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NO. 51170-3-II

COURT OF APPEALS
DIVISION II

IN THE STATE OF WASHINGTON

CLARK COUNTY
RESPONDENT/PLAINTIFF

v.

JENNIFER MAPHET
APPELLANT/DEFENDANT.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

As summarized in Appellant's opening brief, this appeal involves a dispute on whether Plaintiff's authorization of multiple knee surgeries to address a problem with Defendant's kneecap constitutes a binding legal admission that it has accepted responsibility for the kneecap, as well as the consequences of those authorized surgeries.

Plaintiff Cross-Appealed the verdict of the Clark County Superior Court. The Superior Court made a few evidentiary rulings adverse to Plaintiff, from which Plaintiff has sought review. Notably, Plaintiff has not sought review of the Superior Court's jury instructions, despite taking exception below. Despite these adverse evidentiary rulings, the jury returned a verdict entirely favorable to Plaintiff.

However, that verdict was entered contrary to the law and without substantial evidence.

STATEMENT OF THE CASE

Clark County Superior Court's discretionary decision to admit evidence that Plaintiff had authorized eight knee surgeries was not prejudicial error to Plaintiff. It was not prejudicial because Plaintiff prevailed despite these rulings. Plaintiff challenges no other decisions of the trial court. Plaintiff's cross appeal fails.

Plaintiff's application of the Compensable Consequence Doctrine should also be rejected. The statute, regulations, and common law all agree: where surgery is authorized and adverse consequences arise, the self-insured employer is responsible for treating those adverse consequences. Allegations of malpractice or medial mistake do not

constitute an intervening cause, even if true.

Plaintiff conceded the curative March 20, 2015 Fulkerson revision surgery was medically necessary, curative treatment. With proximate cause being the only disputed issue, the decision of the Board of Industrial Insurance Appeals should be affirmed as a matter of law. The judgment of the Clark County Superior Court should be reversed as a matter of law.

STANDARD OF REVIEW

“When reviewing the Board proceedings, [the appellate court] only examine[s] ‘the record to see whether substantial evidence supports the findings made after the superior court’s de novo review, and whether the court’s conclusions of law flow from the findings.’” *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36, 914 P.2d 67 (2015), quoting *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). “However, statutory interpretation remains a question of law [the appellate court] determine[s] de novo.” *Gorre*, 184 Wn.2d at 36, citing *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

Also, “When a trial court makes an erroneous evidentiary ruling, the question on appeal becomes whether the error was prejudicial, for error without prejudice is not grounds for reversal. *Driggs v. Howlett*, 193 Wn. App. 875, 903, 371 P.3d 61 (2016). An error is harmless if it did not affect the outcome of the case. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

ARGUMENT

Plaintiff asks the Court to ignore what it did with its full power and authority as a Self-Insured Employer and under the auspices of Ms.

Maphet's workers compensation claim: authorize eight knee surgeries. Instead, in 2017 Plaintiff tried to litigate its legally binding choices first made in 2013 to authorize multiple kneecap surgeries, starting with the May 14, 2013 Fulkerson surgery. Plaintiff may now regret its choices, but its regret is not sufficient reason for this court to permit evasion of the Compensable Consequences Doctrine.

The Compensable Consequences Doctrine prevents Plaintiff's attempt to rewrite the history of this claim. The doctrine requires this Court to understand the story of this claim: to understand what actually happened and the downstream consequences of those events. The Court must decide, when examining each authorized surgery, whether there was any genuine issue of material fact as to the consequences of that surgery. It must then decide whether there is any genuine issue of material fact as to whether at least one of those authorized surgeries was a proximate cause of the March 20, 2015 Fulkerson revision surgery.

If the answer is: there is no genuine issue of material fact that one of the eight authorized surgeries was a proximate cause of the curative March 20, 2015 Fulkerson revision surgery, then this Court must affirm the decision of the Board of Industrial Insurance Appeals.

1. Plaintiff seeks to remove the authorization evidence to rewrite this claim's history.

The story of this claim is that hardly a year went by without Plaintiff, a Self-Insured Employer, authorizing surgery for Ms. Maphet's knee. Plaintiff doesn't like these facts, because even the unreported case it relies upon held, "Proper and necessary treatment encompasses conditions

secondary to the occupational disease, such as complications from surgery. *See Anderson v. Allison*, 12 Wn.2d 487, 122 P.2d 484 (1942).” *Hull v. PeaceHealth Med. Group*, No. 74413-5-I, 2016 Wash. App. LEXIS 2264 at *12-13. (Ct. App. Sep. 26, 2016). Despite having prevailed below, Plaintiff still filed a cross-appeal for the sole purpose of seeking exclusion of the authorization testimony. Plaintiff cross-appealed to obscure its own decision, eight times over, to authorize knee surgery.

The Court should reject Plaintiff’s cross-appeal because it cannot demonstrate harmful error: it prevailed below. A decision of the trial court cannot be reversed for harmless error.

When a trial court makes an erroneous evidentiary ruling, the question on appeal becomes whether the error was prejudicial, for error without prejudice is not grounds for reversal. . . . Error will be considered prejudicial if it presumptively affects the outcome of the trial.

Driggs v. Howlett, 193 Wn. App. 875, 903, 371 P.3d 61 (2016).

Here, the jury returned a verdict wholly reversing the decision of the Board of Industrial Insurance Appeals. This means the final verdict was wholly in favor of Plaintiff. This point was conceded by Plaintiff’s in its Response Brief at page 19. Plaintiff cannot prove it was harmed by any of the trial court’s decisions in light of this verdict because the admission did not affect the outcome of the trial.

Plaintiff makes a contingent-harmful error argument in its Response brief without citation to any case law to support its odd theory. Plaintiff argues that if this Court agrees that authorization does equal acceptance, then it is harmed by evidence that it authorized the surgeries.

Plaintiff does have a small point. Admission of this evidence does

harm its position on appeal. Authorization evidence harms its case, because the law is self-insured employer are responsible for the consequences of its authorized surgeries. Ms. Maphet is entitled to directed verdict because all of the evidence agreed she needed the March 20, 2015 Fulkerson revision as a consequence of one or more of the eight surgeries authorized by Plaintiff.

Furthermore, this is an allowed workers compensation claim. This means Ms. Maphet's rights, her entitlements, under the Industrial Insurance Act have vested. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733, 57 P.3d 611 (2002). This is the equivalent to saying that Plaintiff is liable for Ms. Maphet's injuries. This appeal is about what benefits arise from this vested claim. *See Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 675, 175 P.3d 1117, 1127 (2008). Workers compensation benefits are the tort equivalent to damages, not liability.

ER 409 is unambiguous. Evidence of offering to pay or actually paying benefits is not admissible to prove liability. Plaintiff was found liable back in 2009 when this claim was allowed. We have moved beyond the liability phase of this workers compensation claim. ER 409 does not prohibit such evidence to prove damages.

Regardless, this argument is somewhat beside the point. The evidence introduced at trial was regarding authorization, not payment. Authorization has a very specific definition within the workers compensation system. WAC 296-20-01002. That definition is a product of the series of appellate cases that hold Self-Insured Employers are responsible for the consequences of their authorized surgeries, even in the

face of malpractice. *Anderson v. Allison*, 12 Wn.2d 487, 492, 122 P.2d 484, 486 (1942). Nothing in ER 409 prohibits the introduction of authorization evidence in a workers compensation appeal.

2. Plaintiff is trying to rewrite the story of this claim and the story of these appeals.

The story of this claim is Plaintiff authorized eight knee surgeries, including three whose sole purpose was to stabilize the kneecap. The Court should treat those authorizations as admissions that Plaintiff is responsible for Ms. Maphet's kneecap. The story of this appeal is Plaintiff conceded to the trial court the disputed March 20, 2015 Fulkerson revision surgery was curative. Concessions on causation and curative treatment means the court below erred when it denied directed verdict.

a. Plaintiff authorized eight surgeries.

Plaintiff wants this Court to disregard the fact it authorized eight surgeries. But the story of this claim is that it did so, under its full weight, power, and authority as a Self-Insured Employer. It knew exactly what it was doing at the time it authorized these surgeries. Under the Compensable Consequences Doctrine, as will be argued further below, the Court is not required to create a daisy chain of primary causation from each surgery back to the original injury. The chain of causation only needs to be connected back to at least one of the eight authorized surgeries.

Yet, Plaintiff argues that its authorizations should be ignored through operation of RCW 51.32.190. It is wrong. RCW 51.32.190 only governs claims processing decisions made prior to claim allowance.

It provides a shield to Self-Insured Employers that such pre-allowance payments are not an admission. It does not govern a Self-Insured Employer's claims administration choices after claim allowance, such as authorizing eight surgeries, including three explicitly designed to stabilize Ms. Maphet's kneecap.

Plaintiff also relies upon RCW 51.32.240, which is not at issue in this appeal. The order on appeal addresses whether or not the March 20, 2015 Fulkerson revision surgery should have been authorized. Yet Plaintiff is arguing about the authorized January 23, 2014 scar removal surgery. The Department was not asked to pass on the question of whether the January 24, 2014 surgery was compensable; nor should it because that surgery was authorized by Plaintiff.

RCW 51.32.240 (1) imposes a one-year statute of limitations for claims of such mistakes. We are well past that statute of limitations for the authorized January 24, 2013 scar tissue removal surgery. RCW 51.32.240(2) makes it clear the Department must make the determination of adjudicator error. Here, no such decision was made by the Department regarding the authorized January 24, 2013 scar tissue removal surgery. Also, adjudicator error refers to the employees of the Department who adjudicate disputes between Self-Insured Employers and injured workers; it does not refer to decisions made by the Self-Insured Employer.

Regardless, RCW 51.32.240 only addresses payments and recoupment of payments. It does not address what happens when a Self-Insured Employer authorizes surgery, per WAC 296-20-01002, from which complications arise that require further surgery. It does not prohibit

application of the Compensable Consequences Doctrine.

The Court should follow what Plaintiff did: authorize eight knee surgeries. The Compensable Consequences Doctrine simply asks: did any of those eight surgeries, performed under the auspices of the claim, cause complications that lead to the March 20, 2015 surgery? Here the evidence all says one or more of them did have such complications, which caused the need for the curative March 20, 2015 Fulkerson revision surgery.

b. Plaintiff conceded the March 20, 2015 Fulkerson revision surgery was curative.

Plaintiff's brief also attempts to minimize or evade the concessions made to Court below during opening statements and closing arguments. Plaintiff conceded the March 20, 2015 Fulkerson revision was curative; thereby narrowing the issues on appeal to proximate cause through application of the Compensable Consequences Doctrine.

While the general jury instructions do provide that statements made by attorneys are mere argument and cannot be construed as statements of law; yet, as officers of the Court, we have a duty of candor to the tribunal, which includes the jury. Our words and positions taken to the jury must matter, otherwise we are not being candid to the tribunal.

When Plaintiff's counsel told the jury, in its opening statement, that it will only be making one determination, "whether the right kneecap instability was proximately caused by the November 8th, 2009 industrial injury and/or residuals therefrom," the Court should accept Plaintiff's position. (VRP Vol. 2 p. 189). Plaintiff's counsel alleges he was engaging in puffery during closing argument when he told the jury:

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

(VRP Vol. 3 pp. 393-94); emphasis added. “Concede” means admitting that something is true or valid. On appeal, Plaintiff is asking the Court to ignore those choices, just like it wants the Court to ignore its choice to authorize the May 14, 2013 Fulkerson surgery.

Finally, during closing rebuttal, Plaintiff told the jury the March 20, 2015 Fulkerson revision, which is in dispute, **“Yes it was curative.** Was it due to a work related injury? No.” (VRP Vol 3 p. 460-61); emphasize added). Plaintiff has made many choices about Ms. Maphet's claim and these appeals; it should be bound to those choices.

Plaintiff's concessions were not merely about the law. They were not only about the facts. Plaintiff's concessions told the jury that when applying the law of the case to these facts the March 20, 2015 Fulkerson revision was curative. The Court must enforce Plaintiff's choices, no matter how much regret Plaintiff may now have.

3. There is no genuine issue of material fact that one of the eight authorized surgeries caused the consequences resulting in the curative March 20, 2015 Fulkerson revision surgery.

Under the Compensable Consequences Doctrine, the Court must examine the record to determine whether any of the eight authorized surgeries caused complications under a multiple proximate cause analysis. Then it must assess whether there is any genuine issue of material fact that those complications, in turn, caused the need for the curative March 20,

2015 Fulkerson revision. By attempting to rewrite the story of its authorizations, Plaintiff wants to instead litigate the authorized January 24, 2013 scar tissue removal surgery. To its detriment, the trial court permitted Plaintiff to challenge its own authorized surgeries.

a. At least one of the eight authorized surgeries caused or aggravated Ms. Maphet's kneecap instability.

It is well settled that Washington is a multiple proximate cause state. *Grimes v. Lakeside Indus.*, 78 Wash. App. 554, 561, 897 P.2d 431 (1995). While *Grimes* does state that the industrial injury must be a cause, the line of Compensable Consequences cases from *Ross* to *Henderson* modify this rule by applying secondary causation: The chain of causation only needs to be connected back to one of the authorized surgeries. *Ross v. Erickson Constr. Co.*, 89 Wash. 634, 155 P. 153 (1916); *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

i. The Compensable Consequences Doctrine applies secondary causation.

