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NO. 51170-3-II

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

CLARK COUNTY,

Respondent,

v.

JENNIFER MAPHET,

Appellant.

**REPLY OF CROSS-APPELLANT
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

Workers deserve the sure and certain relief of medical care, especially when their employers contribute to their medical condition.¹ Clark County authorized several surgeries on Jennifer Maphet's knee. Years later, it denied responsibility for the condition caused by those surgeries despite the county's own authorizations. Clark County's efforts to evade covering Maphet's knee condition fail in two respects. First, if a self-insured employer has authorized surgery, Department regulations require that the treated conditions be accepted as part of the claim. Second, even if the Court determines that authorization does not equal acceptance, an employer must cover the consequences of an authorized treatment under the compensable consequences doctrine.

Clark County engages in no meaningful dispute about the meaning of the Department's authorization regulations. Nor does it distinguish binding case law about the compensable consequences doctrine. Its arguments mainly hinge on its theory that testimony about authorization was not admissible. But authorization is a central fact in workers' compensation cases, and the evidence rules do not exclude this evidence.

¹ Clark County has submitted a brief called "Employer/Respondent's Reply to Brief of Department/Cross-Appellant." The Department will refer to this brief as Clark Cty. RB. This brief is actually the brief of respondent/reply of the Employer/Respondent as it responds to the arguments made in the Department's cross-appellant brief.

Taken to their logical conclusion, Clark County's arguments would undermine the sure and certain relief guaranteed to workers by the Legislature. This Court should reverse and order judgment as a matter of law for Maphet and the Department.

II. ARGUMENT

Clark County's proposed rule of law that employers can authorize treatment without responsibility for the consequences of that treatment would deny workers sure and certain relief under RCW 51.04.010 in three ways. First, it would allow a worker to have years of treatment without knowing if the employer would ultimately cover the treated condition. Second, when the treatment goes wrong, it would allow the self-insured employer to after-the-fact disavow responsibility. And third, it would undermine workers' reasonable reliance on their attending physicians' treatment recommendations. The Court should reject arguments that would allow a self-insured employer to accept responsibility for good treatment outcomes but disavow responsibility for bad outcomes.

This case is about whether a ninth surgery to correct Maphet's patellofemoral instability was a covered benefit under the Industrial Insurance Act. Contrary to Clark County's arguments, whether this condition was proximately caused by Maphet's industrial injury was not a jury question. Clark Cty. RB 7. Clark County does not deny the

foundational facts here: (1) the county authorized Dr. Greenleaf's January 2013 surgery (Clark County challenges only the admissibility of this fact, not that it occurred); and (2) that surgery caused the condition of patellofemoral instability (Clark County does not dispute this fact). While the January 2013 surgery may have been ill advised as Clark County's witnesses attest, workers do not lose coverage under the Act because of the negligence or ill-advised action of a doctor. AR Toomey 35-36, 56; AR Farris 23; *Ross v. Erickson Constr. Co.*, 89 Wash. 634, 647-48, 155 P. 153 (1916); *David Green*, Nos. 13 11951 & 13 11951-A, 2014 WL 5822998, at *5 (Wash. Bd. Indus. Ins. App. Oct. 6, 2014). When an authorized treatment causes the worker's condition—a fact that Clark County does not dispute— proximate cause is established and so there was no proximate cause issue for the jury.

On whether the ninth surgery was proper and necessary treatment for the accepted condition, Clark County's stipulation that it was proper and necessary resolves this question. CR 2A binds the County to its stipulation.

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

Clark County authorized several surgeries to address Maphet's patellofemoral instability. By authorizing these surgeries, Clark County

accepted responsibility for that condition. Self-insured employers may pay benefits only as authorized by the Industrial Insurance Act: self-insured employers must “[a]uthorize treatment and pay bills in accordance with Title 51 RCW and the medical aid rules” WAC 296-15-330(1).² In responding to the Department’s brief of cross-appellant, Clark County says it asserts no right to pay benefits outside the scope of the Industrial Insurance Act. Clark Cty. RB 2-3. This is a critical concession because it necessarily follows that the county authorized treatment under the mandate of the Department’s regulations.

