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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

ANA ZAVALA

Claimant / Plaintiff / Appellant

v.

TWIN CITY FOODS, INC.

Self-Insured Employer / Defendant / Respondent

APPEAL FROM THE SUPERIOR COURT OF FRANKLIN COUNTY
HONORABLE CARRIE RUNGE
FRANKLIN COUNTY CAUSE NO. 11-2-50388-0

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERRORS

1. The Board of Industrial Insurance Appeals, (“Board” or “BIIA”), erred by rejecting the Department’s October 30, 2009 order directing the self-insured employer to provide medical treatment for Ms. Zavala’s industrial injury.

2. Board’s Findings of Facts, (“FF”) are in error:
 - FF # 2: To the extent that it is read that Dr. Kontogianis’s surgery repaired Ms. Zavala’s injury.

 - FF # 3
 - FF # 4
 - FF # 5
 - FF # 6

3. The Board’s Conclusions of Law, (“CL”) are in error:
 - CL # 2
 - CL # 3
 - CL # 4

4. The lower court erred by affirming the Board’s decision dated March 31, 2011.

5. The lower court’s Findings of Facts, (“FF”) are in error:
 - FF # 2: To the extent that it is read that Dr. Kontogianis’s surgery repaired Ms. Zavala’s injury.

 - FF # 3
 - FF # 4
 - FF # 5
 - FF # 6

6. The lower court’s Conclusions of Law, (“CL”) are in error:
 - CL # 1: To the extent that it is read that the Board *still* has jurisdiction.

 - CL # 2
 - CL # 3
 - CL # 4

B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Can the finder of fact decide all material facts of a case based on an impermissible inference?
2. Can the finder of fact give more weight to an impermissible inference than to the uncontested testimony of six witnesses?
3. Can the trier of fact create an evidentiary standard from whole cloth that erects an impossible burden of proof against an injured worker?
4. Ms. Zavala's knee was injured in an industrial accident. The Department of Labor and Industries accepted her industrial injury as having caused her knee condition. Ms. Zavala did not have any pain or problem with her knee *before* the accident; and she has had *continuous* pain and problems with her knee *ever since* the accident: Facts to which she and five other lay witnesses testified, including two coworkers, her son, a neighbor, and her minister. The self-insured employer offered no evidence to contest Ms. Zavala's witnesses. Ms. Zavala had conservative medical treatment and an arthroscopic surgery for her industrial injury. But none of these treatments has improved her condition. She is consequently in need of a knee replacement surgery. The defense witnesses have speculated, based on radiographic images taken *after* the industrial accident, that Ms. Zavala's knee was in such bad condition, that it probably caused her pain before the industrial injury – even though all of them admit that there is no objective evidence that she had symptoms prior to the industrial injury, and that people can have severe degrees of osteoarthritis on radiographic images, yet experience no pain or debilitation whatsoever. Moreover, *as a matter of law*, the Court cannot infer from testimony based on images taken *after* an injury, that a patient was in any way symptomatic *prior to* the injury. Under these facts, can the self-insured employer deny Ms. Zavala coverage of medical treatment for her knee condition?

II. PREFACE REGARDING THE RECORD ON APPEAL

Appellant/Claimant Ms. Zavala arranged for the Certified Appeals Board Record, (“CABR”), to be delivered to this Court. CP 1-3. Appellant/Claimant refers to the CABR as “CABR,” using the same convention as referring to the CP or RP. Part of the CABR includes the transcripts of Board hearings and the perpetuating depositions of expert witnesses. The Board does not number those sections of the CABR contiguously with the other Board records. Appellant/Claimant thus refers to those transcripts and depositions conventionally without specifying the CABR: For example, “Dep. of Kontogianis at 9” or “Tr. at 39.”

III. STANDARD OF REVIEW

This is an appeal from the superior court’s review of an administrative decision by the Board of Industrial Insurance Appeals, (“Board”). Ordinarily, this Court reviews superior courts’ reviews of administrative decisions *de novo*.¹ For review of decisions by the Board, however, Legislature has provided in part at RCW 51.52.140 that “[a]ppel shall lie from the judgment of the superior court as in other civil cases.” The contemporary interpretation of that statute has led to the civil case standard of review on appeal, as if the case were not an

¹ *E.g., Verizon Nw., Inc. v. Employment Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); *Markam Group, Inc. v. Employment Sec. Dep’t*, 148 Wn. App. 555, 200 P.3d 748 (2009).

administrative decision. Following the contemporary interpretation, then, this Court's review "is limited to examination of 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."² *Substantial* evidence means a "sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise."³

But even in civil cases, this Court is not bound by trial court's findings when reviewing a record of documentary evidence.⁴ And this Court can determine how much deference to afford the lower court's findings. Our Supreme Court has reasoned in a line of cases that "when the testimony is taken before an examiner [of the Department of Labor and Industries], neither the joint board nor the trial court is in any better position to weigh and consider the testimony than is this court."⁵ Here, the Department agreed with Ms. Zavala's position, and the self-insured employer appealed the Department's decision to the Board. Ms. Zavala's case was taken by a hearings judge at the Board level, and the hearings judge agreed with Ms. Zavala. It was a panel of two out of the three

² *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (Wn. Ct. App. Div. 3, 1996).

³ *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963).

⁴ *E.g.*, *In re Rosier*, 105 Wn.2d 606, 717 P.2d 606, 717 P.2d 1353 (1986); *Jenkins v. Snohomish County P.U.D.*, 105 Wn.2d 99, 713 P.2d 79 (1986).

⁵ *Matson v. Dep't of Labor & Indus.*, 198 Wn. 507, 517-18, 88 P.2d 825 (1939) (*quoting Cooper v. Dep't of Labor & Indus.*, 195 Wn. 315, 80 P.2d 830 (1938)).

Board members – none of whom heard any of the evidence – who for the first time agreed instead with the self-insured employer. Therefore the *prima facie* correctness of Board’s decision, and of the lower court’s decision, has less force because neither the Board nor the lower court saw or heard the witnesses.⁶

To demonstrate that the Board’s decision is incorrect, Ms. Zavala must show by preponderance that the self-insured employer is required to provide coverage for her medical treatment under the Industrial Insurance Act.⁷ If this Court agrees with Ms. Zavala, then this Court substitutes its own findings and conclusions for those of the Board.⁸

IV. SUMMARY OF THE ISSUES AND STATEMENT OF THE CASE

A. SUMMARY OF THE ISSUES

The question presented is whether Ms. Zavala’s need for further treatment was proximately caused by the industrial injury. As a matter of fact and *as a matter of law*, Ms. Zavala’s knee condition was proximately

⁶ *E.g.*, *Cheney v. Dep’t of Labor & Indus.*, 175 Wn. 60, 26 P.2d 393 (1933); *Dry v. Dep’t of Labor & Indus.*, 180 Wn. 92, 39 P.2d 609 (1934); *Rikstad v. Dep’t of Labor & Indus.*, 180 Wn. 591, 41 P.2d 391 (1935); *Zankich v. Dep’t of Labor & Indus.*, 189 Wn. 25, 63 P.2d 427 (1936); *Barnes v. Dep’t of Labor & Indus.*, 6 Wn.2d 155, 106 P.2d 1069 (1940); *Peterson v. Dep’t of Labor & Indus.*, 22 Wn.2d 647, 157 P.2d 298 (1945).

⁷ *E.g.*, *Olympia Brewing Co. v. Dept. of Labor & Indus.*, 34 Wn.2d 498, 174 P.2d 957 (1949) (*overruled on other grounds by Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958)).

⁸ *E.g.*, *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (Wn. Ct. App. Div. 2, 1992); *Romo v. Dept. of Labor & Indus.*, 92 Wn. App. 348, 962 P.2d 844 (Wn. Ct. App. Div. 3, 1998).

caused by the industrial injury. Ms. Zavala did not have any knee symptoms or debilitation before the industrial accident. After the industrial accident, her knee condition has been continuously symptomatic and debilitating. After receiving treatment following her industrial injury, doctors discovered that Ms. Zavala had osteoarthritis of the knee, and based on radiographic images taken after the injury, they felt that arthritis had probably started in her knee before the industrial injury. Any claim of preexisting arthritis, however, is just a red herring. *As a matter of law*, osteoarthritis that is not symptomatic before an industrial injury might have never become symptomatic, and the industrial injury is to be determined the proximate cause of any subsequent debilitation, because it is deemed to have “lit up” any preexisting but asymptomatic arthritis. As the Department correctly ordered the self-insured employer to provide medical treatment, and as the hearings judge affirmed the Department’s order, the self-insured employer is required by law to cover Ms. Zavala’s medical treatment.

The self-insured employer, however, attempts to use some dubious findings about Ms. Zavala’s MCL in one radiologist’s report, in an attempt to evade the law by attacking Ms. Zavala’s character. The trouble with the self-insured employer’s case is three-fold. First, their own witnesses prove the radiologist’s findings incorrect. Second, this radiological

evidence is still subject to the rule that radiological images taken after an industrial injury are not objective evidence of symptoms before an industrial injury. And finally, even if the radiologist's report of MCL findings were accurate – and it is not – then it only demonstrates that Ms. Zavala might have suffered another injury to her knee; and it is not even suggested anywhere that such injury could be responsible for lighting up her osteoarthritis. In any event, the purported MCL findings are proven wrong by the self-insured employer's own witnesses. The argument merely demonstrates how the self-insured employer seeks to avoid its responsibility under the law to cover Ms. Zavala's industrial injury.

