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Court of Appeals
Division III
State of Washington

Case No.: 318184

WASHINGTON COURT OF APPEALS, DIVISION III

TARGET CORPORATION,

Appellant-Defendant,

v.

PATRISIA VOWELS AND THE DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents-Plaintiffs.

APPELLANT'S BRIEF

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I. INTRODUCTION

Patrisia Vowels (hereinafter, "claimant") filed a claim for a right wrist condition, which the Department of Labor and Industries denied. Claimant appealed to the Board of Industrial Insurance Appeals. An Industrial Appeals Judge and then the Board allowed a claim for a right *and left* occupational disease. Appellant Target Corporation appealed. Following a bench trial, Benton County Superior Court affirmed the Board.

The left wrist condition was not claimed or addressed by the Department, and so was not properly before either the Board or the court. Additionally, the sole medical testimony supporting work as the natural and proximate cause of the wrist condition was based on nothing more than adoption of claimant's belief her work caused the condition. The vast weight of medical testimony denied industrial causation.

Therefore, appellant requests reversal of the Benton County Superior Court decision affirming the Decision and Order of the Board of Industrial Insurance Appeals which allowed an occupational disease claim for bilateral carpal tunnel syndrome.

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II. ASSIGNMENTS OF ERROR

A. First Assignment of Error

The trial court erred in addressing and allowing a claim for left carpal tunnel syndrome because the condition was not properly before it.

B. Second Assignment of Error

Substantial evidence does not support the trial court's determination that claimant established a compensable carpal tunnel syndrome.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Relevant to First Assignment of Error

Did the Board and trial court have jurisdiction to address a left hand/wrist condition when the Department only addressed a right hand/wrist condition?

Did the Board and trial court err in considering left hand/wrist carpal tunnel syndrome when an Interlocutory Order, following a pre-hearing conference, limited the issue to right carpal tunnel syndrome and the judge confirmed this limited scope at the beginning of the hearing?

B. Issues Relevant to Second Assignment of Error

Did the trial court make an unsupported factual determination that use of a hand-held scanner or other activities engaged in by claimant constitute activities peculiar to her employment?

Does competent medical testimony allow a reasonable conclusion that such activities were the proximate cause of a bilateral wrist occupational disease?

Did claimant establish that she used her left hand/wrist to perform work activities that can be considered peculiar to her employment?

Does Dr. Sampson, who focused on right hand/wrist symptoms and the use of a hand-held scanner, provide medical testimony sufficient to establish work was the proximate cause of a left hand/wrist condition?

IV. STATEMENT OF THE CASE

A. Procedural Posture

Claimant filed a claim for her right wrist on August 13, 2009. CP 47. On August 18, 2009, the Department of Labor and Industries (hereinafter, "the Department") issued an order denying her claim on the basis that there was "no proof of a specific injury at a definite time and place in the course of employment", the condition was "not the result of exposure alleged", the condition was "not the result of an industrial injury as defined by the Industrial Insurance Laws", and the condition was "not an occupational disease as contemplated by section 51.08.140 RCW." CP 37. Claimant appealed the Department order to the Board of Industrial Insurance Appeals (hereinafter, "the Board") seeking allowance of her right wrist condition as an occupational disease. CP 59; 80.

Industrial Appeals Judge Daniel W. Johnson presided over the hearing. In the initial pre-hearing conference, the parties stipulated the only issue on appeal was compensability of claimant's right carpal tunnel syndrome. CP 59. This was affirmed by the parties at the start of the hearing on May 18, 2010. CP 80. At hearing, Nancy Wasden, Kelli Cornwell, and Kevin Sampson, M.D. testified on behalf of claimant. CP 136-168; CP 204-249. Claimant also testified on her own behalf. CP 79-136. Throughout the proceedings, claimant repeatedly identified her right wrist as the body part at issue. CP 106; 110; 111; 132. Respondent presented the testimony of Amanda Parker, Carlee Nave, James Brinkman, M.D., and Alfred Blue, M.D. CP 168-198; 250-300; 301-339.