Under the duly promulgated regulations, by “authorizing” the patellofemoral instability surgery, Clark County “accepted” that condition. An “[a]ccepted condition” or “acceptance” is a determination that a condition is the responsibility of the self-insured employer:

Acceptance, accepted condition: 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”

² RCW 51.14.095(1)(a) likewise requires self-insured employers to “follow[] proper industrial insurance claims procedures.”

where it provides that authorization is the self-insured employer's notification that it will provide treatment for an accepted condition:

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.

WAC 296-20-01002 (definition of "authorization").

Reading the definitions together shows that "[a]uthorization" of treatment requires that there first be "an accepted condition." WAC 296-20-01002. After all, only treatment of an accepted condition may be authorized. "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 under the plain language of the regulation.

This bright line rule furthers the public policy aims of the Industrial Insurance Act. The Legislature designed the Act to provide workers with sure and certain relief through "high quality medical treatment and adherence to occupational health best practices[.]" RCW 51.36.010. By requiring a decision about acceptance when an employer authorizes treatment, the Department's regulations help provide continuity of care and high quality medical services. And unlike Clark County's

proposal, under the Department’s regulations, a worker is not left to guess about whether a condition will ultimately be covered. The parties are never required to unravel causation issues after years of treatment, with evidence gone stale or new complications caused by the treatment.³ The Court should apply the definitions of “authorization” and “acceptance” to hold that a self-insured employer is responsible for those conditions for which it has authorized surgery. WAC 296-20-01002.

Clark County does not directly dispute the Department’s analysis of the regulations. Clark Cty. RB 3. This is likely because the court defers to an agency’s interpretation of its own regulations. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004). Instead, Clark County says that the Department “does not point to a shred of testimony or other evidence in the Board record throughout its discussion of these rules.” Clark Cty. RB 3. The Department’s brief is to the contrary.

As explained by the Department, the record establishes that over

³ Under Clark County’s proposed rule of law, 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, it could argue the cancer is unrelated and contest 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. This situation comes from a case litigated before the Board involving Clark County. *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), copied in the appendix to Department’s brief of cross-appellant.

several years, Maphet underwent eight surgeries on her knee. AR 76-77; AR Greenleaf 8-28; DLI Opening Br. 5-8, 25-26. Clark County authorized all the surgeries. AR DeFrang 41-43. The first four surgeries treated Maphet's knee instability, including surgeries on her meniscus, her medial femoral condyle, and her patella. *See, e.g.*, AR Greenleaf 10-13, 25-28. During the fifth authorized surgery to remove scar tissue, Dr. Greenleaf released part of the ligaments holding Maphet's kneecap in place. AR Greenleaf 19-22. Maphet developed patellofemoral instability from this procedure. AR Toomey 29; AR Greenleaf 25-28. Other doctors later questioned the appropriateness of this release. *E.g.*, AR Toomey 35-36, 55-56; AR Farris 23. 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 56-57.

Because of the fifth surgery, Maphet developed patellofemoral instability, and Dr. Greenleaf performed and Clark County authorized additional surgeries in May 2013, December 2013, and August 2014 to try to correct this issue. AR Maphet 26; AR Farris 23-25; AR DeFrang 43. He then performed the ninth contested surgery in March 2015 to treat the same condition the earlier authorized surgeries sought to resolve. AR 77; AR Greenleaf 28-29; AR Whitcomb 189-90.

Clark County does not deny these facts (except for contesting the

admissibility of the authorization testimony) and so admits them. Clark Cty. RB 1-10. When a party to an appeal has an opportunity to respond to an opponent's factual claims but neglects to do so, the party admits the accuracy of the opponent's claims. *See Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992). Under the Department's regulations, since Clark County authorized surgery for patellofemoral instability, it has accepted the condition. WAC 296-20-01002 (definition of "authorization" and "acceptance, accepted condition"). The Department proved as a matter of law that the condition was covered under the claim, and it was error for the trial court to deny the Department's motion for judgment as a matter of law. CR 50.

