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Division III
State of Washington
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Case No.: 369200

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

MAXIM HEALTHCARE SERVICES, INC.,

Appellant,

v.

KATHERYN TAYLOR,

Respondent.

APPELLANT'S REPLY BRIEF

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I. REPLY ON FIRST ASSIGNMENT OF ERROR

Ms. Taylor responds to the First Assignment of Error in her first three arguments. Respondent's Brief, VI.A, VI.B, and VI.C. She contends the fact she had preexisting arthritis "does not matter", the trial court applied the right standard, and substantial evidence supported its findings. Under the correct legal standard, the fact of prior arthritis does matter, and the trial court did not apply the facts to that standard.

A. The Applicable Standard of Review

In an appeal on a workers' compensation case, the role of the appellate court is to "review whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings." *City of Bellevue v. Raum*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012) (quoting *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006)). Where a rational, fair-minded person would not be persuaded by the factual findings, the factual findings are not supported by substantial evidence. *Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301, 310, 289 P.3d 727 (2012); *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177, P.3d 180 (2008). The appellate court reviews factual findings for "substantial evidence in light of the whole record." *Dep't of Labor & Indus. v. Davison*, 126 Wn. App. 730, 737, 109 P.3d 479 (2005).

Contrary to Ms. Taylor's allegations, Maxim is not requesting this Court reweigh or rebalance the evidence; this is not the appellate court's function. *City of Bellevue v. Raum*, 171 Wn. App. 124, 151, 286 P.3d 695 (2012). However, the appellate court does review to determine if the superior court correctly applied the law and made factual findings supported by substantial evidence. The Department's order does not constitute evidence supporting the superior court, nor does the fact of an injury or allowance of a labral tear. This dispute does not concern whether an injury occurred or if it caused a torn labrum. The dispute before the Court focuses specifically on whether the injury also "lit up" Ms. Taylor's preexisting hip arthritis.

What the board understood, and the superior court did not, was that Ms. Taylor had symptomatic hip arthritis before the industrial injury. It cannot be found latent or asymptomatic on this record. Hence, to prove the aggravation, Ms. Taylor must prove that her already-symptomatic degenerative hip condition was accelerated by the injury. The court, like Ms. Taylor, wrongly focused instead on whether symptoms arose after the injury.

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B. The Superior Court Implicitly Made an Unsupportable Factual Finding and Failed To Apply The Correct Legal Standard.

Ms. Taylor argues the superior court applied the correct legal standard for aggravation/lighting up because Finding of Fact 15 and Conclusion of Law 3 state the 2011 injury rendered Ms. Taylor's preexisting arthritis symptomatic and accelerated the aging process. Maxim understands that was the standard applied by the superior court. But that legal standard only applies if the preexisting condition is "latent or quiescent" prior to the industrial injury. *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 682, 94 P.2d 764 (1939). Under Washington law, where the weight of the evidence shows a preexisting condition was symptomatic before the industrial injury *or* the preexisting condition is a naturally progressing condition that would have progressed to symptoms without the industrial injury, the preexisting condition is not considered lit up or aggravated by the industrial injury. *See Zavala v. Twin City Foods*, 185 Wn. App. 838, 860, 343 P.3d 761 (2015); *Austin v. Dept' of Labor & Indus.*, 6 Wn. App. 394, 398, 492 P. 2d 1382 (1971); *Matson v. Dep't of Labor & Indus.*, 198 Wash. 507, 516, 88 P.2d 825 (1939). Ms. Taylor's preexisting right hip osteoarthritis was neither latent nor quiescent prior to the 2011 industrial injury, so the superior court applied the wrong legal standard.

In her brief, Ms. Taylor presents two arguments in support of the superior court's decision. First, she argues she was never diagnosed with a hip condition or had diagnostic testing on her hip prior to the 2011 injury, facts irrelevant to whether her preexisting arthritis was latent or quiescent prior to the injury. Second, she argues it is immaterial whether she would have needed a right hip replacement regardless of the work injury, when, in fact, this is central to the factual and legal issue on appeal.

