

FILED
Court of Appeals
Division III
State of Washington
1/3/2020 8:15 AM

CASE NO.: 369200

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

MAXIM HEALTHCARE SERVICES, INC.,

Appellant,

v.

KATHRYN TAYLOR,

Respondent.

BRIEF OF RESPONDENT

Brian L. Ernst, WSBA No. 14654
Attorneys for the Respondent,
Kathryn Taylor

Beemer & Mumma, P.S.
1710 North Washington
Spokane, Washington 99205
(509) 324-6411

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. SUMMARY OF PROCEEDINGS	2
III. NATURE OF JUDGMENT	4
IV. STANDARD OF REVIEW	4
V. COUNTERSTATEMENT OF THE FACTS	6
VI. ARGUMENT	14
A. The lower court's ruling is supported by substantial evidence.	14
B. The lower court applied the correct standard.	17
C. It does not matter whether Taylor had right hip arthritis prior to her injury.	21
D. The lower court appropriately gave special consideration to the attending physician's testimony.	30
E. Taylor's injury proximately caused both a labral tear and her right hip replacement.	33
VII. ATTORNEY FEES	36
VIII. CONCLUSION	36

TABLE OF AUTHORITIES

CASES	PAGE
<i>Bennett v. Department of Labor & Industries</i> 95 Wn.2d 531 (1981)	23, 24, 26
<i>City of Bellevue v. Raum</i> , 171 Wn.App. 124, 139 (2012)	4, 5, 6, 14, 15, 34
<i>Dennis v. Labor and Industries</i> , 109 Wn.2d 467, 470, (1987)	25
<i>Ellerman v. Centerpoint Prepress</i> , 143 Wn.2d 514, 523, n. 3 (2001)	19
<i>Gaines v. Department of Labor & Industries</i> 1 Wn.App. 547, 550 (1969)	4, 5, 15, 34
<i>Groff v. Department of Labor & Industries</i> , 65 Wn.2d 35, 43 (1964)	5, 30
<i>Hamilton v. Department of Labor & Industries</i> , 111 Wn.2d 569, 571	30
<i>Harbor Plywood v. Department of Labor & Industries</i> , 48 Wn.2d 553, 556 (1956)	20, 22, 26
<i>Jacobson v. Department of Labor & Industries</i> , 37 Wn.2d 444, 448 (1950)	20
<i>Layrite Products v. Degenstein</i> , 74 Wn.App. 881, 887 (1994)	4, 5, 15, 34
<i>Longview Fibre v. Weimer</i> , 95 Wn.2d 583, 589 (1981)	27
<i>Miller v. Dept. of Labor & Industries</i> , 200 Wash. 674, 682, (1939)	22, 26

<i>Potter v. Department of Labor & Industries,</i> 172 Wn.App. 301, 310 (2012)	5, 15
<i>Ray v. Department of Labor & Industries,</i> 177 Wn. 687 (1934)	28, 29
<i>Roellich v. Department of Labor & Industries,</i> 20 Wn.2d 674, 680 (1944)	5, 15
<i>Robinson v. Department of Labor & Industries,</i> 181 Wn.App. 415, 425 (2014)	6, 34
<i>Ruse v. Dep't of Labor & Indus.,</i> 138 Wn.2d 1, 7 (1999)	20
<i>Simpson Timber Co. v. Wentworth,</i> 96 Wn. App. 731, 738, 739 (1999)	30
<i>Spaulding v. Department of Labor & Industries,</i> 29 Wn.2d 115, 128-129 (1947)	30
<i>Street v. Weyerhaeuser Co.,</i> 189 Wn.2d 187, 205 (2017)	24, 26, 35
<i>Tomlinson v. Puget Sound Freight Lines,</i> 166 Wn.2d 105, 117 (2009)	26, 28
<i>Wendt v. Dept. of Labor & Indus.,</i> 18 Wn. App. 674, 683 (1977)	21, 27, 35
<i>Weyerhauser v. Health Department,</i> 123 Wn.App. 59, 65 (2004)	14
<i>Young v. Labor and Industries,</i> 81 Wn.App. 123, 128 (1996)	5, 15, 34
<i>Zavala v. Twin City Foods,</i> 185 Wn.App. 838, 869 (2015)	14, 19, 20, 34