In the July 23, 2010 Proposed Decision and Order, Judge Johnson reversed the Department Order and remanded the matter to the Department to allow the occupational disease claim for bilateral carpal tunnel syndrome. CP 19-30. Employer filed a timely Petition for Review, asserting the judge exceeded the scope of review by addressing the left carpal tunnel condition and, alternatively, that the medical evidence did not support compensability of either left or right carpal tunnel syndrome. CP 12-14. The Board denied employer's Petition for Review and adopted the Proposed Decision and Order and its Final Decision and Order on

September 3, 2010. CP 8. Employer appealed to Benton County Superior Court. CP 1-3.

A bench trial was held before the Honorable Cameron Mitchell of Benton County Superior Court on October 29, 2012. On June 19, 2013, Judge Mitchell issued a Judgment affirming the Board's Decision and Order. CP 342-345. Employer timely appealed that Judgment to the Court of Appeals. CP 347-392.

B. Statement of Facts

1. Testimony of Claimant

At the time of the Board hearing, claimant was forty-five years old and had worked at Target for almost twelve years. CP 82. She first worked as a "flow team member", and her duties consisted of unloading various sized boxes from the trucks onto the floor, opening the boxes, and shelving the product. CP 84-85. She worked eight to ten hour shifts in that position. CP 84. After only one or two months, she transferred to a lead cashier position working eight-hour shifts. CP 87-88. She held the lead cashier position for over a year before moving to a position in the cash office where she counted money using a machine. CP 87; 89. Claimant worked in the cash office for about a year and then moved to receiving and charge backs, where she handled new products from

vendors and return products from customers. CP 90-91. In that position she used a bar code scanner, which she held in her right hand. CP 93.

After a couple of years in receiving and charge backs, claimant moved to a back room captain position; in that position, she scanned and shelved boxes. CP 98. She was in that position for less than a year before being moved to the replenishment team lead position, a position she held for seven or eight years. CP 104. The replenishment team lead position involved scanning and unloading boxes as well as directing her team. CP 105. After that job, she moved into a price changing position and finally to a presentation team lead position. CP 113; 121. As presentation team lead, her job tasks consisted of occasional scanning, shelving, and administrative tasks. CP 131.

Claimant initially sought treatment for her right wrist in 2008 with Dr. Merkley. CP 117. In January 2009, she was diagnosed with carpal tunnel syndrome and had surgery on her right wrist performed by Dr. Sampson. CP 106-107; 117. She initially noticed pain in her right wrist when she was sleeping. CP 109. She also began to notice weakness in her right hand. CP 109-110. Following surgery, her pain did not improve. CP 110. She continued in her full time job as presentation team lead after her surgery. CP 125.

In all of her team lead positions (approximately the last 8 years), claimant had the authority to assign tasks to her team members and to decide which tasks she wanted to do. CP 122. In all of her positions she operated the scanner with her right hand most of the time, since it did not work in her left hand because she is not left handed. CP 127; 134.

Claimant filed a claim, after surgery, “because I did not want to pay as much as I was going to have to pay . . . after my insurance took care of it.” CP 134.

2. Testimony of Carlee Nave

Ms. Nave was the executive team leader of human resources from 2005 to 2007, and again in 2010. CP 185. She first talked to claimant about her wrist problems in 2007. CP 186. She had noticed claimant holding her wrist and asked about it. CP 186. Claimant told Ms. Nave she had carpal tunnel; when specifically asked if it was work related, claimant replied “no.” CP 186. Ms. Nave also asked if she would like to file a claim, and claimant replied “no.” CP 186.

3. Testimony of Amanda Parker

Ms. Parker worked as the store team leader at Target for 18 months and claimant reported to her. CP 169-170. During that time, she worked with claimant on improving job performance. CP 171. In late 2008, she asked claimant about a wrist brace she was wearing, and asked specifically

if she had a work-related injury. CP 173. Claimant replied that she had had carpal tunnel for a long time and that it was not work related. CP 174.

4. Medical Testimony of James Brinkman, M.D.

Dr. Brinkman is a Board certified general and plastic surgeon who specializes in the hands. CP 253. He conducted an independent medical examination of claimant on March 18, 2009. CP 253. As part of his examination, he reviewed all of her medical records from Dr. Merkley, Dr. Sampson, and her diagnostic tests. CP 254. In preparation for his testimony, he also reviewed a July 2009 report from Dr. Blue. CP 254.