1. Ms. Taylor's preexisting right hip osteoarthritis was symptomatic prior to the 2011 injury.

As Ms. Taylor cites, the superior court made a finding (or at least implied a finding) that her preexisting hip osteoarthritis was asymptomatic prior to the 2011 industrial injury. But on appeal, Ms. Taylor does not focus on the evidence for and against that point or outline why the weight of the evidence supports that finding. In fact, most of her argument focuses on attempting to convince this Court that the factual finding does not matter.

In finding Ms. Taylor's preexisting right hip osteoarthritis was not symptomatic prior to the 2011 industrial injury, the superior court relied on the uninformed opinion of Dr. Lynch, who did not review prior records and based his conclusions only on the subjective history provided by Ms. Taylor, an inaccurate and unreliable historian. CBR 457:23-25;

458:1-4. Multiple records confirmed Ms. Taylor had treatment for hip pain and symptoms for years, including only four days before the incident. CBR 139:5-25; 140:1-25; 141:1-5; 169:15-25; 170:1-7. On appeal, Ms. Taylor does not defend the accuracy of her testimony or Dr. Lynch's history; rather, she suggests that even if her hip was symptomatic, it does not matter. The superior court also failed to discuss or acknowledge the evidence of prior treatment or explain why it found Ms. Taylor asymptomatic in light of all the evidence in the record. To be supported by substantial evidence, the courts must look to all the evidence and determine if a conclusion can rationally be reached. *Davison*, 126 Wn. App. 730, 737, 109 P.3d 479 (2005). In this case, the finding that claimant's hip osteoarthritis was asymptomatic cannot be reasonably drawn from the record.

A prior decision, *Austin v. Department of Labor and Industries*, provides a persuasive comparison. In *Austin*, the claimant contended his preexisting ankylosing spondylitis condition was latent prior to the work injury, but subsequently admitted to aches, pains and stiffness in his back before the injury. *Austin*, 6 Wn. App. 394. A physician made aware of these facts after supporting an aggravation testified such complaints would indicate the condition was symptomatic prior to the injury, and further testified the condition was a naturally progressing one that would progress

regardless of injury. The court held that this later testimony negated a conclusion that the preexisting condition was latent or dormant before the injury, and as a result, no jury instruction on “lighting up” was warranted. *Id.* at 398-99.

Like in *Austin*, Ms. Taylor told Dr. Lynch that she has no right hip symptoms prior to the 2011 industrial injury and, based on her report, he concluded her preexisting right hip osteoarthritis was rendered symptomatic by the work injury. CBR 453:6-10; 457:23-25; 458:1-4. However, the clear weight of evidence shows Ms. Taylor’s preexisting right hip osteoarthritis was symptomatic prior to the 2011 injury. She received chiropractic treatment on and off for her right hip for years prior to the 2011 injury, including four days before the injury. As Dr. Schmidt testified, this treatment meant her right hip was symptomatic before that injury. CBR 397:3-6. Under the court’s reasoning in *Austin*, this negates the conclusion that Ms. Taylor’s preexisting condition was latent or dormant prior to the 2011 injury.

The superior court applied the wrong legal standard because it relied on an inaccurate fact: Dr. Lynch’s wrong conclusion that Ms. Taylor’s preexisting right hip osteoarthritis was asymptomatic before the work injury. The correct standard, which the lower court should have applied, and which this Court should now apply, is the *Zavala* standard.

The *Miller* case relied on by Ms. Taylor addresses only a latent preexisting congenital condition, not a symptomatic preexisting condition such as in *Austin, Zavala*, or this record. Ms. Taylor's preexisting right hip osteoarthritis was symptomatic, not latent or quiescent, prior to the injury. The proper question is whether the arthritis is a naturally progressing condition or if it was accelerated by the work injury.