B. STATEMENT OF THE CASE

On September 17, 2007, Ms. Zavala was inside a shaker tub machine, cleaning it with chlorine and soap. CABR 259; CABR 106 *citing* 9/30/10 Tr. at 64; 9/21/10 Dep. of Iverson. She was hurried by her supervisor who instructed her, "This area needs to be clean in 15 minutes; it has to be clean." *Id.* In her rush to complete her work, her left knee struck the industrial equipment with some force, resulting in an injury. *Id.* Before the industrial injury, she never had any disability or even pain in her left knee. CABR 106-107; Tr. 63-71; Tr. Her knee has been painful and debilitating ever since the industrial injury. *Id.* The Department of Labor and Industries, ("Department"), accepted her claim, (CABR 259),

and she received various treatments, including a partial meniscectomy performed by Dr. Kontogianis, (CABR 107). The partial meniscectomy did not fix her industrial injury, however. *Id.* at 108 ln 10-22. She is in need of a total knee replacement. CABR 108-109; Dep. of Kontogianis at 9-10 and 19 ln 16-20.

The self-insured employer urged the Department previously to have the claim closed, and the Department did so on June 16, 2008, (CABR 259). But when Ms. Zavala asked the Department to review the records and leave her claim open for further treatment, the Department concluded that it had prematurely closed Ms. Zavala's claim, and left it open for further treatment, (*id.*). Later when it was determined that Ms. Zavala needs a total knee replacement, instead of providing the medical treatment, the self-insured employer again urged the Department to close Ms. Zavala's claim, and to deny the self-insured employer's responsibility for coverage, and the Department closed her claim on August 21, 2009, (CABR 2, 105, 260). Again, Ms. Zavala asked the Department to review her records, and the Department once again believed that it had closed Ms. Zavala's claim prematurely: On October 30, 2009, the Department reversed itself, left Ms. Zavala's claim open, and ordered the self-insured employer to provide further medical treatment, (CABR 2, 105, 260). But instead of providing the medical treatment, the self-insured employer

appealed the Department's order to the Board of Industrial Insurance Appeals, ("Board"), (CABR 2, 105, 119-20, 125-6, 127). The self-insured employer further filed a motion against Ms. Zavala to stay her coverage of medical treatment while the case is under review, (CABR 128-132).

After all of the evidence was taken in the appeal, the hearings judge pronounced his decision on January 14, 2011. (CABR 2, 105-114). The hearings judge agreed with Ms. Zavala, and affirmed the Department's order that the self-insured employer cover Ms. Zavala's medical treatment, (*id.*). Instead of covering Ms. Zavala's medical treatment, however, on March 2, 2011, **the self-insured employer protested** the hearing judge's proposed decision and order, (CABR 48), **with a 48-paged petition for review to the three-member Board.** CABR (50-100).

Ms. Zavala responded to the self-insured employer's petition with a 36-paged brief that the Board received on March 31, 2011. CABR 10-47 (stamped received by Board on March 31, 2011 at CABR 10). **ON THE SAME DAY** when the three-member Board **received Ms. Zavala's brief,** the Board **issued its seven-paged, single-spaced decision,** **prepared and deposited in the mail.** CABR 2-9 (dated March 31, 2011 at CABR 8; deposited in the mail on March 31, 2011 at CABR 9). It is also noteworthy that the decision is **signed by only two of the three**

Board members. CABR 8. Two out of three of the Board members had decided to reverse the hearings judge and to reverse the department, (id.).

Ms. Zavala appealed to the Superior Court, where the Superior Court affirmed the Board's ruling. CP 4-7. Ms. Zavala then appealed to this Court, (CP 8-10), and it is now four and one-half years after the Department ordered the self-insured employer to cover Ms. Zavala's medical treatment.

V. **ARGUMENT**

A. **IF AN INDUSTRIAL INJURY LIGHTS UP OR AGGRAVATES PREEXISTING OSTEOARTHRITIS, THEN THE OSTEOARTHRITIS IS COVERED UNDER THE ACT.**

In Washington, a worker receives compensation under the Act for conditions proximately caused by industrial injury.⁹ There may be more than one proximate cause for the condition, and the law does not require that the industrial injury be the *sole* proximate cause of the condition.¹⁰

Where a preexisting medical condition is not symptomatic, but becomes symptomatic as a result of the industrial injury – called “lighting up” the preexisting medical condition – then the industrial injury is deemed to be the cause of the injury *as a matter of law*.¹¹ “The worker

⁹ E.g., *Wendt v. Dept. of Labor & Indust.*, 18 Wn. App. 674, 571 P.2d 229 (Wn. Ct. App. Div. 2, 1977).

¹⁰ *Id.*

¹¹ E.g., *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 472, 745 P.2d 1295 (1987); *Miller v. Dept. of Labor & Indus.*, 200 Wn. 674, 682-83, 571 P.2d 229 (1939); *Groff v.*

whose work acts upon a preexisting disease to produce disability where none existed before is just as injured in his or her employment as is the worker who contracts a disease as a result of employment conditions.”¹²

It is a fundamental principle . . . that if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the worker is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the worker’s prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.

Miller v. Dept. of Labor & Indus., 200 Wn. 674, 682-83, 94 P.2d 674 (1939).¹³ Our Supreme Court reaffirmed this long-standing principle as recently as 2009:

Ordinarily the previous physical condition of the worker is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness because the worker’s prior physical condition is not deemed the cause of the injury but merely a condition upon which the real cause operated.

Tomlinson v. Puget Sound Freight Lines, Inc., 166 Wn.2d 105, 119, 206 P.3d 657 (2009).

Where there is evidence that an industrial injury made a preexisting and previously quiescent arthritic condition symptomatic, the

Dept of Labor & Indus., 65 Wn.2d 35, 305 P.2d 633 (1964); *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 392, 828 P.2d 1138 (Wn. Ct. App. Div. 2, 1992)

¹² *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 392, 828 P.2d 1138 (Wn. Ct. App. Div. 2, 1992).

¹³ See also, e.g., *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 119, 206 P.3d 657 (2009).

claimant is entitled to a lighting-up instruction.¹⁴

1. A lit-up medical condition is covered under the Act, even if the preexisting condition might have eventually become disabling.

A lit-up medical condition is covered under the Act, *even if* the preexisting condition alone might have eventually become disabling.¹⁵

This rule again operates *as a matter of law*:

[Where an industrial injury] lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, the resulting disability is to be attributed to the injury and not to the pre-existing physical condition, and it is immaterial whether the infirmity might possibly have resulted in eventual disability or death, even without the injury. *Jacobson v. Department of Labor & Industries*, 37 Wn.2d 444, 224 P.2d 338 (1950), and cited cases.

Harbor Plywood Corp. v. Dept. of Labor & Indus., 48 Wn.2d 553, 556-57 (1956). Washington's Supreme Court emphatically reaffirmed this rule in 2009:

¹⁴ *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 676-77, 679-80, 571 P.2d 229 (Wn. Ct. App. 1977).

¹⁵ *E.g.*, *Ray v. Dep't of Labor & Indus.*, 177 Wn. 687, 33 P.2d 375 (1934); *Brittain v. Dep't of Labor & Indus.*, 178 Wn. 499, 35 P.2d 49 (1934); *McGuire v. Dep't of Labor & Indus.*, 179 Wn. 645, 38 P.2d 266 (1934); *Rikstad v. Dep't of Labor & Indus.*, 180 Wn. 591, 41 P.2d 391 (1935); *Johnson v. Dep't of Labor & Indus.*, 184 Wn. 567, 52 P.2d 310 (1935); *Pulver v. Dep't of Labor & Indus.*, 185 Wn. 664, 56 P.2d 701 (1936); *Matson v. Dep't of Labor & Indus.*, 198 Wn. 507, 88 P.2d 825 (1939); *Miller v. Dep't of Labor & Indus.*, 200 Wn. 674, 94 P.2d 674 (1939); *Harbor Plywood Corp. v. Dep't of Labor & Indus.*, 48 Wn.2d 553, 556-57, 295 P.2d 310 (1956); *Jacobson v. Dep't of Labor & Indus.*, 37 Wn.2d 444, 224 P.2d 338 (1950); *Cogdal v. Dep't of Labor & Indus.*, 170 Wn. 639, 17 P.2d 55 (1932); *Smith v. Dep't of Labor & Indus.*, 179 Wn. 501, 38 P.2d 212 (1934); *Daugherty v. Dep't of Labor & Indus.*, 188 Wn. 626, 63 P.2d 434 (1936); *Frاندila v. Dep't of Labor & Indus.*, 137 Wn. 530, 243 P. 5 (1926); *Powers v. Dep't of Labor & Indus.*, 177 Wn. 21, 30 P.2d 983, (1934)

As the attorney general suggests in an amicus brief, this [proposal to deny arthritis because it is “degenerative”] flies in the face of the plain language of the IIA and its injunction that benefits be granted liberally to reduce the suffering and economic loss arising from industrial injuries. RCW 51.12.010. Washington State has been granting . . . benefits for arthritis for at least 50 years [*sic*, at least 80 years¹⁶] and this seems to be the first time it has been challenged on the basis that it is a degenerative disorder.

Tomlinson, 166 Wn.2d at 112-113 (2009).

As a matter of law, therefore, where a preexisting condition is lit up, a self-insured employer cannot deny coverage by arguing that its injured worker had a preexisting condition that *might have eventually* become symptomatic and disabling.

2. It is well established that arthritis – even severe arthritis – can be asymptomatic, then lit up by an industrial injury, and that such lit-up arthritis is fully covered under the Act.

Washington has long recognized that arthritis – even severe arthritis – is not necessarily debilitating or even painful, and a worker might even be unaware that he has arthritis.¹⁷ As Dr. Gritzka explained here, “I’ve encountered this in my own practice over the years. . . . [T]his

¹⁶ In at least two cases, benefits were provided for preexisting arthritis as early as 1927. In *Van Bellinger v. Dep’t of Labor & Indus.*, 156 Wn. 70, 71, 285 P. 1115 (1930), the Department had awarded benefits for lit-up arthritis in 1927. The physician testified that “this is just another one of the same cases that we see so many of – a working man who developed hypertrophic arthritis and dilation of the arteries and that sort of thing; and while the accident isn’t the thing that originally causes their trouble there isn’t any question but the accident is quite a factor in precipitating the symptoms and aggravating the condition.” *Id.* at 71-72. In *Bryant v. Dep’t of Labor & Indus.*, 173 Wn. 240, 22 P.2d 667 (1933), a worker was provided benefits for arthritis that was lit up by an industrial injury in 1927.