At the time of his examination, claimant complained primarily about her right hand. CP 255. She reported that her symptoms started in the summer of 2008, and occurred predominately at night. CP 260. She would wake in the middle of the night with numbness and tingling in her fingers, and a throbbing pain that she could not relieve with shaking or elevating her hand. Dr. Brinkman noted this was inconsistent with a classical presentation of carpal tunnel syndrome. CP 260. Claimant described her work activities as using a hand-held scanner at work, as well as lifting and moving boxes. CP 260.

Based on the records and his examination, Dr. Brinkman diagnosed claimant with a history of right carpal tunnel syndrome, not work-related, on a more probable than not basis. CP 258. He also found

residual median nerve entrapment due to the open carpal tunnel release, not work-related, and complex regional pain syndrome occurring as a complication of surgery. CP 259. He testified that claimant had multiple factors that can cause carpal tunnel syndrome, including her age, gender, sedentary lifestyle, history of coagulation problems and anticoagulant therapy, and history of hypertension. Further, claimant reported numbness associated with doing activities of daily living and had worked at Target for eight or nine years before the onset of symptoms. CP 265-266. Dr. Brinkman also noted that in the history she provided, she did not report using the hand-held scanner more than thirty times in an hour—the frequency needed to qualify as a repetitive job activity. CP 266. In Dr. Brinkman’s opinion, claimant’s work activities were not the cause of her carpal tunnel syndrome. CP 265, 294-295.

5. Medical Testimony of Alfred Blue, M.D.

Dr. Blue is an orthopedic surgeon who specializes in upper extremity surgery and plastic surgery. CP 305-306. He conducted an independent medical examination of claimant on July 14, 2009. CP 306. At the time of his examination, he reviewed medical records and obtained her medical history. CP 306-307; 310. Claimant described a gradual onset of pain and numbness in her right hand, which she thought was due to the hand-held scanner she used at work. CP 310-311. She reported her

right hand significantly worsening after surgery. CP 311. She did not complain of any left-handed symptoms, nor did she mark the left hand on the symptom diagram she completed at the time of the exam. CP 311-312.

After conducting a physical exam of claimant, Dr. Blue diagnosed her with post-carpal tunnel release, neuropathy, and a history of hypercoagulability. CP 312; 314. He also found her post-surgery symptoms inexplicable. CP 315. Dr. Blue concluded claimant's right carpal tunnel syndrome was not related to her work based on medical research indicating that use of a hand-held scanner of the type used by claimant is not a cause of carpal tunnel compressive symptoms. CP 314-316. He noted that recent medical literature also indicates wrist positions are not causative of carpal tunnel syndrome. CP 317. Other factors, such as age, gender, genetics, increased body mass index, and other medical conditions, are causative of carpal tunnel syndrome. CP 317. He did note repetitive motion can be a cause, but repetitive motion is defined as doing the same action more than twice a minute with a force greater than four kilograms, and claimant's described use of the hand-held scanner at work did not meet these criteria. CP 317-318.

6. Medical Testimony of Kevin Sampson, M.D.

Dr. Sampson has been an orthopedic surgeon for two years. CP 208. At the time of his testimony, he was not Board certified. CP 210.

He first saw claimant on December 1, 2008 for a consultation. CP 211. Claimant complained of hand pain and numbness, which reportedly had been ongoing for many years. CP 212. She told Dr. Sampson her symptoms were worse at night. CP 213. He diagnosed her with carpal tunnel syndrome. CP 215. On January 9, 2009, Dr. Sampson performed a right carpal tunnel release surgery. CP 217. Following surgery, claimant continued to deteriorate, noting complaints of increased pain and numbness in the median nerve distribution. CP 218.

It was not until after the surgery that claimant mentioned to Dr. Sampson her belief that the condition was related to her work activities. CP 221. He testified that she described a hand-held apparatus that she used at work, but he was unfamiliar with the device and did not know what it was. CP 221-222. His opinion that her condition related to her work activities was based on the history claimant provided and her strong belief that it was her work activities. CP 225-226. This required him to assume claimant provided an accurate history. CP 234.

Dr. Sampson did acknowledge carpal tunnel syndrome is multifactorial and other activities can be contributory. CP 226. He does not know all of claimant's work activities. CP 235. He last treated claimant in 2010, approximately a year after her surgery. CP 219.