The clearest expression of the doctrine's use of secondary causation is found in the original compensable consequences case, *Ross*.

The resultant injury or 'aggravation,' to use the words of the statute, is not an independent injury. It is proximate to the original hurt, and is measured as such. Surgical treatment is an incident to every case of injury or accident, and is covered as a part of the subject treated.

Ross, 89 Wash. at 647. The phrase, "the resultant injury" is what we now call the compensable consequence. The consequence of a surgery "is proximate to the original hurt." *Id.* This means secondary causation substitutes for primary causation.

The *Ross* Court makes this substitution more explicit, “When a workman is hurt and removed to a hospital, or is put under the care of a surgeon, he is still, within every intendment of the law, in the course of his employment.” *Ross*, 89 Wash. at 647. This means that when Ms. Maphet underwent surgery on January 24, 2013, she was in the course of employment. She was in the course of employment when Dr. Greenleaf cut her lateral retinaculum. She was also in the course of employment during the authorized May 14, 2013 Fulkerson surgery, and the authorized December 27, 2013 retinaculum repair surgery, and the authorized August 8, 2014 lateral patella ligament repair surgery.

Plaintiff relies upon *Hull, supra*, to argue there is no secondary cause analysis and that Ms. Maphet must prove she injured her kneecap at the time of the original injury. Plaintiff misreads *Hull*. It maintained and used secondary causation to find for the injured worker.

The issue in *Hull* was whether the injured worker suffered from a condition diagnosed as Thoracic Outlet Syndrome (TOS) and whether the Self-Insured Employer was responsible for the downstream consequences of that condition. After noting the injured worker presented sufficient evidence to prove her job activities caused the TOS, the Court wrote, “PeaceHealth offered testimony by forensic physicians that does not provide substantial evidence that Hull's thoracic outlet syndrome was not caused by her work activity.” *Hull*, at *10. In other words, all of the doctors agreed the TOS was related to the claim.

The *Hull* Court added, “If thoracic outlet syndrome is an allowed occupational disease, then the downstream complications of Hull's

surgeries, the sequelae, are also allowed.” *Hull*, at *12. The proximate cause analysis was limited to the connections between the surgery performed under the auspices of the claim and the subsequent medical conditions. The *Hull* Court does not require a separate, distinct causal connection between the original injury and the post-surgery conditions.

Despite what *Hull* says, Plaintiff argues, “The proximate cause analysis relating the need for treatment back to the original injury is the foundation of the workers’ compensation system. *Hull* supports this.” *Plaintiff’s Response Brief*, pp. 28-29. Plaintiff’s assertion about the holding of *Hull* is without citation. Plaintiff repeats this assertion at pages 32-33. Plaintiff does not provide any direct quotation or even a specific page whereupon this Court may find that putative holding.

Rather, *Hull* merely requires a connection between an authorized surgery and subsequent consequences, “Proper and necessary treatment encompasses conditions secondary to the occupational disease, such as complications from surgery. *See Anderson v. Allison*, 12 Wn.2d 487, 122 P.2d 484 (1942).” *Hull*, at *12-13. According to the *Hull* Court, “PeaceHealth concedes that Hull’s balance problems, pulmonary condition, dysphagia, and cricopharyngeal spasms are proximately related to treatment [surgery] for her thoracic outlet syndrome, and as conditions *secondary* to thoracic outlet syndrome, they are allowed.” *Hull*, at *13 (emphasis added).

The *Hull* Court did not require an analysis of each surgical choice made by the surgeon during the authorized surgery. It held the exact opposite: Self-Insured Employers are responsible for the downstream

consequences of surgeries regardless of original causation. *Hull* at 12. If an authorized surgery causes complications, then the injured worker need only prove proximate cause back to the authorized surgery. *Hull* at 13.

Plaintiff even concedes that in *Hull*, “the employer was ultimately found responsible for the complications flowing from the authorized surgery.” *Plaintiff’s Response Brief*, p. 33. Nothing in *Hull* supports Plaintiff’s theory of primary proximate cause because *Hull* affirms and correctly applies the Compensable Consequences Doctrine.

Plaintiff also argues *Hull* excluded evidence of authorization, not just evidence of payment. *Plaintiff’s Respondent’s Brief* p. 27. It simply does not. A simple word search of the decision shows it did not.

ii. The secondary causation analysis applies to more than just surgeries.

The Compensable Consequences Doctrine, in workers compensation, also covers the consequences of injuries that would not have occurred but for the fact a claim exists. This is additional evidence the doctrine is one of secondary, not primary, causation. The Board has used the doctrine to include injuries sustained in a motor-vehicle accident while the injured worker was travelling to a vocational appointment, which she was compelled to attend per RCW 51.32.110. *In re Iris Vandorn*, BIIA Dec., 02 11466 (2003) (Appendix A). This would also include other compelled events, such as independent medical examinations. Under the *Ross* analysis, workers are in the course of employment while attending or travelling to these claim-imposed events.

The Board has also applied this rule to conservative treatment, not

just surgery. For example, a worker with a knee injury attending physical therapy injures her shoulder while performing therapy. Even though the original injury did not injure the shoulder, the shoulder was still covered. See *In re Shawn K. Knight*, Dckt. No. 13 25019 (April 20, 2015) (Appendix B); *In re Gwen R. Carey*, BIIA Dec., 03 13790 (Mar. 30, 2005) (Appendix C); *In re Lisa L. Blizzell*, Dckt. No. 09 15610 (Sept. 8, 2010) (Appendix D); *In re Cynthia L. Hansen*, Dckt. No. 97 7062 (May 18, 1999) (Appendix E).

The Compensable Consequences Doctrine is about what would otherwise constitute an intervening cause during the life of a claim and holds that those new injuries are covered. Primary “medical” causation is not required, so long as the consequences arose under the auspices of the claim.

Under Plaintiff’s formulation of the doctrine, none of the situations in the Board decisions cited above would be compensable. Plaintiff argues the worker must prove the original on-the-job injury was the “but for medical” cause of the new condition. See *Plaintiff’s Respondent’s Brief*, p. 25. Plaintiff asks the Court to narrow the definition of causation to only primary causation. The Court should reject such narrowing of its proximate cause analysis.

iii. An unbroken line can be drawn between either January 24, 2013, the May 14, 2013, the December 27, 2013, or the August 8, 2014 authorized surgeries and the curative March 20, 2015 Fulkerson revision surgery.

The causal connection between the authorized January 24, 2013

scar removal surgery and the kneecap instability is well briefed already by the parties. (Farris p. 23 ln. 7 – p. 24 ln. 11; Toomey p. 56 ln. 14 – p. 57 ln. 5; Greenleaf p. 57 ln. 21 – p. 58 ln. 7). Plaintiff seeks to litigate Dr. Greenleaf’s choices made during that surgery, which will be addressed later. But the Court must not ignore the other subsequent authorized surgeries in its analysis of whether there is a causal link between them and the curative March 20, 2015 Fulkerson revision surgery.

This is most easily and directly done between the authorized May 14, 2013 Fulkerson surgery and the curative March 20, 2015 Fulkerson revision surgery. The connection is literally in the title: they are the same surgery, with the latter fixing the former. The doctors all agreed that Dr. Greenleaf moved the patella tendon too far on May 14, 2013. (Farris p. 28 ln. 22 – p. 29, ln. 12; Toomey pp. 29-33, p. 36 ln. 6-1; Greenleaf p. 57 ln. 21 – p. 58 ln. 7). Plaintiff conceded to the jury that it was necessary to move the tendon back on March 20, 2015.

The connection can also be made to the authorized December 27, 2013 surgery. The purpose of this authorized surgery was to repair (sew back together) the cut lateral retinaculum. (Dep. Greenleaf p. 36; Dep. Farris p. 24; Dep. Toomey pp. 30-31). The retinaculum cut on January 23, 2013. By authorizing the December 27, 2013 surgery, Plaintiff yet again admitted its responsibility for the consequences of authorized January 23, 2013 scar removal surgery.

But because that surgery and the authorized August 8, 2014 surgery to repair the lateral patella ligament did not fix the kneecap instability, the March 20, 2015 Fulkerson revision surgery was proposed.

Dr. Greenleaf had tightened up everything he could on the outside of the kneecap; the only thing left was to move the patella tendon back. Again, Plaintiff conceded to the court below this was curative treatment.

The downstream consequences of these four authorized surgeries are clear: continued kneecap instability. Directed verdict was sought and denied under the Compensable Consequences doctrine. The trial court erred in its legal analysis and application of the Compensable Consequences doctrine. This error is further reflected in the trial court's harmful jury instructions. This Court should correct the error, grant directed verdict wholly in Defendant's favor, and reverse the judgment.

b. Plaintiff wants to change the story of this claim by challenging its own decision to authorize the January 24, 2013 scar removal surgery.

Plaintiff is challenging its own prior decisions and actions to authorize multiple knee surgeries. First, it wants this Court to pretend the authorizations did not happen or have no legal effect. Second, it wants to distract the Court by making Dr. Greenleaf the scapegoat.

i. Plaintiff's authorizations are binding admissions.

Plaintiff has been unable to specifically cite to any holding of any appellate case that testimony it authorized multiple surgeries is inadmissible. Its eight surgery authorizations have a clear and binding legal effect under WAC 296-20-01002: the performed surgery was curative and proximately related to the industrial injury. This point of law is well brief by the Department. Yet despite Plaintiff's own admissions, it proffered medical testimony challenging the causal link between the injury

and the eight surgeries.

Some federal courts have prohibited corporate parties, like Plaintiff, from impeaching themselves. *Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (“Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time [of the testimony of its speaking agent].”). Washington Courts have held that federal interpretation of our Civil Rules are authoritative because they closely follow the Federal Rules of Civil Procedure. *Casper v. Esteb Enters.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004). Plaintiff admitted it authorized these surgeries, it cannot evade its responsibility for any consequences.

ii. Plaintiff admitted Dr. Greenleaf’s “mistake” is not an intervening cause, yet it still complains it should not be responsible for that “mistake.”

Plaintiff argues that under *Ross*, if a doctor commits malpractice while treating a condition that is proximately related to the claim, then the results of the malpractice are covered under the claim. *Plaintiff’s Response Brief*, pp. 30-31. Defendant agrees. Yet, Plaintiff sought to litigate Dr. Greenleaf’s choices during the authorized January 24, 2013 scar tissue removal surgery. Plaintiff argued extensively below that Dr. Greenleaf effectively committed malpractice (whether that is true or not is beyond the scope of this appeal) when he released the lateral retinaculum during that surgery. (VRP Vol 2 pp. 193, 198, 331, 335, 408-413, 464-65).

The story of this claim is that in 2010 and 2011, Ms. Maphet underwent four authorized knee surgeries. There is no dispute those first four knee surgeries were proximately caused by industrial injury. There is no dispute from Drs. Greenleaf and Toomey that those surgeries caused scar tissue to form inside the knee and should be removed. (Dep. Toomey pp. 25-26; 46, ln. 9-16; Dep. Greenleaf, pp. 16-17, 19-20, 23-25). The other orthopedic witness, Dr. Farris, did not express an opinion on this topic (removal of the scar tissue) one-way-or-the-other; but instead was hyper-focused on Dr. Greenleaf's choices during the authorized January 23, 2013 scar tissue removal surgery. (Dep. Farris pp. 21, 23-24, 36-38, 40).

Under *Ross*, Ms. Maphet was in the course of employment while undergoing that surgery. It doesn't matter whether a co-worker (e.g. Dr. Greenleaf) made a mistake and caused an injury. That injury is still compensable under our no-fault system. There is no genuine issue of material fact that Ms. Maphet's kneecap instability was aggravated, in part, by Dr. Greenleaf's cutting the lateral retinaculum.

Dr. Greenleaf was only operating on the knee because he believed, and Plaintiff agreed, that scar tissue from the prior authorized surgeries needed to be removed. But for the original injury and the subsequent authorized four surgeries, Dr. Greenleaf would not have been operating on Ms. Maphet on January 24, 2013. Therefore, because consequences arose from Dr. Greenleaf's choices made during the course of that surgery, then under *Ross* and every subsequent case they are the responsibility of Plaintiff.

Plaintiff wrongly believes it can knock out the entire daisy-chain of causation if it can eliminate the authorized January 23, 2013 scar tissue removal surgery. Ms. Maphet was in the course of employment with each authorized surgery. She merely has to prove at least one of them lead to the March 20, 2015 Fulkerson revision. All of the medical doctors agreed that at least one of the eight authorized knee surgeries resulted in complications causing the curative March 20, 2015 Fulkerson revision. Therefore, directed verdict should have been granted.

4. Plaintiff's attempt at distinguishing cases fail.

Plaintiff's case is premised upon the elimination of secondary causation from the Compensable Consequences Doctrine. Plaintiff attempts to distinguish two of the Compensable Consequences cases. They are not distinguishable from this appeal. It then cites to a Proposed Decision & Order that is not on point.