STATUTES

RCW 51.01	1
RCW 51.32.080(5)	26
RCW 51.52.130	36
RCW 51.52.140	5

OTHER AUTHORITIES

ER 702	31
RAP 18.1	30, 36
WAC 296-20-19000	26
1 Larson Workmen's Compensation Law 170 Section 12.20	26

I. INTRODUCTION

This is an appeal under RCW Title 51, the Industrial Insurance Act. The Employer, Maxim Healthcare Services, Inc., appeals from a May 31, 2019, Judgment directing the Employer to accept responsibility for Taylor's right total hip replacement as ordered by the Washington State Department of Labor & Industries.

All references in this brief to the certified appeal board record of the Board of Industrial Insurance Appeals will use the abbreviation "BR" followed by the page number stamped on the lower right side of the page. All references to exhibits admitted during trial will use the abbreviation "EX." Reference to Clerk's Papers will use "CP" followed by the designated page numbers. References to the Report of Proceedings will use the abbreviation "RP" followed by page number. References to testimony will refer to the page number from the Board record. The Department of Labor and Industries will be referred to as the "Department". The Board of Industrial Appeals will be referred to as the "Board". Kathryn Taylor will be referred to as "Taylor" or the "worker". The self-insured employer, Maxim Health Care Services, Inc., will be referred to as the "Employer" or "Maxim". References to the Appellant's Brief will use the abbreviation "AB" followed by the page number.

II. SUMMARY OF PROCEEDINGS

Taylor was injured on November 15, 2011, during the course of her employment with Maxim Healthcare Services. Maxim is a self-insured employer under Washington's industrial insurance laws. Taylor filed industrial insurance Claim SB-68682 for the injury. On May 8, 2013, Taylor underwent surgery for a right hip labral tear. This surgery was covered under Claim SB-68682. On August 5, 2013, the Department allowed the claim. BR 180-181; EX 3.

On January 26, 2017, the Department issued an order under Claim SB-68682 determining the employer was responsible for the permanent aggravation of Taylor's right hip degeneration and directed the Employer to authorize a right total hip replacement under the Claim. BR 98-99; EX 2.

Following a protest by the Employer, on April 17, 2017, the Department issued an order affirming the January 26, 2017, order. BR 100-101; EX 1.

On May 15, 2017, the Employer appealed to the Board. BR 108-109. Following the presentation of evidence, on September 28, 2018, the Board's Industrial Appeals Judge reversed the Department's Order. BR 57-64. On November 9, 2018, Taylor Petitioned the Board to grant

review. BR 21-46. On November 29, 2018, the Board denied review. BR 4.

On December 19, 2018, Taylor appealed to the Spokane County Superior Court. CP 1-2. On April 12, 2019, Taylor, the Department and Employer presented oral argument before the Honorable John O. Cooney. RP 10-38. On May 6, 2019, Judge Cooney issued a Letter Opinion which reversed the Board. CP 63-68. Judge Cooney determined the testimony of the worker's attending Orthopaedic Surgeon (Dr. Lynch) was entitled to special consideration. Finding of Fact 16; CP 74. Judge Cooney also determined Dr. Lynch had more training, knowledge and experience dealing with hips and was clearly the most qualified expert witness. Finding of Fact 6; CP 66-67; CP 73-74. Judge Cooney determined the Board's decision was incorrect and directed the Employer to accept responsibility for the aggravation of Taylor's right hip degeneration and authorize the total hip replacement as previously ordered by the Department. CP 67-68.

On May 31, 2019, Judge Cooney entered Findings of Fact, Conclusions of Law and Judgment which reversed the Board, and effectively affirmed the Department's January 26, 2017, and April 17, 2017, orders. CP 71-75.

The Employer appeals.

III. NATURE OF JUDGMENT

The trial court's judgment reverses the order of the Board, and determines the Department correctly required the Employer to accept responsibility for a permanent aggravation of Taylor's right hip arthritis and resultant right hip replacement.