¹⁷ *E.g.*, *Harper v. Department of Labor and Industries*, 46 Wn.2d 404, 281 P.2d 859 (1955).

person says they didn't have any problems before the accident, and they had the accident, and now they discovered that they have arthritis and it's now symptomatic. Well, I think that's relatively common." Dep. of Gritzka at 33 In 11-19. Even the self-insured employer's Dr. Bays agrees.

[S]ometimes there's a disconnect between what we see arthroscopically or what we see on x-ray and somebody's pain complaints. It really runs the gamut. Some individuals will have a terrible knee and be completely asymptomatic.

Dep. of Bays at 60.

Such latent or quiescent preexisting arthritis is covered under the Act if an industrial injury lights it up.¹⁸ The worker must be provided full benefits under the Act where the industrial injury lights up arthritis.¹⁹

It is well established that an injury may light up a dormant or quiescent arthritic condition, and that, if the injury is covered by our workmen's compensation act, the injured workman may recover for the full extent of the disability occasioned by the arthritis so lighted up.

Pulver v. Dept. of Labor and Indus., 185 Wn. 664, 702, 56 P.2d 701 (1936).²⁰ Arthritis is "compensable as an industrial injury," *Tomlinson*, 166 Wn.2d at 107.

¹⁸ *E.g.*, *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987); *Harper v. Dep't of Labor & Indus.*, 46 Wn.2d 404, 281 P.2d 859 (1955); *Jacobson v. Dep't of Labor & Indus.*, 37 Wn.2d 444, 224 P.2d 338 (1950).

¹⁹ *E.g.*, *Miller*, 200 Wn. 674 (condition fully compensable where worker had completed years of manual labor prior to the accident and was not suffering from the pre-existing condition).

²⁰ *See also*, *Jacobson v. Dep't of Labor & Industries*, 37 Wn.2d 444, 224 P.2d 338 (1950); *Harper v. Dep't of Labor & Industries*, 46 Wn.2d 404, 281 P.2d 859 (1955); *Bryant v. Dep't of Labor & Indus.*, 173 Wn. 240, 243, 22 P.2d 667 (1933) (a worker was

A self-insured employer may not reduce or deny benefits based on a preexisting but asymptomatic arthritic condition:

The mere presence of degenerative arthritis that is “latent, or quiescent, and not disabling” is not enough to warrant reducing an industrial insurance award when the industrial injury simply “‘lighted up,’ or aggravated” the condition. *Donald W. Lyle, Inc. v. Dep't of Labor & Indus.*, 66 Wn.2d 745, 746, 748, 405 P.2d 251 (1965) (reduction appropriate for “a known, preexisting disabling injury or condition, and the preexisting arthritic condition of the plaintiff’s employee . . . was not within this classification.”).

Tomlinson, 166 Wn.2d at 114-15 (2009).

B. THE INDUSTRIAL INJURY EITHER CAUSED OR LIT UP OSTEOARTHRITIS IN MS. ZAVALA’S KNEE.

- 1. Ms. Zavala presented six uncontradicted lay witnesses who directly observed her before and after the injury, and who consistently testified that she was asymptomatic before the industrial injury, and has been symptomatic ever since.**

Ms. Zavala presented the testimony of six witnesses: Two coworkers, her minister, a neighbor, and her son. Each and every of her witnesses testified that she was asymptomatic before the industrial injury, and that she has been symptomatic since. The self-insured employer did not present any witnesses who observed Ms. Zavala before the industrial injury; furthermore, all of the self-insured employer’s witnesses testified that Ms. Zavala remained symptomatic after the September 17, 2007

injured at a lumber yard, and the Superior Court found, “His back injuries either caused spinal arthritis or aggravated and made manifest to a very marked degree dormant spinal arthritis.”)

industrial injury, (below). Ms. Zavala's six witnesses are uncontradicted.

(1) Maria Martinez met Ms. Zavala when they worked together in 2005, (Tr. at 47). During the July-to-October corn season in 2005, Ms. Martinez saw Ms. Zavala every night at work, (*id.* at 48). They worked the same shift, and Ms. Martinez saw Ms. Zavala while they were working, (*id.*). Their shifts were twelve hours long, (*id.* at 49). After some work shifts, Ms. Martinez drove Ms. Zavala home, (*id.* at 49). After they worked together in 2005, Ms. Martinez visited Ms. Zavala in-person about once every three months, (*id.* at 51), and spoke with her over the phone more frequently, (*id.* at 48). Prior to the industrial injury, Ms. Martinez never observed Ms. Zavala to limp, have any trouble working, or exhibit any pain, (*id.* at 49). Ms. Martinez even observed Ms. Zavala climb stairs without any problem to get to the location where they worked together, (*id.* at 51-52). After the industrial injury, however, Ms. Martinez observed that Ms. Zavala limps when she walks and exhibits pain, (*id.* at 51). Ms. Zavala testified when she worked with Ms. Martinez, work shifts were three days per week, (*id.* at 76). It stands to reason from the testimony and the calendar, therefore, that Ms. Martinez saw Ms. Zavala in 2005 during at least 51 twelve-hour shifts. Since then, Ms. Martinez has seen Ms. Zavala in-person another 20 times before taking the

testimony, (once every three months for five years), with about twelve of those times being in the three years after the September 17, 2007 industrial injury until the hearing, for a total of about 71 times.

(2) **Josefina Vargas** began working with Ms. Zavala at the beginning of August, 2007, (Tr. at 42). They work together in the upstairs area, (*id.* at 43), and often take lunches together, (*id.* at 44). During the agricultural work season, she sees Ms. Zavala about three times per week, and outside the work season, she sees Ms. Zavala about two or three times per month, (*id.* at 42, 44). The work season lasts about three months, (*id.* at 42). Before the industrial injury, Ms. Vargas observed Ms. Zavala not to be in any pain, limp, or exhibit any other difficulties walking, (*id.*). After the industrial injury, Ms. Vargas observed Ms. Zavala limp and appear to be in pain all the time, (*id.* at 43-44). Based on Ms. Vargas's testimony and the calendar, it stands to reason that Ms. Vargas observed Ms. Zavala during work shifts about 20 times before her industrial injury of September 17, 2007. Likewise, it stands to reason that Ms. Vargas has seen Ms. Zavala on the job at least 117 times since the injury, (three times a week for thirteen weeks of the work season, 2008-2010), and outside of work at least 60 times since the injury, (two to three times a month for nine months outside the work season in 2008-2010), for a total of about 197 times.

(3) **Florentino Ledesma** was Ms. Zavala's minister, and held Bible studies and church services in his home about three times a week, (Tr. at 28-29). Although he knew Ms. Zavala in earlier childhood, he did not see her for a long time until they saw one another a couple of times in February 2007 when he was looking for a house, and then again when he moved in her neighborhood in August 2007, (*id.* at 28). Before the industrial injury, he observed Ms. Zavala walk to and from his house, several blocks away, several times a week, to attend Bible studies, (*id.* at 28-30). Before the accident, he never observed Ms. Zavala to limp, and he never perceived her to be in pain, (*id.* at 30). After the accident, however, she missed visits, only attended once or twice per week, and she would not walk there but would get rides from her children, (*Id.* at 30-31). She always limped and exhibited pain after the accident, (*id.* at 30-31). From the testimony and a calendar, it stands to reason that Mr. Ledesma has seen Ms. Zavala a dozen or more times before her September 17, 2007 industrial injury, and between one-hundred and two-hundred times since, for a total of about 112 to 212 times.

(4) **Irma Mendoza** was Ms. Zavala's neighbor, for four or five years, starting around 2005, two years before Ms. Zavala's industrial injury, (Tr. at 9-10). In the summer of 2006, Ms. Zavala purchased some large, heavy tables from Ms. Mendoza, and the two of them carried the

tables a couple of blocks to Ms. Zavala's house, at which time Ms. Zavala exhibited no signs of pain or limping (*Id.* at 10-11). Ms. Mendoza visited Ms. Zavala and often gave her rides, (*id.* at 11-13). Before the industrial injury, Ms. Mendoza never observed Ms. Zavala limping or exhibiting any pain, (*id.* at 12-13). After the industrial injury, Ms. Mendoza took Ms. Zavala to the doctor, including for her surgery, (*id.* at 13). Ms. Mendoza was able to observe Ms. Zavala enter and exit her vehicle, and walk up and down the sidewalk, (*id.* at 16). After the industrial injury, Ms. Mendoza always observed Ms. Zavala in pain, limping, and exhibiting pain and difficulty getting in and out of her car, (*id.* at 15-17). Ms. Mendoza saw Ms. Zavala more frequently before the accident than after it, (*id.* at 16-17). Ms. Mendoza did not quantify the number of times she saw Ms. Zavala. From the record, however, it stands to reason that a conservative estimate favoring the self-insured employer would be about ten times.

(5) **Jose Guadalupe Zavala** is Ms. Zavala's son, (Tr. at 54). He has lived with Ms. Zavala all of his life and has seen her every day, (*id.* at 54-55). He has observed her walk every day, (*id.* at 56). Before the injury, Jose observed that Ms. Zavala never limped or to exhibited pain, (*id.* at 55). Before the accident, Ms. Zavala swept, mopped, walked, and carried groceries, without limping or exhibiting pain, (*id.* at 55-56). Since

the accident, Ms. Zavala is unable to do these things, she limps, and she is in pain every time Jose sees her; it hurts her to walk, to sit down for a while, or to stand up for a while, (*id.* at 57). Based on testimony and a calendar, it stands to reason that he has seen Ms. Zavala roughly 1100 times in the three years before the accident, and roughly 1100 times in the three years since.