Plaintiff starts with the Board's significant decision *In re Arvid Anderson*, BIIA Dec. 65 170 (1986) (Appendix F). Plaintiff notes the evidence in *Anderson* was that a heart problem arose from an authorized surgery, for which there was no dispute the surgery was related to the claim. *Plaintiff's Response Brief*, p. 29. Yet this appeal has the exact same evidence: all of the experts agreed the January 24, 2013 surgery was related to the claim.

While Defendant's experts thought the kneecap problem started earlier than January 2013, Plaintiff's experts testified the kneecap problems arose directly and proximately from the retinaculum release performed during the authorized January 24, 2013 scar tissue removal

surgery. *Supra*. The kneecap instability starting with the authorized January 24, 2013 scar tissue removal surgery is no different than a heart problem first occurring as a result of the surgery in *Arvid Anderson*. *In re Arvid Anderson* factually and legally applies to this appeal.

Next, Plaintiff tries to distinguish the application of *Ross v. Erickson*, 89 Wash. 634, “the treatment that caused any downstream consequences must be for a condition that is proximately related to the original injury.” *Plaintiff’s Response Brief*, p. 30. The treatment, according to Plaintiff, that caused the downstream consequences was the authorized January 24, 2013 scar tissue removal surgery, where Dr. Greenleaf also released the lateral retinaculum. Yet *Ross* holds that you are in the course of employment when undergoing surgery. It is the very act of undergoing authorized surgery that creates the causal connection. This is why *Ross* holds that whether or not the doctor did something wrong during the surgery is irrelevant, the consequences remain compensable.

Plaintiff also tries to justify its attempted elimination of secondary causation through citing to a Proposed Decision & Order by an Industrial Appeals Judge of the Board. *In re Eric J. Somawang*. It also believes this case stands for the proposition that evidence of authorization of a prior hip surgery is irrelevant to whether or not a later hip surgery should be authorized. First, this is not a Decision & Order of the Board nor was it designated as significant by the Board per WAC 296-12-195. Its precedential value is nil and its persuasive value is tenuous.

The *Somawang* Industrial Appeals Judge was not analyzing

whether the 2nd surgery, the total hip replacement, was proximately caused by the original injury. He was merely analyzing the causation evidence connecting the authorized surgery to the subsequent one. The medical experts did not agree and the IAJ was weighing that evidence. In the present appeal, the doctors all agreed there were connections between the authorized surgeries and the curative March 20, 2015 Fulkerson revisions surgery. This is an essential difference that removes any remaining persuasive value of *Somawang*.

5. The focus must be on the consequences to Ms. Maphet, not the Plaintiff.

Plaintiff's argument is about fairness. Plaintiff does not believe it fair to make it responsible for Dr. Greenleaf's choice to cut the lateral retinaculum, the consequence of which was kneecap instability. It did not know Dr. Greenleaf was going to do that and it believes it was inadvisable for him to do so without pre-surgery clinical evidence. Why should it bear the burden of Dr. Greenleaf's choice?

A fairness argument is curious, because it was Plaintiff who authorized the three surgeries subsequent to the January 24, 2013 scar removal surgery. Transforming Plaintiff's regret over its own choices into asserting its status as a victim has no place in our system. The Industrial Insurance Act is a no-fault system.

Also, any fairness argument evokes this Court's inherent equitable powers. A bedrock maxim of equity jurisprudence is "the party seeking equitable relief to have acted in good faith and to come into equity with clean hands." *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn.

App. 203, 216, 242 P.3d 1 (2010). Plaintiff authorized these surgeries, it does not have clean hands.

However, Defendant asks the same question, why should she bear the burden of Dr. Greenleaf's choice to cut the lateral retinaculum? Ms. Maphet, Dr. Greenleaf, and Plaintiff all agreed the January 24, 2013 surgery should occur. It is not Ms. Maphet's fault Dr. Greenleaf chose to release the lateral retinaculum during the authorized January 24, 2013 scar removal surgery.

Ms. Maphet, Dr. Greenleaf, and Plaintiff also all agreed the May 14, 2013 Fulkerson surgery was being "provided for the diagnosis and curative or rehabilitative treatment of an accepted condition." (WAC 296-20-01002 Authorization definition). All three agreed to this again prior to the December 27, 2013 surgery that tried to repair the previously cut lateral retinaculum. They agreed yet again prior to the August 8, 2014 surgery that repaired the lateral patella ligament. These were all done under the auspices of her workers compensation claim; the March 20, 2015 attempt to repair the dislocating kneecap should not suddenly fall outside of the claim.

In balancing fairness, the Industrial Insurance Act compels the Court to only consider Ms. Maphet's equities. She is the one who is entitled to sure and certain relief. RCW 51.04.010. It is her suffering that is to be reduced to a minimum. RCW 51.12.010.

The curative March 20, 2015 Fulkerson revision surgery is simply the natural progression of the downstream consequences of each authorized surgery performed under this claim. No one likes the fact this

has led to a dislocating kneecap, least of all Ms. Maphet; but just because the Self-Insured Employer also does not like it does not mean it can evade the Compensable Consequences Doctrine applied to the authorized January 24, 2013, May 14, 2013, December 27, 2013, or August 8, 2014 surgeries.

6. Attorney Fees

If the Court of Appeals finds in favor of Ms. Maphet, as Cross-Respondent, she is entitled to reasonable attorney fees and costs pursuant to RCW 51.52.130. RAP 18.1. This case involves a Self-Insured Employer, which means there is no requirement this appeal affect the State's accident fund. *Johnson v. Tradewell Stores*, 95 Wn.2d 739, 630 P.2d 441 (1981). By prevailing, Defendant is entitled to attorney fees even if she is not awarded any further benefits.

Furthermore, the *Brand* Court held it does not matter whether or not the injured worker prevailed on all issues. So long as she prevailed on at least one issue on appeal, all attorney fees are payable to the injured worker. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999). If the Court finds against Plaintiff in its cross-appeal, then Defendant is entitled to all of her attorney fees and costs incurred while before this court and the Clark County Superior Court.

Division 1 upheld an award of attorney fees to an injured worker after a Self-Insured Employer appealed a decision of the Board, then voluntarily dismissed its own appeal. The Court found:

The very purpose of allowing an attorney's fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in

presenting his claim on appeal without the incurring of legal expense of the diminution of his award if ultimately granted for the purpose of paying his counsel.

Boeing Co. v. Lee, 102 Wn. App. 552, 557 8 P.3d 1064 (2000). The Court added that its “holding should be a disincentive to file appeals with doubtful chances of success.” *Boeing Co. v. Lee*, 102 Wn. App. at 559.

In *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 577, 141 P.3d 1 (2006), the Supreme Court awarded attorney fees where an injured worker appealed the trial court’s grant of summary judgment. Like the present case, it involved a self-insured employer. Also, it resulted in the appeal being remanded to the trial court for a new trial. Fees were awarded for the time spent before the appellate courts, even though it was unknown if the injured worker prevailed in the new trial. This means fees are awardable, even if the Court orders a new trial.

Then there is the case of *Chuynk & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 232 P.3d 564 (2010), where the injured worker appealed over failure to give a jury instruction. This case also involved a self-insured employer. The Court of Appeals agreed the failure to give the instruction was prejudicial error and remanded the case for a new trial. *Id.* at 248. The Court awarded the injured worker attorney fees, per RCW 51.52.130, for prevailing on appeal. *Id.* at 256. Again, appellate attorney fees were awarded before the outcome of the new trial was known.

Defendant also should be awarded her fees and costs incurred before Clark County Superior Court. It was Plaintiff’s appeal and amongst the issues sought by Plaintiff was exclusion of authorization evidence. Plaintiff did not prevail below.

Again, *Brand* is clear that it does not matter how small of a victory, an injured worker is entitled to recover all of her fees and costs. This issue was so important to Plaintiff that it appealed a favorable jury verdict merely to attempt to preserve this point of law. The Court should grant fees and costs at all levels of appeal.

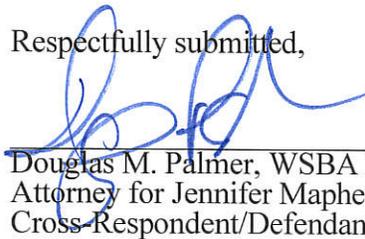
CONCLUSION

Plaintiff wants this Court to pretend the eight authorized surgeries were not performed under the auspices of this workers compensation claim. Plaintiff wants this Court to rewrite the story of this claim. The truth of the matter is all of the surgeries were performed under the auspices of the claim, with the full knowledge and explicit approval of Plaintiff. Approval was given with the full weight of Plaintiff's statutory power, authority, and responsibility as a Self-Insured Employer.

The undisputed evidence is the March 20, 2015 Fulkerson revision surgery was due, at least in part, to the consequences of one or more authorized surgery. Clark County Superior Court erred when it denied directed verdict. There is no genuine issue of material fact. The jury's verdict to the contrary was predicated on disallowed theory of intervening cause: medical malpractice or mistake. The decision of the Board of Industrial Insurance Appeals should be affirmed.

Dated: August 10, 2018.

Respectfully submitted,



Douglas M. Palmer, WSBA No. 35198
Attorney for Jennifer Maphet
Cross-Respondent/Defendant

APPENDIX A

In re Iris Vandorn, BIIA Dec., 02 11466

Vandorn, Iris

SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY

Injury sustained en route from vocational appointment

A new injury, suffered when the worker is involved in an auto accident on the way back from a required vocational appointment, is covered. The new injury is related to the original injury and is a compensable consequence of the original injury. ...*In re Iris Vandorn*, BIIA Dec., 02 11466 (2003)

Scroll down for order.

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

1 **IN RE: IRIS R. VANDORN**) **DOCKET NO. 02 11466**
2)
3 **CLAIM NO. P-105584**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

6
7 Claimant, Iris R. Vandorn, by
8 Law Office of Charles T. Conrad, P.S., per
9 Charles T. Conrad

10
11 Employer, North Star Enterprises, Inc.,
12 None

13
14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Carol O. Davis, Assistant
17

18 The claimant, Iris R. Vandorn, filed an appeal with the Board of Industrial Insurance Appeals
19 on April 4, 2002, from an order of the Department of Labor and Industries dated February 6, 2002.
20 The Department, in its order of February 6, 2002, affirmed a Department dated November 10, 1999,
21 that determined that the claimant's March 23, 1999 automobile accident was not related to the
22 claimant's August 22, 1994 industrial injury; and rejected all of the conditions and costs related to
23 the March 23, 1999 automobile accident. The Department order is **REVERSED AND REMANDED**.
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27 **DECISION**

28 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
29 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
30 Order issued on January 2, 2003, in which the industrial appeals judge reversed and remanded the
31 Department order dated February 6, 2002, with direction to determine that Ms. Vandorn's March 23,
32 1999 automobile injury was covered as a sequelae of her August 22, 1994 industrial injury; to
33 accept the conditions caused by the March 23, 1999 automobile accident; and, to take such other
34 and further action as is authorized or required by law.
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39 This matter was decided by our industrial appeals judge based on the claimant's Motion for
40 Summary Judgment and the Department's Cross-Motion for Summary Judgment. The record
41 consists of various affidavits and exhibits, as set forth in the Proposed Decision and Order. We
42 have reviewed the same affidavits and exhibits as set forth in the Proposed Decision and Order in
43 reaching our decision.
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1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
2 no prejudicial error was committed. The rulings are affirmed.
3

4 On August 22, 1994, Iris R. Vandorn, was injured in the course of her employment with North
5 Star Enterprises, Inc. Ms. Vandorn filed an application for benefits with the Department of Labor
6 and Industries, and the claim was accepted. The claim remained open through March 23, 1999,
7 when Ms. Vandorn was injured returning from a meeting with her attorney and her vocational
8 rehabilitation counselor. The meeting between the claimant and her vocational rehabilitation
9 counselor took place at the office of the claimant's attorney. The meeting was held at the request
10 of the Department as part of the administration of the claim. Ms. Vandorn was injured when her
11 vehicle veered from its lane of travel, crossed the centerline of the roadway, and struck an
12 on-coming bus. She sustained severe injuries as a result of this collision. The claimant seeks to
13 have the injuries sustained in the automobile collision of March 23, 1999, accepted as a part of the
14 original industrial injury.
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20 In the order under appeal, the Department determined that the injuries sustained by
21 Ms. Vandorn in the automobile accident on March 23, 1999, were not related to her earlier
22 August 22, 1994 industrial injury. However, our industrial appeals judge, in the Proposed Decision
23 and Order, directed the Department to accept the injuries associated with the automobile collision
24 of March 23, 1999, as part of the original industrial injury claim. While we agree with the result
25 reached in the Proposed Decision and Order, we have granted review in order to clarify why we
26 believe Ms. Vandorn was covered under our industrial insurance act at the time of the automobile
27 collision on March 23, 1999.
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32 Our industrial appeals judge decided this case based on a "course of employment" analysis.
33 Using this analysis, he found that Ms. Vandorn was in "travel status" in the course of her
34 employment, and, is thus, covered as a traveling worker would be covered, citing as authority our
35 decision in *In re Sherry L. Hayes, Dec'd*, Dckt. No. 93 1945 (April 18, 1995). We disagree with this
36 analysis. We do not believe it is appropriate to analyze an injury in the course of the administration
37 of the claim, using a strict course of employment analysis. Ms. Vandorn was not traveling for her
38 employer, and was not "in the course of her employment," as that term is used in our Industrial
39 Insurance Act on March 23, 1999, when her vehicle struck the bus. Although the definition of
40 "course of employment" has a broad scope within our Industrial Insurance Act, we find no authority
41 to apply the "course of employment" analysis to the facts involving Ms. Vandorn. Instead, we
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1 believe the proper analysis to use in evaluating this claim, is to view Ms. Vandorn's injury in the
2 automobile collision as a compensable consequence to a compensable injury.
3