On cross-examination, Dr. Sampson testified claimant complained her symptoms bothered her the most at night; he conceded carpal tunnel syndrome can be caused by flexing the wrist while asleep. CP 230-231. He acknowledged that if claimant had told him she believed her sleeping position was the cause of her carpal tunnel syndrome, he would have a different opinion regarding the cause of her condition. CP 244.

V. SUMMARY OF ARGUMENT

The superior court, like the Board before it, lacked jurisdiction to determine the compensability of claimant's left carpal tunnel syndrome. Claimant filed a claim only for right carpal tunnel and the Department has not had the opportunity to consider the left carpal tunnel syndrome. The Judgment must be reversed on the basis of subject matter jurisdiction as it pertains to claimant's left hand/wrist condition.

Alternatively, even assuming the Board and the superior court had the jurisdiction to address the left carpal tunnel syndrome, substantial evidence does not support any causal nexus between claimant's work activities and her bilateral carpal tunnel conditions. Employer requests that the Court of Appeals reverse the superior court Judgment and remand the matter to the Board with direction to deny compensability of claimant's bilateral carpal tunnel conditions.

VI. ARGUMENT

A. **The Compensability of Claimant's Left Carpal Tunnel Condition was Outside the Superior Court's Scope of Review.**

1. **Standard of Review: Legal determinations are reviewed under an error of law standard.**

A superior court's legal determinations are reviewed under an error of law standard, which allows this Court to substitute its judgment for that of the lower court. *Energy Northwest v. Harje*, 148 Wn. App. 454, 199 P.3d 1043 (2009). In reviewing a workers' compensation issue, both the Board and the superior court have appellate jurisdiction only, with the scope of review limited to those issues first addressed by the Department. Whether the Board and/or superior court exceeded their respective scope of review is a legal determination assessed under an error of law standard. *See In re Orena Houle*, BIIA Dec., 00,11628, 6 (2001) ("When the Board exceeds the scope of its review, it commits an error of law by passing on an issue or issues not properly before it.').

The Board and the courts act only in an appellate capacity with respect to workers' compensation issues. The Department is the administrative agency with original and exclusive jurisdiction to make determinations concerning the allowance and compensability of claims. *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 540, 886 P.2d 189 (1994) (citing *Abraham v. Dep't of Labor and Indus.*, 178 Wn. 160, 163,

34 P.2d 457 (1934)). Neither the Board nor the courts can consider a question unless it has first been passed upon by the Department. *Lenk v. Dep't of Labor and Indus.*, 3 Wn. App. 977, 982, 985, 478 P.2d 761 (1970); *Kingery v. Dep't of Labor and Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (the Industrial Insurance Act provides both the Board and the superior court serve a purely appellate function). To do so would usurp the prerogatives of the Department, the agency vested by statute with original jurisdiction. *Lenk* at 982 (citing *Cole v. Dep't of Labor and Indus.*, 137 Wn. 538, 243 P. 7 (1926)).

A superior court is an appellate court with respect to appeals from the Board and is bound by the same constraints applicable to all appellate courts. *Boeing Co. v. Heidy*, 147 Wn. 2d 78, 87, 51 P.3d 793 (2002). In cases where the Board exceeds its scope of review, the superior court has been found to lack jurisdiction. In fact, the Washington Supreme Court has consistently held that a superior court cannot even consider a question that was not properly before the Board. *Hanquet v. Dep't of Labor and Indus.*, 75 Wn. App. 657, 663-64, 879 P.2d 326 (1994); *see also Merchant v. Dep't of Labor and Indus.*, 24 Wn.2d 410, 413, 165 P.2d 661 (1946) (“the jurisdiction of the superior court is limited to a review of ‘a question or questions which have been *actually decided* by the department.’”) (emphasis in original). If a question is not first determined by the

Department, it cannot be reviewed either by the Board or the superior court. To do so would be to allow the appellate bodies to assume original jurisdiction over an issue within the exclusive original jurisdiction of the Department, going beyond the letter and spirit of the law.

2. The only issue properly before the Board and the superior court was the compensability of claimant's right carpal tunnel syndrome.

In this case, the only issue properly before the Board and the trial court was the compensability of claimant's right carpal tunnel syndrome.

