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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 318184

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

TARGET CORPORATION,

Appellant-Defendant,

v.

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

Respondents-Plaintiffs.

BRIEF OF RESPONDENT PATRISIA VOWELS

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STATUTES

RCW 51.04.0106
RCW 51.08.1407
RCW 51.52.11510
RCW 51.52.13017

COMES NOW the Respondent, Patricia Vowels, by and through her attorneys of record, David L. Lybbert, of Calbom & Schwab, PSC, and hereby submits a Respondent's Brief as follows:

SUMMARY OF FACTS OF CASE

A claim for an Occupational Disease, namely Carpal Tunnel Syndrome, was filed by the Respondent with the Department of Labor and Industries. Her claim was rejected by the Department, based in part, upon reports of the Medical evaluations arranged by the Self-Insured Employer, including reports of James Brinkman M.D., and Alfred Blue M.D.

Upon hearing and review of testimony of the various witnesses, the Board reversed the Department's Order Rejecting the claim and allowed it as an Occupational Disease, including Carpal Tunnel Syndrome and recognized the condition was affecting Ms. Vowels bilaterally.

The Self-Insured Employer's appeal stems from the allowance of an occupation disease claim by the Board of Industrial Insurance Appeals. They argue that there was insufficient evidence to support the allowance of the claim for an Occupational Disease. The Employer appealed the decision of the Board, that the claim should be allowed, to Superior Court. The Board had allowed it as a bilateral condition, though Ms. Vowels had only had surgery on the right side. The record, including the medical

evidence, considered by the medical experts who saw Ms. Vowels, at the request of the Self-Insured Employer, and who offered opinions on the relatedness of her Carpal Tunnel condition to her work activities, clearly establishes that Ms. Vowel's condition has always been treated and evaluated as a bilateral condition.

To understand why her work activities were the likely cause of her Carpal Tunnel Syndrome, we refer the Court to Findings of Fact No. 2, made by the Board of Appeals. It reads:

Ms. Vowels worked as a team leader in various departments for Target for 12 years. In those occupations she was involved in the continuous and repetitive use of her hands and wrists while handling various sized boxes and products when she unloaded, stocked and marked such products for sale at the retail establishment. The work also involved the repetitive and prolonged use of a scanning device used to track inventory and price products. The operation of this scanning device required constant and continuous flexion and extension of the wrist while pulling the trigger to complete the scan of items being handled. The continuous and repetitive hand and wrist motions in the work constituted distinctive conditions of her employment at Target.

The treatment records included a diagnosis of Carpal Tunnel Syndrome, appearing always as a bilateral condition, with her worst and most pressing need for surgery on the right side. The medical records established that she was fitted with braces for both wrists before having surgery to the right wrist in January 2009.

The order rejecting the claim says that she has no condition that is an Occupational Disease as contemplated by Section 51.08.140 RCW. (CP37)

Lay testimony referred to the condition as being bilateral, worse on the right. (CP 140,157)

The Industrial Appeals Judge referred to the condition as a bilateral problem during the taking of testimony. (CP 154-5)

Medical testimony was presented from Kevin Sampson, M.D., on behalf of Ms. Vowels. He was her treating orthopedist. Dr. Sampson testified that he saw Ms. Vowels for bilateral hand pain and numbness, primarily in the right side. He diagnosed Carpal Tunnel Syndrome. On physical exam he noted positive clinical signs of Carpal Tunnel Syndrome including positive Tinel's and Positive Carpal Tunnel Compression tests. Nerve Conduction testing was positive for bilateral Carpal Tunnel Syndrome, bilaterally, more severe on the right.

