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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 318541

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

ANA ZAVALA, *Appellant*,

v.

TWIN CITY FOODS, INC., *Respondent*.

APPEAL FROM THE SUPERIOR COURT OF FRANKLIN COUNTY
HONORABLE CARRIE RUNGE

BRIEF OF RESPONDENT

WALLACE, KLOR & MANN, P.C.
WILLIAM A. MASTERS
SCHUYLER T. WALLACE, JR.
Attorneys for Twin City Foods, Inc.

By William A. Masters, WSBA#13958
Attorney at Law
5800 Meadows Road, Suite 220
Lake Oswego, Oregon 97035
(503) 224-8949
bmasters@wallaceklormann.com

TABLE OF CONTENTS

	TABLE OF AUTHORITIES	-----	iii
I.	INTRODUCTION	-----	1
II.	ASSIGNMENTS OF ERROR	-----	2
III.	RESTATEMENT OF CASE	-----	6
IV.	STANDARD OF REVIEW	-----	13
V.	ARGUMENT	-----	14
A.	LEGAL PRINCIPLES	-----	14
1.	Lighting Up Principle	-----	15
2.	Legal Necessity of Symptoms	-----	18
B.	FACTUAL CONTENTIONS	-----	18
1.	Onset of Knee Symptoms	-----	20
1.1	Appellant’s Evidence	-----	20
1.2	Respondent’s Evidence	-----	28
1.2.1	Objective Evidence	-----	28
1.2.2	Imaging Studies	-----	30
1.2.3	The <i>Austin</i> Case	-----	38
2.	Industrial Event Caused Knee Symptoms	-----	41
3.	Continued Knee Symptoms	-----	42
4.	More Treatment or Increased Impairment Rating	-----	44

4.1	Fixed and Stable	-----	45
4.2	Impairment Rating	-----	48
VI.	CONCLUSION	-----	49

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Austin v. Dep't of Labor & Indus.</i> , 6 Wn. App. 394, 492 P.2d 1383 (1971)	-----	38, 39, 40, 41
<i>Benedict v Dep't of Labor & Indus.</i> , 63 Wn.2d 12, 385 P.2d 380 (1963)	-----	13
<i>Bennett v. Dep't of Labor & Indus.</i> , 95 Wn.2d 531, 627 P.2d 104 (1981)	-----	1, 17
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001)	-----	13
<i>Crown, Cork and Seal v. Smith</i> , 171 Wn.2d 866, 259 P.3d 151 (2011)	-----	13
<i>Favor v. Dep't of Labor & Indus.</i> , 53 Wn.2d 698, 336 P.2d 382 (1959)	-----	29
<i>Hamilton v. Dep't of Labor & Indus.</i> , 111 Wn.2d 569, 761 P.2d 618 (1988)	-----	33
<i>Harper v. Dep't of Labor & Indus.</i> , 46 Wn.2d 404, 281 P.2d 859 (1955)	-----	18, 31
<i>Hinds v. Johnson</i> , 55 Wn.2d 325, 347 P.2d 828 (1959)	-----	30
<i>Hyde v. Dep't of Labor & Indus.</i> , 46 Wn.2d 31, 278 P.2d 390 (1955)	-----	30
<i>Jacobson v. Dep't of Labor & Indus.</i> , 37 Wn.2d 444, 224 P.2d 338 (1950)	-----	15, 17
<i>Layrite Products Co. v. Degenstein</i> , 74 Wn. App. 881, 880 P.2d 535 (1994)	-----	13

<i>Matela v. Dep't of Labor & Indus.</i> , 174 Wn. 144, 24 P.2d 429 (1933)	-----	46
<i>Meeker v. Howard</i> , 7 Wn. App. 169, 499 P.2d 53 (1972)	-----	26
<i>Moses v. Dep't of Labor & Indus.</i> , 44 Wn.2d 404, 281 P.2d 859 (1955)	-----	29
<i>Oien v. Dep't of Labor & Indus.</i> , 74 Wn. App. 566, 874 P.2d 876 (1994)	-----	29
<i>Omeitt v. Dep't of Labor & Indus.</i> , 21 Wn.2d 684, 152 P.2d 973 (1944)	-----	14
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009)	-----	16
<i>Spalding v. Dep't of Labor & Indus.</i> , 29 Wn.2d 115, 186 P.2d 76 (1947)	-----	33
<i>Stone v. Dep't of Labor & Indus.</i> , 172 Wn. App. 256, 289 P.3d 720 (2012)	-----	16
<i>Sunnyside Valley Irrig. Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2006)	-----	14
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 343 P.2d 183 (1959)	-----	13
<i>Tomlinson v. Puget Sound Freight Lines, Inc.</i> , 166 Wn.2d 105, 206 P.3d 657 (2009)	-----	17, 31, 32, 37
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991)	-----	16
WASHINGTON STATUTES		
RCW 4.44.060	-----	13
RCW 51.32.055	-----	11

RCW 51.32.080(5)	-----	17
RCW 51.32.160	-----	16
RCW 51.52.140	-----	13
RCW 51.52.160	-----	28

**WASHINGTON ADMINISTRATIVE
RULES**

WAC 296-20-01002(3)	-----	11
WAC 296-20-220 (i)	-----	30

**UNITED STATES SUPREME COURT
CASES**

<i>Addington v. Texas</i> , 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed.2d 323 (1979)	-----	27
---------------------------------------------------------------------------------------------	-------	----

<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976)	-----	27
---------------------------------------------------------------------------------------	-------	----

OTHER AUTHORITIES

<i>In re Arlen Long</i> , BIIA Dec., 94 2539 (1996)	-----	1, 15, 16
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I. INTRODUCTION

This is an industrial insurance case. It concerns issues of proximate causation, primarily of medical causation. Ms. Zavala contends that the industrial event proximately caused, in addition to a torn meniscus, a *permanent* lighting up or *permanent* aggravation of her preexisting left knee osteoarthritis.¹ She contends that, as a result, she is entitled either to further medical treatment in the form of a total knee replacement or to an increased rating for permanent partial disability. The self insured employer contends that the Superior Court had substantial evidence to conclude not only that the industrial event did not proximately cause either a *permanent* “lighting up” or a *permanent* aggravation of Ms. Zavala’s preexisting left knee osteoarthritis but also that Ms. Zavala is not entitled either to further medical treatment or to an increased rating for permanent partial disability.

¹ Under industrial insurance law, as a result of an industrial event, a worker may aggravate, either temporarily or permanently, a preexisting symptomatic pathological condition; or “light up” (*viz.*, cause to become symptomatic), either temporarily or permanently, a preexisting asymptomatic pathological condition. *E.g.*, *Bennett v. Dep’t of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981); *In re Arlen Long*, BIIA Dec. 94 2539 at 6-7 (1996); see discussion *infra* at pages 15-18.

II. ASSIGNMENTS OF ERROR

Ms. Zavala has identified, as assignments of error, findings of fact and conclusions of law both at the Board of Industrial Insurance Appeals and at Superior Court. For purposes of this appeal, the relevant assignments of error are those findings of fact and conclusions of law of the Superior Court.

As to the Superior Court findings, the self insured employer objects to Ms. Zavala's shotgun assignment of errors. Presumably, based on the arguments Ms. Zavala has asserted in her Brief, she more particularly assigns the following findings of fact as error:

Assignment of Error No. 1²

2. *** This condition was diagnosed as a partial tear of the left medial meniscus, and was surgically repaired in an arthroscopic procedure on November 21, 2007, by Christopher Kontogianis, M.D.

Ms. Zavala appears to except only to this last sentence in this finding of fact. [Appellant's Brief V.B.6. at pages 31-33].

Assignment of Error No. 2

3. Ana Zavala, prior to her industrial injury of September 17, 2007, had extensive pre-existing degenerative or arthritic conditions in her left knee described as left knee osteoarthritis and grade 4 chondromalacia of the left femoral condyle.

² The Respondent will refer to an Assignment of Error as, for example, AE No.1 (FF No. 2) or AE No. 6 (CL No. 2).

Although she listed this as an assignment of error, Ms. Zavala appears not to except to this finding of fact in her argument in her Brief.

Assignment of Error No. 3

4. Ana Zavala's pre-existing left knee osteoarthritis and chondromalacia of the left femoral condyle were not caused by her industrial injury of September 17, 2007, and the industrial injury did not aggravate or accelerate these extensive pre-existing left knee conditions.

Ms. Zavala appears to except only to the last independent clause in this finding of fact in that limited sense that she only contends that the industrial event *permanently* "lit up" (*viz.*, caused to become *permanently* symptomatic) what she characterizes as preexisting asymptomatic left knee osteoarthritis. [Appellant's Brief V.B.6. at pages 31-33].

Assignment of Error No. 4

5. Ana Zavala's partial tear of the medial meniscus of the left knee was not in need of further proper and necessary medical treatment as of the date of the Department order on appeal, October 20, 2009.

Ms. Zavala appears to except to this finding of fact to the extent that the preexisting osteoarthritis, if *permanently* lit up, needs further treatment. [Appellant's Brief V.C. at pages 46-48].

Assignment of Error No. 5

6. Ana Zavala sustained a permanent partial disability proximately caused by the industrial injury of September 17, 2007, described as 10 percent of the amputation value of the left leg above the knee joint with

short thigh stump (3 inches or below the tuberosity of the ischium).

