brief refers to witness testimony by the witness's last name. While both Jennifer Maphet and Andrew Maphet testified, this brief cites only to Jennifer Maphet's testimony.

Greenleaf, MD, chose to release part of the ligaments holding Maphet's kneecap in place. AR Greenleaf 19-23. Maphet developed patellofemoral instability from this procedure. AR Toomey 29; AR Greenleaf 25-27. Other doctors would later question the appropriateness of this release. *E.g.*, AR Toomey 35-36, 56; AR Farris 23. In particular, one doctor testified that the actions of Dr. Greenleaf altered the mechanics of Maphet's knee, resulting in more issues and problems with her knee. AR Toomey 52-56.

Because of the fifth surgery, Maphet had patellofemoral instability, and Dr. Greenleaf performed surgeries in May 2013, December 2013, and August 2014 to correct the patellofemoral instability. AR Maphet 26; AR Farris 23-25. He then performed a ninth surgery in March 2015 to treat the same condition the earlier surgeries sought to resolve. AR 77; AR Greenleaf 28-29. Although Clark County authorized the previous eight surgeries, it refused to authorize the March 2015 surgery and contested its responsibility for that surgery to the Department. AR Whitcomb 189-90; DeFrang 42-43.

**D. The Department Ordered Clark County to Pay for the Ninth Surgery and the Board of Industrial Insurance Appeals Affirmed**

The Department reviewed the decision and ordered Clark County to pay for this surgery and to accept responsibility for a concussion from

when she fell from the knee instability. AR 5; AR Greenleaf 48-49.<sup>2</sup> Clark County appealed to the Board, disputing that the industrial injury proximately caused patellofemoral instability and that the March 2015 knee surgery was medically proper and necessary to address the condition. AR 76.

At the Board, Dr. Greenleaf testified that Maphet needed the March 2015 surgery to resolve residual issues from the injury and issues caused by prior surgeries. AR 77; AR Greenleaf 28-29, 57-58. The need for treatment stemmed from the authorized surgeries: “her subsequent surgeries caused enough scarring to cause the malalignment of the patella in conjunction with the insufficiency of the medial patellofemoral ligament.” AR Greenleaf 58.

Clark County called Eugene Toomey, MD, who testified that several of the previous surgeries before the March 2015 surgery treated patellofemoral instability. AR Toomey 26-32. He opined that the earlier surgeries were medically appropriate to correct the instability, but he did not think that the industrial injury caused the instability in the first place. AR Toomey 31-32, 36-37. Clyde Farris, MD, testified that the knee

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<sup>2</sup> Around March 2015, Maphet fell because of instability in her knee and sustained a concussion. AR Greenleaf 48-49; AR Maphet 28-29; AR Kelly 77-78. The parties stipulated that if the Board found that the industrial injury caused the need for the contested surgery and the claimed condition of patellofemoral instability, then the claim would cover the concussion. AR 11/28/16 Colloquy 3-4.

surgeries had “distorted” Maphet’s knees and the March 2015 surgery was to correct this. AR Farris 34-35. While equivocating about whether the March 2015 was medically justified to correct instability, Dr. Farris did not believe that the industrial injury caused the need for the ninth surgery. AR Farris 20, 27-30, 36, 38.

Both Dr. Toomey and Dr. Farris thought Dr. Greenleaf should not have performed the release in fifth surgery in January 2013, and attributed her patellofemoral instability to this action. AR Toomey 35-36, 56; AR Farris 23. Both agreed that most of the three surgeries after the fifth surgery were medically appropriate to correct the knee instability. AR Toomey 34-36, 56; AR Farris 23, 27-30.

Clark County presented no evidence that the eight surgeries were authorized only because a pre-existing knee condition was retarding recovery from Maphet’s accepted condition. *See* AR DeFrang 1-53. Clark County bore the burden of proof at the Board and superior court. RCW 51.52.050, .115.

The Board affirmed the Department order directing Clark County to authorize and pay for the March 2015 surgery and to accept responsibility for the concussion. AR 7. The Board found that the industrial injury and its residuals proximately caused the condition

requiring the March 2015 surgery and that the surgery was necessary and proper. AR 7.

**E. The Superior Court Rejected Maphet's and the Department's Argument That, as a Matter of Law, Clark County Accepted Responsibility to Pay for the Ninth Surgery When It Authorized the Previous Surgeries for the Same Condition**

Clark County appealed to superior court. Maphet and the Department asked the superior court to enter CR 50 judgment, arguing that under the Industrial Insurance Act and corresponding regulations the self-insured employer accepts the condition as a matter of law when it authorizes treatment for that condition. CP 95-120. Since Clark County authorized treatment for patellofemoral instability in the sixth, seventh, and eighth surgeries it had to cover any treatment for that condition. *See* CP 117. Maphet and the Department also argued that case law provides that self-insured employers and the Department are responsible to pay for treatment resulting from consequences of previous treatment, so Clark County was responsible to pay for the consequences of the surgeries it authorized. CP 117-18.

The Court denied the motion, finding there was disputed evidence whether the industrial injury or its residuals proximately caused Maphet's patellofemoral instability. CP 165. The Court found that Drs. Toomey and

Farris established sufficient evidence for that question to go to the jury.

CP 165.

**F. The Superior Court Allowed the Parties to Present Evidence that Clark County Authorized the Surgeries, But It Excluded Evidence under ER 409 That Clark County Paid Maphet's Medical Bills**

Maphet moved in limine to reverse the Board's exclusion of evidence under ER 409 that Clark County authorized and paid for Maphet's surgeries between 2010 and 2014. CP 84-94. She argued that ER 409 did not apply to workers' compensation cases like this. The Department agreed that ER 409 did not apply, and that the evidence relates to establishing Clark County authorized the previous surgeries that proximately caused the condition requiring the March 2015 surgery. CP 119. Clark County responded that ER 409 excludes this evidence. CP 128-32. The Court ruled that authorization of treatment evidence is not excluded under ER 409, but the Court excluded any evidence of Clark County paying Maphet's medical bills. CP 169.

**G. Although Clark County Conceded That the Ninth Surgery Was Proper and Necessary, the Jury Found that the Industrial Injury or Its Residuals Did Not Proximately Cause the Condition and That the Surgery Was Not Proper and Necessary**

The parties tried the case before a jury. At the close of evidence, Maphet and the Department renewed their motions for judgment as a matter of law, which the court denied. CP 167-68.

Consistent with its argument about judgment as a matter of law on proximate cause, the Department proposed that the jury verdict answer only whether the surgery was necessary and proper. RP 374; CP 108. The Court rejected that form, and sent the jury a question about whether the industrial injury proximately caused the surgery and a question about whether the surgery was necessary and proper:

QUESTION 1. 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?

....

QUESTION 2. Was the Board of Industrial Insurance Appeals correct in deciding that Jennifer Maphet's March 20, 2015 surgery was proper and necessary treatment?

CP 190-91.

At closing, after the Court instructed the jury on the issues, Clark County conceded that sufficient evidence established that the March 2015

surgery was proper and necessary, and it asked the jury to focus on the first question of proximate cause. CP 393-94.

During Maphet's closing, Clark County objected to Maphet stating that Clark County conceded to question two on the verdict. RP 428.

Outside the jury's presence, Clark County argued that there was an error in its verdict form. RP 428-29. The Court asked if Clark County wanted a mistrial or wished to proceed, and Clark County said it would address the issue on rebuttal. RP 429, 431-32. When the jury returned, Maphet repeated that Clark County conceded that the jury should answer "yes" to question two. RP 433.

On rebuttal, Clark County argued that the jury should say "no" to question two, not because the surgery was not proper and necessary, but because the surgery was unrelated to the industrial injury. RP 456-57. According to Clark County, the only issue for the jury was proximate cause. RP 456-58. The jury answered "no" to both questions, and the Court entered judgment to Clark County. CP 190-91, 199-203. Maphet appealed, and the Department Cross-appealed.