Dr. Sampson testified that he performed Right Carpal Tunnel Release surgery on January 9, 2009. She later developed Complex Region Pain Syndrome. Dr. Sampson testified that he thinks there is a direct relationship between her surgery and her Complex Regional Pain Syndrome. He testified that he believed that her repetitive use of her

hands in her employment was a likely cause of her Carpal Tunnel Syndrome. (CP 225) Dr. Sampson testified that it has always been a bilateral condition, more severe on the right side. (CP 215)

The Employer had Ms. Vowels seen by James Brinkman, M.D. Dr. Brinkman suggested on direct testimony that there were multiple factors contributing to the development of Ms. Vowel's Carpal Tunnel Syndrome.

On cross-exam, Dr. Brinkman acknowledged that he could not rule out the significance of the work as a factor of her condition. He went on to say that "I wouldn't include work as a single cause. I would say it was more work-aggravated, but not directly caused by the work." (CP 273)

He agreed that the type of work she was doing aggravated all of these predisposing factors and was probably why she began developing symptoms. (CP 279)

Dr. Brinkman acknowledged that the medical records he reviewed for his evaluation would show that the Carpal Tunnel Syndrome in Ms. Vowel's case appeared to be a bilateral condition, worse on the right side. (CP 275)

Dr. Brinkman further testified on cross-examination that repetitive grasping together with repetitive pulling and tearing such as opening boxes, or pinching grasping and tearing, if its is prolonged, would be the “gold standard“ of repetitive action that develops Carpal Tunnel Syndrome. (CP 280)

It is clear from reading the Board’s decision that they relied upon the testimony of the attending physician, Dr. Sampson. The Board also found it important that there was abundant lay testimony that corroborated Ms. Vowels’ description of the repetitive employment activities involved repetitive use of her hands and the constant use of the scanning device.

The Board of Industrial Insurance Appeals found that Ms. Vowels, as early as November 2008, was seen by her physician for ongoing progressive development of bilateral hand symptoms, primarily on the right and was diagnosed with Carpal Tunnel Syndrome and underwent surgical release on the right in January 2009. The Board further found that the continuous and repetitive hand and wrist motion performed in the course of her employment at Target was at least a proximate cause of the Carpal Tunnel condition, resulting surgery and residual effects of the surgical procedure. The matter was remanded to

DLI to reverse its order of rejection and allow the claim for Occupational disease. (CP 30)

The Self-Insured Employer lost at both the Board of Appeals and at Superior Court, making the same arguments of lack of jurisdiction and insufficiency of the evidence, and now seeks a reprieve from the Court of Appeals.

DISCUSSION OF CASE LAW

A. GENERAL PROVISIONS OF THE ACT

The statutory scheme of the Industrial Insurance Act, Title 51 RCW, as a whole is also instructive. Unlike other statutes, the Industrial Insurance Act is a self-contained system that provides specific procedures and remedies for injured workers. Under the act, the Washington Legislature, recognizing the importance of the worker to the state, created a system to provide swift and certain compensation for workers injured on the job. In exchange for this guaranteed compensation, the injured worker gives up her right to other legal remedies for her injury:

“The state of Washington ... declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation ... and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished.”

RCW 51.04.010.

This "grand compromise," *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995), operates as a *quid pro quo* in which both employers and employees exchange procedural and substantive rights for an ordered system of certain compensation without regard to fault.

Consistent with the legislative intent behind the Industrial Insurance Act, this court has repeatedly emphasized that the Industrial Insurance Act should be given a liberal interpretation. The act "is remedial in nature and is to be liberally applied to achieve its purpose of providing compensation to all covered persons injured in their employment." *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (1981); *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 799, 953 P.2d 800 (1998).

B. CAUSATION: PROOF REQUIREMENTS

An occupational disease is a "disease or infection as arises naturally and proximately out of employment." RCW 51.08.140. To show that a worker's medical condition arises naturally out of employment, the worker must show that ... her particular work conditions more probably caused ... her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or

disease-based disability must be a natural incident of conditions of that particular employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987).