Ms. Zavala appears to except to this finding of fact to the extent that if the preexisting osteoarthritis of the left knee was *permanently* lit up, then Dr. Gritzka's impairment rating should be adopted. [Appellant's Brief V.C. at page 49].

Ms. Zavala assigns the following conclusions of law as error:

Assignment of Error No. 6

2. The condition caused by the industrial injury of September 17 2007, did not require further proper and necessary medical treatment within the meaning of RCW 51.36.10 as of October 30, 2009.

Ms. Zavala appears to except to this conclusion of law (as she did to finding of fact number 5; assignment of error number 4 above) to the extent that if the preexisting osteoarthritis of the left knee was *permanently* lit up, then she needs further treatment in the form of a knee replacement. [Appellant's Brief V.C. at pages 46-48].

Assignment of Error No. 7

3. Ana Zavala sustained a permanent partial disability within the meaning of RCW 51.32.080 equal to 10 percent of the amputation value of the left leg above the knee joint with short thigh stump (3 inches or below the tuberosity of the ischium).

Ms. Zavala appears to except to this conclusion of law (as she did to finding of fact number 6; assignment of error number 5 above) to the

extent that if the preexisting osteoarthritis of the left knee was *permanently* lit up, then Dr. Gritzka's impairment rating should be adopted. [Appellant's Brief V.C. at page 49].

Assignment of Error No. 8

4. The Department order dated October 30, 2009, is incorrect. This matter is remanded to the Department with directions to issue an order in which it denies responsibility for the conditions described as left knee osteoarthritis and Grade 4 chondromalacia of the left femoral condyle, and to close the claim as otherwise set forth on the order of August 21, 2009, with time loss compensation benefits paid through April 27, 2008, and with an award of permanent partial disability of 10 percent of the amputation value of the left leg above the knee joint with short thigh stump (3 inches or below the tuberosity of the ischium.)

Ms. Zavala appears to except to this conclusion of law (as she did to findings of fact numbers 5 & 6; assignments of error numbers 4 & 5 above) to the extent that if the preexisting osteoarthritis of the left knee was *permanently* lit up, then she needs further treatment in the form of a knee replacement, additional time loss benefits, and an increased impairment rating. [Appellant's Brief V.B.6. at pages 31-33 & V.C. at pages 46-49].

The self insured employer does not accept Ms. Zavala's "statement of the issues pertaining to the assignment of errors." That statement of issues is more argument than a neutral statement of the issues that Ms.

Zavala raised at Superior Court or that she now contends arose from the decision of the Superior Court.

As to factual issues that Ms. Zavala contends were wrongly decided in Superior Court, the proper issue is whether or not the findings of fact are supported by substantial evidence, viewing the record in the light most favorable to the self insured employer, the prevailing party in Superior Court.

As to legal issues that Ms. Zavala contends were wrongly decided in Superior Court, the proper issue is whether the law was correctly identified and then, if correctly identified, correctly applied to the facts under a *de novo* standard of review.

III. RESTATEMENT OF THE CASE

Ms. Zavala said that on September 17, 2007, while at work, she bumped her left knee on a flat upright surface, and, afterwards, developed, *for the first time*, pain in her left knee. [CP—CABR—A. Zavala 63/22-25 & 69/17-19; 71/6-12; Gritzka 19/20-25; 20/1-5; 31/3-5; Bays 13/20-25; 14/1-3; Iverson 11/12-25; 12/14-19]. In October 2007, she saw an orthopedist, Dr. Kontogianis, who ordered arthroscopy of her left knee. [CP—CABR—Kontogianis 4/19-22; 5/13]. Arthroscopy revealed extensive preexisting osteoarthritis of the left knee (near grade 4

chondromalacia)³ and a partially torn medial meniscus. [CP—CABR—Kontogianis 6/8-25; 7/3-4 & 10-17]. As a result, Dr. Kontogianis diagnosed a torn medial meniscus and near grade 4 chondromalacia with near complete loss to bone on the femoral condyle. [CP—CABR—Kontogianis 5/21-25; 6/8-9; 7/1-4]. He further concluded that Ms. Zavala’s near grade 4 chondromalacia on the femoral condyle (*viz.*, osteoarthritis) had preexisted the industrial event and that, because of the severity of that osteoarthritis, she had, more probably than not, left knee pain before the industrial event. [CP—CABR—Kontogianis 10/5-14; 12/2-4; 14/6-12]. He concluded that the industrial event proximately caused the torn medial meniscus and temporarily aggravated the preexisting symptomatic osteoarthritis of the left knee, but did not *permanently* aggravate the preexisting symptomatic osteoarthritis in Ms. Zavala’s left knee. [CP—CABR—Kontogianis 7/10-14; 9/13-17].

On November 21, 2007, Ms. Zavala had a reparative partial meniscectomy, but she continued to complain of pain. [CP—CABR—A.

³ Grade 4 chondromalacia is nearly complete loss to bone; that is, there is bone on bone on one side of the joint. Complete loss to bone would be bone on bone on both sides of the joint. [CP--CABR—Kontogianis 6/8-25; 7/3-4; Gritzka 22/7-15; 51/16-19]. Grade 3 chondromalacia is more than halfway towards complete destruction of the articular cartilage. Grade 4 chondromalacia would be complete destruction of the articular cartilage. You have a large hole in the cartilage and underneath is the bone. [CP--CABR—Bays 31/7-14]. Grade 4 means that bone is exposed and there are places where the cartilage has worn off completely. [CP--CABR—Iverson 23/13-25; 14/1].

Zavala 64/7-12; Kontogianis 5/13-20]. All the medical experts believe she is exaggerating her pain and has responded non-anatomically to clinical testing. [CP—CABR—*cf.* Kontogianis 11/4-22 (concurring with the findings of Dr. Bays in his report of his independent medical examination in which he diagnosed symptom magnification and noted repeated non-anatomical responses to clinical testing); Bays 18/17-20; 19/1-14; 26/4-25; 27/1-7; 28/19-25; 29/1-6; 42/12-17; 43/14-16; Iverson 17/13-25; 18/3-18; 27/4-8; 27/9-21; 38/9-11; 26/20-25; Gritzka 56/1-11 & 15-25; 70/23-25; 71/1-8; 75/16-25; 76/1-4]. All the medical experts considered her an unreliable historian. [CP—CABR—*cf.* Kontogianis 10/11-14; 14/3-12; Bays 18/17-20; 19/1-14; 26/4-25; 27/1-7; 28/19-25; 29/1-6; 42/12-17; 43/14-16; Iverson 22/19-25; 23/1; 27/8; 39/15-20; *cf.* Gritzka 56/1-11 & 15-25; 70/23-25; 71/1-8; 75/16-25; 76/1-4]. All the medical experts believed that, more probably than not, Ms. Zavala had left knee symptoms, such as pain, before the industrial event. [CP—CABR—Kontogianis 10/5-14; 12/2-4; 14/6-12; Bays 40/3-25; Iverson 22/19-25; 23/1-25; 25/8-25; 26/1-8; 36/10-16 & 22-25; 37/1-16; 39/15-20; Gritzka 51/12-21; 57/12-25; 58/1-21; 68/20-23; 69/1-2].

On November 19, 2007, Ms. Zavala filed an industrial insurance claim. [CP—CABR—BIIA D&O Finding of Fact No. 1]. The Department of Labor and Industries (the Department) allowed the claim

and the self insured employer paid Ms. Zavala industrial insurance benefits. *Id.* On August 21, 2009, the Department closed the claim, with time loss benefits paid through April 27, 2008 and an award for permanent partial disability of 10 percent of the amputation value of the left leg above the knee joint with short thigh stump (3 inches or below the tuberosity of the ischium). *Id.* Ms. Zavala protested this closing order and in response, on October 30, 2009, the Department cancelled its August 21, 2009 order, directing the self insured employer to accept responsibility for a permanent aggravation of unrelated preexisting left knee osteoarthritis. *Id.* The self insured employer appealed that October 30, 2009 Department order to the Board of Industrial Insurance Appeals (the Board). *Id.* The Board granted the appeal. *Id.*

At hearing on appeal to the Board, Ms. Zavala contended that the industrial event permanently lit up her preexisting left knee osteoarthritis. [CP—CABR—Gritzka 45/6-10; 47/1-8]. She contended that as a result, she is not medical fixed and stable and needs a total knee replacement. [CP—CABR—Gritzka 44/18-24]. She also contended that if she were fixed and stable, she is entitled to an increase in the impairment rating for permanent partial disability from 10% to 50% impairment. [CP—CABR--Gritzka 46/10-21]. At the Board, she called as witnesses a forensic medical expert, Dr. Gritzka, and six lay witnesses, herself and five close

friends or relatives: Maria Martinez, Josefina Vargas, Florentino Ledesma, Irma Mendoza, Jose Guadalupe Zavala. [CP—CABR—Gritzka 6-76; A. Zavala 63-77; Martinez 47-53; Vargas 41-46; Ledesma 27-37; J. Zavala 54-62]. The self insured employer called three medical experts: Two independent medical examiners, Drs. Bays and Iverson, and Ms. Zavala's treating orthopedic surgeon, Dr. Kontogianis. [CP—CABR--Bays 4-62; Iverson 4-52; Kontogianis 3-20].