IV. STANDARD OF REVIEW

On appeal to the Superior Court, the findings of the Board are presumed correct, and the burden of proof shall be upon the party attacking the same. RCW 51.52.115. This prima facie presumption controls the trial court's disposition only when it finds itself unable to make a determination on the facts because the evidence is evenly balanced. *Layrite Products v. Degenstein*, 74 Wn. App. 881,887 (1994), review denied 125 Wn.2d 1011 (1994). The Superior Court may substitute its own findings and decision for the Board's if it finds, from a fair preponderance of credible evidence, the Board's findings and decisions are incorrect. *City of Bellevue v. Raum*, 171 Wn. App. 124,139 (2012), review denied 176 Wn.2d 1024 (2012).

The trier of fact, be it court or jury, is at liberty to disregard Board findings if, notwithstanding the presence of substantial evidence, it is of the opinion that other substantial evidence is more persuasive. *City of Bellevue v. Raum* at 139; *Gaines v. Department of Labor & Industries*, 1

Wn. App. 547,550 (1969). If the trier of facts, be it jury or judge, reaches a different conclusion from the Board on the facts, then the prima facie presumption of correctness has been overcome. *Groff v. Department of Labor & Industries*, 65 Wn.2d 35,43 (1964). The testimony of a single witness may, if the finder of fact believes him, determine the result, although any number of witnesses may have testified to the contrary. *Roellich v. Department of Labor & Industries*, 20 Wn.2d 674,680 (1944).

Appellate review in industrial insurance cases is similar to other civil cases. RCW 51.52.140. Appellate review is limited to examining the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Young v. Labor & Industries*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996); *Layrite Products v. Degenstein*, 74 Wn. App. 881,887 (1994), review denied 125 Wn.2d 1011 (1994). Evidence is substantial if sufficient to persuade a fair-minded, rational person of the truth of the matter. *Potter v. Department of Labor & Industries*, 172 Wn. App. 301,310 (2012), review denied 177 Wn.2d 1017 (2012).

An appellate court's function is not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion. *City of Bellevue v. Raum*, *supra* at 151.

The appellate court reviews the record in the light most favorable to the party who prevailed in superior court. *Robinson v. Department of Labor & Industries*, 181 Wn. App. 415,425 (2014).

V. COUNTERSTATEMENT OF THE FACTS

The Worker disagrees with the facts proposed by the Employer, which are incomplete and argumentative in violation of RAP 10.3(5). The Worker submits the following facts for the court's consideration.

Taylor is a licensed practical nurse. BR 160. Taylor's job for the Employer involved providing home care for medically fragile children and adults. BR 160. Prior to sustaining the injury in question, Taylor had worked for the Employer for over 10 years without restriction. BR 160, BR 230, BR 231. On November 15, 2011, Taylor was injured while bathing a disabled client. BR 160-11. Taylor turned to the left and had "immediate excruciating pain" in her groin, across the right hip and low back. BR 161. Taylor had never previously experienced this type of pain. BR 161.

Prior to sustaining the injury, Taylor had seen chiropractors off and on her whole life. BR 138. Areas of the body treated included hands, shoulders, bilateral hips, cervical, thoracic and lumbar spine. BR 198. No specific forms of treatment for Taylor's hips were identified in the chiropractic records. BR 198. Taylor would receive a chiropractic

treatment approximately once every two to three months, but only a third of those visits included hip or pelvic treatments. BR 199; BR 232. Indeed, four days prior to sustaining her injury, Taylor received an adjustment to get “straightened out.” BR 198. Taylor testified she never had problems with her hips prior to sustaining the injury. BR 140. She never sought chiropractic treatment specifically for a hip condition. BR 170. She had never been diagnosed as having hip arthritis prior to the injury. BR 169.

Prior to November 15, 2011, Taylor had not sustained any injury to her right hip, nor had any medical provider ever recommended diagnostic testing or orthopaedic consultation for her hip. BR 168-169.