A physician's opinion as to the cause of the claimant's disease is sufficient when it is based on reasonable medical certainty even though the doctor cannot rule out all other possible causes. The evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists. *Intalco Aluminum*, 66 Wash. App. at 654-55, 833 P.2d 390 (1992).

C. CAUSATION: THE LIGHTING UP THEORY OF CAUSATION

Washington courts in *Harbor Plywood Corp. v. Dep't of Labor & Indus.*, 48 Wn.2d 553, 295 P.2d 310 (1956); *Jacobson v. Dep't of Labor & Indus.*, 37 Wn.2d 444, 224 P.2d 338 (1950); *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939), and the many cases cited therein, have consistently held that, whether dealing with an industrial injury or an occupational disease claim, the theory of "lighting up" can be supportive of causation.

In *Wendt v. Dep't of Labor & Indus.*, 18 Wash. App. 674, 571 P.2d 229 (1977), the worker proposed and was refused the following instruction:

“You are instructed that if an injury lights up or makes active a latent or quiescent infirmity or weakened condition, whether congenital or developmental, then the resulting disability is to be attributed to the injury and not to the preexisting condition. Under such circumstances, if the accident or injury complained of is a proximate cause of the disability for which compensation or benefits is sought, then the previous physical condition of the workman is immaterial and recovery may be received for the full disability, independent of any preexisting or congenital weakness.”

To prove causation, the claimant's medical experts must establish that it is "more probable than not that the industrial injury caused the subsequent disability." See *Zipp v. Seattle School Dist. No. 1*, 36 Wash. App. 598, 601, 676 P.2d 538, *review denied*, 101 Wn.2d 1023 (1984).

The Supreme Court in *Sacred Heart Med. Center v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 636-37, 600 P.2d 1015 (1979), discussed the testimony required to satisfy this element as follows:

It is sufficient if the medical testimony shows the causal connection. If, from the medical testimony given and the facts and circumstances proven by other evidence, a reasonable person can infer that

the causal connection exists, we know of no principle, which would forbid the drawing of that inference.

The causal connection can be established with a combination of lay and medical testimony. *Knowles v. Dep't of Labor & Indus.*, 28 Wn.2d 970, 184 P.2d 591 (1947).

In actuality, the "multiple proximate cause" theory is but another way of stating the fundamental principle that, for disability assessment purposes, a workman is to be taken as he is, with all his preexisting frailties and bodily infirmities. *Shea v. Dep't of Labor & Indus.*, 12 Wash. App. 410, 529 P.2d 1131 (1974); *Fochtman v. Department of Labor & Indus.*, 7 Wash. App. 286, 499 P.2d 255 (1972).

The Board's decision is *prima facie* correct under RCW 51.52.115, and a party attacking the decision must support its challenge by a preponderance of the evidence. On review, the Superior Court may substitute its own findings and decision for the Board's only if it finds from a fair preponderance of credible evidence, that the Board's findings and decision are incorrect. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

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D. CONSIDERATION AND WEIGHT GIVEN TO ATTENDING PHYSICIAN'S TESTIMONY

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve such testimony. It does require that you give any such testimony careful thought in your deliberations.

This instruction is in accordance with the law. In *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 56, 761 P.2d 618 (1988), a similar instruction was used and examined in the context of a workers' compensation claim. The *Hamilton* court specifically stated that the instruction was proper because it was an accurate statement of a long-standing rule of law in workers' compensation cases.

E. JURISDICTION OF THE BOARD OF INDUSTRIAL INSURANCE APPEALS

It is not disputed that the Board's and the Superior Court's jurisdiction is appellate only, and for the Board and the trial court to consider matters not first determined by the Department would usurp the prerogatives of the Department, the agency vested by statute with original jurisdiction. If the Department does not pass upon a question, it cannot be reviewed either by the Board or the Superior Court. *Cole v. Dep't of Labor & Indus.*, 137 Wash. 538, 243 P. 7 (1926); *DuFraine v. Dep't of Labor & Indus.*, 180 Wash. 504, 40 P.2d 987 (1935); *Turner v. Dep't of*

Labor & Indus., 41 Wn.2d 739, 251 P.2d 883 (1953). These limitations of jurisdiction were later expanded by the courts.