"The questions the Board may consider and decide are fixed by the order from which the appeal was taken as limited by the issues raised by the notice of appeal." RCW 51.52.070; *Lenk* at 982 (citing *Woodward v. Dep't of Labor and Indus.*, 188 Wn. 93, 61 P.2d 1003 (1936) and *Brakus v. Dep't of Labor and Indus.*, 48 Wn.2d 218, 292 P.2d 865 (1956)).

Claimant filed a claim for a right wrist condition, which was denied by the Department as an occupational disease and an industrial injury in an August 18, 2009 Order. CP 47-48. The Department order did not specifically mention that it related to the left or right or both wrists. Claimant arguably could have raised the left carpal tunnel issue before the Board and the parties could have clarified the scope of the Department order. But instead, claimant narrowed the issue to the right carpal tunnel syndrome.

Claimant, in the Notice of Appeal, sought compensability of her “upper extremity” in the singular tense. CP 34-35. While she did not specify her right carpal tunnel syndrome at that time, she similarly did not seek a bilateral condition. When clarifying the issue in pre-hearing conference, claimant expressly identified the issue as right carpal tunnel syndrome as an occupational disease claim. CP 59.

The Interlocutory Order issued by IAJ Johnson confirms only the right wrist was at issue. At any proceeding, parties may stipulate to the legal and factual issues in dispute. Such agreement is encouraged to limit the scope of litigation. WAC 263-12-095(2); *In re Steven Fridell*, Dckt. No. 04 14032, 3 (August 22, 2005). In pre-hearing conferences, issues are identified on the record for the purposes of resolving doubt about the scope of any dispute and the resultant decision. WAC 263-12-095(2) and (3); *In re James Hicks*, Dckt. No. 98 22022, 2 (January 7, 2000). It also ensures that parties have a “full and fair opportunity to present evidence on all contested issues.” *In re Doyce Hayes*, Dckt. No. 97 4690, 1 (January 26, 1999). Similar to a pretrial order, the statement of issues controls subsequent litigation, subject to modification by the industrial appeals judge or interlocutory appeal. WAC 263-12-095(3).

In the present case, claimant identified the issue as an occupational disease claim for her right wrist in a pre-hearing conference. This

statement of the issue is set out in the Interlocutory Order Establishing Litigation Schedule. In that Order, the parties agreed and the judge affirmed the only issue on appeal was the allowance of “her occupational disease claim for a condition of the right wrist.” CP 59. Claimant did not appeal that Order, nor was the Order modified by the judge. In fact, at the beginning of hearing, Judge Johnson restated the issue as “allowance of an occupational disease claim for a right wrist condition”. CP 80. Again, claimant did not object or correct the judge; in fact, she never raised the left carpal tunnel syndrome condition as an issue.

Despite these facts, the Board *sua sponte* addressed the issue of left carpal tunnel syndrome, and claimant has adopted its decision. Washington statute, administrative rules, and case law confirm the Board is limited to the issues outlined in the pre-hearing statement. WAC 263-12-095(2) and (3); *In re James Hicks*, Dckt. No. 98 22022, 2 (January 7, 2000). Not only did the Board go beyond its jurisdiction, it created a fundamentally unfair situation. Employer had no notice that a left carpal tunnel syndrome was at issue, so was not afforded the opportunity to develop evidence and present a defense relative to that condition. Employer raised this issue before both the Board and the trial court. Judge Mitchell ruled that because the parties questioned the experts about claimant’s left-sided complaints, the left hand/wrist condition issue was

properly before the Board and court. The fact limited questions about left-sided complaints were posed does not equate to that issue being litigated. In merely exploring the cause of claimant's right carpal tunnel syndrome, the presence or absence of bilateral symptoms has importance. For example, Dr. Brinkman testified that bilateral symptoms suggest systemic or metabolic factors as a cause. CP 266. That the left-sided complaints had relevance within the context of a right hand/wrist claim does not mean that claimant presented a claim for the left hand/wrist. Nor does the compensability of a right carpal tunnel syndrome mean left carpal tunnel syndrome is also compensable. CP 330-331. The experts were not presented with specific questions of whether claimant had left carpal tunnel syndrome that would not exist but for distinct conditions of her employment. Had the left hand/wrist condition been at issue, employer (and likely claimant) would have explored these questions in depth.