2. Ms. Taylor's preexisting condition would have naturally progressed regardless of injury.

Ms. Taylor next argues it "does not matter" if she had arthritis before the injury or whether she would have needed a right hip replacement regardless of the work injury. However, under *Zavala*, this is, in fact, key to the determination of coverage.

Undisputedly, Ms. Taylor's right hip osteoarthritis preexisted the 2011 injury. Also, undisputedly, osteoarthritis is a naturally progressing degenerative condition. The question in this case is whether the 2011 work injury caused the need for the subsequent right hip replacement or if the arthritis would have progressed to needing that surgery regardless of the injury. The evidence shows Ms. Taylor's need for a right hip replacement was a direct result of her osteoarthritis, not the labral tear injury.

Ms. Taylor has severe, end-stage osteoarthritis in her right hip with a complete loss of cartilage and wearing out of the bone. CBR 205:25;

206:1-8; 442:16-25; 443:1-11. She was in the final stage of a naturally progressing degenerative condition that would have continued to progress regardless of the 2011 industrial injury. Even, Dr. Lynch, the expert the superior court relied upon, confirmed this in his testimony:

Q: So she tore her labrum in November of 2011 and you had a surgery in 2013 to fix that tear, is it possible that the degenerative arthritis just continued to progress as it had been over a series of many years irrespective of that labral tear?

A: Correct. I think that that's pretty much what I had been saying since the beginning. Her arthritis had a certain trajectory that was not cooked into the pace (ph) of her life. Her arthritis was present and would continue to progress had nothing occurred to her.

CBR 458:19-25; 459:1-3. The same opinions were provided by Drs. Hofmeister and Porter. CBR 216:9-16; 282:23-25; 283:1-3. The legal standard cannot be satisfied on this record because the uncontested evidence shows Ms. Taylor's arthritis would have progressed to the need for hip replacement regardless of the labral tear injury.

The superior court did not consider this standard and evidence, and then reach a conclusion in Ms. Taylor's favor. It wholly failed to apply

this standard. As a result, Ms. Taylor, on appeal, can only argue that it “does not matter”. Ms. Taylor argues *Bennett v. Dep’t of Labor & Indus.*, 95 Wn.2d 531, 627 P.2d 104 (1981) supports her position. But *Bennett* and the other cases cited by Ms. Taylor did not involve a naturally progressing condition. *Zavala* did address a naturally progressing condition and provides a better comparison. *Zavala*, 185 Wn. App. 838.

In *Zavala*, the injured worker suffered a work-related left knee injury resulting in a medial meniscus tear. The arthroscopic surgery for the medial meniscus tear revealed significant, near Grade 4 osteoarthritis in the knee, and subsequently, a total knee replacement was needed.

Ms. Zavala argued her work injury lit up her preexisting asymptomatic osteoarthritis and/or the work injury proximately caused her need for a total knee replacement. She contended: “if she had no symptoms in her knee before the industrial injury, she is entitled as a matter of law to recovery for all symptoms thereafter and all medical treatment needed thereafter even if her preexisting condition contributed to the symptoms.”

Zavala at 861. Ultimately, this Court disagreed. It held: “There remain limits to recovery....A given disability must be the result of the injury rather than solely of a preexisting infirmity....A preexisting condition is not lit up if the weight of the evidence reveals that the condition **was a naturally progressing condition that would have progressed to the**

same symptoms without the injury.” *Id.* (emphasis added) (internal citations omitted). It went on to explain: “Whether a condition is naturally progressing informs whether that condition was latent or quiescent before the industrial injury.” *Id.* at 864.

Like *Zavala*, the present case concerns a preexisting, naturally progressing osteoarthritic condition. The substantial medical evidence confirms the preexisting osteoarthritic condition, which had progressed to Grade 4 osteoarthritis, would have continued to naturally progress regardless of the work injury. CBR 216:9-16; 282:23-25; 283:1-3; 343:12-23; 458:19-25; 459:1-3. The evidence also confirms Ms. Taylor’s need for a total hip replacement was directly related to her preexisting osteoarthritis and not her labral tear. The fact she also needed a left hip replacement surgery despite no injury to the left hip provides further confirmation that the condition would progress regardless of injury. CBR 282:23-25; 283:1-3.