## **V. STANDARD OF REVIEW**

In workers' compensation cases, this Court applies the ordinary standards of review of the superior court's decision. RCW 51.52.140; *see Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d

355 (2009).<sup>3</sup> This Court reviews the trial court’s decision, not the Board’s decision. *See Rogers*, 151 Wn. App. at 179-81.

A party may move for judgment as a matter of law on an issue, which the appellate court reviews de novo. *Butson v. Dep’t of Labor & Indus.*, 189 Wn. App. 288, 296, 354 P.3d 924 (2015). A CR 50 motion is properly granted when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Id.*

Courts accord great weight to the agency’s view of the law it administers, here the Department. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012). The court applies liberal construction of the Industrial Insurance Act “for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . .” RCW 51.12.010.

## VI. ARGUMENT

There are two alternative reasons Clark County is responsible for the ninth surgery to treat patellofemoral instability.

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<sup>3</sup>The Administrative Procedure Act standards do not apply. RCW 34.05.030(2)(a), (c); *see Rogers*, 151 Wn. App. at 180.

First, if a self-insured employer authorizes surgery for a condition, it has accepted that condition. By authorizing treatment for the sixth, seventh, and eighth surgeries to treat Maphet's patellofemoral instability, Clark County accepted responsibility to pay for all treatment related to that condition. As long as the ninth surgery addressed the same condition and was proper and necessary, Clark County is responsible for the surgery.

Second, courts hold that employers are responsible for the sequelae of the treatment they authorize—that is, employers must pay for treatment resulting from surgeries on work-related conditions, even if a doctor's malpractice while performing authorized treatment caused the need for the later treatment. The undisputed evidence shows that the fifth January 2013 surgery, proximately caused the need for Maphet's March 2015 surgery. As the need for the March 2015 surgery was the sequelae of the earlier surgery the superior court erred by leaving the issue to the jury. It should have granted the Department's and Maphet's motions for judgment as a matter of law rather than let the jury decide proximate cause.

The remaining issue on whether the treatment was proper and necessary was resolved when Clark County conceded before the jury that the treatment was proper and necessary. Given the concession that it was proper and necessary, substantial evidence does not support the jury's

verdict that it was not proper and necessary. This Court should reverse the jury verdict and affirm the Board's decision.

**A. Clark County Accepted the Knee Condition When It Authorized Several Surgeries to Correct Patellofemoral Instability**

The undisputed facts show that Clark County authorized treatment for Maphet's patellofemoral instability. In so doing, Clark County accepted responsibility to treat this condition as a matter of law. The superior court incorrectly ruled that Clark County could challenge acceptance of the condition several surgeries later for the same condition. This Court should reverse.

**1. As a matter of law, when an employer authorizes surgery, it accepts the condition treated**

The Industrial Insurance Act provides for payment of proper and necessary treatment for conditions proximately caused by an industrial injury. RCW 51.36.010; *see Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 601, 676 P.2d 538 (1984) (to support finding that worker required more treatment, industrial injury must cause condition); *see also Zavala v. Twin City Foods*, 185 Wn. App. 838, 861, 343 P.3d 761 (2015); 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. (WPI) 155.31 (6th ed.). The Department has adopted regulations to regulate treatment, including

regulations about a self-insured employer's role in treatment.<sup>4</sup> See WAC 296-20-01002; WAC 296-20-03001; WAC 296-15-330; WAC 296-15-266. These regulations have the force and effect of law. *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 910, 246 P.3d 1254 (2011).

The rules of statutory construction apply to administrative rules just as they do to statutes. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). Under a plain language analysis, the court determines a rule's meaning from its terms to "give effect to its underlying policy and intent." *Id.* at 56. The court gives effect to all the language, harmonizing all rules and regulatory scheme. *Id.* at 57; *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). "An agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts." *D.W. Close Co. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 129, 177 P.3d 143 (2008) (internal quotations omitted).

Here, rules govern the authorization of treatment and acceptance of conditions. Self-insured employers fill the shoes of the Department in administering workers' compensation claims for their employees. As a result, self-insured employers must "[a]uthorize treatment and pay bills in

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<sup>4</sup>The Department has authority to create these regulations under RCW 51.36.010(10), RCW 51.04.030(1), and RCW 51.32.190(6).

accordance with Title 51 RCW and the medical aid rules . . .” WAC 296-15-330(1). By “authorizing” the patellofemoral instability surgery, Clark County has “accepted” the condition.

An “accepted condition” has a specific meaning in the Industrial Insurance Act—the term denotes conditions allowed under the claim. WAC 296-20-01002 (definition of “[a]cceptance, accepted condition”).<sup>5</sup> “Accepted condition” or “acceptance” is a determination that a condition is the responsibility of the self-insured employer:

Determination 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 condition 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 Internal Classification of Diseases, Clinically Modified (ICD-CM).

WAC 296-20-01002 (definition of “acceptance, accepted condition”).

And the definition of “authorization” references “accepted condition” where it provides that authorization is the self-insured employer’s notification that it will prove treatment for an accepted condition:

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.

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<sup>5</sup> The term is specifically referenced throughout the Industrial Insurance Act. *E.g.*, RCW 51.32.099(4)(b), (5)(b); RCW 51.36.010(4).

WAC 296-20-01002 (definition of “authorization”).

“Authorization” of treatment means that there first must be “an accepted condition.” WAC 296-20-01002 (definition of “authorization”). “Acceptance” means that the self-insured employer has determined that it is responsible for a condition and will reimburse for treatment, including surgery, for that condition. If the self-insured employer authorizes a surgery, the self-insured employer has accepted the condition.

If a self-insured employer wants to contest acceptance of a condition when a worker’s doctor seeks authorization of a surgery, the self-insured employer can decline to authorize the treatment in the first place because it is not for an accepted condition. This allows the worker to dispute the decision to the Department and argue the condition is related. RCW 51.32.055(6); WAC 296-15-330. But absent this, by authorizing the surgery, the employer has accepted the condition.

When a self-insured employer authorizes treatment, that treatment must comply with WAC 296-15-330 and WAC 296-20-03001. Clark County is incorrect that it may authorize treatment of unrelated conditions. Clark Cty. Br. 39. RCW 51.36.010(2)(a) requires self-insured employers to authorize proper and necessary treatment for conditions related to the industrial injury. *See also* WAC 296-15-330. A self-insured employer may authorize treatment only for conditions proximately caused by the

industrial injury and conditions related to treatment provided under the claim. WAC 296-15-330; WAC 296-15-01002 (definitions of “authorization” and “acceptance”); *see Zipp*, 36 Wn. App. at 601. The only exception is WAC 296-20-055, which allows the Department or an employer to authorize temporary treatment to address unrelated preexisting conditions retarding recovery from an accepted condition—a circumstance not present here.<sup>6</sup>

Clark County’s argument that it may provide authorization for unrelated treatment is essentially an argument that it may act outside of RCW Title 51. But an employer who acts under the cloak of being a self-insured employer lacks the authority to act outside the Industrial Insurance Act. *See* WAC 296-15-330. A self-insured employer acts only under RCW Title 51 on claim related matters. *See also Doss*, 183 Wn.2d at 58 (self-insured employer responsible for medical and disability costs under Industrial Insurance Act); RCW 51.14.010 (“employer under this title” may self-insure); RCW 51.14.080(3) (self-insurer may not “induce[] claimants to treat injuries in the course of employment as off-the-job injuries”).

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<sup>6</sup> Nor does temporary treatment include surgery. WAC 296-20-055.

When a self-insured employer, such as Clark County, has authorized surgery for a condition, the self-insured employer has made a determination that the condition is accepted under the claim. Thus, by authorizing the sixth, seventh, and eighth patellofemoral instability surgeries, Clark County “accepted” the condition. Clark County decided that the industrial injury proximately caused the need for surgeries, so it accepted the condition.

**2. Clark County did more than simply pay bills, it authorized treatment**

Clark County points to RCW 51.32.190 to argue that it is not bound to accept a condition by paying for treatment. Clark Cty. Br. 35-36. The statute explains when payments by the self-insured employer become binding:

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.