4 The compensable consequence doctrine is discussed in 1 Larson's *Workers' Compensation*
5 *Law*, § 10.07 (2002). The doctrine is usually applied in situations where a worker who is required to
6 attend a medical appointment as a part of the administration of a claim, is injured on the way to or
7 from the medical appointment. As Larson notes, the general rule is that such injuries are
8 sufficiently causally connected to the original injury so as to be compensable consequences of the
9 original compensable injury.
10

11 We believe the compensable consequence of a compensable injury doctrine, as set forth in
12 Larson's discussion, is applicable to our Industrial Insurance Act. Additionally, we see no
13 distinction between a trip to a required vocational appointment and a required medical appointment
14 when applying this doctrine. On the facts presented in this record, we find Ms. Vandorn was
15 covered under the Industrial Insurance Act at the time of the automobile collision of March 23,
16 1999, and that any injuries she sustained as result of the collision are covered under the Industrial
17 Insurance Act as compensable consequences of a previously compensable injury.
18

19 The Department order of February 6, 2002, is reversed and this matter is remanded to the
20 Department of Labor and Industries.
21

22 **FINDINGS OF FACT**

- 23 1. On August 31, 1994, the claimant, Iris R. Vandorn, filed an application
24 for benefits with the Department of Labor and Industries. She alleged
25 that on August 22, 1994, while in the employ of North Star Enterprises,
26 Inc., she had suffered an industrial injury to her neck, back, and hip.
27 The Department accepted the claim. On November 10, 1999, the
28 Department issued an order denying responsibility for injuries
29 proximately caused by an automobile accident that occurred on
30 March 23, 1999. In that order, the Department also paid Ms. Vandorn
31 an award for permanent partial disability equal to Category 2 of
32 WAC 296-20-280 for permanent dorso-lumbar and lumbosacral
33 impairments for conditions proximately caused by the industrial injury
34 and closed the claim with time-loss compensation as paid. On January
35 6, 2000, Ms. Vandorn filed her Notice of Appeal with the Board of
36 Industrial Insurance Appeals under Docket No. 00 10257 from the
37 Department's November 10, 1999 order. On June 20, 2000, the Board
38 issued an Order on Agreement of Parties, including that docket number.
39 Pursuant to that order, the Department reconsidered certain prior
40 orders, including its order dated November 10, 1999. On February 6,
41 2002, the Department issued an order affirming its November 10, 1999
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1 order. On April 4, 2002, Ms. Vandorn filed her Notice of Appeal with the
2 Board from that order, and on May 3, 2002, the Board issued an order
3 granting the appeal, assigning Docket No. 02 11466, and ordering that
4 further proceedings be held in this matter.
5

- 6 2. On August 22, 1994, the claimant, Iris R. Vandorn, was working as a
7 flagger for North Star Enterprises, Inc., when she was struck by a
8 vehicle and was injured. The claim was allowed as a compensable
9 claim under Claim No. P-105584
10
- 11 3. On March 23, 1999, Iris R. Vandorn was returning from a meeting with a
12 vocational rehabilitation counselor when the vehicle she was operating
13 veered from its lane of travel and struck an on-coming bus.
14 Ms. Vandorn sustained injuries proximately caused by the automobile
15 collision.
16
- 17 4. Ms. Vandorn's meeting with the vocational rehabilitation counselor was
18 at the direction of the Department of Labor and Industries. Additionally,
19 the meeting was required by the Department as part of the
20 administration of Claim No. P-105584, an allowed compensable claim.
21
- 22 5. The affidavits and exhibits submitted by the parties demonstrate that
23 there is no genuine issue as to any material fact.
24

25 **CONCLUSIONS OF LAW**

- 26 1. The Board of Industrial Insurance Appeals has jurisdiction over the
27 parties to and the subject matter of this appeal.
28
- 29 2. The claimant is entitled to a summary disposition as a matter of law by
30 Civil Rule 56.
31
- 32 3. On March 23, 1999, at the time of her automobile accident, Iris R.
33 Vandorn was covered by the Industrial Insurance Act.
34
- 35 4. The order of the Department of Labor and Industries dated February 6,
36 2002 is incorrect and is reversed. The claim is remanded to the
37 Department with directions to determine that Iris R. Vandorn's March 23,
38 1999 automobile injury was covered as a compensable consequence of
39 her August 22, 1994 industrial injury, to accept conditions caused by the
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1 March 23, 1999 automobile accident, and to take such other and further
2 action as is authorized or required by law.
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4 It is so ORDERED.
5

6 Dated this 11th day of July, 2003.
7

8 BOARD OF INDUSTRIAL INSURANCE APPEALS
9

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11
12 /s/ _____
13 THOMAS E. EGAN Chairperson
14

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17 /s/ _____
18 FRANK E. FENNERTY, JR. Member
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APPENDIX B

In re Shawn K. Knight, Dckt. No. 13 25019

2015 WA Wrk. Comp. LEXIS 110

Washington State Board of Industrial Insurance Appeals

April 20, 2015

DOCKET NO. 13 25019; CLAIM NO. SE-52904

Reporter

2015 WA Wrk. Comp. LEXIS 110 *

IN RE: SHAWN K. WRIGHT

Disposition: AFFIRMED

Core Terms

shoulder, physical therapy, right shoulder, aggravate, industrial injury, permanent, preexisting, arthritis, surgery, pain, arthroplasty, degenerative, worsen, right arm

Counsel

Claimant, **Shawn K. Wright**, by Small, Snell, Weiss & Comfort, P.S., per Kathryn C. Comfort
Self-Insured Employer, Snohomish County, by Pratt, Day & Stratton, PLLC, per Nancy Thygesen Day
Department of Labor and Industries, by The Office of the Attorney General, per Dilek F. Aral-Still

Panel: DAVID E. THREEDY, Chairperson; FRANK E. FENNERTY, JR., Member

Opinion

[*1] DECISION AND ORDER

The self-insured employer, Snohomish County, filed an appeal with the Board of Industrial Insurance Appeals on December 19, 2013, from an order of the Department of Labor and Industries dated November 8, 2013. In this order, the Department ordered the self-insured employer to accept the permanent aggravation of the claimant's preexisting degenerative arthritis of the right shoulder as related to the industrial injury, and to authorize and pay for a total shoulder arthroplasty. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant and self-insured employer filed Petitions for Review of a Proposed Decision and

Order issued on February 25, 2015, in which the industrial appeals judge affirmed the November 8, 2013 Department order.

Although the industrial appeals judge intended to reverse the Department order, Conclusion of Law No. 2 in the Proposed Decision and Order indicates that the Department order under appeal is "affirmed." In addition, the introductory paragraph of the Proposed Decision and Order also indicates that the Department order is [*2] "affirmed." However, the body of the Proposed Decision and Order and Conclusion of Law No. 3 makes it clear that our industrial appeals judge determined that Mr. Wright's right shoulder condition was not caused or aggravated by the industrial injury or the physical therapy prescribed for the injury. It is clear that our industrial appeals judge intended to reverse the Department order under appeal.

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

We granted review because we determine that Mr. Wright suffered an aggravation of his preexisting right shoulder condition due to physical therapy undertaken as treatment for his accepted right arm condition. We affirm the November 8, 2013 Department order.

The issues in this appeal are whether Mr. Wright's preexisting right shoulder degenerative arthritis was aggravated by the industrial injury or its subsequent treatment. Also at issue is whether Mr. Wright's need for right shoulder arthroplasty is necessary and proper treatment related to his industrial injury.

Shawn Wright is a 59-year-old maintenance worker. He is right-handed. He [*3] has worked in the repair and maintenance field his entire working life. Mr. Wright suffered an industrial injury on February 15, 2010, to his right cubital tunnel nerve and radial nerve. He had surgery for these conditions in October 2010 and October 2011.

Mr. Wright had a prior injury to his right shoulder for which he had surgery with orthopedist Ralph T. Haller, M.D., in 1994. This prior claim was closed with a 14 percent permanent partial disability award for his right arm. Afterward, he could not perform heavy-duty jobs involving lifting and overhead work.

After each surgery for the injury before us, Mr. Wright had extensive physical therapy treatment. Exhibit Nos. 1, 2, and 3 depict the physical therapy exercises Mr. Wright had during recovery for surgeries related to his claim. While Mr. Wright was engaged in hand therapy, he began experiencing shoulder symptoms. He testified that the exercises put torque on the right shoulder and increased symptoms he had in his right shoulder. Mr. Wright stated that the therapist stretched the shoulder; that it was very painful; and that the symptoms have not gone away. He is fairly severely limited by his right shoulder pain. Mr. Wright indicated [*4] that he has problems with showering, shaving, and lifting his right arm.

Mr. Wright testified he saw Dr. Haller in June 2004 after an incident at work when he reacted to somebody throwing keys to or at him. This apparently was the last time Mr. Wright sought treatment for his shoulder until after the physical therapy exacerbation. After he had increased problems with his shoulder in physical therapy, he treated with Dr. Haller and with a physiatrist, Michael A. Santoro, M.D. Dr. Santoro and Dr. Haller testified on Mr. Wright's behalf.

Testifying on behalf of the employer were two orthopedic surgeons, Dean S. Ricketts, M.D., and Alan G. Brobeck, M.D. Dr. Brobeck examined Mr. Wright on January 22, 2013, and Dr. Ricketts examined him

on September 18, 2013. Both testified to diagnostic tests that demonstrated severe preexisting arthritis in Mr. Wright's right shoulder. Dr. Ricketts stated that a June 2004 MRI scan showed degenerative joint changes with loose bodies in the right shoulder. Dr. Brobeck indicated that a May 31, 2012 CT scan reported severe degenerative arthritis in the shoulder with significant loss of joint cartilage and loose bodies, and a spur affecting the rotator cuff. [*5] Both doctors thought these were long-standing changes; this was not disputed by Mr. Wright's experts.

Dr. Ricketts conceded that Mr. Wright continued to work with the shoulder after 1995. Dr. Ricketts noted no pain behavior or non-anatomic responses and found significant decreased range of motion on the right. He noted Mr. Wright had a very stiff shoulder. According to Dr. Ricketts, the range of motion measurements were consistent with measurements done in 2004. Dr. Ricketts did not believe that the physical therapy caused any lasting worsening of Mr. Wright's right shoulder. According to Dr. Ricketts, the physical therapy did not change the basic anatomy or accelerate the arthritis in Mr. Wright's shoulder. Mr. Wright would have been a candidate for right shoulder arthroplasty after 2004. Dr. Ricketts agreed that Mr. Wright is in need of a total shoulder replacement but indicated that physical therapy simply illustrated or "brought out" how bad his shoulder really was.

Dr. Brobeck also is familiar with the physical therapy exercises that Mr. Wright had for his right arm treatment. It was Dr. Brobeck's opinion that the exercises did not permanently aggravate Mr. Wright's preexisting [*6] degenerative disc disease. Like Dr. Ricketts, Dr. Brobeck felt that Mr. Wright would have needed a shoulder arthroplasty regardless of the industrial injury or physical therapy treatment.

Dr. Brobeck viewed physical therapy notes for Mr. Wright's treatment from November 2011 through July 2012--some 60 visits. Dr. Brobeck relied on these records to form his opinions. These notes demonstrate that Mr. Wright overdid his physical therapy exercises and that they irritated and caused pain in his right shoulder. Tightness in the right shoulder limited Mr. Wright's ability to perform some of the exercises and he could not tolerate certain exercises due to right shoulder pain. The physical therapy notes clarified the painful nature of the physical therapy exercises on Mr. Wright's shoulder. These records also follow Mr. Wright's testimony about the effects they had on his preexisting right shoulder condition.

Both Drs. Haller and Santoro thought Mr. Wright's right shoulder was aggravated by the physical therapy exercises. Both doctors also knew of the exercises Mr. Wright was doing in physical therapy. Although both were attending doctors for his claim, Dr. Haller is uniquely positioned because [*7] he has treated Mr. Wright for his shoulder since at least 1994. This included a right shoulder surgery in 1994. After the shoulder surgery in 1994, Dr. Haller saw Mr. Wright in 1997 with shoulder complaints for which he issued permanent work restrictions. He also saw Mr. Wright in 2004, after the key incident. However, no treatment was recommended. Dr. Haller did not see Mr. Wright again until May 2012 when Mr. Wright came to see him complaining about his shoulder being aggravated by physical therapy for his arm. Dr. Haller indicated that a May 18, 2012 MRI showed severe arthritis in the shoulder and on examination Mr. Wright had markedly decreased range of motion in the right shoulder.

Dr. Haller's May 18, 2012 office note indicated diagnosis of severe glenohumeral arthritis exacerbated by physical therapy for his work-related hand injury. Dr. Haller recommended shoulder replacement surgery. He continues to recommend the arthroplasty.