Of the four medical experts, three, including Dr. Kontogianis, the treating physician, concluded that the industrial event only *temporarily* exacerbated her extensive preexisting degenerative left knee osteoarthritis. [CP—CABR—Kontogianis 7/7-19; 9/13-17; Bays 39/18-25; Iverson 28/16-25; 29/1-2; 46/13-16]. The fourth medical expert, Dr. Gritzka, Ms. Zavala's forensic expert, said that the industrial event *permanently* aggravated her extensive preexisting osteoarthritis. [CP—CABR—Gritzka 45/6-10; 47/1-8].

Drs. Kontogianis, Bays, and Iverson concluded that the industrial event did not cause her to need to replace her left knee. [CP—CABR—Kontogianis 10/2-4; 19/16-20; 20/6-11; Bays 31/23-25; 32/1-2; 37/13-24; 39/10-25; 52/24-25; 53/1-3; Iverson 28/16-25; 29/1-2; 46/13-16].⁴ Dr.

⁴ Of the four medical expert witnesses, two—Drs. Kontogianis and Gritzka--believed Ms. Zavala needed to replace her left knee. [CP—CABR—Kontogianis

Gritzka said, equivocally, that “*without regard to causation,*” she needed to replace her left knee. [CP—CABR—Gritzka 44/18-24]. He did not specifically testify, to a reasonable degree of medical probability, that the industrial event caused Ms. Zavala to need to replace her left knee. By all objective criteria, Dr. Gritzka was the least reliable expert witness.⁵ [CP—CABR—11/1-3; 14/12-25; 15/6-8 &14-19; 47/19-21; 65/15-25].

Three of the four medical experts, including Dr. Kongtogianis, concluded that by August 31, 2009, when Ms. Zavala’s claim closed, Ms. Zavala, as to injuries proximately caused by the industrial event, was at maximum medical improvement (medically fixed and stable).⁶

19/16-20; Gritzka 44/18-24]. Two other experts—Drs. Bays and Iverson—did not believe she needed to replace her left knee. [CP—CABR—Bays 41/21-25; 42/1-25; 43/1-10; 58/11-17; Iverson 29/15-23; 31/3-15].

⁵ Unlike the other medical experts, Dr. Gritzka has performed no surgery since at least 1988, a period of 23 years. [CP--CABR—Gritzka 65/15-25]. He has no hospital privileges. [CP--CABR—Gritzka 47/19-21]. Unlike the other medical experts, he has been employed for *at least* the last 23 years solely providing forensic examinations for *claimants*. [CP--CABR—Gritzka 11/1-3; 15/14-19]. He performs about 600 to 1000 forensic examinations yearly! [CP--CABR—Gritzka 14/12-25; 15/6-8]. In short, he is a professional forensic examiner for *claimants*. As a result, he has a profound bias. To that end, Ms. Zavala hired him to support her claim. She, with an employee of her counsel, traveled some 220 miles from Pasco, WA, to Milwaukee, OR, to have Dr. Gritzka forensically examine her. [CP--CABR—Gritzka 17/2-3; A. Zavala 72/22-25; 73/10-13]. Presumably, she did so because her treating physician refused to support her claim.

⁶ RCW 51.32.055; WAC 296-20-01002(3) “The department or self-insurer stops payment for health care services once a worker reaches a state of maximum medical improvement. Maximum medical improvement occurs when no fundamental or marked change in an accepted condition can be expected, with or

Three of the four medical experts, including her treating physician, Dr. Kontogianis, rated Ms. Zavala's permanent partial disability as 10 percent of the amputation value of the left leg above the knee joint with short thigh stump (3 inches or below the tuberosity of the ischium). [CP—CABR—Kontogianis 11/9-22; Bays 41/12-20; Iverson 30/14-25; 31/1-2].

The Board, after hearing and reviewing this evidence, reversed the Department order, concluding that the October 30, 2009 Department order was incorrect, and remanded the claim to the Department with directions to issue an order in which it denies responsibility for the conditions described as left knee osteoarthritis and Grade 4 chondromalacia of the left femoral condyle and to close the claim as otherwise set forth on the August 21, 2009 Department order, with time loss compensation benefits paid through April 27, 2008, and with an award of permanent partial disability of 10 percent of the amputation value of the left leg above the knee joint with short thigh stump (3 inches or below the tuberosity of the ischium). [CP—CABR—BIIA D&O Conclusion of Law No.4].

without treatment. Maximum medical improvement may be present though there may be fluctuations in levels of pain and function. A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with the passage of time. Once a worker's condition has reached maximum medical improvement, treatment that results only in temporary or transient changes is not proper and necessary. 'Maximum medical improvement' is equivalent to 'fixed and stable.'"

Ms. Zavala appealed the Board's Decision and Order to Superior Court. In Superior Court, in a bench trial, after extensive briefing and argument (including on Ms. Zavala's Motion for Summary Judgment), the court affirmed the Board's Decision and Order. Ms. Zavala then appealed to this Court. [CP—Court's Decision dated July 24, 2013 and Order and Judgment dated August 27, 2013].

IV. STANDARD OF REVIEW

When the Court of Appeals reviews Superior Court decisions as to issues and conclusions of law, the Court does so *de novo*. *E.g.*, *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001); *Crown, Cork and Seal v. Smith*, 171 Wn.2d 866, 872, 259 P.3d 151 (2011).

When the Court of Appeals reviews Superior Court decisions as to findings of fact, the Court limits its review to determine whether the findings are supported by sufficient or substantial evidence, viewing the record in the light most favorable to the prevailing party in Superior Court. RCW 51.52.140; RCW 4.44.060; *e.g.*, *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575. 343 P.2d 183 (1959); *Benedict v Dep't of Labor & Indus.*, 63 Wn.2d 12, 385 P.2d 380, 381-382 (1963); *Layrite Products Co. v. Degenstein*, 74 Wn. App. 881, 887, 880 P.2d 535 (1994) (Division III). "Substantial evidence" is such evidence that would convince an

unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *E.g., Omeitt v. Dep't of Labor & Indus.*, 21 Wn.2d 684, 686, 152 P.2d 973 (1944); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2006).

V. ARGUMENT

The core of Mr. Zavala's appeal concerns the Superior Court's factual findings. Ms. Zavala contends that, as a matter of law, the Court of Appeals, in reviewing those factual findings, does so *de novo*. [Appellant's Brief at pages 4-5].

This is error. When reviewing the Superior Court's factual findings, this Court limits its review to whether the findings are supported by "substantial evidence," viewing the record in the light most favorable to the prevailing party in Superior Court. [See Respondent's Brief at pages 13-14]. Apparently, Ms. Zavala believes, with justification, that if this Court were to review the Superior Court's factual findings on the proper standard of review, she would not prevail in her appeal.

A. Legal Principles

In part V.A. of Ms. Zavala's Brief, Ms. Zavala states what she considers to be the relevant legal principles governing her appeal. This section of her Brief concerns the so-called "lighting up" principle. In that regard, Ms. Zavala wishes to emphasize the following two points.

1. *Lighting Up Principle*. Ms. Zavala contends that, as a matter of law, if an industrial event proximately causes a quiescent (asymptomatic) infirmity to become active (symptomatic), the resulting disability (symptomatic condition) is considered proximately caused by the industrial event and not by the preexisting infirmity, even if, absent the industrial event, that preexisting infirmity would have later become symptomatic. *E.g., Jacobson v. Dep't of Labor & Indus.*, 37 Wn.2d 444, 448, 224 P.2d 338 (1950).

The self insured employer acknowledges that when preexisting asymptomatic osteoarthritis becomes symptomatic as a result of the industrial event, it is compensable under the Industrial Insurance Act with the following caveat: Either the osteoarthritis may become *temporarily* lit up or it may become *permanently* lit up. *In re Arlen Long*, BIIA Dec., 94 2539 (1996). Whether the preexisting asymptomatic condition is lit up *temporarily* or *permanently* is a question of fact to be resolved through the testimony of qualified medical experts.

In *In re Arlen Long*, a so-called “significant board decision,” the Board of Industrial Appeals held:

The relevant legal holdings in *Miller* and *Fochtman* clarify that the workers' compensation insurer is responsible for disability caused by an industrial injury even if the disability is the product of the industrial injury acting upon a preexisting infirmity. In other words, the insurer is

responsible for the lighting up of a preexisting condition caused by the industrial injury. However, we are not aware of any law which requires the insurer to assume responsibility for the preexisting condition in and of itself. The spondylolisthesis was a preexisting physical condition. Such a preexisting condition may be made symptomatic by subsequent work conditions or injury, but a work related injury may only have a limited or finite effect on the preexisting condition. The effects of a work related injury may not contribute to a further deterioration of the part of body involved. The workers' compensation insurer, here the self-insured employer, is responsible only for the effects of the industrial injury. Factually, it is proper to inquire whether the industrial injury continues to be a cause of a future need for treatment or a cause of further disability. Neither the holdings in *Miller* or *Fochtman*, or any other law of which we are aware, would hold the self-insured employer forever responsible for Mr. Long's preexisting spondylolisthesis simply because Mr. Long's entitlement to particular benefits was once premised upon a lighting up theory.