In the case of *Woodard v. Dep't of Labor & Indus.*, 188 Wash. 93, 61 P.2d 1003 (1936), it says that the questions the Board may consider and decide are fixed by the order from which the appeal was taken. Later, the Supreme Court said the Board may consider the issues raised by the Notice of Appeal. See *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 292 P.2d 865 (1956).

One can easily note the apparent contradiction between the language in *Woodard*, when the court said, in this connection, it must be remembered that the questions to be decided by the joint Board are not determined by the allegations set forth in the petition for rehearing, but are fixed by the order which is sought to be reviewed; and this statement in *Brakus*, where the court held that, although the evidence before the Board might take a wide range, the Board cannot enlarge the lawful scope of the proceedings, which is limited strictly to the issues raised by the Notice of Appeal (or application for rehearing before the joint board). This contradiction was settled by a later Court of Appeal's decision.

The Court of Appeals, in the Case of *Lenk v. Dep't of Labor & Indus.*, 3 Wash. App. 977, 478 P.2d 761 (1970), explained that they

believed the two decisions are reconcilable. They said the issues to be determined by the Board are fixed by both the order and the allegations in the Notice of Appeal.

The court in *Lenk* explained further that the jurisdiction of the Board of Appeal includes issues that were presented both by the Order under appeal and the allegations set forth in the Notice of Appeals. Essentially the court concluded that if the Department considered a “condition”, then the Board could also consider the same “condition”.

In *Lenk* the court was considering an appeal from the rejection of a claim as either an industrial injury or an occupational disease. The court reasoned that when a rejection occurs there are necessarily three issues that arise. (1) Whether or not there was an industrial accident or occupational disease. (2) Whether or not there exists a disability. And, (3) whether or not the disability complained of is causally related to the alleged injury OR occupational exposure.

Here, the Self Insured Employer suggests that the Board of Industrial Insurance Appeals exceeded its Jurisdiction when it not only found the claimant’s right-sided Carpal Tunnel Syndrome to be an Occupational Disease but also found the conditions of her employment

had caused a left-sided Carpal Tunnel condition, or bilateral condition, as well.

We remind the court that the order appealed from was a rejection of the claim filed. The claim was filed for an Occupational Disease of Carpal Tunnel. The records of treatment considered with Ms. Vowel's application would have included the fact that she had symptoms on both sides.

The Claimant's Notice of Appeal says that she is appealing the rejection of her Occupational Disease claim. She maintains in the Notice that she was injured in the course of her employment with Target and that said employment caused injury to her upper extremity.

Paragraph 3 of the Notice of Appeal goes on to state that the Claimant took exception to the Department's determination that her "condition" was not the result of the exposure alleged. This is a much broader concept. The Department Order under appeal says she had no condition that was occupationally related.

This would clearly mean that any condition that was being diagnosed or treated by her doctors at that time had been rejected as occupationally related.

The testimony of Dr. Sampson, the attending physician included the following information about his treatment of Ms. Vowels:

1. She was referred to him to evaluate her need for treatment of bilateral pain and numbness, with her worst symptoms being on the right side. (Sampson p. 9)
2. She had nerve conduction studies that were consistent with bilateral Carpal Tunnel Syndrome. (Sampson p. 12)
3. His initial diagnosis was "Carpal Tunnel Syndrome". (Sampson p. 12)
4. When asked by the Self Insured Employer whether he would agree with the report of James Brinkman M.D., he sent back a letter stating that he disagreed and he felt her Carpal Tunnel Syndrome was related to the conditions of her employment. (Sampson p. 20)
5. He believes that repetitive work activities contribute to the development of Carpal Tunnel Syndrome and has seen it in other patients. (CP 225)
6. He believes that based upon her history of activities at work that these work activities were likely the cause of her Carpal Tunnel Syndrome. He does not limit that statement to the right side only. (CP 225)
7. He believes that a reason she had symptoms worse on the right had to do with the fact that she is right hand dominant and performing the repetitive work motions with the right hand more than her left. (CP 246)