(6) **Ms. Zavala**, the claimant, testified that before the industrial injury, she never had any leg pain, knee pain, or any other leg or knee symptom, (Tr. at 69). Ever since the industrial injury, however, she has not been able to walk well, and her pain has not gone away, (Tr. at 63-64). The pain is unbearable, and she cannot stand it if she's sitting down, laying down, or standing up, (*id.*). She has not been able to do the things she did before, such as clean house, mop, carry groceries, climb stairs, work well, and "everything," (*Id.* at 64-65, 69). She has not been able to walk the few blocks to attend church since the accident, as she did as many as a three times a week before the accident, (*id.* at 65-66). She has returned to work, where the employer has modified her work by providing her a stool so that she can sit or stand, (*id.* at 71).

2. The self-insured employer did not present any direct or objective evidence about Ms. Zavala's condition prior to the industrial injury.

Ms. Zavala's evidence that she was asymptomatic prior to the industrial injury, and continuously symptomatic ever since, is completely uncontested by the self-insured employer. Presumably, the self-insured employer has access to *all* of Ms. Zavala's coworkers, to *all* of her prior and current supervisors, and to *all* of her employment records. Had any of Ms. Zavala's coworkers or supervisors ever observed her, prior to the industrial injury, to limp, to slow her work pace, to grimace or to otherwise complain of pain, then the self-insured employer could have called witnesses from the ranks of its own work force. If Ms. Zavala had ever called out of work because of illness, pain, or a doctor's appointment prior to the industrial injury, then the self-insured employer could have called a witness from among its own supervisors. If Ms. Zavala had ever lagged behind her productivity, or required a workplace modification to accommodate any knee pain or disability prior to the industrial injury, then the self-insured employer could have called a witness from among its managers to testify on the matter.

Despite the self-insured employer's unfettered access to all of Ms. Zavala's coworkers, supervisors, and its own employment office, the self-insured employer did not call a single witness from its operations. Consequently, the only evidence on the record is uncontested, and

establishes that Ms. Zavala was asymptomatic before the industrial injury, and has been symptomatic ever since.

3. There is no articulable reason but to accept Ms. Zavala's witnesses.

On review of an administrative decision such as this, the trial court did not observe any of the witnesses. Nor did the Board observe any of the witnesses. All testimony here was taken before an examiner, and only the transcript was submitted to the Board and then to the lower court, just as it appears before this Court. The Board's and the lower court's decisions therefore do not have the same presumptive effect as if the testimony had been taken live before a finder of fact. "[W]hen the testimony is taken before an examiner, neither the [Board] nor the trial court is in any better position to weigh and consider the testimony than is this court [of appeals]."²¹

Although the trial court is ordinarily free to believe or disbelieve a witness in reaching factual determinations,²² the uncontradicted testimony of a witness is not to be arbitrarily disbelieved. The trial court must have

²¹ *Matson*, 198 Wn. at 518 (citing *Cheney v. Dep't of Labor & Indus.*, 175 Wn. 60, 26 P.2d 393 (1933)); *Sweitzer v. Dep't of Labor & Indus.*, (on rehearing), 177 Wn. 28, 36, 30 P.2d 980, 34 P.2d 350 (1934); *Peterson v. Dep't of Labor & Indus.*, 178 Wn. 15, 33 P.2d 650 (1934); *Dry v. Dep't of Labor & Indus.*, 180 Wn. 92, 39 P.2d 609 (1934); *Rikstad v. Dep't of Labor & Indus.*, 180 Wn. 591, 41 P.2d 391 (1935).

²² *State v. Chapman*, 78 Wn.2d 160, 469 P.2d 883 (1970).

an articulable reason for disbelieving an uncontradicted witness.²³ It only stands to reason that where, as here, the trial court did not observe the witnesses' demeanor under oath, the trial court has a greater obligation to establish articulable reason for disbelieving an uncontradicted witness.

The trial court here decided to disbelieve six uncontradicted witnesses, (CP 12). Despite the uncontradicted and corroborative testimony, the lower court determined that Ms. Zavala did not establish that her condition was latent, quiescent, or asymptomatic before the industrial injury, (CP 12).

Ms. Zavala relies on several many lay witnesses to make her case. These lay witnesses essentially testified that Ms. Zavala did not appear to be in pain or limp prior to the industrial injury and after the industrial injury, she appeared to be in pain and walked with a limp. However, a careful review of the record shows that the witnesses had limited observation of Ms. Zavala. Those with more detailed observations include Ms. Zavala's son, who might be expected to testify favorably on his mother's behalf.

CP 12. A tally of the estimated number of visits gleaned from the testimony of non-family witnesses appears in the table below.

ESTIMATED VISITS (above)	Before Injury	After Injury	TOTAL
Maria Martinez	59	12	71
Josefina Vargas	20	177	197
Florentino Ledesma	12	100	112
Irma Mendoza	5	5	10
TOTAL	96	294	390

²³ E.g., *Matson*, 198 Wn. at 518; *Meeker v. Howard*, 7 Wn. App. 169, 171, 499 P.2d 53, rev. denied, 81 Wn.2d 1003 (Wn. Ct. App. Div. 1, 1972); *Cochran v. Cochran*, 2 Wn. App. 514, 468 P.2d 729 (Wn. Ct. App. Div 1, 1970).

The four non-family witnesses account for roughly 390 direct, in-person visits over a five-year timeframe. That is an average of over 95 in-person visits per witness, or 1.5 in-person visits per week, every week, for five years.

Given these figures, it is inconceivable that the lower court would disbelieve these witnesses based on a rationale that the “witnesses had limited observation of Ms. Zavala,” (CP 12), especially considering that 188 of the visits – just under half – represent twelve-hour work shifts where the witness could see Ms. Zavala and Ms. Zavala often had lunch with the witness or rode home with the witness, (above). The lower court’s assertion is patently false and could not therefore constitute an articulable reason for disbelieving an uncontradicted witness. It is even more unreasonable to dismiss *four uncontradicted witnesses*, especially considering that each their testimonies were consistent with and corroborated one other’s. Further still, the lower court did not have opportunity to observe the witnesses’ demeanor under oath, but rather relied only on a transcript, and did not point to a single inconsistency in the 80 pages of testimony. There is no substantial evidence to support the lower court’s finding that these witnesses are to be disbelieved. There is not even sufficient evidence to support that finding, (below).

4. Rejecting Ms. Zavala's witnesses under the lower court's rationale creates an ambiguous legal standard and erects an impossible burden of proof against injured workers, and is therefore unconstitutional.

Ms. Zavala presented testimony from witnesses of each different context of her life: Home, church, social, and work. Ms. Zavala could not have presented a more representative sample of all areas of her life. Her two coworker witnesses worked with her on over 70 work shifts before the industrial injury, and over a hundred work shifts after the industrial injury, (above). Her minister has seen her over a hundred, possibly over two-hundred times, (above). Ms. Zavala's witnesses have been able to observe her consistently many times before and after her industrial injury.

If the trial court is permitted to disbelieve the uncontested testimony of such witnesses under the rationale that these witnesses had limited observation of Ms. Zavala, and then by the same token *disbelieve* her son because he is related to her and would therefore be expected to be biased, then Ms. Zavala is left without the ability to present *any* witnesses.

The lower court here has constructed two arbitrary and capricious evidentiary standards out of whole cloth. Under the lower court's standard, coworkers who have worked every shift with Ms. Zavala for years do not have sufficient observation of her for their uncontested

testimony to be believed. Under the lower court's standard, ministers who have seen Ms. Zavala every time she has attended church one to three times a week for the last several years, do not have sufficient observation of Ms. Zavala for their uncontested testimony to be believed. Such a standard does not represent an articulable reason to disbelieve uncontested testimony. Under the lower court's other standard, family members are expected to be biased in Ms. Zavala's favor, and their uncontested testimony is therefore not to be believed. Such a standard does not represent an articulable reason to disbelieve uncontested testimony.

Taken together, the lower court's standards erect an impossible burden of proof. There is no witness who could exceed what the lower court deemed as "limited observation" on the one hand, without running afoul of the "expected to be biased" standard on the other. These standards deprive injured workers the ability to qualify any lay witness to testify about observations of the worker's condition and how it affects their work, home, and life. Such impossible burden of proof is a deprivation of substantive due process.

The lower court's evidentiary standards are ambiguous. How many more observations than every working shift for three years, would a coworker need for her uncontradicted testimony to become believable? How many more observations than every church attendance for three

years, would a minister need for his uncontradicted testimony to become believable? If a son who lives with his mother is to be disbelieved out-of-hand on the basis that he would be expected to testify in her favor, then would a spouse also be so disqualified? A son who *does not* live with the claimant? A roommate who is a friend? Could any witness be disbelieved out-of-hand on the basis that they would be expected to testify in favor of the claimant, by virtue that the witness was called by the claimant?

It is critical to consider that the witnesses here are uncontradicted. The trial court furthermore did not observe their demeanor under oath. Yet the trial court determined that they are not to be believed. Under these circumstances, the trial court is making determinations more as a matter of law, not of fact; for there is nothing against which the court can weigh the testimony. The trial court's standards fail to put a claimant on notice of what does and does not meet its standards. The lower court's standards are vague and contradictory and therefore fail constitutionality for want of due process.

5. The "lighting up" doctrine applies here as a matter of law. The lower court incorrectly read the law when it declined to apply the lighting up doctrine.