The Department was only presented with a right hand/wrist claim, and on appeal, claimant specifically limited the issue to right carpal tunnel syndrome. The left carpal tunnel syndrome was not properly raised or at issue before the Board. The Board and the trial court erred in exercising jurisdiction over the left hand/wrist condition.

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B. Substantial Evidence Does Not Support Compensability of Carpal Tunnel Syndrome.

1. Scope of Review: Factual determinations are reviewed under a substantial evidence standard.

Challenges to a Superior Court's decisions are reviewed under the ordinary standard of review for civil cases. RCW 51.52.140. The Court of Appeals reviews whether "substantial evidence supports the trial court's factual findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor and Indus.*, 138 Wn. 2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor and Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). "Substantial evidence" is "evidence of such a character and substance as to convince an unprejudiced, thinking mind of the truth of that to which the evidence is directed." *Ehman v. Dep't of Labor and Indus.*, 33 Wn.2d 584, 597, 206 P.2d 787 (1949) (internal citations omitted). The evidence must be sufficient to convince a rational fact finder that an assertion is true. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008).

If the Court agrees with appellant's First Assignment of Error, and concludes the left wrist/hand was not at issue, then it need only address the right wrist determination in the Second Assignment of Error.

2. Substantial evidence does not support claimant's carpal tunnel condition as a compensable occupational disease.

Compensability of right or left carpal tunnel syndrome as an occupational disease is not supported by substantial evidence. Claimant did not meet her burden of proving the condition arose as a natural consequence or incident of distinctive conditions of her particular employment. *Ruse v. Dep't of Labor and Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909 (1998), *aff'd* 138 Wn.2d 1, 977 P.2d 570 (1999).

An occupational disease is a "disease or infection that arises naturally and proximately out of employment." RCW 51.08.140. The "naturally" requirement means the condition must be caused by work, not the normal progression of life. A worker must show a disease came about as a natural consequence of distinct employment conditions. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481-82, 745 P.2d 1295 (1987). The "proximately" requirement means the disease would not have been contracted but for the work conditions. *Simpson v. Dep't of Labor & Indus.*, 32 Wn.2d 472, 479 202 P.2d 448 (1949). The causal relationship between work and a disease must be established by "competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment." *Simpson*, 32 Wn.2d at 477 (citing

Ehman, 33 Wn.2d at 584; *Seattle-Tacoma Shipbuilding Co. v. Dep't of Labor and Indus.*, 26 Wn.2d 233, 241-42, 173 P.2d 786 (1946)).

Here, the evidence does not allow a reasonable conclusion that claimant's work was the natural and proximate cause of her right (or left) carpal tunnel syndrome. Dr. Brinkman and Dr. Blue, qualified medical experts, provided reliable, persuasive opinions that claimant's right carpal tunnel syndrome is not related to her work activities. These opinions rest on solid factual foundations and consider potential causes within the context of medical science. This medical testimony rebuts both the "naturally" and "proximately" requirements of RCW 41.08.140. Claimant presented only the testimony of one medical expert who adopted her non-expert theory of causation as his own based on the assumption that she gave an accurate history of her condition. CP 234. Dr. Sampson provided the only medical testimony supporting claimant's work as a natural and proximate cause of her right carpal tunnel syndrome. Upon scrutiny, however, Dr. Sampson's opinion is not competent to establish compensability. Dr. Sampson's testimony cannot persuade a rational fact finder that claimant's carpal tunnel syndrome arose naturally and proximately out of her employment.

a) *Vast weight of medical opinion shows condition did not occur “naturally” due to distinct employment conditions.*

Dr. Brinkman reviewed medical records, examined claimant, and took a detailed description from her of the work activities. CP 253-60. He explained that claimant’s work activities, even using the hand-held scanner, did not qualify as repetitive activity, and thus were not a natural cause of carpal tunnel syndrome. CP 265-266. Similarly, Dr. Blue reviewed extensive medical records, undertook a personal examination of claimant, and obtained a detailed description from claimant. CP 306-312. Dr. Blue also concluded claimant did not have distinct work conditions that naturally led to the development of carpal tunnel syndrome. Although he agreed repetitive work activities can be a contributor to carpal tunnel syndrome, he noted claimant’s described work activities were not “repetitive” as defined by the National Institute of Occupation Safety and Health . CP 317-318. He also cited to medical science demonstrating that wrist positions and activity similar to using the hand-held scanner device do not cause carpal tunnel syndrome. CP 314-317. While claimant contends the use of the hand-held scanner at work caused her right carpal tunnel syndrome, it does not qualify as the type of repetitive motion activity causative of carpal tunnel syndrome.