Taylor reported the injury to her supervisor on the day it occurred. BR 161-162. The following day, Taylor received treatment from her chiropractor, who assisted her in filing the claim. BR 162. Because her symptoms did not improve, on November 19, 2011, Taylor was treated at the emergency room. BR 162.

Subsequently, Taylor underwent physical therapy, medical management and had light-duty work restrictions. BR 204. Taylor experienced difficulty walking and performing household activities. BR 171.

On May 25, 2012, an MRI of Taylor's right hip was obtained. BR 327. The MRI revealed chondromalacia and tearing of the labrum with reactionary bursitis. BR 439.

Patrick Lynch, M.D., is Taylor's attending orthopaedic surgeon. Seventy percent of Dr. Lynch's practice is treating hip pathology. Dr. Lynch performs seven to ten hip replacements a week, and five to seven hip arthroscopies a week. BR 436.

Dr. Lynch opined the November 15, 2011, injury caused a labral tear which was superimposed upon pre-existing hip arthritis. BR 460-461. Dr. Lynch further opined the injury permanently aggravated and accelerated the underlying arthritis. BR 453; BR 461. Dr. Lynch opined the injury "accelerated the process of aging her hip necessitating a hip replacement at the time at which she received it." BR 453. Dr. Lynch indicated that traumatizing a joint which already has arthritis is "like putting gasoline on a fire...in the case (sic) of an arthritic joint which becomes traumatized, that joint's reparative powers are diminished".

On May 8, 2013, Dr. Lynch performed a right hip arthroscopy. BR 442. It is not disputed that this surgery was covered under Taylor's industrial insurance claim by the Employer. BR 227; BR 226.

Following surgery, Taylor's right hip condition deteriorated. In office visits on September 5, 2013; February 25, 2014; and May 15, 2014, Dr. Lynch noted Taylor was continuing to lose range of motion. She continued to experience visible discomfort with a limp and Dr. Lynch advised Taylor a right hip replacement would ultimately have to be performed. BR 446-447. In order to delay replacement, Dr. Lynch supervised a course of conservative therapies, including anti-inflammatories and work modifications. BR 447. On August 20, 2014, Dr. Lynch also performed an intra-articular injection with anti-inflammatories and steroid into the hip. BR 447.

Following her right hip labrum surgery, Taylor began developing left hip symptoms which she attributed to over-compensating for her injured right hip. BR 166. Dr. Lynch also noted Taylor's left hip became more disabled as Taylor favored her right hip. BR 448-449.

In 2014, Taylor returned to lighter duty work for another employer. BR 143-144. On October 30, 2014, Taylor sustained a new injury to her back and hip, Claim AW-36484. No medical examiner has contended this injury had any permanent effect upon Taylor's right hip condition. BR 61; BR 221; BR 372.

Daniel Schmidt, D.O., was Taylor's attending physician for the October 30, 2014, injury. During his initial examination on November 5,

2014, Taylor informed Dr. Schmidt she had sustained an injury three years previously to her right hip, had undergone labral surgery with Dr. Lynch and was never quite the same after that with a limp and decreased motion. BR 367. Thereafter, Dr. Schmidt supervised a course of conservative treatments.

On June 26, 2015, Taylor was examined by Eric Hofmeister, M.D., at the request of the Employer for the October 30, 2014, injury, Claim AW-36484. BR 219. Dr. Hofmeister's practice emphasizes hand and upper extremity care. BR 219. Dr. Hofmeister concluded Taylor's need for a right total hip replacement was not proximately caused by the October 30, 2014, injury. BR 221. Dr. Schmidt agreed. BR 372. Based upon the medical consensus that the October 30, 2014, injury required no further treatment, the Department closed Claim AW-36484 in July 2015. BR 372.

Thereafter, Dr. Schmidt continued to treat Taylor for her worsening hip condition. On September 17, 2015, Dr. Schmidt noted Taylor had very limited mobility in her right hip. BR 372– 373. On October 28, 2015, Dr. Schmidt recommended Taylor consult with Dr. Lynch for her left hip which was getting worse because of her altered gait due to her right side. BR 373 – 374.