RCW 51.32.190(2). Clark County’s argument that this means an employer can pay for a surgery and its payment is not considered binding fails for two reasons. Clark Cty. Br. 35-36.

First, this case does not involve Clark County’s mere payment of medical bills. Instead it is an authorization: a legal determination (a

“notification”) that the self-insured employer will accept responsibility for the bill and for the treatment of the accepted condition. WAC 296-20-01002 (definition of “authorization”). Not all treatment bills need prior authorization. *See* WAC 296-20-030. Often the Department or self-insurer will pay a bill without a prior authorization. The self-insurer may later request the Department to audit bills to determine whether they are authorized. RCW 51.36.090. It is in this way the Legislature has distinguished between payment and authorization.

Second, treatment is not compensation—compensation includes wages and monetary remuneration, while treatment tries to return the worker to a fixed and stable condition. *See* RCW 51.08.178 (defining wages); RCW 51.36.010 (setting forth Department’s authority to establish treatment guidelines). While RCW 51.32.190 states that payments of compensation do not bind an employer to all worker compensation benefits, treatment is not included in this exception under the plain meaning of “payment of compensation.” WAC 296-15-340 defines “payment of compensation” as only including time loss compensation.<sup>7</sup>

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<sup>7</sup> The Court should also reject Clark County’s argument that RCW 51.32.240 shows that “compensation” in RCW 51.32.190 includes treatment. *See* Clark Cty. Br. 36. RCW 51.32.240(1) provides the opposite—it uses the more global term “payment of benefits,” and did not limit it to payment of compensation.

**3. Allowing self-insured employers to authorize multiple treatment procedures and then disclaim responsibility does not provide for sure and certain relief under the Industrial Insurance Act**

The Industrial Insurance Act provides for sure and certain relief to injured workers, and self-insured workers are responsible to implement this mandate. RCW 51.04.010; RCW 51.14.010. Self-insured employers are subject to penalties if they fail to provide prompt treatment to injured workers. RCW 51.14.095; WAC 296-15-266. They can be penalized if they “induce[] claimants to treat injuries in the course of employment as off-the-job injuries, persuade[] claimants to accept less than the compensation due, or unreasonably make[] it necessary for claimants to resort to proceedings against the employer to obtain compensation.” RCW 51.14.080(3); *see also* RCW 51.14.095. The Department can withdraw the self-insured employer’s certification if they violate these requirements. RCW 51.14.080.

Clark County argues that employers will become “paralyze[d]” to authorize treatment because they will not know if the conditions should be accepted or not and will delay treatment to determine this. *See* Clark Cty. Br. 38. It is not a “humane” approach, as Clark County posits, to authorize the treatment “with the expectation that the legal and adjudicative process

will work itself out in due time.” Clark Cty. Br. 38. Instead, it produces uncertainty and delay. Under Clark County’s approach, self-insured employers essentially would induce employees to treat the injuries as “off the job” because the employer is providing unclaimed, related payments. And if self-insured employers balk at authorizing treatment as Clark County suggests, they unreasonably make it onerous on claimants. The Legislature has made the policy choice that self-insured employers cannot become paralyzed.

Assigning responsibility to employers when they authorize treatment follows the public policy aims of the Industrial Insurance Act. The Legislature designed the Act to give priority to workers by promptly providing them sure and certain relief. According to Clark County, a self-insured employer could benevolently pay for treatment for a worker’s cancer for years. But when the worker dies from that cancer 20 years later, self-insured employers have argued the cancer is unrelated and have contested the survivor’s right to death benefits. The worker’s family is put in the difficult position of having to recreate the medical history and facts from decades ago, where it is unlikely records even exist.<sup>8</sup>

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<sup>8</sup> This situation comes from a case litigated before the Board involving Clark County. App. A; *Tony Dodge*, Dckt. Nos. 15 12777, 15 13572, 15 14176, 15 14974 (Wash. Bd. Indus. Ins. App. Feb. 16, 2016) (proposed decision adopted by Board).

The Department's rules provide that a decision about acceptance be made at the time of the authorization of the surgery. This makes sense because then the parties do not need to try to unravel what happened after years of treatment, with evidence gone stale or new complications caused by the treatment.

Workers should not undergo surgery for unrelated conditions that places them at risk for further complications. A prompt determination of acceptance follows the Legislature's intent to provide sure and certain relief.

**4. *Hull v. Peacehealth Medical Group* does not support Clark County's argument**

Clark County mischaracterizes *Hull v. Peacehealth Medical Group*, No. 74413-5-I, 2016 WL 5373820 (Sept. 26, 2016) (unpublished). Clark Cty. Br. 27-28. Not only do unpublished decisions have limited persuasive value (GR 14.1), that this case never addressed whether the self-insured employer's authorization meant it accepted the conditions. And the case ultimately holds that there was not substantial evidence to support the trial court's finding that the claimant's condition and secondary conditions did not arise naturally and proximately from her employment. *Hull*, 2016 WL 5373820 at \*5. That is a different question than the one presented here. If anything, *Hull* reaffirms that with no

intervening cause, an employer is responsible for the conditions it accepts and any secondary conditions resulting from the treatment.

**5. The undisputed evidence established that Clark County authorized surgery before March 2015 to treat knee instability, so it accepted the condition treated by the March 2015 surgery**

The undisputed facts show Clark County authorized eight surgeries on Maphet's knee. AR DeFrang 41-43. Both Clark County's medical witnesses agreed that the sixth, seventh, and eighth surgeries before March 2015 treated patellofemoral instability. AR Toomey 26-32. Dr. Farris suggested that her knee had become "distorted by some knee surgeries." AR Farris 34-35. The undisputed evidence shows Maphet's March 2015 surgery treated the same condition addressed by surgeries that Clark County authorized before. AR Greenleaf 6, 9, 12, 18, 22-23, 225-28; AR DeFrang 42-43. Since Clark County authorized the earlier surgeries for the express purpose to treat Maphet's patellofemoral instability and since the March 2015 surgery addressed that same condition, Clark County accepted responsibility for the condition treated by the March 2015 surgery. *See* AR DeFrang 42-43. It cannot go back on accepting that condition.

This means that the March 2015 surgery treated a condition proximately caused by Maphet's industrial injury.<sup>9</sup> The superior court erred in denying the motions for judgment as a matter of law.

**B. In the Alternative, the Compensable Consequences Doctrine Compels Coverage of the Sequelae of Maphet's Eight Prior Surgeries**

Even if Clark County had not accepted Maphet's condition, the compensable consequences doctrine would apply. This doctrine provides that when a self-insured employer authorizes treatment and something goes wrong during that treatment (like a doctor making a mistake during surgery), the employer is responsible for the consequences of that treatment. *See Ross v. Erickson Constr. Co.*, 89 Wash. 634, 647, 155 P. 153 (1916). The undisputed evidence shows that occurred here. A doctor performed an unnecessary surgical action in Maphet's fifth surgery, requiring the need for the sixth, seventh, eighth, and ninth surgeries to correct the resulting abnormalities. *See, e.g.*, Clark Cty. Br. 9; RP 464. As a matter of law, Clark County, not Maphet, should be responsible for the effects of the fifth surgery. The superior court erred.

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<sup>9</sup>There is no evidence that Clark County authorized the treatment as an aid to recovery. Clark County bore the burden to present that theory as the appealing party under RCW 51.52.050 and .115.

**1. Well-settled case law makes employers responsible for the consequences of the treatment the workers receive**

The Supreme Court has recognized that if treatment performed for an industrial injury causes complications, the claim covers later treatment, even when those complications were caused by the medical provider's negligence or ill-advised action. *Ross*, 89 Wash. at 647 (though a physician's negligence aggravated the worker's injuries, the treatment was still covered). This is known as the compensable consequences or sequelae doctrine in workers' compensation. *Anderson v. Allison*, 12 Wn.2d 487, 498-99, 122 P.2d 484 (1942) (Industrial Insurance Act covers sequelae of treatment of medical conditions, such as malpractice); 1 Arthur Larson et al. *Larson's Workers' Comp. L.*, 10-1, 10-23 to 10-25 (2017).