Dr. Sampson, claimant's surgeon, provided the only medical testimony supporting compensability. Although the opinion of an attending physician often receives special consideration, it is not entitled to greater weight or credibility than the other medical experts. *See Groff v. Dep't of Labor and Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964). The basis for the medical experts' opinions must be considered in determining the weight given to each. Dr. Sampson eschewed medical science to rely only on what claimant told him—that using a hand-held device caused her condition. CP 226; 234.

Dr. Sampson's testimony is not enough to establish claimant had distinct employment conditions causing her condition. He admittedly did not know what the hand-held apparatus was that claimant used. CP 221-222. He did not know if this was a repetitive activity of her job, and had no knowledge of her wrist position when using the hand-held device. CP 235. Dr. Sampson's opinion was not based on expert analysis of the facts; rather, he based it on claimant's strong belief that using a hand-held device caused her condition. CP 225-226. He did not consider her work activities a contributing cause prior to her assertion that they were the cause. CP 229. Because he lacked knowledge of the frequency and even nature of her work activities, Dr. Sampson had no basis from which he could logically conclude claimant performed distinctive (repetitive)

conditions at work which caused carpal tunnel syndrome. *Ruse v. Dep't of Labor and Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909 (1998), *aff'd* 138 Wn.2d 1, 977 P.2d 570 (1999).

When the evidence robustly supports a factual finding, a determination counter that finding lacks substantial evidence. *Jenkins*, 143 Wn. App. 256. The evidence here is robust that claimant's work activities could not be considered "repetitive" as defined for purposes of relating activity to causation of carpal tunnel syndrome. Both Dr. Brinkman and Dr. Blue identified why the described activities from claimant did not qualify as repetitive actions. Dr. Sampson lacked knowledge about claimant's activities and thus cannot competently determine if those activities are repetitive. The trial court's determination that claimant's hand-held scanner use and other activities were distinct conditions of employment—or that claimant met the naturally requirement—lacks substantial evidence.

b) Vast weight of medical opinion shows condition did not arise "proximately" from work activities.

Likewise, a rational fact finder could not conclude on this record that work conditions were the proximate or "but for" cause of claimant's condition. A proximate cause entails both legal causation and cause in

fact. Legal causation is determined as a matter of law; cause in fact is reviewed for substantial evidence. *Id.* at 254.

Dr. Sampson relied on claimant's history of onset of complaints and correlation of complaints to certain activities. Because Dr. Sampson deferred to claimant's report, the reliability of that reported history must also be considered. Claimant's history regarding the cause of the condition changed once she realized the treatment would be expensive. Only then did she decide to file a claim and shift responsibility for the cost of the treatment to her employment. CP 134. Two competent witnesses testified that when they first noticed claimant's complaints regarding her right hand/wrist, she told them it was long standing and unrelated to work. CP 173-174; 186. She even refused a human resource team leader's suggestion that she file a claim. CP 186. Claimant clearly brought this claim because of monetary concerns, a bias which cannot be ignored. Her history of when complaints arose and what they related to is simply unreliable.

Moreover, the evidence does not allow a reasonable inference that work activities were a "but for" cause of claimant's carpal tunnel syndrome. Dr. Brinkman directly addressed this question. He identified several known risk factors for carpal tunnel syndrome, including several applicable to claimant. CP 265-66. Dr. Brinkman addressed these other

risk factors and concluded that, even without her employment, she likely would have developed carpal tunnel syndrome anyway. CP 279. His opinion rebuts finding work activities the proximate, or “but for” cause of the condition. Dr. Blue and Dr. Brinkman considered the many factors that could contribute to claimant’s carpal tunnel syndrome, including her description of work activities. Drawing from this factual and research-based perspective, they concluded claimant’s condition was not a proximate cause of the condition.