On December 3, 2015, Taylor was examined by Dr. Lynch for both of her hips. BR 448. Dr. Lynch opined Taylor's left hip became worse as she was favoring the right hip. BR 448-449.

On December 10, 2015, Taylor was examined by Dr. Hofmeister at the request of the Employer. Dr. Hofmeister opined the November 15, 2011, injury caused a simple hip strain and did not proximately cause the need for hip replacement. BR 207; BR 214.

On cross-examination Dr. Hofmeister admitted the hip labrum helps dissipate the pressure within the hip joint and helps maintain stability of the hip. BR 224. Dr. Hofmeister agreed the November 15, 2011, industrial injury caused a labral tear in the right hip, and that coverage for the labral surgery performed by Dr. Lynch was appropriate under Claim SB-68682. BR 227; BR 226. Dr. Hofmeister opined that prior to sustaining the November 15, 2011, injury, Taylor had pre-existing hip arthritis, "and due to the industrial injury, along with the already pre-existing arthritis, she had a manifestation of this hip arthritis in the form of a labral tear." BR 226-227.

Dr. Hofmeister agreed a total right hip replacement was medically reasonable. BR 227. However, Dr. Hofmeister contended the need for a hip replacement was due solely to Taylor's ongoing arthritis. BR 216.

Dr. Schmidt disagreed with Dr. Hofmeister. BR 376. Dr. Schmidt opined Taylor's right hip had been permanently aggravated by the November 15, 2011, industrial injury, and required surgical replacement. BR 376.

Therefore, on June 16, 2016, Employer's counsel obtained another medical examination, this time with Douglas D. Porter, M.D.. BR 269. At the time Dr. Porter examined Taylor, he had no active practice other than performing forensic examinations. BR 267-268. Dr. Porter contended the November 15, 2011, injury did not injure Taylor's right hip in any way. BR 283.

On cross-examination Dr. Porter admitted 3 prior independent medical examinations performed on May 19, 2012; March 4, 2013, and October 30, 2013, had opined the November 15, 2011, injury had proximately caused a labral tear and aggravated pre-existing degenerative changes in the right hip. BR 298; BR 299; BR 294-297; BR 226-227.

On June 22, 2016, Dr. Lynch performed a total left hip replacement. BR 165; BR 448. On August 8, 2016, Dr. Schmidt disagreed with Dr. Porter's conclusions, indicating Taylor's right hip was permanently aggravated by the November 15, 2011, injury. BR 377. Dr. Schmidt opined Taylor's pre-existing right hip arthritis was permanently

aggravated or lit up by the November 15, 2011, injury, resulting in the need for replacement. BR 378.

Based upon Dr. Schmidt's non-concurrence, on September 10, 2016, the Employer obtained another forensic medical examination with Scott Shawen, M.D.. Dr. Shawen opined that prior to sustaining the November 15, 2011, injury, Taylor had pre-existing degenerative joint disease in the right hip which was permanently aggravated or lit up by the injury. BR 331; BR 346; BR 350. Dr. Shawen also testified medical research confirms a patient undergoing hip arthroscopy has a five to ten time increase in the chance of needing a hip replacement. BR 332, BR 341.

Dr. Shawen further testified that Brian Tallerico, M.D., "who is a very conservative independent medical examination provider, made the determination that this original injury was related and that she needed a hip scope. That to me becomes the crux of this where you have an arthritic hip and had a hip scope." BR 339.

On March 17, 2017, Dr. Lynch noted Taylor's right hip had lost nearly all internal rotation. On March 28, 2017, Dr. Lynch performed a total right hip replacement. BR 449-450. Based upon Taylor's MRI; his findings during the arthroscopic surgery, and findings during the subsequent hip replacement surgery, Dr. Lynch opined Taylor's pre-existing hip arthritis was aggravated or rendered symptomatic by the

November 15, 2011, injury. BR 453; BR 461. Dr. Lynch further opined the industrial injury accelerated the process of aging; thereby necessitating a hip replacement at the time it was performed. BR 453; BR 450.