B. The Compensable Consequences Doctrine Also Compels Coverage of the Consequences of Maphet's Many Surgeries

The compensable consequences doctrine provides that when a self-insured employer authorizes treatment and something goes wrong during that treatment (such as a doctor making a mistake during surgery), the employer is responsible for the consequences of that treatment. *See Ross*, 89 Wash. at 647-48. The negligence of the doctor is not an intervening cause under this doctrine. *Id.* The *Ross* Court held that even if a physician's negligence aggravated the worker's injury, the workers' compensation laws covered the negligence. *Id.*; *see also Anderson v.*

Allison, 12 Wn.2d 487, 498-99, 122 P.2d 484 (1942); cf. *Yarrough v. Hines*, 112 Wash. 310, 313, 192 Pac. 886 (1920). *Ross* is still good law.

The compensable consequences doctrine is well recognized in workers' compensation law. Contrary to Clark County's arguments, the compensable consequences doctrine even applies to authorized surgery of an unrelated condition. See *Green*, 2014 WL 5822998, at *6; *Ladonia Skinner*, No. 14 10594, 2015 WL 4153105, at *3 (Wash. Bd. Indus. Ins. App. June 12, 2015); 1 Arthur Larson et al. *Larson's Workers' Comp. L.*, 10-24 to 10-26 (2017); Clark Cty. RB 7. In *Green*, the Board decided that the worker's industrial injury did not cause or aggravate a disc herniation or arthritis. 2014 WL 5822998, at *3. But the Board ruled that the consequences of the surgery for those conditions were covered because the self-insured employer authorized surgery for those conditions: "regardless of whether the authorization was ill-advised or resulted in treatment for conditions unrelated to the industrial injury, the consequences of the surgeries are the responsibility of the self-insured employer." *Id.* at *5. The Board noted that the worker acted reasonably when undergoing the surgery because it was authorized and because he had to cooperate with the treatment recommendations. *Id.* at *6.

Clark County's attempts to distinguish *Green* on the basis that there were "unchallenged final and binding authorization orders," which it

claims “were vital to the Board’s analysis in *Green*.” Clark Cty. RB 6. This argument fails for two reasons. First, there is no need to have a final and binding Department authorization order here because Clark County does not dispute it authorized the surgery. And second, in *Green*, the Board ruled that the authorization orders did not establish that the condition was caused by the industrial injury, finding in that case that the condition was unrelated. 2014 WL 5822998, at *2.⁴ Yet even though it found the condition unrelated, the Board found the consequences of the treatment for that condition a covered benefit. *Id.* at *6.

Clark County’s attempted distinction of *Skinner* also fails. While the county asserts that the Board reached its decision based on expert opinion that the claimant’s condition was proximately caused by her injury, Clark Cty. RB 6, it neglects to point out that the employer’s own doctor testified that the worker’s condition was unrelated. Immediately

⁴ The *Green* Board and the Department disagree about whether authorization equals acceptance. The law provides that if an employer authorizes a treatment for a condition, the condition is accepted. WAC 296-20-01002 (definition of acceptance and authorization). The Legislature authorized the Department to adopt this regulation under RCW 51.04.030 and RCW 51.36.010(10). The court follows a regulation adopted under a legislative grant of authority. *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 910, 246 P.3d 1254 (2011). The court defers to the Department when there is a conflict in interpretation between the Department and the Board because the Department is the executive agency charged by the Legislature to administer the statute. *Dep’t of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013). The court gives substantial judicial deference to an agency views when an agency determination is based on matters “close to the heart of the agency’s expertise.” *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997). But the Board is correct that even if the condition is not accepted, the employer is responsible for the consequences of the authorized treatment. It is on this point that the Department relies.

following this discussion about unrelated conditions, the Board said: “[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.” 2015 WL 4153105, at *3 (quotations omitted). Under this analysis, the consequences of the surgery for Maphet’s patellofemoral instability condition must be covered.