In re Arlen Long, BIIA Dec. 94 2539 at 6-7.⁷

If the former event occurs—a *temporary* lighting up--then the compensation, in the form of medical treatment and time loss benefits, if

⁷ The BIIA designates and publishes certain decisions as "significant decisions." RCW 51.52.160. It is appropriate for this court to consider the BIIA's interpretation of the laws it is charged with enforcing, in addition to relevant case law. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 183 n.10, 210 P.3d 355 (2009). These decisions are persuasive but not binding authority in the Superior Court or Court of Appeals. See *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 268, 289 P.3d 720 (2012) (Div. I). In *In re Arlen Long*, the Board has stated nothing more than that the issue about what medical condition the self insured employer is responsible is a matter of medical fact.

appropriate, is limited to the period that the osteoarthritis is lit up or symptomatic. *Id.*

If the latter event occurs—a *permanent* lighting up--then the compensation may include, in addition to medical treatment and time loss benefits, an award of permanent partial disability (PPD), if appropriate, or, in the alternative, if appropriate, a pension. If in the latter event, the worker receives an award for permanent partial disability (PPD), that award is not offset against the value of the latent, preexisting pathological condition. *E.g., Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

In this regard, by contrast, if the preexisting pathological condition were symptomatic before the industrial event and became *permanently* “aggravated” as a result of the industrial event, then the value of the preexisting symptomatic pathological condition would be offset against the value of the total permanent impairment as assessed after the industrial event. RCW 51.32.080(5); *e.g., Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 108, 206 P.3d 657 (2009).

Cases Ms. Zavala has cited, such as *Jacobson v. Dep't of Labor & Indus.*, 37 Wn.2d 444, 224 P.2d 338 (1950), do not stand for the legal proposition that if an industrial event proximately causes a quiescent

(asymptomatic) infirmity to become active (symptomatic), the resulting symptomatic condition is considered to be, *as a matter of law, permanent*.

2. *Necessarily Symptomatic*. Ms. Zavala also contends that, *as a matter of law*, a worker may have a preexisting pathological medical condition, such as severe osteoarthritis, without *necessarily* having symptoms or a disability. *Harper v. Dep't of Labor & Indus.*, 46 Wn.2d 404, 405-406, 281 P.2d 859 (1955). [Appellant's Brief V.A.2. at pages 13-15].

This contention is error. It is more appropriate to say that a worker may have a preexisting pathological medical condition, such as severe osteoarthritis, without *necessarily* having symptoms or a disability--not as a matter of law but as a matter of fact. That is, it is a determination of medical fact, as to *each* such pathological condition at issue, established through the opinions of qualified medical experts.

B. Factual Contentions

In part V.B. of Ms. Zavala's Brief, Ms. Zavala states what factual findings this Court should adopt under what she argues should be *de novo* review.⁸ This is the heart of her appeal. She divides this part of her argument into eight somewhat artificial and sprawling subsections. In a nutshell, her argument on the factual issues is as follows:

⁸ As indicated earlier in this Response, this is not the proper standard of review.

PREMISES:

1. She had no left knee symptoms before the industrial event. [Appellant's Brief V.B.1.; AE No. 1 (FF No. 2) & AE No. 3 (FF No. 4)].
2. The industrial event proximately caused left knee symptoms. [Appellant's Brief V.B.6.; AE No. 1 (FF No. 2) & AE No. 3 (FF No. 4)].
3. After medical treatment, she continued to have left knee symptoms. [Appellant's Brief V.B.6.; AE No. 1 (FF No. 2) & AE No. 3 (FF No. 4)].

CONCLUSION:

4. Therefore, she needs further medical treatment or a higher impairment rating. [Appellant's Brief V.C.; AE No. 4 (FF No. 5); AE No. 5 (FF No.6); AE No. 6 (CL No. 2); AE No. 7 (CL No. 3); AE No. 8 (CL No.4)].

The self insured employer will respond to each of these four elements of Ms. Zavala's argument under those four headings.

1. Ms. Zavala argues that, as a matter of fact, Ms. Zavala had no left knee symptoms before the industrial event. [Appellant’s Brief V.B.1.; AE No. 1 (FF No. 2) & AE No. 3 (FF No. 4)].

This factual issue is the clear focus of Ms. Zavala’s argument, the rock upon which the rest of her argument stands. Ms. Zavala divides her argument on this factual issue into two basic components: First is the nature of her evidence and why (as a matter of fact and law) it must be believed. Second is the nature of the self insured employer’s evidence and why (as a matter of fact and law) it must not be believed. In this regard, none of her arguments has merit.

1.1. Ms. Zavala’s Evidence

Ms. Zavala contends that, as a matter of fact, she had no left knee symptoms before the industrial event based on her testimony and the testimony of her five other lay witnesses. [Appellant’s Brief V.B.1.]. She further contends that this Court should review this factual issue *de novo*. But the correct standard of review is whether the Superior Court’s factual findings are supported by sufficient or “substantial evidence,” viewing the record in the light most favorable to the self insured employer.

As the following discussion indicates, these lay witnesses, besides having an obvious bias for Ms. Zavala, had limited observations of her and proffered contradictory or incomplete testimony. And so their testimony

cannot be considered conclusive evidence that Ms Zavala was asymptomatic before the industrial event.⁹

Ana Zavala. Ms. Zavala testified that before the industrial event, she never had any pain, not even in her head. [CP—CABR--A. Zavala 69/17-21; 71/6-12]. She testified that on the day of the industrial event, she was hurriedly cleaning an area when in her words “I hit my knee and ever since then I have not been able to walk.” [CP—CABR--A. Zavala 63/22-25].¹⁰ She further testified that since the industrial event, she has continued to have pain, limiting her daily activities. [CP—CABR--A. Zavala 64/7-12; & 25-26; 65/126; 66/9-15; 69/22-26]. But she testified that she has returned to work. [CP—CABR--A. Zavala 66/13-15; 71/13-14]. She testified that before the industrial event, she worked with one of her lay witnesses, Maria Martinez, in 2005, but that since then, she has hardly seen her. [CP—CABR--A. Zavala 72/13-16; 76/6-14].

⁹ That factual contention—that she was asymptomatic before the industrial event—is also contradicted by most of the medical experts, including Ms. Zavala’s treating physician.

¹⁰ Various medical witnesses provided added detail about the nature of the industrial event. Dr. Gritzka testified that Ms. Zavala reported that she developed left knee pain when, after kneeling and then standing, she bumped her knee hard *apparently* on the undersurface of a tray or large tub called a shaker. [CP--CABR—Gritzka 19/20-25; 20/1-5; 31/3-5]. Dr. Bays testified that Ms. Zavala explained that she developed pain in her left knee when she bumped the front of her left knee against the flat surface of a metal vat. [CP--CABR—Bays 13/20-25; 14/1-3]. She described no twisting of the left knee in this industrial event. *Id.* Dr. Iverson testified that Ms. Zavala reported she had developed pain in her left knee while at work when she had struck her left kneecap against the flat part of the wall of a tub. [CP--CABR—Iverson 11/12-25; 12/14-19].

Irma Mendoza. Ms. Mendoza provided equivocal testimony. She said she was unaware that Ms. Zavala had had an injury. [CP--CABR—Mendoza 12/6-13]. She said that in 2007 (the year of the industrial event), she probably spoke with Ms. Zavala on the telephone a few times. [CP--CABR—Mendoza 13/15]. She said in 2008, she heard from Ms. Zavala that she had slipped and fallen down, injuring her knee, and she had driven Ms. Zavala to her physician a few times before Ms. Zavala's knee surgery. [CP--CABR—Mendoza 13/20 and 25-26]. (Ms. Zavala reported that she injured her knee by bumping it on a metal tub, not by falling down. [CP--CABR—Bays 13/15-25; 14/1-3; Gritzka 19/20-25; 20/1-5]). Ms. Mendoza said that, on those occasions, Ms. Zavala said she had knee pain. [CP—CABR—Mendoza 16/12-13 & 17]. Ms. Mendoza said that in 2009, she spoke with Ms. Zavala on the telephone a couple of times, but did not observe her. [CP--CABR—Mendoza 23/7-9 & 19-23]. She said that in 2010, she spoke with Ms. Zavala a couple of times on the telephone. [CP--CABR—Mendoza 17/22-23]. Ms. Mendoza's testimony is relevant only to two points: (1) she did not know of the industrial event or had false information about it or had information about another injurious event not work-related that injured Ms. Zavala's knee; and (2) that soon before Ms. Zavala's knee surgery, Ms. Zavala complained of knee pain. That, of course, would be expected from a torn meniscus just before surgery.