The lower court misquoted the law in *Austin v. Dep't of Labor & Indus.*, 6 Wn. App. 394, 492 P.2d 1383 (Wn. Ct. App. Div. 3, 1971). The lower incorrectly cited *Austin* as having ruled that a pre-existing condition

is not lit up “if the condition was a naturally progressing condition that would have progressed to symptoms without the injury.” CP 2. The complete opinion of *Austin* is attached at Ex. 1 hereto; it is brief and can be quickly read in its entirety. **The rule that the lower court attributed to *Austin* is completely absent from *Austin* or any other case, and is further contrary to longstanding black-letter law, (see above).** An actual reading of *Austin* supports Ms. Zavala here. In *Austin*, the lighting up instruction was denied because **the only evidence before the court in *Austin* was that the claimant’s preexisting condition was symptomatic well before the industrial injury:**

[The claimant] admitted on cross-examination that for a number of years before the accident he had occasional stiffness in his back and muscles; that he lost 1 or 2 days' work on an earlier occasion; and a couple of days in bed at home would straighten him out. Moreover, the production manager of Ralston Purina noted that before the accident claimant's gait was very stiff; he did not have a normal walk and it was unnatural for claimant to move or stand in a straight position.

Id. at 396-97. The claimant further testified that over a period of a number of years before the industrial injury, he would occasionally experience pain, fatigue, and soreness, including stiffness “in every bone in my body,” that he would visit the company doctor, and would spend a couple of days at home in bed and that would straighten him out. *Id.* at 396 fn 1.

Additionally, the claimant's preexisting condition in *Austin* had been diagnosed, and its progression had been tracked on x-ray for 10 years prior to industrial injury:

The evidence shows claimant's condition following the injury was diagnosed as ankylosing spondylitis, sometimes referred to as rheumatoid arthritis of the spine or "Marie Strumpell's arthritis." It is clear this condition preexisted the injury; the company doctor traced the condition on X rays for 10 years prior to the injury.

Austin, 6 Wn.App. at 396.²⁴

The "independent development" of the preexisting condition, however, was not the dispositive issue in *Austin*. The material point in *Austin* is that there was quite a bit of objective evidence that the preexisting condition was symptomatic and debilitating prior to the industrial injury. "This testimony negatives the conclusion claimant's preexisting condition was latent or dormant before the injury." *Id.* at 398. No doctor testified that the preexisting condition was inactive before the injury or that the injury "lit up" a latent condition. *Id.* at 399. Based on the complete absence of evidence, the court in *Austin* held that "the evidence was insufficient to justify the giving of a 'lighting up' instruction and it was properly refused." *Id.*

²⁴ It is furthermore commonly known that rheumatoid arthritis is an autoimmune disorder wherein the body's immune system attacks its own cartilage, and that it is a completely different disease than osteoarthritis, (otherwise known as "wear and tear" arthritis). See medical experts' testimony herein. Unlike "wear and tear" osteoarthritis, ankylosing arthritis (a rheumatoid arthritis) "develops without trauma and is naturally progressive independent of intervening events," *Austin*, 6 Wn.App. at 398.

Ms. Zavala's case is not even remotely like *Austin*. Here, Ms. Zavala had direct *and uncontested* testimony of herself and five additional lay witnesses, all of whom testified consistently that she was asymptomatic before the industrial injury, and symptomatic afterwards, (above). Furthermore, *all* of the expert witnesses who testified here swore that the industrial injury aggravated Ms. Zavala's preexisting osteoarthritis, (below), even though some believe only temporarily.

Austin does affirm and restate the longstanding black-letter law:

We have held in an unbroken line of decisions that, if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition.

Austin, 6 Wn. App. at 395 (quoting *Miller*, 200 Wn. at 682). *Austin* further declared that an injured worker is entitled to the lighting up instruction if there is any sufficient evidence: "Each party is entitled to have his theory of the case presented to the jury by proper instruction if there is any evidence to support it." *Id.* at 396 (citing *DeKoning v. Williams*, 47 Wn.2d 139, 141, 276 P.2d 694 (1955)).

Here, Ms. Zavala has direct, consistent, and uncontested testimony of six lay witnesses to support the "lighting up" doctrine. *As a matter of law*, the lighting up doctrine must be applied.

6. Ms. Zavala's condition was lit up as a result of the industrial injury.

The industrial injury caused the menisci in Ms. Zavala's knee to tear, which is accepted as proximately caused by the industrial injury. This is not in contest.

Dr. Gritzka testified that Ms. Zavala's osteoarthritis was lit up. "She developed symptoms that her treating orthopedic surgeon ascribed to arthritis and tried to treat with Synvisc, or artificial joint fluid lubricant, without much success, and further studies showed bone on bone. . . ." Dep of Gritzka at 26-27. Dr. Gritzka attributed Ms. Zavala's present condition and need for further treatment to the industrial injury "because the injury led to the meniscectomies which accelerated her arthritis." *Id.* at 47. He explained that Ms. Zavala had portions of "not just one but both menisci removed, so this created an increased risk factor to develop osteoarthritis of the knee." Dep. Gritzka at 26 line 13-16. "[B]ecause of the loss of the menisci and progressive loss of the articular cartilage, she had worn off all the cartilage in her knee, so now she has bone on bone." *Id.* at 27. "[A]fter the meniscectomy . . . she was found to have bone-on-bone contact in her knee." *Id.* at 28. Dr. Gritzka concluded on a more-probable-than-not basis that the meniscectomy accelerated the degenerative process and caused the bone-on-bone phenomenon to occur

sooner than it would have – or maybe never would have – if she would not have had the meniscectomies that were necessary as a result of the industrial injury. *Id.* at 29, 30.

Dr. Kontogianis acknowledged that the industrial injury aggravated any preexisting arthritic condition, (Dep. of Kontogianis at 17; CABR 108). Dr. Iversen acknowledged that the industrial injury exacerbated any preexisting arthritis, (CABR 111).

All of the physicians were consistent that there is no objective evidence that Ms. Zavala was symptomatic before the industrial injury. Dr. Gritzka testified that he reviewed Ms. Zavala's medical history and records from other physicians, and there were no complaints about her knees prior to the industrial injury. Dep. Gritzka at 18-19. Dr. Gritzka did question her about her medical history, and she did not describe any prior issues with either knee. *Id.* at 19. Dr. Bays testified that he did not have any information that Ms. Zavala had complained about her knee prior to the injury, that she had any prior surgeries, any prior injuries, or hospitalizations. Dep. Bays at 44. "I'm unaware of any complaints prior to this injury," (*id.*). "There is no paper trail that shows that she'd been seen for these conditions. And so, you know, it's certainly possible that there were no symptoms beforehand," (Dep. of Bays at 40). Dr. Iversen

testified that there was no history of having any knee problems with either knee prior to the industrial incident. Dep. Iversen at 13.

All of the medical experts likewise agree that Ms. Zavala has been symptomatic continuously ever since the industrial accident; her symptoms have not gone away. Dr. Bays, for example, commented, “The other consideration is that, from a subjective standpoint, she indicates that nothing has improved her condition” Dep. of Bays at 42.

As a matter of law, any preexisting but latent arthritis “is not deemed the cause of the injury, but merely a condition upon which the real cause operated,” (*Miller*, 200 Wn. at 682-83), and “the resulting disability is to be attributed to the injury and not the preexisting physical condition,” (*Harbor*, 48 Wn.2d at 556-57). Because Ms. Zavala’s preexisting condition was asymptomatic before the industrial injury and was lit up by the industrial injury, her present condition is, *as a matter of law*, proximately caused by the industrial injury.

- 7. The self-insured employer has failed to offer any sufficient evidence that Ms. Zavala’s arthritis was symptomatic or disabling prior to her injury. A doctor’s opinion that a condition was symptomatic or disabling before an industrial injury, based on images taken after the industrial injury, is pure speculation and is insufficient as a matter of law to establish that an injured worker had symptoms or disability prior to an industrial injury.**

To prove that a medical condition was symptomatic or disabling *prior to* an industrial injury, any expert medical testimony must be based at least in part *on objective evidence existing prior to the date of injury*.²⁵

Harper is particularly on-point here. In *Harper*, the claimant fell from scaffolding and injured his back. When physicians examined his x-rays taken after the injury, they expressed that the x-ray demonstrated a remarkable amount of arthritis, and that they would have expected the claimant to have been almost totally disabled prior to his injury. Nevertheless, our Supreme Court explained that this was insufficient:

[E]ven though the x-ray discloses a marked arthritic condition, it does not, of itself, establish a disabling condition. Despite the presence of a ‘remarkable amount’ of osteoarthritis, as shown by the x-ray, . . . which Dr. J. E. Jackson would have expected to be almost totally disabling, the claimant had, prior to his injury on that date, experienced no difficulty, discomfort, or disability.

Harper, 46 Wn.2d at 405-406. The *Harper* court ruled that any disability, “as it exists at any relevant date, must be determined by medical testimony, some of it based upon objective symptoms.” *Harper*, 46 Wn.2d at 406-7, *citing Hyde v. Dep’t of Labor & Indus.*, 46 Wn. 2d 31, 34, 278 P.2d 390 (1955).

Washington’s Supreme Court reiterated in 2009:

²⁵ *E.g.*, *Hyde v. Dep’t. of Labor & Indus.*, 46 Wn.2d 31, 34, 278 P.2d 390 (1955) (*citing Moses v. Dep’t of Labor & Indus.* and cases cited therein, 44 Wn.2d 511, 268 P.2d 665 (1954)); *see also, e.g., Harper v. Dep’t. of Labor & Indus.*, 46 Wn.2d 404, 406-7, 281 P.2d 859 (1955); *Hyde v. Dep’t. of Labor & Indus.*, 46 Wn.2d 31, 278 P.2d 390 (1955).

[X]-ray findings, while objective in that they can be seen, are not, solely by themselves, proof of a loss of physical function. Cf. *In re Johnston*, No. 97 4529, 1999 WL 190864 (Wn. Bd. of Indus. Ins. Appeals Mar. 2, 1999). We emphatically agree that x-ray findings alone would be insufficient. . . .