VI. ARGUMENT

A. The lower court's ruling is supported by substantial evidence.

The Employer contends the lower Court “made findings against the weight of the record” and “a preponderance of this record supports the Board’s finding”. AB page 19. The majority of the Employer’s brief focuses on factual determinations made by the lower court and why the Employer disagrees with them. Respectfully, the Employer’s contentions do not warrant appellate review.

Weighing the evidence is a function for the trier of fact. An appellate court’s function is not to reweigh or rebalance the competing testimony and inferences or to apply anew the burden of persuasion. *City of Bellevue v. Raum*, 171 Wn. App. 124,151 (2012), review denied 176 Wn.2d 1024 (2012). Indeed, an appellate court will defer to the trier of fact regarding witness credibility or conflicting testimony and will not overturn them on appeal. *Zavala v. Twin City Foods*, 185 Wn. App. 838,869 (2015); *Weyerhauser v. Health Department*, 123 Wn. App. 59,65 (2004).

Therefore, appellate review is limited to examining the record to see whether substantial evidence supports the findings made and whether the court's conclusions of law flow from the findings. *Young v. Labor & Industries*, 81 Wn. App. 123, 128 (1996); *Layrite Products v. Degenstein*, 74 Wn. App. 881,887 (1994), review denied 125 Wn.2d 1011 (1994). Evidence is substantial if sufficient to persuade a fair-minded, rational person of the truth of the matter. *Potter v. Department of Labor & Industries*, 172 Wn. App. 301,310 (2012), review denied 177 Wn.2d 1017 (2012).

The trier of fact is at liberty to disregard Board findings if, notwithstanding the presence of substantial evidence, it is of the opinion other substantial evidence is more persuasive. *City of Bellevue v. Raum*, *supra* at 139; *Gaines v. Department of Labor & Industries*, 1 Wn. App. 547,550 (1969). The testimony of a single witness may, if the finder of fact believe him, determine the result, although any number of witnesses may have testified to the contrary. *Roellich v. Department of Labor & Industries*, 20 Wn.2d 674,680 (1944).

Therefore, the initial query presented before this court is simply whether substantial evidence supports the lower court's decision. The Employer's assertion this record lacks substantial evidence supporting the lower court's judgment is without merit.

Preliminarily, it is important to recognize the agency, charged with the administration of the Industrial Insurance Act, ruled on Taylor's behalf.

On January 26, 2017, the Department issued an order under Claim SB-68682 determining the employer was responsible for the permanent aggravation of Taylor's right hip degeneration and directed the Employer to authorize a right total hip replacement under the Claim. BR 98-99; EX 2. Following a protest by the Employer, on April 17, 2017, the Department issued an order affirming it's prior determination. BR 100-101; EX 1.

Second, even the Employer must acknowledge substantial evidence supports a conclusion Taylor's November 15, 2011, industrial injury proximately caused a torn hip labrum. Indeed, the Employer administratively accepted the torn labrum and paid for the arthroscopic surgery performed by Dr. Lynch. BR 215, 227.

Consistent with this determination, three Employer medical examiner's acknowledged Taylor's torn hip labrum was industrially-related and surgery was covered under the claim. This includes Dr. Hoffmeister, BR 227; Dr. Tallerico BR 339; and Dr. Shawen, BR 346. Taylor's attending orthopaedic surgeon (Dr. Lynch) also agreed the injury caused a right labral tear. BR 461.

Third, Taylor's attending orthopaedic surgeon (Dr. Lynch), her attending physician (Dr. Schmidt), and the Employer's medical examiner (Dr. Shawen), all testified the injury resulted in a permanent aggravation of Taylor's underlying hip arthritis. BR 377; BR 378; BR 453; BR 461; BR 331.

Finally, Taylor's attending orthopaedic surgeon (Dr. Lynch) and her attending physician (Dr. Schmidt) opined the need for Taylor's right total hip replacement was proximately caused by the November 15, 2011, injury. BR 378; BR 453. Further, Dr. Shawen testified hip arthroscopy accelerates the need for a hip replacement. BR 332, BR 341.

