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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 33350-7

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

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**M.A. MORTENSON COMPANY,  
Appellant**

**v.**

**KURT FOWLER, LYDIG CONSTRUCTION, INC., AND THE  
DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE  
OF WASHINGTON,  
Respondents.**

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**RESPONDENT KURT FOWLER'S BRIEF**

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## TABLE OF AUTHORITIES

THE FOLLOWING AUTHORITIES, STATUTES AND RULES ARE NOT CITED IN RESPONDENT KURT FOWLER'S BRIEF BUT THEY ARE ADOPTED AS STATED IN THE BRIEF OF RESPONDENT LYDIG CONSTRUCTION.

### Cases

- Abraham v. Dep't of Labor & Indus.*,  
178 Wash. 160, 162, 34 P.2d 457 (1934)
- Allison v. Dep't of Labor & Indus.*,  
66 Wn.2d 263, 268, 401 P.2d 982 (1965)
- Cyr v. Dep't of Labor & Indus.*,  
47 Wn.2d 92, 96, 286 P.2d 1038 (1955)
- Dana's Housekeeping v Department of Labor and Indus.*,  
76 Wash.App. 600, 605, 886 P.2d 1147 (1995)  
rev.den'd 127Wn.2d 1007, 898 P.2d 307 (1995)
- Dayton v. Dep't of Labor & Indus.*,  
45 Wn.2d 797, 278 P.2d (1954)
- Ehman v. Dep't of Labor & Indus.*,  
33 Wn.2d 584, 595, 206 P.2d 787 (1949)
- Elterich v. Arndt*,  
175 Wash. 562, 574 27 P.2d 1102 (1933)
- Harbor Plywood Corp. v. Dep't of Labor & Indus.*,  
48 Wn.2d 553, 295 P.2d 310 (1956)
- Joy v. Dep't of labor & Indus.*,  
285 P.3d 187, 189 (2012)
- Kallos v. Department of Labor & Indus.*,  
46 Wn.2d 26, 30, 278 P.2d 393 (1955)

*In re Kenneth Keierleber*,  
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*Kingery v. Dep't of Labor & Indus.*,  
132 Wn.2d 162, 171, 937 P.2d 565 (1997)

*Lenk v. Dep't of Labor & Indus.*,  
3 Wn.App. 977, 982, 985, 478 P.2d 761 (1970)

*Longview Fibre Co. V. Weimer*,  
95 Wn.2d 583, 628 P.2d 456 (1981)

*Radford v. City of Hoquiam*,  
54 Wn.App. 351, 355, 773 P.2d 861 (1989)

*Romo V. Department of Labor and Indus.*,  
92 Wn.App.348, 162 P.2d 844 1988)

*Rose v. Dep't of Labor & Indus.*,  
57 Wn.App. 751, 756, 790 P.2d 201 (1990)

*Ruse v. Dep't of Labor & Indus.*,  
138 Wn.2d 1, 5, 977 P.2d 570 (1999)

*Sepich v. Dep't of Labor 7 Indus.*,  
75 Wn.2d 312, 216, 450 P.2d 940 (1969)

*Shea V Dep't of Labor 7 Indus.*,  
12 Wn.App. 410, 529 P.2d 1131 (1974)

*Shufeldt v. Dept of Labor & Indus.*,  
57 Wn.2d 758, 760, 359 P.2d 495 (1961)

*State v Taylor*,  
150 Wn.2d 599, 608, 890 P.3d 605 (2003)

*Wendt v. Dep't of Labor & Indus.*,  
18 Wn.App. 674, 571 P.2d 229 (1977)

**Statutes**

RCW 51.04.010  
RCW 51.08.100  
RCW 51.08.178  
RCW 51.32.080  
RCW 51.32.160  
RCW 51.52.050  
RCW 51.52.060  
RCW 51.52.110  
RCW 51.52.115  
RCW 51.52.140  
WAC 296-14-420

**Rules**

CR 35  
CR 50  
CR 59(a)(1), (7), (8)  
RAP 3.1  
RAP 3.3

## **I. COUNTERSTATEMENT OF THE FACTS**

RESPONDENT KURT FOWLER ADOPTS THE COUNTER-STATEMENT OF THE ISSUES (FACTS) AS STATED IN THE BRIEF OF RESPONDENT LYDIG CONSTRUCTION.