Tomlinson, 166 Wn.2d at 118 (emphasis added). Evidence of mere preexisting arthritis, therefore, is insufficient to infer preexisting *disabling* arthritis or preexisting *symptomatic* arthritis.

Even the self-insured employer's defense medical examiners testified that they cannot conclude prior symptoms or disability from an x-ray or radiological image.

There are individuals that can go their whole lives and you look at the x-rays and it looks like there's no reason that they could even stand or walk, and yet they have minimal symptoms. And yet there's other individuals that, radiographically, might look like they have mild to moderate degenerative arthritis, but yet they are significantly symptomatic. And so it has to be a case-by-case basis.

Dep. Bays at 45-46.

When asked whether it is possible to examine an image such as an x-ray or MRI and predict how much pain the patient experiences, Dr. Gritzka responded definitively, "No, you can't tell." 9/21/10 Dep. of Gritzka at 35 lines 18-21. When asked whether such images can reveal how the patient is functioning, Dr. Gritzka replied, "No. Sometimes people do function surprisingly well even with terrible looking images."

Id. at 35-36.

[I]t's surprising how often you will do x-rays for some other condition and discover that this person has terrible looking joints, but they don't have any complaints. So that's fairly common, I would say, that people have significant, quote, degenerative changes or arthritis and they are not complaining about it. This is a little bit of a medical mystery, frankly, but it's not uncommon. I've certainly seen it many times.

Id. at 31-32.

I've had patients and examinees both where x-rays have provided objective evidence of significant osteoarthritis of various joints, but the patient or the injured worker or claimant has no complaints referable to that joint.

Id. at 35.

Dr. Kontogianis also indicates that there is not a necessary correlation between imaging and symptom or functioning. He believes that everybody gets arthritis of the knee if they live long enough, yet not everyone would become symptomatic. Dep. Kontogianis at 13. When asked specifically whether a knee such as Ms. Zavala's always correlates with the patient's having experienced symptoms prior to the injury, he responded that he could not say "a hundred percent." *Id.* at 13-14. Nevertheless, he testified that Ms. Zavala would "most likely" have had a "symptomatic knee" prior to the injury, based only on x-rays and his surgery performed *after* the industrial injury. *Id.* at 10. Dr. Kontogianis was asked, but was unable to explain why he would have expected Ms. Zavala to be symptomatic prior to the injury. When asked why he would

have expected her to have been symptomatic, he merely asserted the tautological fallacy, “Because it hurts.” *Id.* at 10 ln 5-14. The cross examiner then challenged Dr. Kontogianis’s foundation for making such a conclusory remark.

Q: How many patients have you operated on the knee that actually had no complaints?

A: None. I don’t operate on people who don’t have complaints. . . . We don’t operate on people that don’t have symptoms.

Id. at 14. Dr. Kontogianis therefore has no experience foundation to express what proportion of a population with a certain knee condition is asymptomatic. He was then asked whether he is aware of any research about what proportion of the population with a knee condition like Ms. Zavala’s would be symptomatic versus asymptomatic. He responded, “I can’t quote you any studies regarding the symptomatic rate of severe arthritis of the knee.” *Id.* at 15. He therefore has a complete absence of any professional foundation to opine whether a patient with a certain arthritic condition would or would not be symptomatic.

Neither could Dr. Iverson point to any research or medical literature or experiential evidence about what proportion of the population with certain knee conditions would actually be symptomatic versus asymptomatic, (Dep. of Iverson at 36-37).

Dr. Bays was asked, “Given your review of the operative findings and the imaging studies in this case, what’s the likelihood that [Ms. Zavala] . . . had no symptoms or restrictions as relates to the left knee condition prior to this injury?” Dep. of Bays at 40 ln 2-5. He responded, “That’s a difficult question to answer. There is no paper trail that shows that she’d been seen for these conditions. And so, you know, it’s certainly possible that there were no symptoms beforehand,” (Dep. of Bays at 40). (To be fair, Dr. Bays continued, that he would think it unlikely that Ms. Zavala would have experienced no symptoms, given the extent of her pathology observed after the injury, (*id.*)). Dr. Bays admitted that it is possible for a person to have a damaged meniscus yet remain asymptomatic, (*id.* at 45). He further testified

Really it’s across the gamut. There are individuals that can go their whole lives and you look at the x-rays and it looks like there’s no reason that they could even stand or walk and yet they have minimal symptoms.

Dep. of Bays at 45-45. When pressed again on redirect, Dr. Bays again opined,

[A]gain, sometimes there’s a disconnect between what we see arthroscopically [in surgery] or what we see on x-ray and somebody’s pain complaints. It really runs the gamut. Some individuals will have a terrible knee and be completely asymptomatic. Other individuals will be markedly symptomatic.

Dep. of Bays at 60.

By their own testimonies, the medical witnesses here concede, consistently with 80 years of unbroken Washington case law, that it is impossible to determine whether a person experienced pain or disability from arthritis prior to an injury, based solely on medical diagnostics gathered *after* the injury. The medical witnesses here go even further, though, explaining that it is not even possible to determine whether a person *presently* experiences any arthritic symptoms based on radiological images. Their testimony that Ms. Zavala probably had knee pain before the injury, is mere conjecture based on their hypothesized counts of how many people with certain conditions on x-rays either have or have not complained of pain. But even there, their baseline is biased. It is their own testimony that they do not treat people who do not experience any symptoms. And it only stands to reason that only people who have some symptoms will present themselves to an orthopedist for an x-ray. Orthopedists, as healers, thus have a biased experience of only patients who believe they need healed. Thus, the medical witnesses lack foundation to testify about any “probability” that Ms. Zavala had knee symptoms prior to the industrial injury.

The question of whether Ms. Zavala experienced pain prior to the industrial injury is furthermore an issue of discernible fact, and is therefore not subject to any “more probable than not” medical opinion. To

determine whether it will rain yesterday, one does not look to a forecast; one looks at historical climatic data. It either did or it did not rain yesterday; it is not a question of probability. Similarly, Ms. Zavala either did or did not experience symptoms prior to the industrial injury. The fact is discernible from objective evidence, from her own testimony, from the testimony of five additional uncontradicted lay witnesses, and from the fact that there is a complete absence of any evidence that Ms. Zavala ever experienced pain, sought treatment, called in sick, required work accommodations, or slowed her productivity prior to the industrial injury. A physician's speculation and conjecture based on images taken after the injury is wholly irrelevant and is impermissible.

To disregard the objective evidence in favor of the physicians' conjecture constitutes an error in logic known as the "ecological fallacy" or the "constitutional fallacy." The fallacy is to impute the property of a group to each and every one of its members: "If most are, then everyone is." One common extension of this fallacy is the one applied here. That is, the cogent proposition "if everyone is, then none isn't," extends to a version of the ecological fallacy, "If most are, then none is not." For example, most people are not struck by lightning. But it would be fallacy to conclude that no one is ever struck by lightning. One could imagine that a man presented to the emergency room during a thunderstorm,

unconscious and in cardiac failure, with burned hands and burned feet, nylon plaid pants having melted to the lower part of his legs, and five golfing buddies who swear to the triage nurse that the patient had been holding a golf club to the sky under an old oak tree when they saw that he was struck by lightning. One could imagine next that the triage nurse said, “Don’t be silly. Most people never get struck by lightning, so he was most likely not struck by lightning.” The buddies might insist, “But we saw him get struck by lightning, and just look at him; what else could have possibly happened to him?” The triage nurse replies, “Well, most burns to the hands and feet are caused by fuel fires or hot water. So more probably than not, this man was burned by fire or water, and not lightning.” The triage nurse in the example is committing the ecological fallacy, “most, therefore every.”

Of course, it is precisely the ecological fallacy that the self-insured employer wants this Court to commit. The self-insured employer urges that six uncontroverted witnesses’ testimony, who directly observed Ms. Zavala prior to the industrial injury, are disregarded in favor of a version of the ecological fallacy: “Most people I see with x-rays that look like this are symptomatic, therefore every person with x-rays that look like this are symptomatic.” But the doctors’ own testimonies contradict that conclusion when they admit that there is often disconnect between the

radiological images and the patient's symptoms. What if Ms. Zavala is one of those individuals, however common or uncommon, who might have had a remarkable degree of osteoarthritis prior to her industrial injury, yet experienced no pain or other symptom from it? How could she possibly prove that she was asymptomatic?

What the lower court has done here is to completely bar any application of the lighting up rule. Where an injured worker is asymptomatic prior to an industrial injury, that injured worker will have a complete absence of medical treatment for that condition. The only evidence the injured worker could therefore rely upon would be non-medical testimony about direct, observable facts. But as long as "most people with arthritis are symptomatic," then any number of medical experts will always be able to testify that "more probably than not, the injured worker was symptomatic." A self-insured employer need merely hire one more medical expert than the injured worker, and forever gain the numeric majority – if not the preponderance – of medical evidence that "most people with arthritis are symptomatic, therefore this injured worker more probably than not was symptomatic." Where the court can, as here, disregard uncontested direct testimony in favor of the ecological fallacy, then 80 years of case law on the lighting up doctrine is dead. And no

worker forever more will be able to prove that an industrial injury lit up a preexisting arthritic condition.

Just as the *Harper* court ruled that speculation on after-acquired x-rays is insufficient to prove preexisting symptoms, it is likewise insufficient here. Like the doctors in *Harper*, the Employer's experts here testified that because of the evidence about Ms. Zavala's knee, collected after her industrial injury, that she probably experienced symptoms before the date of her injury. Like *Harper*, Ms. Zavala did not experience any difficulty, discomfort, or disability prior to the industrial injury, despite the doctors' expectations to the contrary. Like *Harper*, evidence of arthritis after the injury, no matter how bad the arthritis may appear, coupled with doctors' expectations that she was symptomatic prior to the injury, is insufficient evidence to prove prior symptoms, disability, or impairment.