Simply summarized, substantial evidence supports both the Department of Labor & Industries' order and the Superior Court's Judgment and Order.

B. The lower court applied the correct standard.

The Employer contends the lower court "did not apply the legal standard" for aggravation/lighting up. AB 20. The Employer alleges "Nowhere in the Superior Court's decision does the standard applicable to establishing an aggravation or lighting up of a pre-existing condition appear." AB 20. Notably, the Employer does not contend the Court was unaware of the appropriate legal standard. Nor does the Employer appear

to seriously contend the appropriate legal standard was not followed by the Court.

Instead, the Employer feigns concern because: “Nowhere in the Superior Court’s decision does the standard applicable to establishing an aggravation or lighting up of a preexisting condition appear.” AB 20. The Employer’s concern is disingenuous.

Indeed, the legal standard was briefed by the parties. CP 8-25; CP 26-40; CP 41-59. Also, the legal standard for aggravation and/or lighting up was addressed by the parties during oral argument. RP 12; RP 17; RP 20.

Respectfully, we find it interesting the Employer contends Judge Cooney did not appropriately apply the correct legal standard when Judge Cooney specifically entered Finding of Fact 15 and Conclusion of Law 3, determining Taylor’s industrial injury caused a right hip labral tear, rendered her pre-existing arthritis symptomatic and accelerated the process of aging. CP 74. The above Finding and Conclusion demonstrates the Court’s familiarity with, and appropriate application of the law to the facts.

Importantly, the trial Court’s 6-page Letter Opinion further confirms Judge Cooney’s application of the correct legal standard to the facts presented in this appeal. A memorandum opinion may be considered a

supplement to formal findings of fact and conclusions of law. *Ellerman v. Centerpoint Prepress*, 143 Wn.2d 514,523 n.3 (2001); *Zavala v. Twin City Foods*, 185 Wn.App. 838,859 (2015).

In the Court's Letter Opinion, Judge Cooney summarized the evidence presented, and rationally explained the application of the lighting up doctrine to the facts as follows:

"The industrial injury sustained by Ms. Taylor on November 15, 2011, caused a labral tear in her right hip. Although she suffered degenerative joint disease at the time of the industrial injury, her right hip was asymptomatic. The industrial injury of November 15, 2011, accelerated her preexisting condition, resulting in arthroscopic surgery being performed on her right hip. The arthroscopic surgery proved unsuccessful in treating Ms. Taylor's pain and lack of mobility. The arthroscopic surgery further necessitated the need for Ms. Taylor to undergo a right hip replacement. The industrial injury Ms. Taylor sustained on November 15, 2011, was the proximate cause of her right hip replacement." CP 67.

The Employer further alleges the court "provided no discussion whatsoever about whether the pre-existing condition would have progressed notwithstanding the injury." AB 21. Contrary to the Employer's assertion, whether Taylor's pre-existing asymptomatic hip

arthritis might possibly have resulted in eventual disability is immaterial upon the question of the Employer's liability under Washington's Industrial Insurance Act. *Jacobson v. Department of Labor & Industries*, 37 Wn.2d 444,448 (1950); *Harbor Plywood v. Department of Labor & Industries*, 48 Wn.2d 553,556 (1956).

Taylor's need for a right total hip replacement at age 85 or 105 is immaterial because Taylor's medical expert opined the November 15, 2011, injury was one of the proximate causes of Taylor's need for hip replacement surgery. BR 451.

Also, whether a given disability is the result of the injury or solely of a pre-existing infirmity is normally a question of fact. *Zavala v. Twin City Foods*, *supra* at 862; *Jacobson v. Department of Labor & Industries*, 37 Wn.2d 444,448 (1950). A worker is entitled to benefits if the employment either causes a disabling disease or aggravates a pre-existing disease so as to result in a new disability. *Ruse v. Department of Labor & Industries*, 138 Wn.2d 1,7 (1999). "In an aggravation case, the employment does not cause the disease, but it *causes the disability* because the employment conditions accelerate the pre-existing disease to result in disability." *Ruse*, *supra* at 7. (Emphasis in original).