Dr. Haller conceded that he wrote an October 11, 2012 letter to Mr. Wright's attorney in which he recited that physical therapy was a "minor bump in the road" and would not have caused a permanent aggravation of Mr. Wright's arthritis. However, after [*8] meeting with Mr. Wright and reviewing his history in June 2013 Dr. Haller changed his opinion, determining that the physical therapy caused a permanent aggravation of Mr. Wright's severe preexisting arthritis.

Dr. Santoro was of the opinion that Mr. Wright's shoulder problem progressed at a more accelerated rate because of the physical therapy treatments. According to Dr. Santoro, the preexisting right shoulder condition was aggravated by the surgery for the elbow and the physical therapy afterward, and Mr. Wright has continued to get worse. Dr. Santoro thought Mr. Wright's need for treatment for the shoulder is related to the industrial injury.

All the medical experts agree that Mr. Wright is in need of a shoulder arthroplasty. The question is whether the physical therapy aggravated Mr. Wright's shoulder to the extent that he needs the treatment he would not otherwise have needed.

Although it is true Dr. Haller changed his opinion about whether the physical therapy was the cause for Mr. Wright's need for shoulder surgery, Dr. Haller testified that his opinion changed only to the extent he believed that the physical therapy caused a permanent aggravation of Mr. Wright's shoulder and [*9] was not merely a temporary exacerbation. As explained by Dr. Haller, this change of opinion was based on the context of the history related over time by Mr. Wright. Mr. Wright told Dr. Haller in May 2012 that physical therapy had caused his shoulder to be painful. It was not until later that Dr. Haller became aware that the increased shoulder pain related to physical therapy never went away--that is, that it was not transitory but continued to bother Mr. Wright.

It appears our industrial appeals judge was influenced by there apparently being no objective findings to demonstrate a worsening in Mr. Wright's shoulder. However this is not an aggravation case. *In re Donald L. Plemmons*¹ clarifies that objective findings of worsening are not required to show aggravation of a preexisting condition. As noted in *Plemmons*: "Objective medical findings of worsening are only required to reopen a claim, or to pay a permanent partial disability award to a worker with a pre-existing impairment. [*10] . . . If medical testimony establishes a worker's job duties accelerated his need for treatment or aggravated his underlying condition, his claim can be allowed."²

In addition, conditions caused by treatment for an industrial injury are part and parcel of the injury itself.³

Mr. Wright went for some six years performing fairly heavy work without seeking treatment for his shoulder until after the physical therapy aggravated his condition.

A preponderance of the evidence supports the Department order on appeal.

FINDINGS OF FACT

¹ *In re Donald Plemmons*, BIIA Dec., 04 12018 (2005).

² *Plemmons* at 3.

³ *In re Arvid Anderson*, BIIA Dec., 65,170 (1986).

1. On February 20, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. **Shawn** Wright sustained an industrial injury on February 15, 2010, when [*11] he injured his right elbow and hand while using a manual screwdriver to remove and replace three windows for six or seven hours.
3. **Shawn** Wright's right shoulder condition diagnosed as severe degenerative osteoarthritis of the glenohumeral joint with multiple intra-articular loose bodies and a bone spur rising off the coracoids causing a narrowing of the coracohumeral space preexisted the industrial injury of February 15, 2010, and was aggravated by the physical therapy prescribed as treatment for his industrial injury.
4. As of November 8, 2013, Mr. Wright was in need of a total right shoulder arthroplasty proximately related to the February 15, 2010 industrial injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. **Shawn** Wright's aggravated right shoulder condition is in need of further necessary and proper medical treatment as provided by RCW 51.36.010.
3. The Department of Labor and Industries order dated November 8, 2013, is correct and is affirmed.

Dated: April 20, 2015.

Dissent By: JACK S. ENG

Dissent:

I respectfully dissent. In my view, a preponderance of the evidence does not demonstrate that Mr. Wright's [*12] shoulder condition was permanently aggravated by the physical therapy for his right arm.

Drs. Ricketts and Brobeck testified persuasively that in all likelihood Mr. Wright's severely arthritic right shoulder had already reached a point at which surgery was appropriate before his physical therapy sessions. As noted by Dr. Ricketts, the transitory pain experienced by Mr. Wright from his physical therapy exercises simply served to illustrate how bad his shoulder had become.

Mr. Wright's surgeon, Dr. Haller, changed his opinion about the effect of the physical therapy on Mr. Wright's shoulder without adequately explaining why. At first, Dr. Haller agreed with Dr. Ricketts and Dr. Brobeck that the physical therapy exercises did not permanently aggravate Mr. Wright's shoulder condition. Although he later changed his mind, Dr. Haller was unable to point to any objective evidence of a permanent nature demonstrating worsening of Mr. Wright's shoulder.

Based on the evidence, it is clear to me that Mr. Wright's severe degenerative arthritis in his right shoulder that preexisted the February 15, 2010 industrial injury was not caused by or permanently worsened by the physical therapy prescribed [*13] for the industrial injury. I agree with our industrial

appeals judge and would adopt the result and analysis reached in the Proposed Decision and Order. The November 8, 2013 Department order should be reversed.

Dated: April 20, 2015.

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APPENDIX C

In re Gwen Carey, BIIA Dec., 03 13790 (2005)

2008 WA Wrk. Comp. LEXIS 191

Washington State Board of Industrial Insurance Appeals

September 16, 2008

DOCKET NO. 07 15892; CLAIM NO. W-700310

Reporter

2008 WA Wrk. Comp. LEXIS 191 *

IN RE: GWEN R. CAREY

Disposition: REVERSED AND REMANDED

Core Terms

claimant, industrial injury, proximately cause, school district, strain, partial disability, cervical, permanent, food

Counsel

Claimant, **Gwen R. Carey**, by Law Office of Robert M. Keefe, per Robert M. Keefe

Self-Insured Employer, Edmonds School District No. 15, by Reeve Shima, P.C., per Mary E. Shima

Panel: THOMAS E. EGAN, Chairperson; FRANK E. FENNERTY, JR., Member; CALHOUN DICKINSON, Member

Opinion

[*1] DECISION AND ORDER

This is an appeal filed by the claimant, **Gwen R. Carey**, on May 29, 2007, from an order of the Department of Labor and Industries dated May 24, 2007. In this order, the Department affirmed its order dated February 2, 2007, in which the Department closed the claim with time loss compensation benefits paid to August 27, 2002, and without an award for permanent partial disability. The Department order is **REVERSED AND REMANDED**.

DECISION

Pursuant to *RCW 51.52.104* and *RCW 51.52.106*, this matter is before the Board for review and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order issued on July 3, 2008, in which the industrial appeals judge reversed and remanded the order of the Department dated May 24, 2007.

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

The issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order. We have granted review solely to [*2] correct the language in Conclusion of Law No. 6, so that the conclusion conforms with the law and the facts.

Ms. Carey's Motion for CR 11 Sanctions

On August 15, 2008, Ms. Carey filed a Motion for CR 11 Sanctions with this Board against Edmonds School District No. 15. It should be noted the claimant cited only the court rule in support of her request for sanctions.

In her motion, Ms. Carey specifically contended the self-insured employer violated the rule when "employer counsel represented to the Board in pre-hearing motion proceedings on March 21, 2008 that the claimant was free to seek treatment for her industrial injuries from 2002-2007." Claimant Response to Employer Petition for Review, at 1. Ms. Carey contended the school district, in fact, refused to pay for any treatment provided by either Jeff L. Summe, D.O., or Edwin T. Malijan, RPT, during that time-frame. In essence, Ms. Carey alleges the school district violated CR 11 because it advanced a position which was not well-grounded in fact or was posited on information not formed after a reasonable inquiry into [*3] the facts.

In this appeal, Edmonds School District No. 15 presented testimony from four medical witnesses. Richard E. Marks, M.D., examined Ms. Carey on August 13, 2002. He declared the cervical strain and right forearm tendonitis Ms. Carey's industrial injury proximately caused were medically fixed and stable as of that date. He added Mr. Malijan's physical therapy records generated from December 2002, through December 2003, reflected provision of treatment which was not curative for any condition Ms. Carey's industrial injury proximately caused.

William J. Stump, M.D., examined Ms. Carey on October 8, 2002. The neurologist attested the right elbow and cervical strains Ms. Carey's May 7, 2002 industrial injury proximately caused probably resolved within 12 weeks of her industrial injury. His review of Mr. Malijan's records dated December 10, 2002, through December 2003, led him to conclude the physical therapy was directed to treating the cervical degenerative disc disease which pre-existed Ms. Carey's industrial injury and, as such, did not hold any proximate cause connection to the injury.

Bradley I. Billington, M.D., concluded Ms. Carey did not require treatment for any condition [*4] her industrial injury proximately caused as of December 23, 2003, when the orthopedist examined Ms. Carey. Based on his examination of September 25, 2006, James A. Champoux, M.D., also determined the conditions Ms. Carey's May 7, 2002 industrial injury proximately caused were fixed and stable.

Ms. Carey holds the burden to justify her request for sanctions against Edmonds School District No. 15. *Biggs v. Vail*, 124 Wn.2d 193 (1994); *Eugster v. City of Spokane*, 110 Wn. App. 212 (2002); *Brin v. Stutzman*, 89 Wn. App. 809 (1998). She has failed to prove any allegation the self-insured employer advanced during pre-trial motions was filed without a good basis in fact and without reasonable inquiry.

Ms. Carey's Motion for CR 11 Sanctions is **DENIED**.

After consideration of the Proposed Decision and Order, the self-insured employer's Petition for Review filed thereto, the claimant's response to the Petition for Review, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of [*5] the evidence and is correct as a matter of law.

FINDINGS OF FACT

1. The claimant, **Gwen R. Carey**, filed an Application for Benefits with the Department of Labor and Industries on June 5, 2002, in which she alleged an industrial injury involving her right arm that occurred on May 7, 2002, while acting in the course of her employment for Edmonds School District No. 15. On June 13, 2002, the Department allowed the claim. On February 2, 2007, the Department issued an order in which it closed the claim with time loss as paid to August 27, 2002, and without further award for permanent partial disability. On February 27, 2007, the claimant filed a protest with the Department of the order dated February 2, 2007. On May 24, 2007, the Department issued an order in which it affirmed its order dated February 2, 2007, and on May 29, 2007, the claimant filed an appeal of the May 24, 2007 order with the Board of Industrial Insurance Appeals. On July 30, 2007, the Board issued an order in which it granted the appeal under Docket No. 07 15892.
2. The claimant, **Gwen R. Carey**, injured her right elbow and arm on May 7, 2002, while acting in the course of her employment for Edmonds School District [*6] No. 15 when she was cutting up a large quantity of honeydew melons and her arm became swollen and painful.
3. In June 2002 the claimant was participating in physical therapy for her right upper extremity under this claim when she suffered a cervical strain, which has been allowed under this claim pursuant to the Board's Decision and Order issued in March 2005 under consolidated Docket Nos. 03 13790 and 03 21396.
4. **Gwen R. Carey** is 41 years old, completed the tenth grade in high school, and later earned her GED. She has attended several quarters of community college classes. The claimant's work history has included most facets of the food industry including server, bartender, barista, food preparation, and caterer. The claimant also owned and operated a daycare business, and has experience in retail sales, some office work, and a variety of experience as a cashier. Her job of injury on May 7, 2002, involved food preparation and she worked an average of 30 to 32 hours weekly.
5. **Gwen R. Carey** worked an average of 16 hours per week between October 2002 and July 2004 as a cashier in food service. She also worked between 20 and 30 hours per week between December 2005 and March 2007 as [*7] a food specialist/cashier/ barista.
6. The claimant attended five different quarters of community college between 2002 and 2004 at Edmonds Community College.
7. **Gwen R. Carey** was capable of working full-time in a sedentary capacity as a parking lot cashier from August 28, 2002 through May 24, 2007.
8. The treatment provided to the claimant by Dr. Jeff L. Summe and by prescription, Edwin T. Malijan, a physical therapist, between December 10, 2002 and June 14, 2004, and again, between May 2005 and August 2005, were necessary and proper medical treatment for **Gwen R. Carey** under this claim.

9. **Gwen R. Carey's** right upper extremity strain and cervical strain, proximately caused by the industrial injury of May 7, 2002, were medically fixed and stable as of May 24, 2007.

10. **Gwen R. Carey** did not suffer any permanent impairment regarding her right upper extremity strain and cervical strain, proximately caused by the industrial injury of May 7, 2002, as of May 24, 2007.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The treatments provided by Dr. Jeff L. Summe and by prescription, Edwin [*8] T. Malijan, a physical therapist, to the claimant between December 10, 2002 and June 14, 2004, and again, between May 2005 and August 2005, were necessary and proper medical treatment for **Gwen R. Carey** under this claim, pursuant to RCW 51.36.010.

3. **Gwen R. Carey** was not a temporarily and totally disabled worker, pursuant to RCW 51.32.090, between the dates of August 28, 2002 and May 24, 2007.

4. **Gwen R. Carey's** conditions, proximately caused by the industrial injury of May 7, 2002, were medically fixed and stable and not in need of further treatment pursuant to RCW 51.36.010, as of May 24, 2007.