Ms. Zavala has proved that the lighting up doctrine applies here, that arthritic condition was proximately caused by the industrial injury, and that her need for further treatment is proximately caused by the industrial injury.

8. The MCL issue is a red herring.

The self-insured employer alleges that Ms. Zavala had evidence of a medial collateral ligament tear, ("MCL"), on one of her diagnostic

images taken after the industrial injury. CABR 87-88. If Ms. Zavala did have an MCL tear, then Dr. Gritzka and Dr. Iversen agree that it was most likely not caused by the industrial injury. Neither Dr. Gritzka nor Dr. Iversen viewed the actual images, however, but rather relied solely on the radiologist's written report. Dep. of Iversen at 7-13.

Dr. Bays saw the report, but more importantly, he viewed the radiological image for himself. Dep. of Bays at 27-28. He did not believe that the image demonstrated an MCL tear. He in fact performed specific tests to rule out that Ms. Zavala had a torn MCL:

I perform[ed] what's called a varus and valgus stress testing. . . . I assess[ed] the integrity of the ligament on the inside part of the knee, that would be the medial collateral ligament. That was done specifically because the MRI scan showed that there might have been something involving the MCL. My examination showed that the MCL was entirely intact. There was absolutely no evidence of any injury to the MCL. The mechanism of injury would be inconsistent with an injury to the MCL, and . . . my examination revealed that it was completely intact.

Dep. of Bays at 25.

Dr. Bays further commented on arthroscopic surgery of the knee, "Anytime you do an arthroscopic procedure, one of the typical types of surgeries would involve the meniscus, either the medial or lateral meniscus; however, when you're in the knee joint, since you're there, you take care of anything that you find." Dep. of Bays at 9 ln 11-16. Dr. Kontogianis performed an arthroscopy of the knee, and his only findings

were “significant degenerative change in her knee, as well as a torn medial meniscus.” Dep. of Kontogianis at 5-6. He did not find a torn medial collateral ligament, (“MCL”). *Id.* Dr. Gritzka recognized that Dr. Kontogianis did not find a torn MCL, (Dep. of Gritzka at 38-39).

Both Dr. Bays and Dr. Kontogianis saw the actual MRI image; Dr. Bays did not believe the image showed an MCL tear; Dr. Bays conducted clinical tests and specifically ruled out MCL damage; Dr. Kontogianis actually cut open Ms. Zavala’s knee and went inside it under a directive to repair anything that is broken, and did not find a torn MCL. Dr. Gritzka and Dr. Iversen, on the other hand, reported only what they read in the second-hand report written by a radiologist. The only experts who were qualified to testify as to whether the radiologist’s report was correct, actually testified that the radiologist was incorrect, or testified inconsistently with it. Therefore there is not substantive evidence to conclude an MCL injury here.

Moreover, even if the radiology report is correct – and it is not – then it still constitutes mere speculation and conjecture based upon an after-acquired image, (*see above*). Furthermore, no physician testified that the image would indicate that the industrial injury did not light up Ms. Zavala’s osteoarthritis.

C. THE SELF-INSURED EMPLOYER SHOULD BE ORDERED TO COVER MS. ZAVALA'S KNEE REPLACEMENT BECAUSE HER NEED FOR FURTHER MEDICAL TREATMENT IS A PROXIMATE RESULT OF HER INDUSTRIAL INJURY. IN THE ALTERNATIVE, THE SELF-INSURED EMPLOYER SHOULD BE ORDERED TO COVER MS. ZAVALA'S 50 PERCENT IMPAIRMENT OF THE LEG.

Ms. Zavala's treating physician, Dr. Kontogianis, opined that she needs a total left knee replacement. Dep. of Kontogianis at 9-10 and 19 ln 16-20. And Dr. Gritzka agrees. CABR at 108. The question is whether the need for further treatment is a proximate result of the industrial injury. Dr. Gritzka attributes the industrial injury as the proximate cause for her necessary knee replacement. CABR at 109 ln 10-11. Dr. Kontogianis, the treating physician, also believed that Ms. Zavala's need for a knee replacement was proximately caused by the industrial injury. CABR at 108 ln 5-9; Dep. of Kontogianis at 19 (in agreement with Dr. Gritzka). But later, Dr. Kontogianis changed his mind. *Id.* As was noted, Dr. Kontogianis's opinions have been something of "a moving target." CABR at 108, 112 ln 20 *citing* Dep. of Iverson at 50; see also Dep. of Bays at 61 ("Dr. K has agreed with everybody's report."). Dr. Kontogianis explained, "My opinion will change as time progresses based on different arguments presented to me. I would have to say my latest opinion, which would be my present opinion, is that her need for a total knee was due to

her preexisting condition and not her industrial injury.” Dep. of Kontogianis at 20.

Because the industrial injury lit up her preexisting condition, however, (*see above*), Ms. Zavala’s need for further treatment is proximately caused by the industrial injury *as a matter of law*. Any preexisting arthritis “is not deemed the cause of the injury, but merely a condition upon which the real cause operated,” (*Miller*, 200 Wn. at 682-83), and “the resulting disability is to be attributed to the injury and not the preexisting physical condition,” (*Harbor*, 48 Wn.2d at 556-57). It is not a question of fact about which Dr. Kontogianis can opine, but rather a matter of law that her condition is to be attributed to her injury and not to her preexisting condition.

Furthermore, the Board ordered Ms. Zavala’s claim closed before her condition was fixed and stable. When the attending physician, Dr. Kontogianis, was asked when Ms. Zavala became fixed and stable, he could not determine a date. “I don’t have the date that she was medically fixed. Sometime in ’09. I couldn’t tell you when, exactly, we could determine she was fixed.” Dep. of Kontogianis at 7-8. He was pressed further, and noted that he had determined

[Ms. Zavala] appears *mostly* fixed and stable . . . “Mostly” being a word used to mean that something isn’t complete yet. . . . We

could play the semantics here, but I think anybody could tell you what the word “mostly” means.

Dep. of Kontogianis at 8. The last time he saw Ms. Zavala was July 17, 2009, (*id.* at 9). At that time, Ms. Zavala was in need of a knee replacement surgery, (*id.* at 9-10).

In *Matela*,²⁶ the court dealt with an “almost” recovery. The claimant’s treating physician testified that the injured worker’s condition was a result of preexisting arthritis, not the industrial injury. *Matela*, 174 Wn. at 145. A different doctor testified that “at the time of the injury Matela had what was called a symptomless arthritis, which was not unusual in a man of his age,” (*id.* at 146), and that the arthritic condition “was due to the injury,” (*id.* at 145-46). “When the department closed the claim, it acted upon a report made by its chief medical adviser, to the effect that Matela had ‘recovered almost entirely from his injury,’ and that his condition at that time was ‘one of disease and not accident,’” (*id.* at 146.). The *Matela* court held that the condition was a result of the industrial injury, that “the claim was closed before the claimant had entirely recovered from his injury,” and directed the department to allow benefits including further medical treatment, (*id.* at 146). Ms. Zavala’s case here exactly parallels *Matela*. Like *Matela*, her case should remain

²⁶ *Matela v. Dep't of Labor & Indus.*, 174 Wn. 144, 24 P.2d 429 (1933)

open, and the department should be directed to provide further benefits including medical treatment.

In the alternative, if this Court should find that Ms. Zavala is fixed and stable, then her impairment should be placed at 50 percent, not 10 percent. Again, because of the lighting up doctrine, the preexisting arthritis is “merely a condition upon which the real cause operated,” (*Miller*, 200 Wn. at 682-83), and “the resulting disability is to be attributed to the injury and not the preexisting physical condition,” (*Harbor*, 48 Wn.2d at 556-57). Dr. Gritzka is the only medical expert who properly graded rated Ms. Zavala at 50 percent impairment, based on the bone-on-bone condition in her knee.

Based on the report that she has bone-on-bone contact in her left lower extremity according to the standard impairments of the “American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition,” which is the version that the Washington Department of Labor and Industries uses, bone-on-bone contact in the knee is equal to 50 percent impairment of the lower extremity You look at the chart in the AMA guides, and it says zero residual articular cartilage equals 50 percent impairment of the lower extremity. That’s straight up. . . . My opinion doesn’t enter into it. It’s just what the chart says.

Dep. of Gritzka at 46, 69. Dr. Bays and Dr. Iversen, on the other hand, rated Ms. Zavala at 10 percent, because they only accounted for the surgery that removed part of her meniscus, but failed to account for the resulting disability: The bone-on-bone condition of her knee. Dep. of

Bays at 39; Dep. of Iversen at 30.

VI. REQUEST FOR COSTS AND FEES

Ms. Zavala requests costs and fees under RCW 51.52.130.

VII. CONCLUSION

Because Ms. Zavala's preexisting osteoarthritis was lit up by her industrial injury, the self-insured employer must provide medical treatment as a matter of law. If it is determined that she is not in need of further medical treatment, however, her appropriate disability rating is 50 percent, based on the bone-on-bone knee condition, and not 10 percent merely because of the partial meniscectomies.

Ms. Zavala therefore respectfully requests this Court to reverse the lower court's decision, and to direct the Department to order the self-insured employer to cover Ms. Zavala's knee condition. In the alternative, Ms. Zavala respectfully requests this Court to modify the lower court's decision to include a disability rating of 50 percent of the left leg, instead of 10 percent.

RESPECTFULLY SUBMITTED this 25th day of March, 2014,



SCOTT E. RODGERS, WSBA # 41368
RODRIGUEZ & ASSOCIATES, P.S.
ATTORNEYS FOR PLAINTIFF

Austin v. Dep't of Labor & Indus.
Court of Appeals of Washington, Division Three
December 17, 1971
No. 200-3

Reporter: 6 Wn. App. 394; 492 P.2d 1382; 1971 Wash. App. LEXIS 1263

Clinton G. Austin, Appellant, v. The Department of Labor and Industries, Respondent

Subsequent History: [***1] As Amended by Order of the Court of Appeals January 27, 1972, Deleting Directions That the Opinion Should not be Published.