In workers' compensation cases, if the employer believes that a doctor's negligence caused the worker's disability to be greater than it otherwise would have been, the employer's remedy is to seek damages from the negligent provider, not to use that negligence to limit its responsibility under the worker's claim. *See Talleday v. Delong*, 68 Wn. App. 351, 358, 842 P.2d 1023 (1993) (Department can seek reimbursement for legal malpractice when recovering third-party lien); RCW 51.24.050.

The Board has decided that the compensable consequences doctrine requires self-insured employers to reimburse surgeries later found ill-advised or unnecessary: “[I]t is well-established that when . . . the worker reasonably relies on the advice of her doctors, the consequences of treatment are compensable, even if the treatment later turns out to be ill-advised or not necessitated by a condition covered under the claim.” *Ladonia Skinner*, No. 14 10594, 2015 WL 4153105, at \*3 (Wash. Bd. Indus. Ins. App. June 12, 2015) (quotations omitted); *David Green*, Nos. 13 11951 & 13 119151-A, 2014 WL 5822998, at \*6 (Wash. Bd. Indus. Ins. App. Oct. 6, 2014) (even if condition turns out to not be related, the consequences of authorized treatment are covered).

In *Skinner*, the claimant suffered a lumbar strain that ultimately required surgery, which then led to another syndrome. 2015 WL 4153105 at \*2-3. Rejecting the self-insured employer’s argument that it was not responsible for the later syndrome, the Board ruled that the claimant reasonably relied on the advice of her doctors in obtaining the surgery, so the employer was “responsible for the consequences of the recommended surgery.” *Id.*<sup>10</sup>

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<sup>10</sup>The Board noted that there would be an exception if the claimant had been notified that the treatment was denied, but proceeded with the surgery anyway. *Id.* at \*3. There was no evidence the surgery was denied. *Id.*

In *Green*, the Board determined that a disc herniation and arthritis were not directly related to the industrial injury, but the Board applied the compensable consequences doctrine to attribute the consequences of an authorized back surgery to the worker's claim. 2014 WL 5822998, at \*4-6. The Board noted that it was reasonable for the worker to undergo the surgery and pointed out that RCW 51.32.110 requires workers to cooperate with medical treatment. *Id.* at \*6.<sup>11</sup>

Clark County ignores *Skinner*, which concludes that the consequences of unrelated surgery that is authorized under the claim must be compensated. And Clark County's attempt to distinguish *Green* by stating that there were Department orders authorizing treatment bolsters the Department's argument. Clark Cty. Br. 31-32. In *Green*, the self-insured employer refused to authorize treatment, requiring the Department to issue orders resolving the disputes by authorizing the surgeries. 2014 WL 5822998, at \*2. The claimant relied on those orders to have the treatment, which then led to additional treatment. *Id.* Clark County authorized the first eight surgeries, and Maphet relied on those

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<sup>11</sup> *Green* incorrectly states that an order authorizing surgery does not cover acceptance of a condition. 2014 WL 5822998, at \*2. The Board did not consider WAC 296-20-01002 or WAC 296-15-266. And the Court defers to the Department when there is a conflict in interpretation between the Department and the Board, as the Department is the executive agency charged by the Legislature to administer the statute. *Dep't of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013).

authorizations and had the surgeries. The Department did not need to get involved because Clark County voluntarily authorized the surgeries.

Clark County authorized a surgery and, during that surgery, the doctor released a tendon, which from the evidence at trial appears to be a mistake or negligence. Clark County's arguments seem to be that because the surgery was not at first for a tendon release, the consequences of performing the release are not compensable. But under the compensable consequences doctrine, Clark County authorized the surgery and allowed the doctor to make the mistake about the tendon release so it falls within the ambit of the consequences of the authorized surgery.

Clark County incorrectly argues that, even under the compensable consequences doctrine, there is still the question of proximate cause about whether the original injury caused the need for the surgery. Clark Cty. Br. 31, 39-40. According to Clark County, the ninth surgery had to be proximately caused by the original injury (falling down the stairs), to be part of the claim. Clark Cty. Br. 39-40. And it argues that since Dr. Greenleaf caused the need for the ninth surgery when he did January 2013 surgery on the knee, the ninth surgery is unrelated to the original injury. *See id.* at 33, 40-41.

Clark County ignores that a doctor's mistaken or negligent treatment cannot be an intervening cause, as a matter of law. *See Ross*, 89

Wash. at 647; *see also Yarrowh v. Hines*, 112 Wash. 310, 313, 192 Pac. 886 (1920). Clark County misunderstands the requirements of the compensable consequences doctrine. The ninth surgery does not need to be proximately caused by the fall if it is proximately caused by the residuals of a previous surgery, if the worker sought the surgery for treatment of a condition that relates to the injury. *Yarrowh*, 112 Wash. at 313; *Skinner*, 2015 WL 4153105, at \*3. Clark County does not deny that when Dr. Greenleaf operated on her in January 2013 it was for her injury to remove scar tissue in the first instance before the release was performed. AR Toomey 31-32; *see Clark Cty. Br.* 39-41. She reasonably received treatment from him because Clark County authorized the surgery. That the doctor performed the release that turned out to be ill advised is not her fault; it is part of the consequences of the surgery. *See Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995) (industrial insurance system is no-fault system).

Even viewing the evidence in the light most favorable to Clark County, the record establishes that Clark County authorized Maphet's surgeries, that Maphet reasonably relied on her doctor's recommendations and had all the surgeries, and that the surgeries caused conditions that required even more treatment. It is undisputed that when Dr. Greenleaf conducted the fifth surgery releasing the tendon that ultimately led to the

need for the ninth surgery, the ninth surgery was for the same patellofemoral instability condition that Clark County had authorized in the sixth, seventh, and eighth surgeries. This case fits squarely in the compensable consequences doctrine. *See Skinner*, 2015 WL 4153105 at \*2-3 (a claimant reasonably relies on the advice of her doctors in obtaining the surgery and the employer was “responsible for the consequences of the recommended surgery”). The compensable consequences doctrine makes Clark County responsible for the ninth surgery as a matter of law.

**2. Sound public policy mandates applying the compensable consequences doctrine to require self-insured employers to cover the residuals of the surgeries they authorize**

A worker should not bear the risk of something going wrong with the treatment provided under the Industrial Insurance Act. The perspective of Maphet is critical. Maphet in 2013 was told that she needed surgery and was told that her employer agreed that the surgery should be authorized under her claim. When deciding to consent to the surgery, she should not have to worry that she will be without a remedy if something goes wrong.

The compensable consequences doctrine furthers the goal of providing sure and certain relief. Providing treatment for the consequences of surgery ensures that workers receive the treatment they need. Otherwise, after an unsuccessful surgery, a worker will be left guessing

whether the next examination or treatment will be covered or whether they must pay out of their own pocket.

A worker acts reasonably in undergoing surgery recommended by the worker's doctor and authorized by the self-insured employer. *Skinner*, 2015 WL 4153105, at \*3; *Green*, 2014 WL 5822998, at \*6. Indeed, a worker can be held noncooperative for not participating in recommended treatment. RCW 51.32.110. If a worker relies on the advice of the worker's doctors, the consequences of that treatment should be covered. Otherwise, workers would be put in the untenable position of either refusing to undergo recommended treatment (for fear it might make them worse, with the worsening not being covered under their claim) or undergoing it (and being left without coverage if it makes them worse). This would contradict the sure and certain relief promised by the Industrial Insurance Act. RCW 51.04.010.

**3. The trial court erred when it asked the jury to decide proximate cause**

The superior then sent a verdict form that asked whether the condition treated by the ninth surgery was proximately caused by the industrial injury or its residuals. CP 190. It was error to have that verdict form because the compensable consequences doctrine (and the

authorization equals acceptance argument) took proximate cause away from the jury. This Court should reverse.