The testimony of the Employer's medical expert, James Brinkman, M.D., confirms that in the medical records of treatment he had when he saw the claimant, confirmed that the condition diagnosed by Drs. Merkley and Sampson was that of Bilateral Carpal Tunnel Syndrome,

worse on the right. Dr. Brinkman acknowledged that we often see this condition as worse in the dominant hand. (CP 275)

The testimony of the Self Insured Employer's other medical witness clearly establishes that the records being reviewed in connection to the claim for Occupational Disease included Nerve Conduction testing that showed Bilateral Carpal Tunnel Syndrome, severe on the right and moderate on the left. (CP 309)

Dr. Blue also acknowledged that the records he reviewed for his evaluation of the claimant would confirm that she has had Carpal Tunnel Syndrome and that it was merely worse on the right side. And that he did not question the fact that the claimant had Bilateral Carpal Tunnel Syndrome. (CP 326)

It is abundantly clear that the records being considered by the Self Insured Employer and obviously also by the Department of Labor and Industries, when they were effecting the adjudication of Ms. Vowel's claim for Occupational Disease, were records that showed that the condition was bilateral, though always worse on the right side.

We therefore believe that when the Department issued its order to reject this claim, they were also considering the bilateral condition and thus, the order appealed from included adjudication that neither the right-

sided Carpal Tunnel Syndrome, nor the left sided Carpal Tunnel Syndrome was an Occupational Disease. The reject order did not limit itself to the right hand. It rejected any condition she had as not qualifying as an occupational disease.

The Self Insured Employer's claim that the Board exceeded its jurisdiction is unsupported by the record. To rule otherwise would lead to piecemeal litigation.

F. ATTORNEY FEES

RCW 51.52.130 provides for attorney fees when an appeal in the Superior or Appellate Court reverses or modifies the BIIA's decision and grants additional relief to the worker or if the employer is the appealing party and the worker's right to relief is sustained.

The reasonableness of an attorney fee award is reviewed under an abuse of discretion standard. A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. If a fee shifting statute does not indicate how a fee award is to be calculated, Washington courts use the lodestar method, multiplying the attorney's reasonable hourly rate by the number of hours reasonably expended.

This amount may be enhanced for a number of reasons, including risks associated with cases taken on a contingency basis. The lodestar

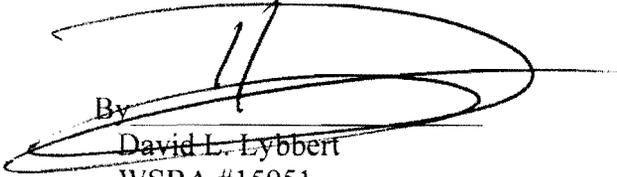
method is used to calculate legal fees in workers' compensation cases Washington case law permits a court to add a multiplier to a lodestar fee as a contingency adjustment under circumstances discussed in *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

CONCLUSION

We believe the Board of Appeals made correct and well founded factual determinations to allow the claim for Bilateral Carpal Tunnel Syndrome. We believe the affirmation of the Board by the Superior Court was also well supported by the facts and the law. We ask that the court affirm the determinations made by the Board of Industrial Insurance and by the Superior Court. If the Superior Court's decision is found correct, the Defendant will submit a Motion for Attorney's Fees at a later date.

Respectfully submitted this 10 day of February, 2013.

CALBOM & SCHWAB, P.S.C.

By 

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I certify that I caused to be mailed or delivered on
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**BRIEF OF RESPONDENT PATRISIA
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