Ms. Taylor argues these facts are irrelevant if her right hip was not disabling at the time of injury, stating she was working without restrictions and “did not even know she had hip arthritis....”. Respondent’s Brief, 27. However, under *Zavala* the question is not whether the preexisting right hip osteoarthritis was disabling prior to the work injury to the point of requiring work restrictions or even if the injured worker had knowledge of

the arthritic condition prior to the work injury. The question is whether the preexisting condition was symptomatic at the time of injury and whether it would naturally progress, resulting in the need for the total hip replacement, irrespective of the work injury. *Zavala*, 185 Wn. App. at 860. Here, the osteoarthritis was symptomatic and naturally progressive.

The appellate court must review the superior court's application of the law for plain error, and the superior court's failure to apply the correct legal standard requires reversal. *Zavala*, 185 Wn. App. at 869; *Energy Northwest v. Harje*, 148 Wn. App. 454, 199 P.3d 1043 (2009). The superior court erred in failing to address the legal standard laid out by this Court in *Zavala*, that "[a] preexisting condition is not lit up if the weight of the evidence reveals that the condition was a naturally progressing condition that would have progressed to the same symptoms without the injury." *Zavala* at 861. The superior court did not make a factual finding at all on this point. Instead, it incorrectly applied the lighting up standard outlined in *Miller v. Department of Labor and Industries* for a latent condition. *Miller*, 200 Wash. 674, 682. Since Ms. Taylor's case does not involve a "latent or quiescent" condition, the *Miller* standard does not apply. *Id.* The superior court's failure to apply the correct legal standard in this case is reversible error.

II. REPLY ON SECOND ASSIGNMENT OF ERROR

If the Court reaches the Second Assignment of Error, it should reverse and remand the decision to the superior court for failing to properly apply the special consideration rule.

While an attending physician's opinion should be given special consideration, it should not be given greater weight or credibility than other evidence. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988) (citing *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964)). "[T]he testimony of the treating physician is not conclusive." *Chalmers v. Dep't of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967). In this case, the superior court incorrectly gave more weight and credibility to Dr. Lynch's opinion, misapplying the special consideration rule and resulting in conclusions that lack substantial evidence.

Contrary to Ms. Taylor's assertions, Maxim is not asking this Court to review any credibility determinations made by the lower court. Ms. Taylor incorrectly states the superior court found Maxim's experts lacked credibility. Respondent's Brief, 31. Actually, the superior court made no findings regarding the credibility of Maxim's experts; instead, it focused almost entirely on the opinions of Dr. Lynch, stating his testimony deserved greater weight. CP 67. While it referenced his expertise, it made

this assertion citing the special consideration rule. Maxim asks the Court to review the special consideration standard the superior court applied to Dr. Lynch's opinion.

As the superior court itself acknowledged, "Dr. Lynch did not review a substantial amount of Ms. Taylor's documented medical history." CP 65. Instead, Dr. Lynch based his opinions on erroneous information provided by Ms. Taylor regarding her medical history. *See* CBR 458:2-4. Rather than addressing this shortcoming, the superior court relied on Dr. Lynch by applying the special consideration rule as if it were per se controlling. It even chastised the board for not relying on Dr. Lynch because of his flawed factual foundation. CP 66-67. The mere fact that Dr. Lynch served as attending physician does not excuse shortcomings such as basing his opinion on erroneous information. *Chalmers* at 601.

The special consideration rule does not warrant reliance on the opinion of an attending physician with expertise but inaccurate information. The superior court erred by applying the special consideration rule as an excuse or salvo for Dr. Lynch's undisputed lack of full and accurate information. The superior court's decision to rely on Dr. Lynch lacks substantial evidence.