**C. The Trial Court Properly Ruled That ER 409 Does Not Apply and Testimony Regarding Authorization Is Relevant**

The superior court did not abuse its discretion in ruling that the authorization testimony is admissible.<sup>12</sup> CP 169. ER 409—a civil liability rule—does not apply. And Clark County’s arguments to the contrary lack merit. The Court should reject Clark County’s ER 409 argument and affirm on this point.

ER 409 provides that “[e]vidence 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.” This rule does not apply for two reasons.

First, this rule does not apply to workers’ compensation matters. ER 409 concerns proving liability for an injury, but liability is not at issue in a workers’ compensation case. The Industrial Insurance Act is a grand bargain where employers agree to be responsible for all work-related injuries regardless of liability and in turn are granted immunity from common law responsibility. RCW 51.04.010; *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002) (citing *Meyer v. Burger*

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<sup>12</sup> Key here is not that Clark County paid for the surgeries, but that it authorized them.

*King Corp.*, 144 Wn.2d 160, 164, 26 P.3d 925 (2001)). Liability is not considered because the statutory scheme provides “sure and certain relief” and the injuries are “withdrawn from private controversy.” RCW 51.04.010. Inconsistent civil rules, like ER 409, yield to the Industrial Insurance Act. *See* CR 81(a); *Putman v. Wenatchee Valley Med. Cent.*, P.S., 166 Wn.2d 974, 982, 216 P.3d 374 (2009) (using the workers’ compensation system as an example of a special proceeding distinguished from common law); *Afoa v. Dep’t of Labor & Indus.*, \_\_\_ Wn. App. 2d \_\_\_, 418 P.3d 190, 198-99 (2018) (workers’ compensation proceedings are unique and not subject to the same jury trial requirements). Instead, entitlement to benefits is statutory, and the terms of whether benefits are due is governed by statute, not rules governing common law liability. *See, e.g., Stertz v. Indus. Ins. Comm’n*, 91 Wash. 588, 590-91, 597, 605, 158 P. 256 (1916), *abrogated on other grounds by Birklid*, 127 Wn.2d at 874; *Weiffenbach v. City of Seattle*, 193 Wash. 528, 535, 76 P.2d 589 (1938). ER 409 is inapt and it was not error to allow the authorization testimony.

Issues of authorization are critical to determining the legal issues here and it is not error to have the information before this Court, the superior court, or the fact-finder. At a minimum, this Court needs and the superior court needed to consider the authorization evidence to determine whether Clark County followed the regulations requiring it to properly

provide authorized treatment to Maphet in the first place: WAC 296-20-01002 (defining authorization), WAC 296-20-03001 (requiring authorization of surgery), and WAC 296-15-330 (requiring following medical aid rules). These rules show that ER 409 does not fit with the Industrial Insurance Act because authorization is central to analysis under the Act.

Second, even if in the abstract ER 409 applies to workers' compensation cases, the rule excludes "[e]vidence of furnishing or offering or promising to pay," but it says nothing about "authorizing" treatment in the workers' compensation sense. This case is about more than just giving the treatment—it is about Clark County making a legal determination that the first eight surgeries were proper and necessary treatment when they were authorized. The authorization evidence was not offered to show that Clark County implicitly agreed that an industrial injury occurred in the first place (which would be barred under ER 409 if it applies at all). That is what liability means under ER 409, and what actions like furnishing, offering, or promising to pay address.

Instead, the question is whether the evidence is relevant. The authorization testimony is relevant to whether Clark County accepted the condition and whether the surgery resulted as a sequelae of the previous

authorized surgeries. Since the authorization testimony is relevant to those issues, and not barred by ER 409, the trial court correctly admitted it.

Clark County erroneously relies on *Hull*. Clark Cty. Br. 27. To the extent that an unpublished opinion is persuasive, *Hull* discussed ER 409 in a single sentence. 2016 WL 5373820 at \*5. The *Hull* Court never explained what evidence was before the court and how it related to the proceedings. *Id.* Looking at the rest of the *Hull*, however, cuts against Clark County's argument. The *Hull* Court held that Hull's occupational disease was caused by working conditions, and that "the downstream consequences of her surgery are also covered." *Id.* The Court thus evaluated evidence that the occupational disease had been allowed, which is the same type of evidence the superior court here allowed. If anything, *Hull* allows authorization testimony to establish that the employer accepted a condition. This Court should reject Clark County's flawed argument and affirm the superior court's ruling that authorization testimony is admissible.

**D. The Court Should Reverse and Affirm the Board, or in the Alternative, Reverse and Remand for a New Trial with the Correct Jury Instructions and Verdict Form**

The correct remedy is to reverse the superior court and affirm the Board because as a matter of law the industrial injury proximately caused the need for surgery and Clark County has conceded the issue of whether

the treatment was proper and necessary. When Maphet and the Department brought the motions for judgment as a matter of law (and renewed them at the close of evidence), there appeared to be a factual dispute between Dr. Farris and the other doctors about whether Maphet's ninth surgery was medically proper and necessary. As a result, the parties focused on the proximate cause analysis, with Maphet and the Department asking the superior court to decide the issue as a matter of law and only presenting the jury the issue of whether the treatment was proper and necessary.

During Clark County's closing and rebuttal arguments, however, Clark County conceded that the surgery was medically proper and necessary. RP 393-94. And even after Maphet's closing argument, Clark County was unequivocal on rebuttal that the only issue before the jury was proximate cause and that the surgery was necessary and proper.<sup>13</sup> RP 393-94, 433, 456-57. The Court should take Clark County at its word that the surgery was proper and necessary and that the only issue was proximate cause. *See State v. Silva*, 106 Wn. App. 586, 595-99, 24 P.3d 477 (2001) (holding counsel conceded guilt to two offenses during closing argument,

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<sup>13</sup> Clark County incorrectly argued that the second question on the verdict question dealt with proximate cause. RP 393-94. Nowhere in the question is proximate cause mentioned, and the sole issue for the jury to decide by that question is whether the surgery was proper and necessary. CP 190-91.

which was a legitimate trial tactic).<sup>14</sup> As the need for the surgery was proximately caused by Maphet's industrial injury, and as Clark County conceded that the surgery was proper and necessary, nothing is left for a court to resolve. With the concession on the necessary and proper issue, substantial evidence does not support the jury verdict. The proper remedy is to reverse the superior court and order that the Board be affirmed.

If the Court disagrees that Clark County conceded that the surgery was proper and necessary, then the Court should reverse and remand to superior court for a new trial. The only issue before the superior court would be whether the surgery was proper and necessary, and the jury would need to be instructed as such.

## VII. CONCLUSION

The superior court erred when it sent the proximate cause issue to the jury for two reasons. First, Clark County accepted the condition of patellofemoral instability when it authorized the sixth, seventh, and eight surgeries, so it is responsible for the ninth surgery. Second, the compensable consequences doctrine requires self-insured employers to pay for the consequences of the surgeries they authorize, even doctors'

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<sup>14</sup>Although *Silva* is a criminal case, it shows that even when important constitutional rights are at stake, like the right protecting against self-incrimination, counsel can still concede facts during closing argument. There is no reason it could not also occur in a civil matter like this one.

mistakes. This Court should reverse the superior court's denial of Maphet's and the Department's motions for judgment as a matter of law, and affirm the Board.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of July, 2018.

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# APPENDIX

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: TONY DODGE DEC'D ) DOCKET NOS. 15 12777, 15 13572, 15 14176 &  
2 ) 15 14974  
3 )  
4 CLAIM NO. T-943649 ) PROPOSED DECISION AND ORDER  
5

6 **Wayne B. Lucia, Industrial Appeals Judge** — Mr. Tony Dodge, Dec'd., worked for the  
7 self-insured employer (SIE), Clark County. On February 12, 1993, he sustained an accidental,  
8 deep, puncture wound to the palm of his hand from a concealed hypodermic syringe. This occurred  
9 in the course of employment as he was moving some furniture. Mr. Dodge reported the puncture  
10 wound and incident to the SIE. No lasting ill effects were noted at that time.