Florentino Ledesma. Mr. Ledesma testified vaguely and equivocally. He has known Ms. Zavala since he was a child in Mexico. [CP--CABR—Ledesma 28/6]. He apparently was away from her for some time; the record is not clear for what period of time. He saw her February 2007 in Pasco, WA. [CP--CABR—Ledesma 28/12]. At that time, he had no details or recollected observations about Ms. Zavala's physical condition. [CP--CABR—Ledesma 28/24]. He then left the Pasco area, but returned there in August 2007. At that time, he again had no recollected observations about Ms. Zavala's physical condition. [CP--CABR—Ledesma 29/4]. At some point, later, maybe in October 2007, Ms. Zavala told him she had an accident, injuring her knee. [CP--CABR—Ledesma 29/4-7 & 13]. She said she had pain. [CP--CABR—Ledesma 29/29/6-7]. He saw her limping, but cannot remember on which leg. [CP--CABR—Ledesma 30/17-18; 34/26; 35/1-2]. There was no testimony during what particular time frame he saw her limping. Mr. Ledesma's testimony is relevant only to the point that before Ms. Zavala's knee surgery on November 21, 2007, Ms. Zavala complained of knee pain. That, of course, would be expected from a torn meniscus just before surgery.

Josefina Vargas. Ms. Vargas said he knew Ms. Zavala while they both lived in Mexico. [CP--CABR—Vargas—41/18-20]. She said she did not see Ms. Zavala in 2006. [CP--CABR—Vargas—42/10]. She said she

saw Ms. Zavala after twenty years in 2007, beginning in August. [CP--CABR—Vargas—42/14-16; 45/16-20]. In 2007, she was working with Ms. Zavala at Twin City Foods. [CP--CABR—Vargas—42/16; 44/17]. She did not observe Ms. Zavala to have difficulty walking. [CP--CABR—Vargas—43/22-24]. After the accident, she saw Ms. Zavala limping. [CP--CABR—Vargas—43/25-26; 44/10-12]. It is unclear for what period these observations occurred. Ms. Vargas did not identify the date of the accident or the nature of the accident. Ms. Vargas believed that in the accident, Ms. Zavala injured her left foot. [CP--CABR—Vargas—46/11]. (Ms. Zavala said she injured her left knee.) There was no testimony during what particular time frame Ms. Vargas saw Ms. Zavala limping, whether before and/or after Ms. Zavala's surgery in late November 2007.

Maria Martinez. Ms. Martinez testified vaguely and equivocally. She worked with Ms. Zavala from only July to October 2005. [CP--CABR—Martinez 48/12-14]. She said that in 2006, she never observed Ms. Zavala walking. [CP--CABR—Martinez 52/16-18]. She said that sometime after 2007—it is unclear when--she visited Ms. Zavala's home and Ms. Zavala arose from the couch to obtain something to drink. [CP--CABR—Martinez 51/14-16; 52/24-26; 53/1-2]. On doing so, Ms. Martinez said vaguely "I could tell that her knee was hurting." [CP--CABR—Martinez

51/14-16]. She said Ms. Zavala had a limp. [CP--CABR—Martinez 51/17-19]. Yet, when asked as follows, she said as follows:

Q. And am I correct that in 2007 you did not observe Ms. Zavala walk?

A. When she would offer me something to drink. [CP--CABR—Martinez 52/24-26].

From that testimony, it is unclear whether the episode of drink-offering she recounted occurred after 2007 or during 2007. She did not know whether Ms. Zavala had any difficulty walking in July 2007 because she was no longer working with her, and their only contact was by telephone. [CP--CABR—Martinez 53/12-15].

Jose Zavala. Mr. Zavala is Ms. Zavala's son, who lives with her. [CP--CABR—J. Zavala 54/22-26]. He said that before her 2007 injury, his mother had no pain, but after the 2007 injury, she limped. [CP--CABR—J. Zavala 55/9-16]. Mr. Zavala has an obvious bias, and his testimony was surprisingly truncated given his involvement in Ms. Zavala's life.

Ms. Zavala contends that because the self insured employer called no lay witness to contradict the testimony of her proffered lay witnesses, as a matter of law, these six witnesses must be believed unless the Superior Court articulated a reason to disbelieve them. [Appellant's Brief V.B.2 & V.B.3.]. She further contends that, as a matter of fact and law,

the Superior Court did not articulate such a reason. [Appellant's Brief V.B.3. at pages 22-23].

For this contention, Ms. Zavala cites to a series of cases in footnote 23 at page 23 of her Brief. Representative of those cases is *Meeker v. Howard*, 7 Wn. App. 169, 499 P.2d 53 (1972). There the court indicated as follows:

The trial court's fact-finding function and our function are dissimilar. We may not substitute our own findings for those of the trial court if its findings are supported by substantial evidence. *** Questions of witness credibility are peculiarly for the trial court, not for this court. This rule applies even though the testimony of a witness is uncontradicted. However, uncontradicted testimony is not to be arbitrarily disbelieved. There must be a reason for doing so. *** Thus, the uncontradicted testimony of the witness may disclose discrepancies or inconsistencies, or may be inherently improbable. In the case of expert testimony by the owner or other witness, the court may consider the qualifications of the person testifying to be minimal, or may consider the reasons he gives in support of his opinions to be inadequate.

Meeker v. Howard, 7 Wn. App. at 171.

In keeping with that standard, the Superior Court did articulate cogent reasons for disbelieving these six witnesses, as discussed above and below. [CP No. 028—Superior Court's Decision at page 2; Respondent's Response Brief in the Court of Appeals at pages 20-25]. These lay witnesses are not uncontradicted. Not only is their testimony subject to limitations of observation but is also vague and in places

inherently contradictory or contradicted by other evidence, such as the testimony of three medical experts, including Ms. Zavala's treating physician. Therefore, this assignment of error is without merit.

Ms. Zavala contends that by disbelieving the testimony of Ms. Zavala and her five so-called "uncontested" lay witnesses, on the basis that they had limited observations and/or had an obvious bias, the Superior Court has created an arbitrary, capricious and ambiguous evidentiary standard and an impossible burden of proof. That evidentiary standard and/or burden of proof, Ms. Zavala contends, violates her constitutional right to "substantive due process of law." [Appellant's Brief V.B.4.].

This *alleged* violation of due process is arguably more procedural than substantive. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332-335, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976); *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed.2d 323 (1979). Whatever the precise nature of Ms. Zavala's legal contention, her argument is without merit. First, for this contention, Ms. Zavala has failed to cite to any case authority. Second, the Superior Court articulated cogent reasons why it did not believe these six lay witnesses. And so no predicate exists for the alleged constitutional violation. Third, she failed to raise this issue in Superior Court. Fourth, the alleged error is not manifest. RAP 2.5(a)(3). Fifth, Ms. Zavala argues for a rule that disregards basic procedural due process.

That is, she argues for a rule that if a plaintiff is the only witness on his/her behalf and the defendant is unable to find a contradicting lay witness because, for instance, only the plaintiff witnessed the alleged tortious event, then the court must direct a verdict for the plaintiff. In other words, cross examination of the plaintiff is a meaningless process not designed to reveal the plaintiff's bias or his/her ability or opportunity to observe or, given those limitations, his/her power to elicit more convincing testimony.

1.2. The Self Insured Employer's Evidence

Ms. Zavala contends that the self insured employer failed to offer any sufficient evidence that Ms. Zavala's preexisting severe osteoarthritis was symptomatic before the industrial event. [Appellant's Brief V.B.7.]. This contention is without merit.

1.2.1. *Objective Evidence.* In this regard, Ms. Zavala argues that as a matter of law, proof that a pathological medical condition was symptomatic before the industrial event must partly consist of *objective* evidence existing before the industrial event. [Appellant's Brief V.B.7.].

This statement is not the law. The requirement for *objective* medical evidence is relevant in two contexts: (1) aggravation claims under RCW 51.32.160 and (2) claims for permanent partial disability awards (PPD). Neither of these situations is relevant to the issue here—

whether or not the industrial event proximately caused a *permanent* lighting up of an alleged asymptomatic osteoarthritic left knee.

(1) *Aggravation Claims under RCW 51.32.160.*¹¹ Objective medical findings are necessary in the limited context of an “aggravation claim” under RCW 51.32.160. In such a claim, the claimant must establish that the previously allowed injury in a preexisting closed claim has become, since closure, aggravated, and that the aggravation is proved by more than merely subjective complaints of an aggravation—namely, that it is proved in part by objective evidence of an aggravation of that previously allowed injury. Objective findings are those [which are independent of voluntary action and] which can be seen, felt or [consistently] measured by an examining physician. *E.g., Oien v. Dep’t of Labor & Indus.*, 74 Wn. App. 566, 569-570, 874 P.2d 876 (1994); *Favor v. Dep’t of Labor & Indus.*, 53 Wn.2d 698, 704-705, 336 P.2d 382 (1959). Moreover, very importantly, that proof requirement rests with the claimant, not with the self insured employer. *E.g., Moses v. Dep’t of Labor & Indus.*, 44 Wn.2d 404, 517, 281 P.2d 859 (1955). Ms. Zavala’s claim is not an aggravation claim under RCW 51.32.160.

¹¹ The court should be careful to distinguish between (1) an “aggravation” claim under RCW 51.32.160, where the worker is alleging that he/she has aggravated a previously allowed and closed claim, and (2) a contention in a new injury claim where the worker alleges that the industrial event “aggravated” or exacerbated a preexisting *symptomatic* pathological condition (not originally due to an industrial event).