Even Dr. Sampson acknowledged carpal tunnel syndrome is multifactorial, and can be caused just by flexing the wrist in sleep. While acknowledging claimant’s first report to him was problems when sleeping, he did not evaluate if the condition would have developed but for the work activities. CP 226. He admitted that had claimant attributed her symptoms to sleeping position, he would have endorsed that as the cause. CP 244. In contrast to the opinions of Drs. Brinkman and Blue—based on scientific evidence, medical literature, as well as an understanding of claimant’s medical history and work activities—Dr. Sampson’s opinion deserves little weight. He deferred medical analysis to claimant, and supported her claim solely on her assessment that the hand-held scanner had caused it.

Dr. Sampson's opinion does not provide "a sufficient quantum of evidence" that claimant's work activities were a proximate cause of her condition. *See e.g. Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash. 2d 169, 176, 4 P.3d 123 (2000). His opinion is flawed because he lacked knowledge of the nature and frequency of claimant's work activities, he relied on her suspect history, he ignored medical science and expert opinions regarding causes of carpal tunnel, and instead of applying expert reasoning, he blindly adopted claimant's belief about causation. The trial court's determination lacked substantial evidence.

c) No logical medical testimony links claimant's left carpal tunnel syndrome to work.

Alternatively, even if the right carpal tunnel syndrome is allowed, the medical evidence on that condition does not allow finding the left carpal tunnel condition compensable. Dr. Sampson, the only medical opinion presented by claimant, focused on the causation and his treatment of the *right* carpal tunnel condition. CP 212; 214; 217. He relied on claimant's assertion that she frequently used a "hand-held apparatus" at work which caused her symptoms. CP 221-223. He focused on the use of the device and admittedly did not know all of her work activities. CP 235-236. Because Dr. Sampson's opinion relied on claimant's use of the hand-

held scanner, and this activity was predominantly right-handed, there is no medical opinion tying claimant's left sided condition to her job activities.

Unknown to Dr. Sampson, but admitted by claimant, she used her right hand in an entirely different manner than the left, and that her symptoms were not the same bilaterally. CP 94; 98-99; 126; 132. Even if use of the scanner could support right carpal tunnel syndrome, it could not support left carpal tunnel syndrome because she did not use the scanner in her left like she did on the right. Claimant testified she would use the scanner with her left hand very little, certainly less than a quarter of the time she was scanning. She would "toss it over to the other hand to use it for a minute" when her right hand hurt, but it did not work well in her left hand. CP 127; 134. When doing other tasks, she would use her right hand particularly "a lot" during the work day. CP 132. From her testimony, it is clear this was very minimal use of the scanner with her left hand. Dr. Sampson supports work-relatedness based on the history of frequent use of the hand-held scanner. This history simply does not exist for the left hand, and as a result, no medical testimony logically establishes work causation.

VII. CONCLUSION

Claimant defined the issue as a right carpal tunnel syndrome as an occupational disease. She did not raise any claim for a left-sided

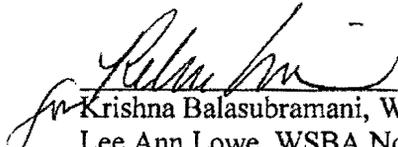
condition. The trial court erred as a matter of law when it addressed left carpal tunnel syndrome.

On the merits, the record does not support finding claimant had distinctive working conditions that naturally and proximately caused her carpal tunnel syndrome. The testimony of Dr. Sampson failed to address the necessary facts or medical science; the trial court erred in giving weight to Dr. Sampson's opinion when Dr. Sampson himself admitted to a lack of relevant knowledge and to his blind adoption of claimant's belief about her condition. Substantial evidence does not support the trial court's determination that work was the natural and proximate cause of a right or left carpal tunnel syndrome.

The trial court erred in affirming the Board's decision allowing this claim for bilateral carpal tunnel syndrome. Appellant respectfully requests the Court of Appeals reverse the Judgment and deny this claim in its entirety.

Dated: January 9, 2014

Respectfully submitted,



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Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed **APPELLANT'S BRIEF**
via efileing to the following the following:

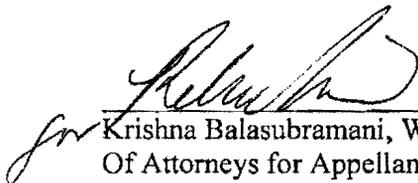
Ms. Renee S. Townsley, Clerk
Washington State Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201-1905

I further certify that on this date, I mailed a copy of the foregoing
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