## **II. STATEMENT OF THE CASE**

RESPONDENT KURT FOWLER ADOPTS THE STATEMENT OF THE CASE SUBMITTED IN THE BRIEF OF RESPONDENT LYDIG CONSTRUCTION (INCLUDING PROCEDURAL HISTORY AND FACTUAL HISTORY) WITH THE FOLLOWING ADDITIONS:

### **A. ADDITIONAL FACTS OF THE CASE.**

Appellant submitted medical testimony from three doctors to support its position that there was no industrial injury on the date of August 3, 2011. The three testifying doctors were Dr. Lance Brigham, Dr. William Dinenberg, and Dr. James Schwartz.

- 1. Dr. Brigham, who never examined or even saw Mr. Fowler, provided testimony that an injury took place. He did Not Support Appellant's Position.**

Dr. Brigham testified via deposition on November 27, 2012. His testimony squarely supported the contention that there was an injury on August 3, 2011. His Direct Examination was a mere 13 pages long (see CABR, Brigham, pages 1-13)<sup>1</sup>.

- Dr. Brigham stated upon questioning that “The injury of 2/19/2008 was a twisting injury and (sic) uneven ground carrying a four by ten piece of plywood. The second injury (note: the 8/3/2011 injury) by the physician’s initial injury report was just bending down to use a drill. (CABR, Dr. Brigham, , p.8).
- Dr. Brigham was asked about Mr. Fowler’s change in symptoms after the August 3, 2011 injury, and why there was a change in symptoms, he replied, “well, that’s a hard to say. I mean, I’m just – that’s what he said it hurt. Been not a common mechanism of injury.” (CABR, Dr. Brigham, p. 10).
- Dr. Brigham admitted he had never spoken to, seen, or examined Mr. Fowler. (CABR, Dr. Brigham, p. 14).
- Dr. Brigham was asked point blank if there was an industrial injury on August 3, 2011 and he answered “**yes**” (emphasis added). (CABR, Dr. Brigham, p. 18).

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<sup>1</sup>This brief refers to the testimony taken at the Board of Industrial Insurance Appeals which is located in the Certified Appeal Board Record (CABR) by the surname of the witness followed by the page number of the hearing or deposition transcript.

- Dr. Brigham also reported that the symptoms, per the records he reviewed, were worse after the August 3, 2011 injury. (CABR, Dr. Brigham, p. 18).

Now, there is some testimony by Dr. Brigham that can cloud the ultimate issue. For instance, he states that he didn't think the movement made by Respondent Fowler was the type that would ordinarily cause an injury. (CABR, Dr. Brigham, p. 9), but that is not relevant to the ultimate issue. Dr. Brigham also stated that the type of motion made by Mr. Fowler to produce this injury was common to daily living. (CABR, Dr. Brigham, p. 11).

However, there is no requirement in Labor and Industries law that a movement, or motion be atypical to be considered something that would cause an industrial injury. Dr. Brigham also stated that the MRI itself didn't indicate a new injury. (CABR, Dr. Brigham, p. 25). Again, this is just not a necessary element under the law. An industrial injury does not need to be proven via MRI or any other imaging study.

Overall, Dr. Brigham supplies no evidence that could lead a jury, if full weight is given to him, that an industrial injury did not occur on August 3, 2011.

**2. Dr. Dinenberg's testimony also confirmed that an industrial injury occurred on August 3, 2011.**

Dr. Dinenberg's deposition also took place on November 27, 2012. These depositions are not that long, his direct testimony started at page 5 and ended at page 23.

Dr. Dinenberg cemented, with his testimony, that an injury took place on August 3, 2011:

- Dr. Dinenberg stated his diagnosis was "Aggravation of medial meniscus tear of right knee." (CABR, Dr. Dinenberg, p. 18).
- Dr. Dinenberg also was then asked in the very next question if such diagnosis was in terms of a reasonable medical probability. He responded, "Yes. I thought that was related to the work injury of 3 August 2011 on a more-probable-than-not basis." (CABR, Dr. Dinenberg, p. 18). (emphasis added).

- Dr. Dinenberg stated, upon cross-examination, that were it not for the August 3, 2011 injury, the Respondent Mr. Fowler would not be quite as strong of a candidate for surgery as he would be without such injury by stating “I think that’s what aggravated his meniscal tear”. (CABR, Dr. Dinenberg, p 25).

Now, again, there is some cloudiness in of the record, with questions and answers that don’t directly impact the main issue we have here – did an industrial injury occur? Dr. Dinenberg stated that the MRI’s before the August 3, 2011 injury and after look similar. (CABR, Dr. Dinenberg, p 18). However – that just doesn’t weigh in on the ultimate question. Dr. Dinenberg also stated that the images didn’t really indicate a need for treatment (CABR, Dr. Dinenberg, p 20). Again – that’s not necessary at all to prove an industrial injury.

In conclusion, Dr. Dinenberg, like Dr. Brigham, made it clear that an injury occurred on August 3, 2011.