(2) *Claims for PPD.* In claims for awards of permanent partial disability (PPD), the *claimant* (not the self insured employer) must establish that the alleged PPD is based at least in part on objective medical evidence. *E.g., Hyde v. Dep't of Labor & Indus.*, 46 Wn.2d 31, 34-35, 278 P.2d 390 (1955). Ms. Zavala's claim is for additional medical treatment in the form a total knee replacement. On this claim, she needs to prove, through expert medical testimony, that as a proximate result of the industrial event, she needs, as proper and necessary medical treatment, a total knee replacement. To negate her proof, the self insured employer has no duty to do so by *objective* medical evidence (or in the Ms. Zavala's inherently contradictory terminology "objective symptoms")¹².

1.2.2. *Imaging Studies.* Ms. Zavala next argues that the self insured employer relies upon expert medical testimony that is based *solely* on an interpretation of imaging studies of Ms. Zavala's left knee performed after the industrial event. [Appellant's Brief V.B.7.]. In that

¹² Ms. Zavala borrows this imprecise terminology from *Hyde v. Dep't of Labor & Indus.*, 46 Wn.2d 31, 34, 278 P.2d 390 (1955). Symptoms are subjective complaints mediated through the patient's consciousness. For this reason, they are not objective. See WAC 296-20-220(i)—"objective physical or clinical findings are those findings on examination which are independent of voluntary action and can be seen, felt, or consistently measured by examiners." Objective findings, in ordinary cases, are those within the independent knowledge of the doctor, because they are perceptible to persons other than a patient. Subjective complaints are those perceived only by the senses and feelings of a patient. The doctor must be told of them because he cannot himself perceive them." *Hinds v. Johnson*, 55 Wn.2d 325, 327, 347 P.2d 828 (1959).

regard, she asserts that, as a matter of law, a medical opinion that a pathological medical condition was symptomatic before the industrial event, predicated on imaging studies *alone*, is insufficient proof that the pathological medical condition was symptomatic before the industrial event. *E.g., Harper v. Dep't of Labor & Indus.*, 46 Wn.2d 404, 406, 281 P.2d 859 (1955); *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 108, 206 P.3d 657 (2009). [Appellant's Brief V.B.5. & V.B.7.].¹³

In *Harper*, x-rays revealed that the claimant had extensive preexisting degenerative disc disease. The court held that that x-ray finding did not *by itself* establish that the claimant had pre-existing PPD. In that case, the claimant testified that he had no “difficulty, discomfort, or disability” before the industrial event and, in this regard, he was apparently believed. *Harper*, 46 Wn.2d at 406. By contrast, in *Tomlinson*, the claimant “attempted to show that he had no impairment of function in his left knee before his July 21, 1999 industrial injury.” *Tomlinson*, 166 Wn.2d at 109. But in *Tomlinson*, unlike in *Harper*, the claimant was not believed, and so despite his testimony, the medical

¹³ Ms. Zavala in this section of her argument essentially argues that, as a matter of law, because some few people with grade 3 or 4 chondromalacia do not have symptoms, most people with grade 3 or 4 chondromalacia do not have symptoms. In this case, the medical experts testified that most people with grade 3 or 4 chondromalacia in their experience have symptoms.

experts found that based on the degree of osteoarthritis in his knee, he was disabled before the industrial event.

In *Tomlinson*, the Supreme Court noted:

Tomlinson's principal argument is that 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 (Wash. Bd. of Indus. Ins. Appeals Mar. 2, 1999). We emphatically agree that x-ray findings *alone* would be insufficient, but that is not the case before us. The industrial insurance judge concluded that all three physicians who testified, including his treating doctor, agreed that at the time of the industrial injury, Tomlinson's preexisting condition was bone on bone in his weight bearing knee joint. He also found that all three physicians agreed that he had a preexisting 50 percent PPD. In addition, the industrial appeals judge heard Tomlinson's own testimony, which the judge found evasive. He showed "lack of candor" about his past medical treatment and did not remember injuring his knee and discussing the possible need for a bilateral total knee replacement seven years before his industrial injury. *** In short, Tomlinson's own testimony supported the conclusion that he had loss of function before his 1999 industrial injury. We find there was substantial evidence to support the finding of a preexisting PPD. [Emphasis added.]

Tomlinson, 166 Wn.2d at 118-119.¹⁴

In this dispute, the Superior Court had "substantial evidence" to support its finding of fact that Ms. Zavala's left knee was symptomatic

¹⁴ *Tomlinson* involves the issue of preexisting PPD, not the issue presented here whether the industrial event proximately caused a *permanent* lighting up or *permanent* aggravation of Ms. Zavala's pre-existing degenerative joint disease, requiring treatment in the form of a total knee replacement.

before the industrial event. Three of the four medical experts--Drs. Kontogianis, Iverson and Bays--concluded that her left knee was, more probably than not, symptomatic before the industrial event. Dr. Kontogianis, the treating surgeon, who is entitled to *special consideration*,¹⁵ testified that he found a significant degree of preexisting left knee osteoarthritis, near grade 4 chondromalacia, in Ms. Zavala's left knee. [CP--CABR—Kontogianis 6/8-25; 7/3-4]. He said that given that degree of preexisting left knee osteoarthritis, more probably than not, based on his *clinical experience*, she had symptoms before September 17, 2007. [CP--CABR—Kontogianis 10/5-14; 12/2-4; 14/6-12]. He said further that he has never found a patient with grade 4 chondromalacia in the knee that was asymptomatic. [CP--CABR—Kontogianis 14/10-12].

As he testified:

Q. Based on the surgery you did in November 2007, would someone with those type of degenerative findings have what we term a symptomatic knee prior to her September industrial injury?

A. Most likely.

Q. And why is that?

A. Why would somebody have symptoms from having severe degenerative arthritis of the knee?

Q. Yeah.

A. Because it hurts. [CP--CABR—Kontogianis 10/5-14].

¹⁵ The Superior Court should accord the testimony of the attending/treating physician with "special consideration." *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 129, 186 P.2d 76 (1947).

Dr. Iverson testified that, given the medical evidence from his medical examination, Ms. Zavala probably did not provide a reliable history. [CP--CABR—Iverson 22/19-25; 23/1; 39/15-20]. He believed, more probably than not, that given Ms. Zavala’s extensive preexisting osteoarthritis, her left knee hurt before the industrial event. [CP--CABR—Iverson 22/19-25; 23/1-25; 25/8-25; 26/1-8; 36/10-16 & 22-25; 37/1-16; 39/15-20].

Dr. Bays testified that given the Ms. Zavala’s extensive and severe preexisting osteoarthritis, he believed, more probably than not, that her left knee hurt before the industrial event. [CP--CABR—Bays 40/3-25].

On this issue, Dr. Gritzka, Ms. Zavala’s forensic and only medical expert, provided equivocal testimony. At one point he said that *commonly* people with significant osteoarthritis have no symptoms. [CP--CABR—Gritzka 31/18-25; 33/6-17; 35/7-17]. But at another point he said that, with grade 4 chondromalacia, *most* people will have symptoms. [CP--CABR—Gritzka 51/12-21]. As he testified:

Q. Once a person has a Grade 3 or Grade 4 chondromalacia of the knee, you would expect them to have symptoms on a more-probable-than-not basis; correct?

A. Well, certainly the Grade 4, but on the other hand, this is pretty variable situation, but if a person has Grade 4, that means they virtually already have bone-on-bone contact, where Grade 5 means there is not cartilage there at all. Most of those people are symptomatic but not necessarily all. [CP--CABR—Gritzka 51/12-21].

He also said that with grade 3 chondromalacia, a person may or may not have symptoms. [CP--CABR—Gritzka 51/12-21]. Yet he then said that most people with grade 3 chondromalacia will have symptoms. [CP--CABR—Gritzka 57/12-25; 58/1-2; 68/20-23; 69/1-2].

From this evidence, the Superior Court clearly had “substantial evidence” to support its finding of fact that the Ms. Zavala’s left knee was symptomatic before the industrial event.

Moreover, Ms. Zavala’s credibility was at issue. And that is why, despite Ms. Zavala’s assertion to the contrary, the evidence that she had a torn medial collateral ligament in her left knee before the industrial event is indeed relevant. [Appellant’s Brief V.B.8.]. She said that before the industrial event, she had absolutely no problems with her left knee. [CP--CABR—A. Zavala 69/17-19].

As she testified:

Q. Before the accident did you ever have pain in your legs or knees?

A. Nothing ever hurt, not even my head. [CABR—A. Zavala 69/17-19].

But Dr. Iverson and even Dr. Gritzka, Ms. Zavala’s own forensic medical expert, found that her medial collateral ligament in her left knee was torn from her tibia by a violent trauma before the industrial event and that she had a tibial bone contusion in her left leg before the industrial

event that could not have occurred absent violent trauma. [CP--CABR—Gritzka 38/18-25; 39/1-7; 21/6-7; 37/11-20; Iverson 25/2-15; 27/17-25; 28/1-13; 47/14-25; 48/1-19]. This testimony of Drs. Gritzka and Iverson contradicts Ms. Zavala’s testimony that she had no pain in her leg or knee before the industrial event. She was considered an unreliable historian.