5. As of May 24, 2007, **Gwen R. Carey** was not a permanently partially disabled worker within the meaning of RCW 51.32.080.

6. The Department of Labor and Industries order dated May 24, 2007, is incorrect and is reversed. This claim is remanded to the Department with directions to issue a further order in which it directs the self-insured employer to pay all treatment bills of Dr. Jeff L. Summe and Edwin T. Malijan, a physical [*9] therapist, for the periods of December 10, 2002 through June 14, 2004, and between May and August 2005, less any bills that have been paid for such treatment during those periods, and to thereupon close the claim with time loss compensation as paid to August 27, 2002, and without compensation for permanent partial disability.

It is **ORDERED**.

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APPENDIX D

In re Lisa L. Blizzel, Dckt. No. 09 15610

2010 WA Wrk. Comp. LEXIS 182

Washington State Board of Industrial Insurance Appeals

September 08, 2010

DOCKET NOS. 09 15610, 09 15706, 09 15707 & 09 15708; CLAIM NO. AE-93568

Reporter

2010 WA Wrk. Comp. LEXIS 182 *

IN RE: LISA L. BIZZELL

Disposition: AFFIRMED

Core Terms

sprain, neck, compensation benefit, right shoulder, claimant, industrial injury, physical therapy, time-loss, heritage, pain, arm, shoulder

Counsel

Claimant, Lisa L. Bizzell, by Law Office of Jonathan F. Stubbs, per Jonathan F. Stubbs

Employer, Heritage Rehab & Specialty Care, by Employer Resources Northwest, Inc., per Erin J. Dickinson

Department of Labor and Industries, by The Office of the Attorney General, per Lynette Weatherby-Teague

Panel: DAVID E. THREEDY, Chairperson; FRANK E. FENNERTY, JR., Member

Opinion

[*1] DECISION AND ORDER

In Docket Number **09 15610**, the employer, Heritage Rehab & Specialty Care (Heritage) filed an appeal with the Board of Industrial Insurance Appeals from a Department order dated May 13, 2009. In this order, the Department affirmed an order dated November 11, 2008, in which it corrected and superseded its orders dated July 16, 2008, and July 17, 2008; and determined that the Department was responsible for the condition diagnosed as neck sprain and right shoulder sprain, which was determined by medical evidence to be related to the accepted condition under the industrial injury for which Lisa Bizzell's claim was filed. The May 13, 2009 order is **AFFIRMED**.

In Docket Number 09 15706, Heritage filed an appeal with the Board of Industrial Insurance Appeals from a Department order dated May 22, 2009. In this order, the Department modified its orders dated

April 7, 2008, and April 21, 2008, from temporary to determinative. The April 7, 2008 order awarded time-loss compensation benefits from March 21, 2008, through April 3, 2008, in the amount of \$ 1,335.46. The April 21, 2008 order awarded time-loss compensation benefits from April 4, 2008, through April 17, 200, in [*2] the amount of \$ 1,335.46. The May 22, 2009 order is **AFFIRMED**.

In Docket Number 09 15707, Heritage filed an appeal with the Board of Industrial Insurance Appeals from a Department order dated May 26, 2009. In this order, the Department affirmed its order dated May 8, 2008, in which it awarded time-loss compensation benefits from April 18, 2008, through May 7, 2008, in the amount of \$ 1,907.80. The May 26, 2009 order is **AFFIRMED**.

In Docket Number 09 15708, Heritage filed an appeal with the Board of Industrial Insurance Appeals from a Department order dated May 27, 2009. In this order, the Department affirmed its order dated May 14, 2008, in which it ended time-loss compensation benefits as paid from May 8, 2008, through May 11, 2008, in the amount of \$ 381.56 because Ms. Bizzell returned to work. The May 27, 2009 order is **AFFIRMED**.

DECISION

As provided by *RCW 51.52.104* and *RCW 51.52.106*, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on May 17, 2010, in which the industrial appeals judge [*3] reversed and remanded the orders of the Department dated May 13, 2009, May 22, 2009, May 26, 2009, and May 27, 2009. All contested issues are addressed in this order.

The Board has reviewed the evidentiary rulings in the record of proceedings and in the Proposed Decision and Order, and finds that no prejudicial error was committed. The rulings are affirmed.

As for the merits of this appeal, we disagree with our judge's determination that Ms. Bizzell's neck sprain and right shoulder sprain were not allowable conditions under the claim. We also disagree with her conclusion that the claimant was not entitled to time-loss compensation benefits from March 21, 2008, through May 11, 2008. The following is a summary of the evidence necessary to explain our decision.

The claimant, Lisa Bizzell, is a 48-year-old, right-hand-dominant licensed practical nurse who was injured on July 5, 2007, while stretching over another person to retrieve a thick medical chart from a shelf. The chart stuck, and she yanked on it. She reached over the other person's head to catch it, and heard popping sounds in her right arm. She felt pain, but continued to work. She did not see a doctor until the first week of [*4] August 2007, when her pain worsened. Her doctor diagnosed a sprained right wrist and recommended physical therapy.

She started physical therapy the following month, but felt that it made her arm worse. The physical therapist recommended she return to her doctor, which she did. She received several cortisone injections over the next several months, none of which helped. She was referred back to physical therapy, which she resumed in January 2008. By now, she was guarding her right arm, but in physical therapy, the therapist moved the arm without her volition. She found the therapist's movements extremely painful, and felt that it exacerbated her pain that now traveled up her arm to include her shoulder and neck. She had never had problems there before.

Ms. Bizzell continued working her regular 40-hour week until February 25, 2008. Her condition continued to deteriorate to the point that she could not use her right arm or hand. A light-duty desk job was developed with duties that, it was believed, she could accomplish with only her non-dominant hand. It was approved by her attending physician, Dr. Neal Shonnard. She returned to work, and did that job from March 17 through March 20, [*5] 2008. The administrator of the nursing facility where she was employed said that her attending physician then revoked approval for that job, and Ms. Bizzell stopped working. Ms. Bizzell confirmed that this was true. She returned to work again on May 12, 2008.

RCW 51.32.090(4) provides, "Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work."

Further, **even if the doctor's judgment is later found to have been erroneous** (which on this record might be the case because both testifying doctors thought that the claimant could work during the period in question), the claimant is still entitled to the time-loss compensation benefits. *In re Charles Hindman*, BIIA Dec., 32,851 (1970).

Because Ms. Bizzell accepted the light-duty job and attempted to perform the duties, only to be advised after several days that her attending physician's approval for that job had [*6] been revoked, she falls within the scope of RCW 51.32.090(4). Therefore, the Department orders in which it granted time-loss compensation benefits should be affirmed.

The second issue is the segregation of the neck sprain and right shoulder sprain conditions. Medical testimony came from two physicians, both called by the employer. Robert Winegar, M.D., orthopedic surgeon, and John Maxwell, M.D., neurosurgeon, conducted an examination of Ms. Bizzell on June 10, 2008. Neither of them thought that the industrial injury had caused a neck or right shoulder condition, although they both agreed that Ms. Bizzell had a right shoulder rotator cuff tear, as shown on an MRI on April 2, 2008. Dr. Winegar did not dispute that Ms. Bizzell had shoulder and neck problems, but, in his opinion, if the torn rotator cuff had been caused by a traumatic injury, the pain would have been immediate. However, Ms. Bizzell had waited a month before seeing a doctor. Dr. Winegar did not express any opinion on whether the January 2008 physical therapy was responsible for the shoulder and neck pain.

Dr. Maxwell agreed that Ms. Bizzell had shoulder and neck problems, but not [*7] due to the industrial injury itself because she had not reported any problems in that area for six months after the injury. However, Dr. Maxwell believed that the physical therapy in January 2008 was responsible for her shoulder and neck conditions. Because Dr. Winegar did not opine on whether the January 2008 physical therapy might have caused the right shoulder and neck conditions, Dr. Maxwell's opinion constitutes the preponderance of the evidence on the point.

Because it is settled law that the consequences of treatment for an industrial injury are considered to be part and parcel of the injury itself (*In re Arvid Anderson*, BIIA Dec., 65,170 (1986), citing *Anderson v. Allison 12 Wn.2d 487 (1942)* and *Ross v. Erickson Construction Co.*, 89 Wash. 634 (1916)), the neck sprain and right shoulder sprain should be covered as part of the claim.

Therefore, the four Department orders on appeal in this matter should be affirmed.

FINDINGS OF FACT

1. The claimant, Lisa Bizzell, filed an application for workers' compensation benefits with the Department of Labor and Industries on August 8, 2007, in which she alleged that [*8] she sustained an industrial injury on July 5, 2007, during the course of her employment with Heritage Rehab & Specialty Care. The claim was allowed and benefits paid.

On September 8, 2008, the Department issued an order in which it affirmed Department orders dated April 7, 2008, April 21, 2008, May 8, 2008, and May 14, 2008. In these orders, the Department paid time-loss compensation benefits for the period March 21, 2008, through May 11, 2008. On May 29, 2008, the Department issued an order in which it reconsidered each of these orders. On May 22, 2009, the Department issued an order in which it modified the April 7, 2008, and April 21, 2008 orders from temporary to determinative. On June 4, 2009, the employer filed a Notice of Appeal to the May 22, 2009 order with the Board of Industrial Insurance Appeals. On July 9, 2009, the Board issued an Order Granting Appeal under Docket No. 09 15706, and agreed to hear the appeal.

On May 26, 2009, the Department issued an order in which it affirmed the order dated May 8, 2008. On June 4, 2009, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals to the May 26, 2009 order. On July 9, 2009, the Board issued an [*9] Order Granting Appeal under Docket No. 09 15707, and agreed to hear the appeal.

On May 27, 2009, the Department issued an order in which it affirmed the order dated May 14, 2008. On June 4, 2009, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals to the May 27, 2009 Department order. On July 9, 2009, the Board issued an Order Granting Appeal under Docket No. 09 15708, and agreed to hear the appeal.

On November 11, 2008, the Department issued an order in which it superseded orders dated July 16, 2008, and July 17, 2008, and accepted responsibility for neck sprain and right shoulder sprain as related to the claim. On November 20, 2008, the employer filed a protest to the November 11, 2008 Department order. On May 13, 2009, the Department issued an order in which it affirmed the November 11, 2008 Department order. On June 4, 2009, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals to the May 13, 2009 Department order. On July 9, 2009, the Board issued an Order Granting Appeal under Docket No. **09 15610**, and agreed to hear the appeal.

2. On July 5, 2007, while in the course of her employment with Heritage Rehab & Specialty [*10] Care, Ms. Bizzell injured her right wrist and elbow when she reached over another person and yanked on a heavy chart to remove it from a shelf. As a result of this traumatic event, she sprained her right wrist and elbow. Her injury required medical treatment.

4. In January 2008, Ms. Bizzell underwent physical therapy as reasonable and necessary treatment for conditions resulting from her industrial injury. This treatment proximately caused the claimant to suffer conditions of right shoulder sprain and neck sprain. These conditions require further necessary and proper treatment.

5. Ms. Bizzell was 48 years old when she testified. She graduated from high school, took some college courses, and was trained as a licensed practical nurse.

6. Ms. Bizzell's attending physician, Dr. Neal Shonnard, approved a light duty job for the claimant that she began on March 17, 2008. Ms. Bizzell worked at the light-duty job until March 20, 2008, at which time she discontinued the job on the advice of Dr. Shonnard.

7. Ms. Bizzell returned to work on May 12, 2008.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these [*11] appeals.

2. The claimant's January 2008 physical therapy constituted necessary and proper medical treatment for the industrial injury as contemplated by RCW 51.36.010.

3. The conditions diagnosed as right shoulder sprain and neck sprain were proximately caused by the industrial injury and should be allowed as residuals of the industrial injury as set forth in RCW 51.08.100.

4. The claimant was a temporarily, totally disabled worker within the meaning of RCW 51.32.090 from March 21, 2008, through May 11, 2008, and is entitled to time-loss compensation benefits for that period.