11 After being alerted to abnormal liver-function test results during routine physical examination,  
12 Mr. Dodge was diagnosed with chronic hepatitis C in 1995. He filed an application for occupational  
13 disease benefits on March 14, 1995. On September 27, 2014, Mr. Dodge died from liver cancer  
14 caused by his chronic hepatitis C condition.

15 The February 12, 1993 puncture wound caused the claimant to have chronic hepatitis C and  
16 thereby entitled him to be eligible for medical care and other benefits until his death, and for his  
17 widow to be eligible for beneficiary benefits.

18 **APPEAL INFORMATION AND PROCEDURAL/EVIDENTIARY RULINGS**

19 See the Addendum at the end of this order.

20 **DISCUSSION**

21 The Board is an Evidence Rule tribunal, that is, evidence introduced at a hearing must  
22 conform to the Washington Rules of Evidence. One rule, ER 409, states:

23 Evidence of furnishing or offering or promising to pay medical, hospital,  
24 or similar expenses occasioned by an injury is not admissible to prove  
25 liability for the injury.<sup>1</sup>

26 The SIE asserts this claim was not allowed, and according to its reckoning, precludes  
27 evidence that the employer may have paid for or offered medical treatment to Mr. Dodge over a  
28 period of about 20 years. The Board may inspect the claim file in order to establish its jurisdiction  
29 over the issues raised by the parties.<sup>2</sup> That inspection was necessary here to limit this decision to  
30 those issues the Board has jurisdiction over.

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46 <sup>1</sup> ER 409.

47 <sup>2</sup> *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965)

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ATTORNEY GENERAL'S OFFICE  
L&I DIVISION OLYMPIA

1 Assistant Chief Laura Bradley conducted the *Holzerland* review, on or about February 9,  
2 2016, at my request. The review showed the SIE sent Mr. Dodge a postcard on June 24, 1996,  
3 which closed the claim as of that date.<sup>3</sup> Mr. Dodge protested the closure.<sup>4</sup> The Department  
4 cancelled the SIE's closure order, keeping the claim open. The Department order dated  
5 October 15, 1996,<sup>5</sup> was not protested or appealed. It contains the required protest and appeal  
6 language, and is, therefore, a final order, binding on the parties.<sup>6</sup>

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10 The SIE's closing notice reflects the claim was received March 17, 1995, that arose out of a  
11 February 1993 injury. The claim identification number is T-943649. This is the same claim number  
12 found on the Department's October 15, 1996 order; the same number appears on each of the  
13 orders on appeal in this matter.

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15  
16 The Board does not have jurisdiction to reconsider claim allowance now. That was well-  
17 decided by the parties in early 1995. The SIE's assertion the claim was not allowed lacks merit.  
18 For about 20 or so years, each of the parties conducted their mutual affairs as if the claim were  
19 allowed. Mr. Dodge was repeatedly tested, diagnosed based on that testing, treated, and he  
20 eventually died from his work-related disease.

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22  
23 A potentially related issue involves recordkeeping. The SIE handled workers compensation  
24 issues in house, but later retained a third-party administrator, Gallagher Bassett Services, Inc.,  
25 which remained until 2007 or 2008. That administrator was succeeded by Novapro. The first  
26 Novapro entry involving Mr. Dodge's claim was made April 7, 2008. Ms. Katherine DeFrang, a  
27 current Novapro employee and manager of this claim, suggested in her testimony the records from  
28 Clark County and Gallagher Bassett were not available.

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31 There are four appeals in these consolidated matters, three by the SIE and one from the  
32 claimant. With employer appeals, the SIE has the burden to present a prima facie case on appeal.  
33 As that elemental case is made, the burden shifts to the responding parties. They must then prove  
34 by preponderance the orders appealed by the SIE are correct.<sup>7</sup> In the lone claimant appeal, the  
35 burden is to prove by preponderance the appealed order is incorrect.<sup>8</sup> So, differing burdens of proof  
36 apply to the respective parties.

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43 <sup>3</sup> Exhibit No. 4

44 <sup>4</sup> Exhibit No. 5

45 <sup>5</sup> Exhibit No. 6

46 <sup>6</sup> *Marley v Department of Labor and Indus.*, 125 Wn.2d 533 (1994)

47 <sup>7</sup> *In re Christine Guttromson*, BIIA Dec., 55,804 (1981)

<sup>8</sup> RCW 51.52.050; WAC 263-12-115

1           Docket No. 15 12777

2           This SIE appeal of the Department order of February 27, 2015, touches upon three distinct  
3 issues. They are: (1) Mr. Dodge died September 27, 2014, in the course of employment; (2) his  
4 widow is entitled to survivor benefits; and (3) the SIE is not eligible for Second Injury Fund benefits  
5 under the circumstances of this claim.  
6

7           Mr. Dodge was stuck in his left hand with a hidden hypodermic needle on February 12, 1993.  
8 In his deposition he testified to making an injury report to his employer. "And so after I got stuck in  
9 the hand with a syringe I filed an accident report with Ed Pavone - - I don't know if he's been here  
10 long enough to know him - - and we documented it."<sup>9</sup>  
11

12           The claimant had normal liver function in 1992; two years later he had mildly elevated  
13 findings. Further testing produced a hepatitis C diagnosis in 1995. Mr. Dodge and his physician,  
14 Dr. Timothy Craven, completed an Application for Benefits, SIF-2 form on March 14, 1995.<sup>10</sup>  
15

16           After making his application, Mr. Dodge began receiving treatment for his hepatitis C  
17 condition. After some early success, the claimant's condition worsened. He developed liver  
18 cirrhosis, a type of scarring as the liver attempts to heal itself, reacting to the chronic hepatitis C  
19 infection. The cirrhosis later developed into liver cancer, which was also treated. Eventually, on  
20 September 27, 2014, the cancer got the best of Mr. Dodge and he passed away.  
21

22           When someone develops hepatitis C, the patient is assessed in terms of his personal risk  
23 factors. Mr. Dodge was not a drug abuser, nor does he have any other alarming risk factors. He  
24 and a friend attempted mutual tattoos at age 13, but abandoned the idea because it hurt too much.  
25 Because hepatitis C develops within 10 years of exposure, the tattoo is not a factor. The claimant  
26 was married for 44 years, happily so according to Ms. Dodge. She did not appear to be sick with  
27 the virus. No noteworthy risk factors in Mr. Dodge's off-work life and experience were identified.  
28

29           Although the risk of contracting hepatitis C from one particular needle stick is small, this is  
30 not an epidemiological inquiry. The concern is Mr. Dodge and no one else. The February 12, 1993  
31 needle stick that went deep into his left palm, causing the wound to bleed, is the infection source  
32 that comes most readily to mind. The evidence supports this conclusion.  
33

34           Mr. Dodge's infection followed the worst case, but normal progression of his chronic hepatitis  
35 C viral infection. It began with elevated liver enzymes after the needle stick. The following year  
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46           <sup>9</sup> Dodge Dep. at 6

47           <sup>10</sup> Exhibit No. 2

1 Mr. Dodge was diagnosed with chronic hepatitis C viral infection. The virus affects the liver. He  
2 later developed cirrhosis, following which the claimant had liver cancer. He died because of the  
3 liver cancer caused by the hepatitis C infection, which came from the 1993 needle stick. Thus,  
4 Mr. Dodge died in the course of his employment.  
5

6  
7 What began as a simple injury morphed into disease. That disease arose naturally and  
8 proximately out of the distinctive conditions of Mr. Dodge's employment with the SIE.<sup>11</sup> When blood  
9 testing confirmed he had hepatitis C, the claimant and his attending physician filed an Application  
10 for Benefits within days of the diagnosis. That application was timely under the Act.<sup>12</sup> As  
11 Mr. Dodge had a disease caused by the distinctive conditions of his employment, the condition  
12 killed him, and his Application for Benefits was timely made, there is no barrier for Ms. Dodge to  
13 receive survivor's benefits. Her application must have been filed within the one-year period  
14 permitted by statute as the Department had determined her eligibility by January 26, 2015.<sup>13</sup>  
15