III. REPLY ON THIRD ASSIGNMENT OF ERROR

Substantial evidence does not support the superior court's determination that the injury was the proximate cause of the total hip replacement surgery. This unsupportable decision provides an alternative basis to reverse the superior court's judgment.

For Ms. Taylor's right hip replacement surgery to be covered under her workers' compensation claim, it must be established that the need for the surgery was proximately caused by the industrial injury. While the industrial injury need not be the sole cause of the need for surgery, and there can be more than one proximate cause, there must be a direct sequence between the work injury and the need for surgery, such that the surgery would not have been needed without the work injury. *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 683-4, 571 P.2d 229 (1977); *see also Zavala*, 185 Wn. App. at 861 ("In order for a claimant to recover under the workers' compensation act, she must establish a causal connection between the work injury and the subsequent physical condition"). In this case, the causal chain between the 2011 work injury and the subsequent 2017 total right hip replacement surgery was broken by over five years and another right hip injury.

In Section IV.E of her brief, Ms. Taylor misinterprets Maxim's argument, implying Maxim argued the 2014 injury was the sole cause for

the total hip replacement. Maxim does not contend the 2014 injury was the sole cause of the need for surgery, but does contend it was an intervening event that needed to be considered by the superior court in evaluating proximate cause. The superior court failed to consider the role of the 2014 injury at all, making no factual findings relevant to this inquiry.

While the 2014 right hip injury may not be the sole cause of the surgery, it is an intervening cause that aggravated the right hip osteoarthritis and broke the causal chain between the 2011 work injury and the 2017 hip replacement surgery. Dr. Schmidt testified the right hip replacement surgery should have been covered under the 2014 injury, since that injury exacerbated the hip condition, and, in fact, he recommended the surgery under the 2014 claim. CBR 406:17-24; 408:4-10. Similarly, Dr. Lynch agreed the 2014 injury aggravated the right hip arthritis. CBR 456:3-6. Substantial medical evidence supports the 2014 injury as an intervening event that played a role in the right hip osteoarthritis. As such, the superior court needed to consider that injury when assessing proximate cause.

The superior court erred in failing to address whether the 2014 right hip injury was an intervening event that broke the chain of proximate causation between the 2011 injury and the 2017 right total hip replacement surgery. Substantial evidence does not support that Ms. Taylor would not

have required the right total hip replacement but for the 2011 injury because the superior court failed to make any findings about the role of the 2014 injury. As Ms. Taylor notes, it is “for the trier of fact to determine which version of substantial evidence is more persuasive.” Respondent’s Brief, 34. In this case, the superior court did not make such a determination as it wholly failed to consider or discuss the evidence regarding the intervening 2014 injury. Because it did not consider the 2014 injury, it remains unknown if or how that intervening event may influence the superior court’s conclusions on causation. This requires reversal and remand.

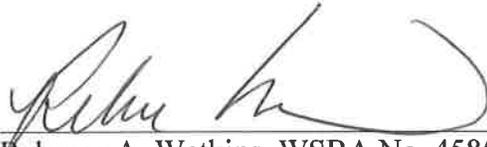
IV. CONCLUSION

The superior court rejected the prima facie findings of the board almost entirely based on its adoption of Dr. Lynch. The reliance on Dr. Lynch, in turn, flowed from an apparent belief that the special consideration rule required it to adopt Dr. Lynch’s opinion even though Dr. Lynch lacked accurate information about Ms. Taylor’s pre-existing hip osteoarthritis. Even the most experienced physician must have accurate information to provide a reliable opinion. For the reasons provided above and in Appellant’s Brief, the superior court failed to correctly apply the law and made factual findings and conclusions unsupported by substantial

evidence. Maxim respectfully requests the Court of Appeals reverse the judgment and reinstate the Order of the board.

Dated: February 3, 2020

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Rebecca A. Watkins", written over a horizontal line.

Rebecca A. Watkins, WSBA No. 45858
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this date, I e-filed a copy of
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DATED: February 3, 2020



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