Contrary to Clark County’s arguments, it is not a question of fact for the jury to determine if Dr. Greenleaf was treating a condition proximately caused by the industrial injury. Clark Cty. RB 7. Rather, proximate cause is established by the fact that, but for the injury, Maphet would not have been in the position to undergo the many surgeries authorized by Clark County. It is undisputed that Clark County authorized the January 2013 surgery and that this surgery caused the condition of patellofemoral instability. Dr. Greenleaf’s January 2013 surgery may have been ill advised as Clark County’s witnesses attest, but the negligence or ill-advised action of a doctor is covered under the claim. AR Toomey 35-36, 56; AR Farris 23; *Ross*, 89 Wash. at 647-48; *Green*, 2014 WL 5822998, at *5. A worker can hardly be faulted for relying on a doctor’s treatment recommendations when the self-insured employer has itself authorized the doctor to perform the surgery. *See Green*, 2014 WL

5822998, at *6; *see Ross*, 89 Wash. at 647-48. Because the Department established that the January 2013 knee surgery was authorized under the claim and that Maphet's patellofemoral instability condition resulted from that treatment, proximate cause is established as a matter of law

The compensable consequences doctrine furthers the goal of providing sure and certain relief and reducing suffering of workers. RCW 51.04.010; RCW 51.12.010. Treating the consequences of surgery ensures that workers receive the treatment they need. Otherwise, it would be workers who would bear the risk of unsuccessful surgery contrary to the whole purpose of the Industrial Insurance Act, which is to provide "sure and certain" medical care to workers. RCW 51.04.010.

The trial court erred when it denied the Department's motion for judgment as a matter of law based on the compensable consequences doctrine. *See* CR 50.

C. Clark County's Evidentiary Arguments Have No Merit

The trial court committed no evidentiary error. Clark County's argument about the liability payment rule, ER 409, has no merit because this rule does not apply to workers' compensation cases and, in any event, this is a case about authorization, not payment. The Court should not consider Clark County's argument that Katie DeFrang's testimony should

be struck because Clark County did not assign error to this testimony and because it cites no portion of the superior court record where it objected.

1. The trial court properly ruled that ER 409 does not prevent testimony about authorization

Rather than challenge the meaning of the regulations or the facts surrounding the acceptance of the patellofemoral instability condition, Clark County challenges the admissibility of the authorization testimony. Clark Cty. RB 3-4. The county asserts that ER 409 prohibits admission of the evidence of authorization. Clark Cty. RB 4. But Clark County does not deny that the authority cited by the Department shows that workers' compensation proceedings are unique and not subject to the same rules as other proceedings. *E.g., Putman v. Wenatchee Valley Med. Cent., P.S.*, 166 Wn.2d 974, 982, 216 P.3d 374 (2009); DLI Opening Br. 35. Because liability is not at issue in workers' compensation proceedings, ER 409 does not apply.

ER 409 addresses "liability" for an injury: "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" (emphasis added). But the Industrial Insurance Act is not a liability statute. The Act does not require liability for an injury because the Legislature abolished common law rules of civil liability:

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.

RCW 51.04.010. The Act covers a worker if the injury occurred during the course of employment. RCW 51.32.010. The Act provides “a swift, no-fault compensation system for injuries on the job.” *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995); *see also* RCW 51.04.010.

The Act “took away from the workman his common-law right of action for negligence and [i]n its place it provided for industrial insurance, thereby creating the right of the workman to compensation from the workers’ compensation fund.” *Afoa v. Dep’t of Labor & Indus.*, 3 Wn. App. 2d 794, 811, 418 P.3d 1980 (2018) (quotations omitted).

Unlike tort cases, liability is not an issue in workers’ compensation claims. *See* RCW 51.04.010. In a tort case, the plaintiff must prove that an alleged tortfeasor caused an injury to the plaintiff, and so is liable for damages. *E.g., Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975). In such a case, the injured party must establish liability to receive reimbursement for his or her medical costs. *See generally Patterson v.*

Horton, 84 Wn. App. 531, 543, 929 P.2d 597 (1997). This contrasts with workers' compensation, where the self-insured employer must pay benefits without a fault-based liability inquiry. RCW 51.32.010. So long as the worker is injured in the course of employment, the employer is responsible for medical costs. RCW 51.32.010.

The purposes underlying ER 409 do not apply to workers' compensation proceedings. As noted by Professor Tegland, "the [409] rule is based upon the belief that payments or offers to pay are usually made for humane reasons, not as admissions of liability, and that a contrary rule would discourage assistance to injured persons." Karl B. Tegland, 5D Wash. Prac., *Courtroom Handbook on Wash. Evidence* § 409:1 (2017-18 ed.). Such a belief may apply in a tort case, but not to a workers' compensation case because it is not "humane reasons" but the Industrial Insurance Act that requires self-insurers to pay the medical costs of injured workers. RCW 51.36.010; RCW 51.04.010; WAC 296-15-330.