16  
17 The last issue under Docket No. 15 12777 is eligibility for Second Injury Fund relief to the  
18 SIE.<sup>14</sup> The fund is available when permanent total disability or death is due to the combined effects  
19 of preexisting condition(s). Mr. Dodge had hepatitis A, a food or fecal borne infection, in 1986 or  
20 1987 from a restaurant. About 30 other restaurant customers were sickened at the time. He also  
21 got a vaccination for hepatitis B from a Fred Meyer store many years ago. This background  
22 explains why Mr. Dodge tested positive for the A and B versions.  
23

24  
25 Medical testimony showed the A and B varieties do not cause or otherwise affect the  
26 contracting or course of hepatitis C. They are three distinct viruses labeled hepa, meaning liver,  
27 with titis, or infection or inflammation. Given the lack of relationship between the A, B, and C types  
28 of hepatitis; and the three distinct exposures Mr. Dodge had spread over time; this occupational  
29 disease does not qualify for Second Injury Fund treatment.  
30

31 The February 27, 2015 order is affirmed.  
32

33 Docket No. 15 14176  
34

35 The SIE appealed a March 20, 2015 order directing it to pay time-loss benefits from  
36 October 23, 2013, through September 26, 2014, and to pay several, specifically enumerated  
37 medical bills that accrued during the last weeks of Mr. Dodge's life.  
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45 <sup>11</sup> RCW 51.08.140

46 <sup>12</sup> RCW 51.28.055

47 <sup>13</sup> RCW 51.32.050

<sup>14</sup> RCW 51.16.120

1 The SIE allowed the claim for treatment and began paying Mr. Dodge's hepatitis C medical  
2 costs for testing, diagnosis, and treatment. Ms. Dodge said the claimant did not receive any  
3 medical bills from 1993 into 2014. The bills started coming to their home shortly after Mr. Dodge  
4 passed away. Physicians and medical providers have a right to be paid when the employer at risk  
5 is self insured.<sup>15</sup> The specifically enumerated, but unpaid medical bills are from the last weeks of  
6 Mr. Dodge's life and are related to his occupational disease. The Department correctly applied the  
7 facts and the law when it directed the SIE to pay those bills.  
8

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11 When a claim is allowed and active, all benefits the worker may be entitled to are due and  
12 payable without delay.<sup>16</sup> In Mr. Dodge's case, the SIE did not pay any time-loss benefits. He kept  
13 working as much as he could. Because of the effects of the occupational disease Mr. Dodge was  
14 not able to work from October 23, 2013, through September 26, 2014.  
15

16  
17 The claimant's job with the SIE was eliminated, after which Mr. Dodge began working for the  
18 Salvation Army. Because of insurance issues he left that employment and began working for  
19 Siemens Corporation, where he and Ms. Dodge had medical insurance coverage. Siemens was  
20 purchased by the Shell Oil Company. While at Siemens/Shell, the claimant began a course of  
21 interferon therapy, which he found physically debilitating. In August 2004, his treating physician at  
22 Kaiser, Dr. Willis, took him off work. Mr. Dodge retired from Shell Oil Company in 2004 for medical  
23 reasons related to this occupational disease and its treatment.  
24

25  
26 Dr. Atif Zaman, a liver disease specialist, was one of the claimant's treating physicians. He  
27 opined Mr. Dodge would not have been able to work as of October 23, 2013, and following, given  
28 the physical toll the treatment regimen was taking.  
29

30  
31 As Mr. Dodge stopped working in 2004 for medical reasons related to this claim, and his  
32 condition worsened without relenting until his September 27, 2014 death, then he could not work  
33 full time, as he did in 1994, from October 23, 2013, through September 26, 2014. Up to the day  
34 before Mr. Dodge died, one could conclude his disability was temporary and total.<sup>17</sup> He would have  
35 been a temporarily, totally disabled worker, as contemplated by RCW 51.32.090, from October 23,  
36 2013, through September 26, 2014, as a result of his occupational disease.  
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39 The March 20, 2015 order is affirmed.  
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<sup>15</sup> RCW 51.36.085

<sup>16</sup> RCW 51.48.017

<sup>17</sup> RCW 51.32.090  
46  
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1 protest to the Board as a direct appeal. The March 20, 2015 order amended a March 2, 2015  
2 order, and thereby directed the employer to pay time-loss benefits from October 23, 2013, through  
3 September 26, 2014, and to pay several specifically enumerated medical bills. The order is correct  
4 and is affirmed.  
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7 In Docket No. 15 14974, the employer, Clark County, filed an appeal with the Board of Industrial  
8 Insurance Appeals on April 28, 2015. The employer appeals a Department order dated  
9 February 26, 2015. In this order, the Department directed the employer to pay two specifically  
10 enumerated medical bills. The order is correct and is affirmed.  
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13 In Docket No. 15 13572, the claimant, Tony Dodge, Dec'd, filed an appeal with the Board of  
14 Industrial Insurance Appeals on March 27, 2015. The claimant appeals a Department order dated  
15 March 12, 2015. In this order, the Department determined the claimant's wage at the time of injury  
16 was \$2,180.64. The order is reversed and remanded to the Department with direction to  
17 recalculate the wage at time of the occupational disease so as to include the cost of any  
18 employer-paid health insurance.  
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#### 22 FINDINGS OF FACT 23

- 24 1. On June 24, 2015, an industrial appeals judge certified that the parties  
25 agreed to include the Jurisdictional Histories in the Board record solely  
26 for jurisdictional purposes.
- 27 2. Tony Dodge, Dec'd, developed an occupational disease condition,  
28 diagnosed as hepatitis C, that arose naturally and proximately out of  
29 distinctive conditions of employment, when he suffered a puncture  
30 wound in his left hand by a hidden hypodermic needle on February 12,  
31 1993, and which became manifest on March 14, 1995.
- 32 3. At the time of the needle puncture, and later when his occupational  
33 disease became manifest, Tony Dodge, Dec'd, was employed by Clark  
34 County, a self-insured employer.
- 35 4. On October 15, 1996, the Department of Labor and Industries issued an  
36 order that reopened the claim after the self-insured employer had closed  
37 the claim; the October 15, 1996 order has not been protested or  
38 appealed.
- 39 5. Docket No. 15 12777 - Tony Dodge's, Dec'd, occupational disease  
40 condition developed into cirrhosis of his liver, followed by liver cancer,  
41 and his eventual death on September 27, 2014.
- 42 6. Tony Dodge, Dec'd, died on September 27, 2014, due to his  
43 occupational disease condition that arose in the course of his  
44 employment.  
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- 1 7. There were no preexisting or other conditions that contributed to Tony  
2 Dodge's, Dec'd, death.
- 3 8. At the time of his death, Tony Dodge, Dec'd, had been married to Sally  
4 Dodge for 44 years.
- 5 9. Docket No. 15 141276 – Due to the residual impairment, proximately  
6 caused by his occupational disease, Tony Dodge, Dec'd, was precluded  
7 from obtaining and performing reasonably continuous, gainful  
8 employment from October 23, 2013, through September 26, 2014.
- 9 10. There are several specific medical treatments for Tony Dodge's, Dec'd,  
10 occupational disease that have not yet been paid by the self-insured  
11 employer.
- 12 11. Docket No. 15 14974 - There are two specific medical treatment and  
13 postmortem bills for Tony Dodge's, Dec'd, occupational disease that  
14 have not yet been paid by the self-insured employer.
- 15 12. Docket No. 15 13572 – At the time Tony Dodge's, Dec'd, occupational  
16 disease became manifest, the self-insured employer was paying for his  
17 medical insurance.