Prior History: Appeal from a judgment of the Superior Court for Spokane County, No. 193888, George T. Shields, J., entered December 9, 1969. *Affirmed.*

Syllabus

Action to review a decision of the Board of Industrial Insurance Appeals. Plaintiff appeals from a judgment entered on a verdict in favor of the defendant.

Counsel: *Otto M. Allison, Jr.* (of *Fredrickson, Maxey, Bell & Allison*), for appellant.

[***2] *Slade Gorton, Attorney General*, and *Michael E. Donohue, Assistant*, for respondent.

Judges: Green, J. Munson, C.J., and Evans, J., concur.

Opinion by: GREEN

Opinion

[*394] [**1382] On December 2, 1966, claimant, Clinton G. [*395] Austin, an employee of Ralston Purina Co., suffered an injury to his back while lifting sacks of calcium phosphate. He submitted a claim to the Department of [**1383] Labor and Industries, which was closed on September 29, 1967 with an award for permanent partial disability of 5 per cent of the maximum allowable for unspecified disability. The Board of Industrial Insurance Appeals affirmed the department action. The board's ruling was affirmed by a Spokane County jury. From this verdict, claimant appeals.

The only error assigned on appeal is the trial court's refusal to give the following requested instruction:

If you find that the plaintiff's industrial injury herein aggravated and made active a latent or dormant

preexisting condition, under the law, the resulting disability is to be attributed to the injury and not to the pre-existing physical condition, and the plaintiff is entitled to recover for the entire condition. Claimant [***3] contends this instruction properly states the law established in Miller v. Department of Labor & Indus., 200 Wash. 674, 682, 94 P.2d 764 (1939), where it is stated:

We have held in an unbroken line of decisions that, if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition. It is claimant's theory the injury of December 2, 1966 made active or "lighted up" a latent or dormant preexisting condition; as a consequence, the *Miller* rule applies and the instruction should have been given. He contends that when the instruction was refused, the jury was not permitted, under the instructions given, to consider claimant's theory. As a result, it erroneously arrived at a negative answer to the following interrogatory:

Was the Board of Industrial Insurance Appeals correct in determining that on or about September 29, 1967, the condition proximately caused by plaintiff's industrial injury of December 2, 1966, was fixed and that further medical treatment would [***4] not tend to lessen plaintiff's causally related disability?

[*396] It is clear no instruction was given on claimant's theory.

[1] [2] Each party is entitled to have his theory of the case presented to the jury by proper instruction, if there is any evidence to support it. DeKoning v. Williams, 47 Wn.2d 139, 141, 286 P.2d 694 (1955). A claimant must produce sufficient substantial facts, as distinguished from a mere scintilla of evidence to make a case for the trier of fact. Savler v. Department of Labor & Indus., 69 Wn.2d 893,

896, 421 P.2d 362 (1966); *Miller v. Department of Labor & Indus.*, 1 Wn. App. 473, 478, 462 P.2d 558 (1969). The only question before this court is whether there is sufficient evidence to present to a jury the theory that claimant's injury made active or "lighted up" a latent preexisting condition. It is our view there is not.

The evidence shows claimant's condition following the injury was diagnosed as ankylosing spondylitis, sometimes referred to as rheumatoid arthritis of the spine or "Marie Strumpell's arthritis." It is clear this condition preexisted the injury; the company doctor traced the condition on X rays for 10 years [***5] prior to the injury.

In his brief, claimant contends the condition was latent because he had no back trouble prior to the injury and was able to carry on his work lifting 100-pound bags of calcium phosphate. Since the injury he has not been able to do so. While the claimant did so testify on direct examination, he admitted on cross-examination that for a number of years before the accident he had occasional stiffness in his back and muscles; that he lost 1 or 2 days' work on an earlier occasion;

and a couple of days in bed at home would straighten him out. ¹ [***1384] Moreover, the production [*397] manager of Ralston Purina noted that before the accident claimant's gait was very stiff; he did not have a normal walk and it was unnatural for claimant to move or stand in a straight position. ²

Claimant relies upon Dr. Robert Burroughs who first examined him in March 1968, 16 months after the injury, and stated:

It is my opinion that it is more likely than not that, that particular injury triggered off a sustained exacerbation of his chronic preexisting ankylosing spondylitis. This testimony does not state the preexisting condition was latent or inactive. Moreover, it was elicited based on a history in which claimant denied any back aches, pains or stiffness prior to the injury. ³ However, on cross-examination [*398] when Dr. Burroughs ⁴ was asked to assume there were complaints of aches, pains and stiffness in his back and joints [***7] prior to the [***1385] injury, he

¹ "O Now, I am wondering if I had your answer right to Mr. Allison's question. You said prior to this particular injury you never had any back pains or back fatigue at all? A I had stiffness and everything, but not the trouble that I have now. O Did you have this very often, or just occasionally? A Just occasionally. Sort of fatigue or soreness. Everybody gets a stiff back once in awhile. O Was this over a number of years? A It was over a number of years: yes, sir. O Had you had any stiffness or soreness in the back say a few months prior to this, four or five months prior to the injury in December of 1966? A Not that I can recall. O But you did occasionally have some stiffness? A Yes. O In what part of your back did you have the stiffness? A Every bone in my body from that work out there. It was heavy work. O You did have stiffness in the back off and on prior to this particular date? A Yes. . . . O Before your injury you stated you did have stiffness in lifting all this weight? A Yes. O Did you have relatively the same type of stiffness in the joints you have now, but not as severe? A Sometimes you would work ten or twelve hours as the regular crew wouldn't want to stay over and me and another fellow finished it up, and it was just a good old stiff back. O And in the joints of your hands and fingers? A Yes. O More muscle ache than joint ache? A More muscle ache than anything. . . . O You say that you lost one or two days with a stiff back? A I couldn't pinpoint the time. It has been so long back I can't recall. O You indicated that you went to a doctor? A The company doctor, Dr. Reid. Q You say you would spend a couple of days at home in bed and then you would straighten out? A Yes."

² "A He did have a walk very different from the walk of other people. His gait was very stiff and it was noticeable that he did not have a normal walk. Also, his job was a lift truck driver which involves handling bags in addition to driving a lift truck and it was noticeable when getting off of the lift truck that there was a stiffness and difficulty or unnatural -- it was unnatural for him to move or stand in a straight position."

³ In *Sayler v. Department of Labor & Indus.*, *supra*, the court said, at page 896:

If the doctor has not been advised of a vital element bearing upon causal relationship, his conclusion or opinion does not have sufficient probative value to support an award.

⁴ "O Assuming the Claimant had some complaints of stiffness in his joints and initial stiffness when standing up or walking around or working hard, would this indicate some of the signs of ankylosing arthritis? A Those symptoms would be a suspected factor for this. I am certain if it was looked for several years or possibly quite a number of years before the accident it would have been found. O Assuming those facts, and what he had before, would you say it was non-symptomatic prior to this injury? A I think that this is unusual. This is really quite unusual, but every once in awhile a patient comes in for another condition and on X ray they have a fairly advanced ankylosing spondylitis. O Assuming he complains of stiffness and pains in getting up and getting around primarily in the joints, and stiffness from hard work or muscle strain: assuming they are there and this condition pre-existed the injury as you stated, would you say the condition was symptomatic prior to the time of the injury? A Yes, assuming that. .

testified this would indicate the condition was symptomatic prior to the injury. He also testified it is unusual not to have symptoms. Further, he said the condition was a naturally progressing condition and would have progressed naturally without the injury. This testimony negatives the conclusion claimant's preexisting condition was latent or dormant before the injury.

[***8] Claimant also cites the testimony of Dr. William Grieve who examined claimant in August 1967 and testified for the respondent. On direct examination, he said that ankylosing arthritis develops without trauma and is naturally progressive independent of intervening events. It was his opinion claimant's condition was fixed and any further treatment would be for the arthritis and not for the injury. Claimant relies upon that portion of his testimony on cross-examination wherein Dr. Grieve said the arthritic condition existed prior to the injury; the injury aggravated

it and caused the condition to become symptomatic but temporary. However, he also said the symptoms from the strain [*399] were past and in his opinion the claimant's present symptoms were due to the underlying preexisting condition unrelated to the injury. From our review of the testimony, it is evident Dr. Grieve did not testify the preexisting condition was inactive before the injury nor that the injury "lighted up" a latent condition.

In our view, the evidence was insufficient to justify the giving of a "lighting up" instruction and it was properly refused. Cf. Hutchings v. Department of Labor & Indus., [***9] 24 Wn.2d 711, 725, 167 P.2d 444 (1946); Rambeau v. Department of Labor & Indus., 24 Wn.2d 44, 163 P.2d 133 (1945); Sayler v. Department of Labor & Indus., *supra*.

Judgment affirmed.

.. O Did they indicate had there not been an injury would the condition progress on a natural progressing rate without any effect from the injury? A It is my opinion that the condition had been progressing and would have continued to progress naturally, Yes. Q Even if he hadn't had the injury it might have progressed to where you saw him in your examination? A True."

FILED

CERTIFICATE OF SERVICE

MAR 26 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

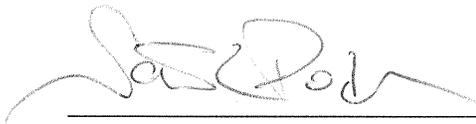
I, the undersigned, certify that on this day, I served copies of the documents listed below with all required charges prepaid, by the methods indicated below, to the following persons:

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On this 25th day of March, 2014,



Scott E. Rodgers