ER 409 has no applicability where liability is not at issue. The Act is a statutory benefits scheme—if someone qualifies under the statute, that person gets benefits. Unlike tort cases, questions of liability are not present under the Industrial Insurance Act, which provides for a no-fault statutory benefits scheme. *See Birklid*, 127 Wn.2d at 859. This Court should affirm the superior court's determination that ER 409 does not

apply in workers' compensation proceedings where liability is not at issue.

Even if ER 409 could apply to workers' compensation cases, Clark County fails to show that it applies here. Under the plain language of the rule, the county's arguments fail for two reasons: (1) the rule is about payment and this case is about authorization and (2) the rule is about the original injury and not everything that happens after the injury.

First, ER 409 does not encompass a self-insured employer's treatment authorizations. The rule 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." ER 409. It says nothing about "authorizing" treatment in the workers' compensation sense: a specific legal determination under WAC 296-20-01002 and WAC 296-20-03001 to allow a surgery as a covered benefit. Authorization is a legal determination that the treatment is "proper and necessary treatment ... of an accepted condition" WAC 296-20-01002 (definition of authorization). Payment and authorization are two different things. ER 409 does not bar testimony about the legal determination of authorization.

Instead of disputing the definition of authorization, Clark County relies on an unpublished decision, *Hull v. PeaceHealth Medical Group*, No. 74413-5-I, 2016 WL 5373820 (Wash. Ct. App. Sept. 26, 2016)

(unpublished), that provides little guidance about ER 409's applicability.

The court's sole discussion is:

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.

2016 WL 5373820, *5 (emphasis added). This sentence does not apply because the Department does not rely on evidence of Clark County's *payment* for Maphet's surgeries. Instead, Clark County's acceptance of Maphet's knee condition is based on evidence of *authorization*, an entirely different legal concept.

The Court should also not rely on *Hull* because it has little persuasive value. GR 14.1 provides that unpublished decisions are not precedential and have only persuasive value. Clark County tries to spin a single sentence into more than what it is. The *Hull* Court considered neither the context of the Department's regulations about authorization nor the compensable consequences doctrine. Its bare sentence about ER 409 provides no persuasive guidance to other courts.

Second, the rule does not apply because it is only about the initial injury, not everything that happens after the claim is allowed. Without citation to authority, Clark County argues that "liability for the injury" under ER 409 includes any question of statutory responsibility for benefits

after allowance of the injury. Clark Cty. RB 4. But the rule is specific in addressing the question of “injury” and who is liable for that injury, and Clark County is reading a meaning into the evidence rule that simply is not present. In other words, the rule is about whether a party is responsible for an injury in the first place, not the damages that flow from the injury. The initial question about liability for Maphet’s injury was resolved in 2009 when the Department allowed the claim. AR 7, 105.

Clark County’s efforts to impose ER 409 on the Industrial Insurance Act’s no-fault statutory scheme must fail. A core purpose of the Act “is to allocate the cost of workplace injuries to the industry that produces them, thereby motivating employers to make workplaces safer.” *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 19, 201 P.3d 1011 (2009). It would be contrary to this mandate to impose ER 409 on the Industrial Insurance Act.

2. Clark County has not assigned error to Katie DeFrang’s testimony as a whole; nor has it shown that it objected to the testimony as a whole

Raising an argument unsupported by an assignment of error or citation to the record or authority, Clark County asserts that Katie DeFrang’s testimony about authorization related only to the penalty issue and that the trial court should not have considered that testimony when the penalty issue was bifurcated and subject to a separate bench trial. Clark

Cty. RB 3-4. At the Board of Industrial Insurance Appeals, there was a consolidated hearing on both the penalty issue and the surgery issue, and the hearing was not bifurcated. *See* AR 3-8. DeFrang's testimony about authorization remained relevant to whether authorization equals acceptance of the condition and to whether the compensable consequences doctrine applies.