#### 21 CONCLUSIONS OF LAW

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
23 parties and subject matter of these appeals.
- 24 2. Docket No. 15 12777 - Tony Dodge's, Dec'd, occupational disease  
25 condition, which became manifest on-or-about March 14, 1995,  
26 developed into cirrhosis of his liver, followed by liver cancer, and his  
27 eventual death on September 27, 2014, as contemplated by  
28 RCW 51.08.140.
- 29 3. Tony Dodge, Dec'd did not have a previous bodily disability within the  
30 meaning of RCW 51.16.120.
- 31 4. Clark County is not entitled to Second Injury Fund relief pursuant to  
32 RCW 51.16.120.
- 33 5. Tony Dodge's, Dec'd, wife of 44 years, Sally Dodge, is entitled to  
34 survivor's benefits, within the meaning of RCW 51.32.050.
- 35 6. The Department order dated February 27, 2015, is correct and is  
36 affirmed.
- 37 7. Docket No. 15 141276 – Tony Dodge, Dec'd, was a totally, temporarily  
38 disabled worker from October 23, 2013, through September 26, 2014,  
39 as contemplated by RCW 51.32.090.
- 40 8. Medical bills for treatment of Tony Dodge's, Dec'd, occupational disease  
41 are the responsibility of the self-insured employer and are to be promptly  
42 paid, within the meaning of RCW 51.48.017 and RCW 51.36.085.
- 43 9. The Department order dated March 20, 2015, is correct and is affirmed.
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10. Docket No. 15 14974 - Medical bills for treatment of Tony Dodge's, Dec'd, occupational disease are the responsibility of the self-insured employer and are to be promptly paid, within the meaning of RCW 51.48.017 and RCW 51.36.085.
  11. The Department order dated February 26, 2015, is correct and is affirmed.
  12. Docket No. 15 13572 – Tony Dodge's, Dec'd, monthly wage calculation did not include the cost for employer-provided health insurance benefits, contrary to RCW 51.08.178.
  13. The Department order dated March 12, 2015, is incorrect and is reversed and remanded to the Department with direction to issue an order that recalculates Tony Dodge's, Dec'd, wage at the time of his occupational disease manifestation, to specifically include the cost of employer-provided health insurance benefits, and which takes such other action as may be required by the facts and the law.

Dated: February 16, 2016



Wayne B. Lucia  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals

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**Addendum to Proposed Decision And Order**  
**In re Tony Dodge Dec'd**  
**Docket Nos. 15 12777, 15 13572, 15 14176 & 15 14974**  
**Claim No. T-943649**

**Appearances**

Beneficiary, Sally Dodge, by Busick Hamrick Palmer, PLLC, per Douglas M. Palmer

Self-Insured Employer, Clark County, by Law Office of Gress & Clark, LLC, per James L. Gress & Brett B. Schoepper

Department of Labor and Industries, by The Office of the Attorney General, per James S. Johnson

**Hearing Testimony Considered**

Claimant Witnesses

1. Catherine DeFrang
2. Sally Dodge

Objections were made by the SIE's counsel during the testimony of the hearing witnesses. The objections were overruled, but in a qualified way. ER 409 does not permit evidence of providing or paying for medical treatment to prove responsibility or liability. The SIE is correct in this regard. The testimony objected was to be used only for historical purposes and to show the progress of Mr. Dodge's condition. The history of this claim became more difficult, given the large number of records reported to be missing.

**Perpetuation Deposition Testimony Considered**

The following depositions are published in accordance with WAC 263-12-117 with all objections overruled and all motions denied except as indicated below.

Employer Witnesses

1. Dr. Robert Levenson

Claimant Witnesses

1. Dr. Atif Zaman
2. Dr. Timothy Craven
3. Tony Dodge

Objections were made by the SIE's counsel during the testimony of the deposition witnesses. The objections were overruled, but in a qualified way. See explanation above regarding the interplay of ER 409 and building a history of the claimant's disease.

**Physical Exhibits Considered**

The claimant filed a motion under ER 904 for the admission of certain documents. The motion was timely. The employer responded it had no objections. The following exhibits are admitted per the claimant's motion:

1. Death Certificate for Tony Dodge, date of death September 27, 2014, causes being hepatic failure, liver cirrhosis, hepatitis C.

- 1 2. SIE-2 Accident Report dated March 14, 1995, for chronic hepatitis C from a workplace  
2 needle stick occurring in February 1992.
- 3
- 4 3. Physician's initial report, dated March 13, 1995, diagnosing Mr. Dodge with chronic  
5 hepatitis C from a needle stick to his left hand on February 14, 1993.
- 6 4. SIE Claim Closure Notice indicating the claim was received March 17, 1995, with a  
7 February 1993 injury date, and closure of the claim on June 24, 1996.
- 8 5. Application to Reopen Claim, signed by Mr. Dodge July 19, 1996.
- 9 6. Department letter dated October 15, 1996, informing the SIE and Mr. Dodge the  
10 Department is setting aside the claim closure notice dated June 24, 1996.
- 11
- 12 7. Department order dated November 15, 1996, cancelling the order dated June 24,  
13 1996, and keeping the claim open for authorized treatment.
- 14
- 15 8. TPA letter to Kaiser Permanente, dated June 25, 2009, seeking medical records.
- 16 9. September 17, 2014 deposition of Tony Dodge, taken in his hospital room 10 days  
17 prior to his death. Although the claimant's representative asked the deposition be  
18 admitted as an exhibit, it is more appropriate to publish his deposition. Thus, Exhibit  
19 No. 9 is rejected, but the deposition is published to preserve his testimony.

20 Other exhibits offered and considered are:

- 21
- 22 10. Journal diary of TPA activities with Mr. Dodge and the claim. The original ruling  
23 rejecting this exhibit on November 9, 2015, is reversed. The exhibit is admitted for the  
24 limited purpose of showing the claim was open and active, but evidence of costs or  
25 medical treatment is not taken into account so as to follow ER 409.
- 26 11. This exhibit is the first page of Exhibit No. 10, almost identical but for the print date on  
27 the upper right side, and was admitted at the hearing. The hearing ruling is reversed  
28 and this exhibit is rejected as duplicative.
- 29
- 30 12. Claim Payment List listing the payments made during the course of this claim. The  
31 list was admitted at the hearing. The hearing ruling is reversed and this exhibit is  
32 rejected as contrary to ER 409.
- 33 13. Claimant's Request for Admissions and the SIE's answers are admitted as an exhibit.

### 34 **Reserved Rulings**

35 The claimant filed a discovery deposition and exhibits in its Motion for Directed Verdict. The  
36 deposition and attached exhibits are not admitted as exhibits. The motion was denied.  
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In re: TONY DODGE DEC'D  
Docket No. 15 12777 15 13572 15 14176 15 14974

NO. 51170-3-II

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

CLARK COUNTY, ET AL.,

Appellant,

v.

JENNIFER MAPHET,

Respondent.

CERTIFICATE OF  
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served the DEPARTMENT OF LABOR & INDUSTRIES BRIEF OF RESPONDENT/CROSS APPELLANT and this CERTIFICATE OF SERVICE to counsel for all parties on the record in the below described manner:

**Via Electronic Filing to:**

Derek Byrne, Clerk/Administrator  
Court of Appeals Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

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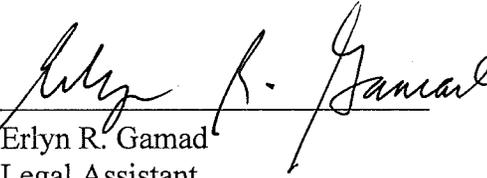
**Via E-Service and via First Class United States Mail, Postage  
Prepaid to:**

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Brett Schoepper  
Gress, Clark, Young & Schoepper  
8705 SW Nimbus Avenue Suite 240  
Beaverton, OR 97008

DATED this 17<sup>th</sup> day of July, 2018.

  
\_\_\_\_\_  
Eryln R. Gamad  
Legal Assistant

**WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE**

**July 17, 2018 - 2:12 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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