**3. Dr. Schwartz' testimony proves that an industrial injury occurred and cannot be refuted.**

Dr. Schwartz, like the other two doctors mentioned in this brief, testified on November 27, 2012, and also provided limited testimony. His direct examination lasted from page 5 to page 18.

Dr. Schwartz also confirms that an industrial injury took place on August 3, 2011.

Dr. Schwartz testified:

- “I saw him for an injury that’s dated from August 3<sup>rd</sup>, 2011, he knelt down, twisted on the knee he was kneeling on, and he had acute pain in his knee.” (CABR, Dr. Schwartz, p. 58).
- Dr. Schwartz stated, when asked what his diagnosis was for Mr. Fowler’s knee as of the date he examined Mr. Fowler on October 20, 2011: “I thought he had a meniscal tear and a medial collateral ligament strain related to the August 3<sup>rd</sup>, 2011, date of injury.” (CABR, Dr. Schwartz, p. ).
- Upon cross-examination, Dr. Schwartz was asked if he would agree that Mr. Fowler did, in fact, sustain an industrial injury on August 3, 2011 while working for

Mortenson. Dr. Schwartz' one word reply was "yes".

(CABR, Dr. Schwartz, p. 25).

At this point, these are the witnesses relied upon by Appellant to prove that an industrial injury DIDN'T take place. They have all three stated that an industrial injury took place. There is no medical evidence that counters what these three doctors have said (and we haven't even quoted the doctors called by Respondent Fowler or Respondent Lydig).

### **III. ARGUMENT**

RESPONDENT KURT FOWLER ADOPTS THE ARGUMENT AS STATED IN THE BRIEF [ARGUMENTS A THROUGH F] OF RESPONDENT LYDIG CONSTRUCTION WITH THE ADDITIONS BELOW.

**G. The Medical Evidence Submitted By The Appellant Was Convincing Only In Proving That An Industrial Injury Took Place On August 3, 2011, And The Only Conclusion That Can Be Reached Is That Such An Injury Took Place That Day.**

The three physicians critical to this appeal: Dr. Brigham, Dr. Dinenberg and Dr. Schwartz may not agree as to what type of treatment is necessary for Respondent Fowler, or what level of damage was done to his knee by the August 3, 2011 incident, or whether this is a natural or expected movement that would likely cause such injury.

However, they all agree to the most pivotal question in this case: an industrial injury occurred on August 3, 2011. There is no doubt from reviewing these brief deposition transcripts. All three doctors agree.

I can extend this argument, and extend this brief, but what more needs to be said? Counsel asked the relevant questions of the physicians, on point, and received specific answers, and the Chelan County Superior Court awarded a Directed Verdict That should be upheld.

**H. Legal Fees Should Be Awarded To The Respondent Kurt Fowler For All Fees And Costs Incurred At The Superior Court Level And At The Court Of Appeals.**

The Respondent Kurt Fowler is entitled to legal fees and costs for asserting and defending his worker's compensation rights pursuant to RCW 51.52.130. This includes legal fees and costs incurred at the Superior Court and Court of Appeals levels. Respondent Kurt Fowler hereby asserts his rights to such legal fees and costs.

**IV. CONCLUSION**

An industrial injury occurred on August 3, 2011, and it is uncontested that such injury occurred. The Court of Appeals should affirm the ruling of the Chelan County Superior Court to grant a Directed Verdict on such issue.

Respondent Kurt Fowler is entitled to legal fees and costs as a claimant in this case, defending his rights under the Workers Compensation Act (RCW 51) at the Court of Appeals level. We are Requesting such an award.

RESPECTFULLY SUBMITTED this 7 day of October, 2015.



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

M.A. MORTENSON COMPANY,	)	
	)	PROOF OF SERVICE
Appellant,	)	
	)	
v.	)	
	)	
KURT R. FOWLER, LYDIG	)	
CONSTRUCTION, INC., and	)	
DEPARTMENT OF LABOR AND	)	
INDUSTRIES OF THE STATE	)	
OF WASHINGTON,	)	
	)	
Respondents.	)	
_____	)	

I, Maricela (Sally) Guerra, under penalty of perjury pursuant to the laws of the State of Washington, declares that on October 8, 2015, she caused to be served Respondent Kurt Fowler's Brief and Certificate of Service in the below described manner:

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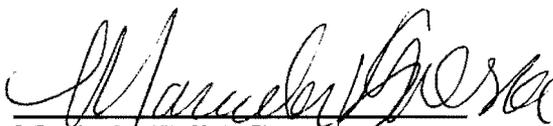
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