But more significantly, Clark County has not assigned error to the admission of the testimony as a whole or pointed out where in the record it objected to the testimony on this ground. *See* Clark Cty. RB 1, 3; RAP 10.3(a)(4). A party must also point out where in the record it made an objection for the court to consider the issue. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider contentions unsupported by reference to the record); *see also Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) (party must object to evidence for judicial consideration). Clark County points to no such objection in its briefing. DeFrang's testimony is before this Court.

D. Clark County Has Conceded the Question of Proper and Necessary Treatment

The question before the superior court was whether Maphet's ninth surgery to treat patellofemoral instability should be a covered benefit

under the Industrial Insurance Act. To be a covered benefit, there were two elements: (1) did a previously authorized surgery or the original injury proximately cause the condition, and (2) was the treatment proper and necessary treatment?

As for the first element, the Department and Maphet proved proximate cause as a matter of law. *See Zipp v. Seattle Sch. Dist.*, 36 Wn. App. 598, 601, 676 P.2d 538 (1984) (an industrial injury must proximately cause the condition). As explained above, proximate cause was established when Clark County authorized the treatment and the consequences of that treatment resulted in Maphet's knee condition. The superior court should not have submitted this question to the jury.

As for the second element, Clark County conceded that Maphet's treatment was proper and necessary treatment. *See* RCW 51.36.010. Treatment is proper and necessary if it is curative or rehabilitative. WAC 296-20-01002 (definition of proper and necessary); 6A Wash. Prac. *Wash. Pattern Jury Instr. Civ.* § 155.31 (6th ed.). While conflicting evidence was adduced at trial,⁵ in its closing argument, the county conceded that Maphet's March 2015 surgery was both proper and necessary:

Frankly I am not concerned about question two. And I will concede to you that there is sufficient evidence to say yes to that. We all know that that surgery that's at issue here

⁵ AR Toomey 34-35; AR Greenleaf 28; AR Farris 27-30.

helped somewhat — not much — but it did help somewhat to minimize her falls.

RP 393-94. 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: “Yes it was curative. Was it due to a work related injury? No.” RP 460-61; *see also* RP 456-57. According to Clark County, the only issue for the jury was proximate cause. RP 456-58.

Clark County’s stipulation is binding. CR 2A provides that “no agreement or *consent* between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record” (emphasis added). Clark County now argues that a lawyer’s argument is not evidence, but here we have a disputed issue under CR 2A and Clark County’s consent to the adverse fact binds it. It would be the height of unfairness to allow a party to concede to a disputed fact before the jury and then later disavow that stipulation.

Concessions in court bind a party in front of a jury because a party may have a strategic reason for the concession. *State v. Silva*, 106 Wn. App. 586, 595-99, 24 P.3d 477 (2001). *Silva* does not prove Clark County’s arguments as it asserts. Clark Cty. RB 8-9. To the contrary, in

Silva, an admission on one crime applied when there were multiple counts at issue, and so the party could admit to one of the crimes. 106 Wn. App. at 596. Here, a clear concession binds Clark County because it was in open court on the record. CR 2A.

Clark County resolved the issue of proper and necessary treatment, so this case need not return to the jury to decide the issue. If the Court does not agree with the Department's analysis on this point, the Court should remand the matter to the superior court to address the sole question of whether the treatment was proper and necessary.

Because both proximate cause and the proper and necessary determination are established as a matter of law, the Court of Appeals should reverse the superior court and affirm the Board order.

III. CONCLUSION

Maphet relied on her doctor when she underwent the fifth surgery in January 2013. Under Clark County's proposed rule of law, she bears the burden of a surgery gone wrong. But this cannot be the rule of law. It was error for the trial court to not rule as a matter of law that proximate cause was established. 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 because Clark County conceded that the treatment is proper and necessary, the trial court's ruling to the contrary should be reversed. This

Court should affirm the Board.

RESPECTFULLY SUBMITTED this 13th day of September 2018.

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

CLARK COUNTY,

Appellant,

v.

JENNIFER MAPHET,

Respondent.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Reply of Cross-Appellant Department of Labor & Industries and this Certificate of Service in the below described manner:

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DATED this 13th day of September, 2018.

A handwritten signature in black ink, appearing to read "Shana Pacarro-Muller". The signature is written in a cursive style with a large initial "S".

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