5. The Department orders dated May 13, 2009, May 22, 2009, May 26, 2009, and May 27, 2009, are correct and are affirmed.

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APPENDIX E

In re Cynthia L. Hansen, Dckt. No. 97 7062

1999 WA Wrk. Comp. LEXIS 94

Washington State Board of Industrial Insurance Appeals

May 18, 1999

DOCKET NOS. 97 7062 & 97 8865; CLAIM NO. N-932613

Reporter

1999 WA Wrk. Comp. LEXIS 94 *

IN RE: CYNTHIA L. HANSEN

Disposition: REVERSED AND REMANDED

Core Terms

shoulder, meat, right shoulder, claimant, disability, aggravate, finger, loss of earning power, meat cutter, per hour, full-time, partial, food, medical condition, provide treatment, earning capacity, upper extremity, return to work, auto parts, occupational, derangement, proximately, capsulitis, adhesive, counter

Counsel

Claimant, **Cynthia L. Hansen**, by Small, Snell, Weiss & Comfort, P.S., per Richard E. Weiss

Employer, Johnny's Food Center # 1, None

Department of Labor and Industries, by The Office of the Attorney General, per Kay A. Germiot, Assistant

Panel: THOMAS E. EGAN, Chairperson; JUDITH E. SCHURKE, Member

Opinion

DECISION AND ORDER

The claimant, **Cynthia L. Hansen**, filed two appeals with the Board of Industrial Insurance Appeals from orders of the Department of Labor and Industries: in Docket No. 97 7062, an appeal filed September 10, 1997, from an order dated August 8, 1997; and, in Docket No. 97 8865, an appeal filed November 7, 1997, from an order dated September 5, 1997. The August 8, 1997 order affirmed a prior order dated June 26, 1997, that stated medical evidence disclosed unrelated conditions described as cervical, lumbar and right shoulder strain, left hammer toe and a psychiatric condition, and denied Department responsibility for the conditions as unrelated to the injury for which the claim was filed. The September 5, 1997 order closed the claim with time loss compensation ended as paid to March 21, 1997, and without further time loss compensation or award for permanent partial disability. **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued on December 14, 1998. The industrial appeals judge reversed the Department orders and remanded the matter to the Department with direction to accept responsibility for the claimant's right shoulder condition diagnosed as internal derangement and adhesive capsulitis, to provide treatment for this condition, to provide the claimant time loss compensation for the period February 3, 1996 through May 27, 1996, and for the period March 22, 1997 through September 5, 1997, and to take such further action as is indicated by the facts and the law.

The industrial appeals judge sustained Ms. Hansen's objections, on grounds of relevance, to the Department's questions concerning her return to work in September of 1997. Ms. Hansen contended the information sought was not relevant because it concerned periods after the appealed September 5, 1997 closing order. We reverse the ruling of the industrial appeals judge. The material is clearly relevant to the determination of the extent of Ms. Hansen's employability. Her return to work was during a period proximate to the period for which she seeks time loss benefits, and there has been no testimony to suggest that her medical condition improved after September 5, 1997. Ms. Hansen had adequate opportunity to testify upon redirect examination, and did testify, regarding the circumstances of this return to work. We reverse the ruling at 8/19/98 Tr. at page 34, line 23, and admit into evidence the material at 8/19/98 Tr. at page 34, line 5, through page 36, line 23. We also admit into evidence Ms. Hansen's redirect testimony in response to this at 8/19/98 Tr. at page 45, line 1, through page 46, line 23.

We have reviewed the remaining evidentiary rulings in the record of proceedings and find that no prejudicial error was committed. We affirm these rulings.

DECISION

Issues and summary: The issues in this appeal are: whether the Department should accept responsibility for **Cynthia L. Hansen's** right shoulder condition; and, whether, and to what extent, Ms. Hansen was temporarily disabled from employment due to covered medical conditions during the periods February 3, 1996 through May 27, 1996, and March 22, 1997 through September 5, 1997. We agree with our industrial appeals judge's determination that the Department is responsible for the right shoulder condition under this claim. We disagree with the determination that Ms. Hansen was temporarily totally disabled from employment and therefore entitled to full time loss compensation during the referenced periods above. We find that Ms. Hansen was capable of employment during these periods, although her earning capacity was diminished. We, therefore, remand the matter to the Department to provide treatment for the right shoulder condition and to provide partial time loss compensation (loss of earning power compensation) for the periods February 3, 1996 through May 27, 1996, and March 22, 1997 through September 5, 1997.

Background: Ms. Hansen, born January 31, 1957, was raised in a family meat cutting business. Since 1983, Ms. Hansen has worked largely as a journeyman union meat cutter, mostly at Johnny's Food Center # 1. She has also, however, an additional varied work history, including: corrections employment from November 1982 to February 1983; child care provider from February 1983 to January 1984; three months of auto parts counter work; and, self-employment as the owner of a print shop for 15 months, March

1988 to June 1989. Ms. Hansen has her high school diploma from Clover Park Vocational Institute and a certificate from Clover Park in an early childhood specialist program.

Ms. Hansen filed her claim for right upper extremity problems on October 17, 1994, while she was employed as the meat manager at Johnny's Food Center # 1. She said she was working at least 6 days a week, and 8 or more hours a day at that time. She described the meat cutting tasks to include repetitive manual meat cutting and heavy lifting above shoulder height, including some overhead lifting. Ms. Hansen testified that this type of work aggravated her right hand and shoulder, causing aching, numbness, and swelling. She also had problems with her fingers, particularly the middle or long finger, which got so she could not bend it, and there was a lump underneath it. Some of her symptoms were from the elbow up to the shoulder, which was so sore she could not sleep on it.

Ms. Hansen sought medical care from Dr. Scott Connolly, who became her attending physician. He prescribed anti-inflammatory medication and referred her to a hand specialist, Dr. Thomas Griffin. Dr. Griffin treated her with cortisone injections in her hand and wrist, and diagnosed a trigger finger of her right long finger, tendonitis of the forearm, and right carpal tunnel syndrome. Surgery was performed to remove the lump in her hand. Following surgery, Ms. Hansen participated in physical therapy, but she still could not bend her finger, which continued to cause her problems when she tried to hold a knife to do her meat cutting job, although at least she could get it wrapped around the knife following the surgery. She also was enrolled in a work-conditioning program. She testified her shoulder and arm became more painful, and she began to experience headaches and muscle tightness in her shoulder and neck. Ms. Hansen had an arthrogram of her right shoulder, and Dr. Connolly provided her cortisone injections. She was also referred to Dr. Wendell Adams, an orthopedic surgeon.

Ms. Hansen stopped working around October 4, 1994, when she filed the claim. She has worked some between then and the time her claim was closed on September 5, 1997. She worked full-time at the Red Apple Grocery Store from May 1, 1995 through July 14, 1995, at light duty, cutting meat. Ms. Hansen testified she was receiving loss of earning power benefits from the Department due to the difference between her Red Apple salary and her previous wage of \$ 16.70 an hour. She testified she stopped working at Red Apple in July 1995, because the work was aggravating her hand and arm. She did not otherwise work through the time her claim was closed on September 5, 1997.

Shoulder condition: Contrary to the Department's contentions, the weight of the evidence establishes that Ms. Hansen has a shoulder condition related to the exposure and conditions for which this claim was filed, in addition to the carpal tunnel syndrome and trigger finger problems. Ms. Hansen began experiencing upper extremity problems sometime before filing the claim in 1994. Although the focus in initial treatment was lower in her right extremity, she also complained of pain in her right shoulder, which became more dramatic during a work-conditioning program.

Dr. Thomas Gritzka, an orthopedic surgeon, reviewed records and evaluated Ms. Hansen June 25, 1998. While he agrees the medical focus up to 1997 was lower on the extremity, he also testified: Ms. Hansen has internal derangement and adhesive capsulitis of the shoulder; proximately caused by her work in the meat department by way of lighting up or aggravating a rheumatologic predisposition, as accurately recounted by the industrial appeals judge. We note that Dr. Lewis Almaraz, the neurologist who testified for the Department, indicated "ultimately, yes" he would defer to Dr. Gritzka's opinion that Ms. Hansen has a right shoulder impingement syndrome. Almaraz Dep. at 24-25. Although Dr. Almaraz initially indicated he would have expected to see more muscle atrophy, he also indicated that muscle atrophy

would be less in an individual who had been working with the condition. Ms. Hansen had been working when evaluated by these two physicians.

Finally, even had Ms. Hansen's shoulder condition risen to significance (i.e., manifested) later than the original conditions for which the claim was filed, it is clear the shoulder condition became more symptomatic and required medical attention as a result of the conditioning program, which was part of the treatment for the original conditions covered under this claim. As such, the shoulder condition would still be a covered condition under this claim. See, e.g., *In re Arvid Anderson*, BIIA Dec., 65,170 (1986). For this reason, the Department's reliance on Dr. Gritzka's suggestions that the shoulder condition arose during the later conditioning program is misplaced. Dr. Gritzka has recommended physical therapy as treatment for the shoulder condition, as well as physical therapy and injections for Ms. Hansen's elbow condition. We, therefore, find that the Department is responsible for the right shoulder condition and remand the claim to the Department to provide treatment for the condition. We also consider the shoulder condition in determining Ms. Hansen's employability.

Entitlement to time loss or loss of earning power compensation: Dr. Gritzka testified that Ms. Hansen *should not work as a meat cutter*, as it will aggravate the right upper extremity and also make treatment more difficult. This is consistent with Ms. Hansen's account of the onset and cause of her medical problems. As indicated previously, we have admitted into evidence the testimony solicited from Ms. Hansen by the Department concerning her return to meat cutting in September 1997. This work began as part-time work and then became full-time in March 1988 at Larry's Market, where Ms. Hansen indicated she was earning \$ 18.25 per hour. To explain why she returned to work at a job that she perceived as potentially harmful to her, Ms. Hansen testified that she and her husband have five children, her husband is seriously ill, and that they otherwise would have no insurance. She testified her husband's medications alone cost \$ 1,400 per month. Ms. Hansen contends she works at meat cutting with pain and that she does so only because she feels she must do so for these unusually pressing reasons.

Ms. Hansen's later return to work as a meat cutter does not preclude our finding that Ms. Hansen is entitled to full or partial time loss compensation during the earlier periods in 1996 and 1997. Legal precedent cautions that, where appropriate, we should look beyond the mere fact of whether an individual is, or is not, working at a particular job, and that we should look to the medical advisability of the work as well as to the surrounding circumstances. Although the exact circumstances were different, this general understanding was important in our reasoning in *In re Richard Chase*, BIIA Dec., 60,114 (1982). In *Chase*, this Board held that a finding of permanent total disability is not necessarily precluded by the injured worker's employment at odd-lot work, not generally available in the labor market, at the time the claim was closed, where the work was causing the worker much discomfort and the worker was laid off two months later. Here, we are convinced by Dr. Gritzka's testimony that meat-cutting work is inadvisable for Ms. Hansen given her shoulder condition. The fact that she chose to work at the same or similar employment for compelling personal reasons during a legally distinguishable period, does not *necessarily or logically* negate the validity of Dr. Gritzka's view, nor does it preclude our finding that Ms. Hansen's refraining from meat cutting work earlier was medically reasonable, even if there was no difference in Ms. Hansen's medical condition between the periods compared. In the circumstances of this case, we find that Ms. Hansen's medical condition precluded her employment as a meat cutter during the periods in question, even though she later resumed work as a meat cutter.

On the other hand, Ms. Hansen's account of the meat cutting work as painful and done only out of extraordinary necessity does not lead us to conclude that she is entitled to full time loss compensation for

the prior periods wherein she did not work. We disagree with Ms. Hansen's contention, and the industrial appeals judge's determination, that Ms. Hansen was not capable of any gainful employment during the periods February 3, 1996 through May 27, 1996, and March 22, 1997 through September 5, 1997. Ms. Hansen has a varied work background in work other than meat cutting. Ms. Hansen also has transferable skills from her duties as manager while in the meat cutting business. We are mindful that the industrial appeals judge noted Ms. Hansen has a learning disability that causes reading and writing problems. Ms. Hansen testified to this. We disagree with the Department's contention that there is *no* medical support for such a determination. Vocational counselor Martha Foley testified, without objection, that a psychiatrist, Dr. Vanderbilt, referenced Ms. Hansen as having a learning disability.

Nevertheless, we do agree with the Department insofar as to indicate that the record before us does not convincingly support a view that Ms. Hansen has any *particular degree of functional limitation* due to a learning disability. Vocational counselor Gary Rusth well noted that the key vocational issue is *functional ability*. Ms. Hansen does not demonstrate, nor did she present any other evidence of, any notable functional limitation relevant to several jobs considered, such as delivery driver, security guard, day care provider, auto parts counter work, or meat cutting. Mr. Rusth based his belief upon many factors. Ms. Hansen attained the meat manager position at Johnny's, which is admittedly one of the largest meat cases in Pierce County. Her work involved ordering, scheduling, supervising and the like. Ms. Hansen has obtained her high school diploma, her driver's license, a certification in childcare, and a food handler's certificate. She is a resourceful individual with a multitude of work experience, which we must infer required functional ability in reading and writing.

We have compared Ms. Foley's testimony with that of Mr. Rusth, and we have taken into account the whole of the testimony regarding Ms. Hansen's medical conditions, including, but not limited to, her shoulder condition, and her training and work experience. We are firmly convinced that Ms. Hansen could have safely performed a variety of jobs. We believe delivery truck work might aggravate Ms. Hansen's shoulder due to the driving, and we see no reason why Ms. Hansen could not perform full-time work such as that of security guard, auto parts counter person, or child day care provider. Ms. Foley and Mr. Rusth testified that such work would provide earnings of approximately \$ 5.25 per hour. We find that Ms. Hansen is, therefore, not entitled to full time loss compensation for the periods in question. The evidence best establishes that during the periods February 3, 1996 through May 27, 1996, and March 22, 1997 through September 5, 1997, Ms. Hansen's earning capacity was equivalent to full-time employment (8 hours per day, 5 days per week) at \$ 5.25 per hour.

We, therefore, remand this matter to the Department to accept, and provide treatment for, Ms. Hansen's right shoulder condition, and to provide her loss of earning power compensation for the periods February 3, 1996 through May 27, 1996, and March 22, 1997 through September 5, 1997.