That is, the self insured employer here had more than just the imaging studies to establish that Ms. Zavala had symptoms in her left knee before the industrial event. Overall, the self insured employer had the following evidence:

(1) The imaging studies and arthroscopic observation of Ms. Zavala’s left knee shortly after the industrial event; and

(2) Medical experts, including Ms. Zavala’s treating physician, who testified that based on their *clinical experience*, with the degree of osteoarthritis found in Ms. Zavala’s knees, Ms. Zavala more probably than not had symptoms there before the industrial event; and

(3) Medical experts, including Ms. Zavala’s own medical expert Dr. Gritzka, who testified that Ms. Zavala’s medial collateral ligament in her left knee was torn from the tibia by a violent trauma before the industrial event, a fact that contradicts Ms. Zavala’s own testimony that she had no injury before the industrial event; and

(4) Medical experts, including Ms. Zavala's own medical expert Dr. Gritzka, who testified that Ms. Zavala had a tibial bone contusion in her left leg before the industrial event that would have occurred from a violent trauma unrelated to the industrial event; and

(5) Medical experts who testified that Ms. Zavala was not a reliable historian based on her medical history and the way she presented herself during examination. [CP--CABR—Bays 18/17-20; 19/1-14; 26/4-25; 27/1-7; 28/19-25; 29/1-6; 42/12-17; 43/14-16; Iverson 16-21; 17/13-25; 18/3-18; 26/20-25; 27/4-21; 38/9-11; Gritzka 56/1-11 & 15-25; 70/23-25; 71/1-8; 75/16-25; 76/1-4].

So, in summary, the evidence should be evaluated not only in the context of the medical probabilities but also in light of Ms. Zavala's credibility. In that light, the medical experts, in reaching their opinions, need not accept Ms. Zavala's history or testimony at face value. They may consider the totality of circumstances in determining whether she has provided an accurate history of her symptoms both before and after the industrial event. *See Tomlinson*, 166 Wn.2d at 109 & 114-115. Based on the totality of circumstances, the Superior Court had "substantial evidence" to support its factual finding that Ms. Zavala has not provided an accurate medical history—that is, on a more than probable than not basis her preexisting osteoarthritis was symptomatic before the industrial

event. On that score, the self insured employer's evidence is not, as a matter of law, infirm and Ms. Zavala's evidence is not, a matter of law, unassailably true. From this evidence, it is abundantly clear that the Superior Court's finding of fact that the industrial event did not light up the Ms. Zavala's preexisting osteoarthritis is supported by "substantial evidence".

1.2.3. The *Austin* Case. Ms. Zavala contends that the case of *Austin v. Dep't of Labor & Indus.*, 6 Wn. App. 394, 492 P.2d 1383 (1971) (Division III), cited by the Superior Court to supports its decision, is distinguishable. In *Austin*, objective evidence indicated that the worker's preexisting medical condition was symptomatic before the industrial event. [Appellant's Brief V.B.5. & V.B.7.]. The Superior Court did not interpret *Austin* otherwise. The Superior Court, in reaching its decision, determined that that "Ms. Zavala did not establish that her condition was latent, quiescent or asymptomatic before the workplace event/industrial injury." [CP No. 028—Superior Court's Decision at page 2].

The evidence in *Austin* is similar to the evidence in this case. In *Austin*, based on that evidence, the Court of Appeals concluded that the claimant had not proven that his preexisting condition was quiescent, and therefore was not entitled to a lighting up jury instruction. *Austin*, 6 Wn. App. at 396. In *Austin*, the claimant had preexisting ankylosing

spondylitis. He testified that before the industrial event he could carry on his work, lifting 100-pound bags. He admitted that before the accident, he had occasional back and muscle stiffness; that he lost one or two days' work on an earlier occasion; and a couple of days in bed at home would straighten him out. *Austin*, 6 Wn. App. at 396-97. His manager noted that before the accident, claimant's gait was very stiff. But he said that since the injury, the claimant has been able to work.

The claimant relied upon the testimony of two medical experts: Drs. Burroughs and Grieve. After considering their testimony, the court concluded that neither testified that the preexisting condition was latent before the injury or that the injury "lighted up" a latent condition. *Austin*, 6 Wn. App. at 397-99.

Although Dr. Burroughs did not state the preexisting condition was latent, he did testify that the industrial event triggered a sustained exacerbation of claimant's chronic preexisting ankylosing spondylitis. When asked to assume there were complaints of aches, pains and stiffness in claimant's back and joints before the injury, he testified this would indicate the condition was symptomatic before 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. *Austin*, 6 Wn. App. at 397-98.

Dr. Grieve testified that ankylosing arthritis develops without trauma and is naturally progressive independent of intervening events. He said the arthritic condition existed before the injury; the injury aggravated it, and caused the condition to become temporarily symptomatic. In his opinion, the claimant's present symptoms were due to the underlying preexisting condition unrelated to the injury. *Austin*, 6 Wn. App. at 398-99.

Arguably, Dr. Burroughs' testimony conflicts with Dr. Grieve's testimony. Dr. Grieve testified that although the condition was preexisting, the industrial event caused the condition to become only *temporarily* symptomatic. Dr. Burroughs testified that, assuming the claimant had testified that he had stiffness and pains in getting up and getting around primarily in the joints, and stiffness from hard work or muscle strain (as he did), then the claimant's preexisting condition was symptomatic before the industrial event. In any case, clearly, the evidence did not support the contention that the industrial event *permanently* lit up the preexisting condition.

In the case at hand, contrary to Ms. Zavala's contention, the Superior Court did not rely, in reaching its decision, upon *Austin* for the principle that "the preexisting condition is not lit up if the weight of evidence reveals that the condition was a naturally progressing condition

that would have progressed to symptoms without the injury.” [Appellant’s Brief V.B.5. at pages 27-30]. Rather, the Superior Court relied upon *Austin* for the principle that “a preexisting condition is not lit up if the weight of the evidence reveals ... that the condition was symptomatic before the workplace event... .” [CP No. 028—Superior Court’s Decision at page 2]; *Austin*, 6 Wn. App. at 397-398. It concluded that “Ms. Zavala did not establish that her condition was latent, quiescent or asymptomatic before the workplace event/industrial injury.” [CP No. 028—Superior Court’s Decision at page 2]. As indicated earlier, “substantial evidence” supports the Superior Court’s findings of fact.

2. Ms. Zavala contends that the industrial event proximately caused Ms. Zavala’s left knee symptoms. [Appellant’s Brief V.B.6.; AE No. 1 (FF No. 2) & AE No. 3 (FF No. 4)].

Ms. Zavala says that, while at work, she struck her left knee on a shaker tub machine. Ms. Zavala says that, afterwards, before she had treatment, she had pain in her left knee. [Appellant’s Brief V.B.6.]. Although Dr. Bays believed that the nature of the described industrial event was insufficient to cause an injury to Ms. Zavala’s knee, the claim was administratively allowed for a meniscal injury, a pain producing condition. [CP--CABR—Bays 33/23-25; 34/1-17].

3. Ms. Zavala contends that after medical treatment, she continued to have left knee symptoms. [Appellant’s Brief V.B.6.; AE No. 1 (FF No. 2) & AE No. 3 (FF No. 4)].

Ms. Zavala contends that, as a matter of fact, after her left knee surgery, she continued to have left knee pain. [Appellant’s Brief V.B.6.]. She further contends that, therefore, *as a matter of law*, the industrial event *permanently* lit up the asymptomatic osteoarthritis in Ms. Zavala’s left knee. [Appellant’s Brief V.A. at pages10-11 & V.C. at page 47]. This contention is without merit. Ms. Zavala further contends that this Court should review this factual issue *de novo*. But this contention too is without merit. As discussed, the correct standard of review is whether the Superior Court’s factual findings are supported by sufficient or “substantial evidence,” viewing the record in the light most favorable to the self insured employer.

Whether or not the industrial event *permanently* lit up the asymptomatic osteoarthritis in Ms. Zavala’s left knee is a question of fact, not of law. Moreover, whether or not the osteoarthritic left knee was asymptomatic before the industrial event, the preponderance of medical testimony established that the industrial event affected that preexisting left knee osteoarthritis only *temporarily*. By August 21, 2009, Ms. Zavala, by the preponderance of medical evidence, had reached maximum medical

improvement (was fixed and stable) so that her claim could be and was closed.

Drs. Kontogianis, Iverson and Bays have testified, to a reasonable degree of medical probability, that the industrial event did not permanently aggravate Ms. Zavala's left knee osteoarthritis. [CP—CABR—Kontogianis 7/7-19; 9/13-17; Bays 39/18-25; Iverson 28/16-25; 29/1-2; 46/13-16]. Dr. Kontogianis, Ms. Zavala's treating physician, testified that the industrial event proximately caused the medial meniscal tear and only *temporarily* aggravated the preexisting near grade 4 chondromalacia [CP--CABR—Kontogianis 7/7-19; 9/13-17]. As he testified:

Q. With the degenerative arthritis as being pre-existing the industrial injury of September 2007, did that injury permanently or temporarily aggravate her arthritic condition?

A. I would say temporarily. [CP--CABR—Kontogianis 9/13-17].

Dr. Bays testified that the industrial event only *temporarily* aggravated her preexisting osteoarthritis. [CP--CABR—Bays 39/18-25]. Similarly, Dr. Iverson testified that the industrial event only *temporarily* aggravated her preexisting osteoarthritis. [CP--CABR—Iverson 28/16-25; 29/1-2; 46/13-16]. Only Dr. Gritzka testified the industrial event permanently aggravated Ms. Zavala's preexisting osteoarthritis. [CP--CABR—Gritzka 45/6-10; 47/1-8].

From this evidence, it is abundantly clear that the Superior Court had “substantial evidence” to support a factual finding that the industrial event only temporarily aggravated Ms. Zavala’s preexisting osteoarthritis.

4. Ms. Zavala concludes that, therefore, she needs either further medical treatment or a higher impairment rating. [Appellant’s Brief V.C.; AE No. 4 (FF No. 5); AE No. 5 (FF No.6); AE No. 6 (CL No. 2); AE No. 7 (CL No. 3); AE No. 8 (CL No.4)].

Ms. Zavala contends that, as a matter of law, because the industrial event proximately caused her preexisting asymptomatic osteoarthritis in her left knee to become, as a matter of law, *permanently* symptomatic, this Court must order, as a matter of law, the self insured employer either to authorize a total knee replacement or, if Ms. Zavala is medically fixed and stable, to award Ms. Zavala benefits for a permanent partial disability for a 50% impairment of her left lower extremity. [Appellant’s Brief V.C.].

This contention is without merit. First, it assumes facts which are untrue. That is, Ms. Zavala’s left knee osteoarthritis was not asymptomatic before the industrial event and the industrial event did not permanently light up or aggravate that osteoarthritis. Second, it assumes a law that is untrue. Ms. Zavala errs in contending that the “lighting up rule” is such that if her osteoarthritis were asymptomatic before the industrial event and symptomatic afterwards, then, *as a matter of law*, she is *permanently* disabled, and entitled to whatever medical treatment she wants.

It is an issue of medical fact whether the lighting up, if it occurred, is temporary or permanent. [See the discussion in Respondent’s Brief at pages 15-17]. The preponderance of medical evidence here is that the preexisting osteoarthritis was symptomatic before the industrial event and that the industrial event merely *temporarily* exacerbated Ms. Zavala’s preexisting osteoarthritic symptoms. In other words, the Superior Court had substantial evidence to so find.

Ms. Zavala errs in contending that if her osteoarthritis were symptomatic before the industrial event and those symptoms were exacerbated afterwards, then *as a matter of law* she is *permanently* injured, permanently disabled, and entitled to whatever medical treatment she wants. It is an issue of medical fact whether the exacerbation is temporary or permanent. The preponderance of medical evidence here is that the industrial event merely *temporarily* exacerbated Ms. Zavala’s preexisting osteoarthritis. [CP—CABR—Kontogianis 7/7-19; 9/13-17; Bays 39/18-25; Iverson 28/16-25; 29/1-2; 46/13-16].

4.1. *Fixed and Stable.* Ms. Zavala contends that, as a matter of fact, her left knee is not medically fixed and stable in that it needs to be surgically replaced. This contention is without merit. The Superior Court had “substantial evidence” upon which to conclude that the industrial event did not proximately cause a medical need to replace Ms. Zavala’s

left knee. That is, the Superior Court had “substantial evidence” upon which to conclude that the industrial event only proximately caused a temporary, not a permanent, exacerbation of the preexisting symptomatic osteoarthritis in Ms. Zavala’s left knee.

Drs. Kontogianis, Iverson, and Bays testified, to a reasonable degree of medical probability, that as to conditions caused by the industrial event, Ms. Zavala needed no further medical treatment. Drs. Kontogianis testified, to a reasonable degree of medical probability, that the industrial event caused a tear the medial meniscus in the left knee. [CP--CABR—Kontogianis 7/10-17]. That tear was surgically repaired. Dr. Kontogianis opined that, as a result of the industrial event, after that surgery, Ms. Zavala needed no further medical treatment. [CP—CABR—Kontogianis 11/18-22].¹⁶

In this regard, Ms. Zavala contends that, as a matter of fact, she was not medically fixed and stable because Dr. Kontagianis could only testify that she was *mostly* medically fixed and stable. *Matela v. Dep’t of Labor & Indus.*, 174 Wn. 144, 24 P.2d 429 (1933). [Appellant’s Brief V.C. at pages 47-48]. This contention is without merit. Dr. Kontagianis

¹⁶ Although Dr. Kontogianis said that Ms. Zavala needs to replace her left knee, he concluded that the industrial event did not cause the need for that proposed knee replacement. [CP--CABR—Kontogianis 19/16-20].

testified that on March 14, 2008, he thought she was mostly fixed and stable. [CP—CABR—Kontogianis 8/3-20]. He then testified that while he was treating Ms. Zavala, the temporary aggravation of her preexisting symptomatic osteoarthritis became fixed and stable. [CP—CABR—Kontogianis 9/13-20]. He further testified that on June 4, 2009, more than a year after March 14, 2008, he reviewed the report of Dr. Bays' April 17, 2009 independent medical examination and agreed with Dr. Bays' conclusion that Ms. Zavala needed no further intervention for her industrial condition as well as with Dr. Bay's rating of permanent partial impairment (PPD). [CP—CABR—Kontogianis 11/9-22; Bays 42/4-11]. So, contrary to Ms. Zavala's contention, Dr. Kontogianis concluded that Ms. Zavala was fixed and stable by at least April 17, 2009.

Dr. Bays said that Ms. Zavala needs no further treatment for her torn medial meniscus. He also said that Ms. Zavala does not need to replace her left knee. He further said she would not benefit from such surgery. [CP--CABR—Bays 42-43]. Dr. Iverson said that Ms. Zavala needs no further treatment for her torn medial meniscus. [CP--CABR—Iverson 29/15-23]. He said that if she does need to replace her left knee, that knee replacement would not be due to the industrial event. [CP--CABR—Iverson 31/3-15]. Dr. Gritzka, Ms. Zavala's forensic expert, says that Ms. Zavala needs to replace her left knee. But surprisingly he fails to

say that the industrial event caused the need to replace her left knee. [CP--CABR—Gritzka 44/18-24]. Dr. Gritzka’s testimony is insufficient to establish specific causation. He needed to testify that *to a reasonable degree of medical probability, the industrial event medically caused the need for claimant to replace her left knee*. But he did not say that.

4.2. *Impairment Rating*. Ms. Zavala further contends that, if, as a matter of fact, she is fixed and stable, then, as a matter of fact, she should be rated with a permanent impairment of 50% of her left lower extremity. Only Ms. Zavala’s forensic medical expert, Dr. Gritzka, so testified. Ms. Zavala argues that only his testimony should be considered because only he concluded that the industrial event *permanently* lit up Ms. Zavala’s allegedly asymptomatic preexisting osteoarthritis. [CP—CABR—Gritzka 46; 69].

This contention is without merit. The Superior Court had “substantial evidence” upon which to conclude that, as a result of the industrial event, Ms. Zavala sustained a permanent partial disability, described as 10 percent of the amputation value of the left leg above the knee joint with short thigh stump (three inches or below the tuberosity of the ischium).

Drs. Kontogianis, Bays and Iverson concluded, to a reasonable degree of medical probability, that once Ms. Zavala became fixed and stable,

she sustained a permanent partial disability, owing to her meniscal tear, described as 10 percent of the amputation value of the left leg above the knee joint with short thigh stump (3 inches or below the tuberosity of the ischium). [CP—CABR—Kontogianis 11/9-22; Bays 41/12-20; Iverson 30/14-25; 31/1-2].

VI. CONCLUSION

For the preceding reasons, Twin City Foods, Inc. respectfully requests that this Court affirm the Superior Court's judgment affirming the decision of the Board of Industrial Insurance reversing the order of the Department of Labor and Industries.

Respectfully submitted this 12th day of May 2014.

Wallace, Klor & Mann, P.C.



William A. Masters, WSBA No. 13958
Schuyler T. Wallace, Jr. WSBA No. 15043
Attorneys for Respondent Twin City Foods, Inc.
5800 Meadows Road, Suite 220
Lake Oswego, OR 97035
Phone: (503) 224-8949
bmasters@wallaceklormann.com

1 CERTIFICATE OF SERVICE

2 I hereby certify, under penalty of perjury, that I mailed an original and copies of the document
3 listed beneath to the following parties referenced below by depositing it in the United State Post
4 Office in Lake Oswego, Oregon on today's date, in a sealed envelope, postage prepaid, first class
5 mail to:

6
7 Court of Appeals No.: 318541
8 Respondent: Twin City Foods, Inc.
9 Document: **BRIEF OF RESPONDENT**

10 Renee S. Townsley, Clerk/Administrator
11 The Court of Appeals of the
12 State of Washington – Division III
13 500 N. Cedar Street
14 Spokane, WA 99201

15 Scott Rogers
16 Norma Rodriguez
17 Rodriguez and Associates
18 7502 W. Deschutes Place
19 Kennewick, WA 99336

Cindi Hatch (*via email*)
Twin City Foods, Inc.
P.O. Box 1326
Pasco, WA 99301

20 Julie Anderson (*via email and U.S. mail*)
21 Matrix Absence Management
22 P.O. Box 779005
23 Rocklin, CA 95677

24 DATED: May 12th, 2014.

25 WALLACE, KLOR & MANN, P.C.

26 

Schuyler T. Wallace, Jr., WSBA No. 15043
William A. Masters, WSBA No. 13958
Attorneys for Respondent Twin City Foods, Inc.