We have considered the Proposed Decision and Order, the Department's Petition for Review, and the Claimant's Reply to Department's Petition for Review. After careful consideration of the entire record before us, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On October 17, 1994, **Cynthia L. Hansen**, the claimant, filed an application for industrial insurance benefits, alleging she sustained an industrial injury on August 9, 1994, to her right hand during the course of her employment with Johnny's Food Center # 1. Her claim was allowed as an occupational disease and

time loss compensation was paid. On June 26, 1997, the Department of Labor and Industries issued an order indicating that medical evidence disclosed unrelated conditions described as cervical, lumbar and right shoulder strain, left hammer toe and psychiatric condition; the Department denied responsibility for those conditions as unrelated to the injury for which the claim was filed. On July 30, 1997, the claimant filed a protest and request for reconsideration of that order. On August 8, 1997, the Department issued an order indicating the June 26, 1997 order was correct and was affirmed. On September 5, 1997, the Department issued an order that indicated the Department was closing the claim with time loss compensation ended as paid to March 21, 1997, and without further award for time loss compensation or permanent partial disability. On September 10, 1997, the claimant filed a Notice of Appeal from the August 8, 1997 order. On October 10, 1997, and again on October 20, 1997, the Board of Industrial Insurance Appeals issued orders extending time to act on the appeal. On October 30, 1997, the Board issued an order granting the appeal, assigning it Docket No. 97 7062, and directing that further proceedings be held.

On November 7, 1997, the Board received a Notice of Appeal that the claimant placed in the U.S. Postal Service on November 5, 1997, from the order issued by the Department on September 5, 1997. The claimant did not receive the September 5, 1997 Department order until September 8, 1997. On December 4, 1997, the Board granted that appeal subject to proof of timeliness, assigned it Docket No. 97 8865, and directed that further proceedings be held.

2. On or about August 9, 1994, **Cynthia L. Hansen**, the claimant, while in the course of her employment with Johnny's Food Center # 1, sustained repetitive trauma to her right upper extremity while cutting meat. Her condition arose naturally and proximately out of her meat cutting activities, which involved distinctive conditions of that employment. As a proximate cause of the occupational disease that developed on or about August 9, 1994, Ms. Hansen developed internal derangement and adhesive capsulitis of her right shoulder due to an aggravation of a pre-existing rheumatologic condition in her right shoulder, causing the pre-existing condition to become symptomatic.

3. Ms. Hansen's right shoulder conditions, which arose naturally and proximately from her work at Johnny's Food Center # 1 on or about August 9, 1994, were not fixed and stable as of September 5, 1997, and she was in need of further treatment for that condition.

4. Ms. Hansen is 41 years old. She finished the 11th grade. She spent several years at a vocational school meat-cutting program, and later she received her high school diploma. She attended special education courses in school due to a learning disability. She has a certificate from a vocational school in an early childhood specialist program. She has performed meat-cutting work much of her working life and has management experience in this work, including scheduling, ordering, and supervising. She also has experience in other occupations, such as working as a corrections officer, self-employment as an owner of a print shop for 15 months, and auto parts counter work. Repetitive meat-cutting tasks aggravate her right hand and shoulder, and a right trigger finger condition. She continues to experience problems in her right upper extremity, such as swelling, and her right shoulder also bothers her.

5. Taking into account her age, education, work experience and other relevant factors, between February 3, 1996 and May 27, 1996, and March 22, 1997 and September 5, 1997, the claimant was not capable of reasonably continuous gainful employment as a meat cutter. She was capable of reasonably continuous gainful employment in work such as a security guard, auto parts counter person, or child day care. Her

maximum earning capacity during these periods was equivalent to full-time work (8 hours per day, 5 days per week) at \$ 5.25 per hour.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of these appeals.
2. From February 3, 1996 through May 27, 1996, and from March 22, 1997 through September 5, 1997, the claimant was entitled to partial time loss compensation (loss of earning power compensation), but she was not entitled to full time loss compensation within the meaning of RCW 51.32.090. Her maximum earning capacity during this period of time was equivalent to full-time employment, 8 hours per day, 5 days per week, at wages of \$ 5.25 per hour, within the meaning of RCW 51.32.090(3), and her earnings at the time of injury adjusted to what they would have been but for the occupational disease, which are yet to be determined by the Department.
3. The claimant's condition of right shoulder internal derangement and adhesive capsulitis is a covered condition under this claim and is in need of medical services within the meaning of RCW 51.36.010.
4. The orders of the Department of Labor and Industries issued on August 8, 1997 and September 5, 1997, are incorrect and are reversed. This claim is remanded to the Department of Labor and Industries with directions to: accept responsibility for the claimant's right shoulder condition diagnosed as internal derangement and adhesive capsulitis as an occupational disease, and to provide treatment therefor under this claim; deny responsibility for cervical and lumbar strain, left hammer toe, and a psychiatric condition; provide the claimant partial time loss compensation (loss of earning power compensation) benefits for the periods February 3, 1996 through May 27, 1996, and March 22, 1997 through September 5, 1997, consistent with maximum earning capacity of 8 hours per day, 5 days per week, at \$ 5.25 per hour and other determinations to be made by the Department; and to take such further action as is indicated by the facts and the law.

It is so ORDERED.

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APPENDIX F

In re Arvid Anderson, BIIA Dec. 65 170 (1986)

Anderson, Arvid

SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY

Aggravation by treatment

Conditions resulting from treatment for the industrial injury are considered part and parcel of the injury itself. A cardiac arrhythmia caused by the stress of surgery is therefore attributable to the industrial injury.*In re Arvid Anderson, BIIA Dec., 65,170 (1986)* [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 86-2-04442-1.]

Scroll down for order.

1 There is, however, a causal link between Mr. Anderson's cardiac arrhythmia and his industrial
2 injury. The medical evidence clearly shows that this condition, variously referred to in the record as
3 atrial fibrillation, cardiac palpitations and tachycardia/bradycardia, directly arose as a result of the
4 stress attendant to Mr. Anderson's industrial neck surgery in May, 1981. It is, of course, settled law
5 that the consequences of treatment for an industrial injury are considered to be part and parcel of the
6 injury itself. Anderson v. Allison, 12 Wn. 2d 487 (1942); Ross v. Erickson Construction Co., 89 Wash.
7 634 (1916). Dr. Albert H. Reisig, Jr., a cardiologist and Mr. Anderson's attending doctor for his cardiac
8 arrhythmia, testified that the neck surgery of May, 1981, did not worsen or increase Mr. Anderson's
9 pre-existing conditions of cardiomyopathy and mitral valve prolapse. His testimony further establishes
10 that Mr. Anderson's cardiac arrhythmia was still being treated, and in need of further treatment, as of
11 the date of the Department's closing order herein. Accordingly, since at least part of Mr. Anderson's
12 industrially-related condition was not fixed, any question as to the extent of permanent disability
13 attributable to his industrial injury of January 13, 1981, is premature, and not appropriate to be decided
14 in this appeal
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22 FINDINGS OF FACT

23 Findings 1 and 2 of the Proposed Decision and Order entered in this matter on December 16,
24 1985, are hereby adopted by the Board and incorporated herein as the Board's Findings 1 and 2. In
25 addition, the Board finds:
26
27

- 28 3. The claimant has conditions involving the heart diagnosed as
29 cardiomyopathy and mitral valve prolapse. Both of these conditions
30 pre-existed the claimant's industrial neck injury of January 13, 1981, and
31 are wholly unrelated thereto. Neither condition was aggravated or
32 worsened by the claimant's industrial neck surgery of May, 1981.
33
- 34 4. As a result of the claimant's industrial neck surgery of May, 1981, and the
35 stress attendant thereto, the claimant developed a condition of the heart
36 diagnosed as cardiac arrhythmia. This condition was not fixed but was in
37 need of further treatment as of the date of the Department's closing order
38 of May 26, 1983.

39 CONCLUSIONS OF LAW

- 40 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
41 and subject matter of this appeal.
42
- 43 2. The order of the Department of Labor and Industries dated May 26, 1983,
44 closing this claim with a permanent partial disability award of 20% as
45 compared to total bodily impairment for the claimant's cervico-dorsal
46 condition, is incorrect, and should be reversed, and this claim remanded to
47 the Department with instructions to reopen the claim and direct the

1 self-insured employer to accept responsibility for the claimant's cardiac
2 arrhythmia, provide treatment therefor, and to take such order and further
3 action as may be authorized or required by law.
4

5 It is so ORDERED.

6 Dated this 22nd day of July, 1986.
7

8 BOARD OF INDUSTRIAL INSURANCE APPEALS
9

10 /s/ _____
11 GARY B. WIGGS Chairperson
12

13 /s/ _____
14 FRANK E. FENNERTY, JR. Member
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16

17 DISSENTING OPINION
18

19 I agree with the Board majority, to the extent that they find that the claimant's cardiac
20 arrhythmias occurring in May, 1981 were produced by the stresses attendant to his industrial neck
21 surgery at that time, acting upon his pre-existing cardiomyopathy and mitral valve prolapse.
22

23 However, it is clear to me that those surgery-connected episodes constituted temporary
24 aggravations only. Whatever later cardiac arrhythmic symptoms the claimant has had are not
25 continuations of those which developed in 1981, but new episodes manifesting the underlying
26 unrelated conditions of cardiomyopathy and/or mitral valve prolapse. To me, the controlling expert
27 opinion on this point is that of Dr. Reisig, cardiologist who monitored and attended the claimant in
28 1981, and performed further heart evaluations in November, 1983 and November, 1984. The doctor's
29 key testimony was as follows:
30
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34 "Q. (By Mr. Moore) Doctor, as I understand it, you indicated the arrhythmia is
35 physically caused by the cardiac myopathy and the mitral valve prolapse
36 in some combination of one.
37

38 A. Most likely.

39 Q. The actual arrhythmic symptoms are probably brought on by whatever
40 stresses he has in his daily life.
41

42 A. Aggravated and more frequent because of that.

43 Q. If he were able to be very relaxed and not stressed, then it would be likely
44 that he would have less symptoms of arrhythmia?
45

46 A. Correct.
47

1 Q. As I understand it from your testimony previously, you have stated that the
2 specific arrhythmic condition that he experienced in May of 1981 was
3 related to the surgery and the pre-surgery induction he experienced at that
4 time and the stresses or anesthetics related to that.
5

6 A. More likely than not.

7 Q. But since that time, any arrhythmic symptoms that he's had have been
8 related to a combination of the pre-existing myocardial myopathy and the
9 mitral valve prolapse and whatever stresses he has experienced at the
10 time he has the arrhythmia.

11 A. Yes.

12 Q. And the stresses from the surgery are not related to these later arrhythmic
13 situations.

14 A. Correct."

15
16
17 And further:

18 "Q. Would it be fair to state, Doctor, that whatever effect the surgery had, and
19 whatever it was at the time of surgery, whether it was stress or the
20 anesthesia, whatever it was, but what you saw at the time of the surgery
21 and what they saw prior to surgery that was causing the arrhythmia was a
22 temporary aggravation that ceased by the time you saw him in November
23 of 1983?
24

25 A. Correct."
26

27
28 Furthermore, since 1981 the claimant has had less heart symptoms and arrhythmic episodes,
29 and his myopathy appears to have improved, according to Dr. Reisig as well as his family physician,
30 Dr. Paul Russell. Claimant is taking prescribed medications for his heart, to control the underlying
31 conditions and to prevent arrhythmic episodes, and to mitigate such episodes as do occur. Clearly,
32 this is sound medical management; but payment for such ongoing treatment, as of May, 1983 and into
33 the indefinite future, is not the responsibility of this claim.
34
35

36
37 All the medical evidence agrees that whatever permanent disability the claimant may have at or
38 near the closing date from his heart condition is not related to his industrial neck condition.
39 Furthermore, this record establishes that, since the industrial injury and the neck surgeries performed
40 for it in May and November, 1981, the claimant has developed additional conditions of peripheral
41 neuropathy, diabetes, and some rheumatoid arthritis. These developments may well partly explain
42 why he chose a retirement pension from Kaiser as of December 31, 1982, and is also now receiving a
43
44
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1 Social Security disability pension. None of these more recently developing conditions, of course, are
2 related to the January, 1981 neck injury.
3

4 As to the correct evaluation of claimant's permanent disability due solely to the neck injury, the
5 record fully supports the permanent partial disability award based on Category 3 of permanent
6 cervical-dorsal impairments.
7

8 In sum, I would direct acceptance of responsibility under this claim for whatever medical
9 attention and treatment was rendered for the claimant's cardiac arrhythmia episodes connected with
10 the May, 1981 surgery (and perhaps such further treatment as may have been given for further
11 cardiac arrhythmia problems, if any, up through the November, 1981 surgery). Otherwise, I would
12 affirm the Department closing order of May 26, 1983.
13
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15

16 Dated this 22nd day of July, 1986.
17

18
19 /s/
20 PHILLIP T. BORK, Member
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IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

CLARK COUNTY,) COA No. 51170-3-II
)
Appellant,)
)
v.) PROOF OF SERVICE
)
)
JENNIFER MAPHET,)
)
Respondent.)
_____)

The undersigned states that on August 10, 2018, I served via US Mail, as indicated below, Reply Brief of Appellant, as attached, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: August 10, 2018.



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