The lower court having previously determined Taylor's industrial injury proximately caused a labral tear; accelerated Taylor's underlying

arthritis resulting in increased disability; and proximately causing the need for Taylor's right total hip replacement. Further discussion by the Court was simply not necessary.

C. It does not matter whether Taylor had right hip arthritis prior to her injury.

The Employer contends Taylor's right hip osteoarthritis was symptomatic prior to sustaining her injury and Taylor's testimony to the contrary is "not reliable." AB 21-22. Again, the Employer urges this Court to weigh the evidence on this issue. The Employer alleges if Taylor's right hip was symptomatic, the Employer gets off the hook for Taylor's total hip replacement. The Employer's tunnel vision optic of Washington industrial insurance law is wrong.

In Washington, the worker is taken as she is, with all of her pre-existing frailties and bodily infirmities. *Wendt v. Department of Labor & Industries*, 18 Wn.App. 674, 682-683 (1977). Washington law recognizes two possible scenarios when an injured worker may receive benefits for a pre-existing medical condition.

First, coverage is granted when a pre-existing condition is asymptomatic and the injury proximately causes the condition to become symptomatic and disabling. This is known as "lighting up." Under this circumstance, the previous physical condition of the workman is

immaterial and recovery may be had for the full disability regardless of any preexisting or congenital weakness. Again, under this scenario it is immaterial whether the infirmity might possibly have resulted in eventual disability even without the injury. *Harbor Plywood v. Department of Labor & Industries*, 48 Wn.2d 553,556-557 (1956). The theory upon which this principle is founded is the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated. *Miller v. Department of Labor & Industries*, 200 Wash. 674, 682-683 (1939).

Importantly, a worker can have a pre-existing condition which previously required treatment, yet was non-disabling, and still claim benefits under the "lighting-up" rule. Indeed, in *Miller*, the worker had a pre-existing congenital deformity in his back which rendered him susceptible to injury. In April, 1937, the worker hurt his back while performing work and missed 9 days of work for treatment. Thereafter, Miller returned to work for 3 months before sustaining a second injury on August 4, 1937. In determining the August 4, 1937 injury had "lit-up" Miller's back, the Court held as follows:

"As we have many times stated, the provisions of the workmen's compensation act are not limited in their benefits to such persons only as approximate physical perfection, for few if any workmen are completely

free from latent infirmities originating either in disease or in some congenital abnormality.” *Miller* at 682.

Even more on point, in *Bennett v. Department of Labor & Industries*, 95 Wn.2d 531 (1981), our Court reviewed a situation much more extreme than Taylor’s. In December 1973, Bennett sustained an injury to his low back while working in Washington. Prior to sustaining the Washington injury, Bennett had injured his back in Oregon in 1959. Treatment for the Oregon injury included 3 surgeries, with the last surgery being a lumbar laminectomy. When the Oregon claim was closed, Bennett also received a permanent disability award. *Bennett* at 535, FN 1. Following the Oregon injury, Bennett returned to his usual work as a carpenter, and performed the work without restriction although he did have residual weakness in his left leg. *Bennett* at 534. The Department of Labor & Industries attempted to close Bennett’s Washington claim with a reduced disability award, alleging Bennett had a pre-existing low back condition which was symptomatic and disabling before the Washington injury ever occurred. On the other hand, Bennett alleged his pre-existing low back condition was non-disabling prior to the Washington injury, because he had been able to perform heavy duties as a carpenter without difficulty.

Bennett’s attending physician testified that prior to sustaining the Washington injury, Bennett’s prior Oregon injury and surgeries had

produced a residual weakness in Bennett's back putting him more at risk of injury than one who had not experienced such a history. He also testified the Washington injury "lighted up" Bennett's symptoms. *Bennett* at 534.

After hearing evidence, the Board determined Bennett's back was not asymptomatic prior to sustaining the Washington injury, and denied Bennett's request for full benefits. (Sound familiar?). Bennett appealed to the Superior Court, where the court gave a "lighting up" instruction to the jury, which determined Bennett was entitled to the full disability award sought. The Department appealed, alleging Bennett's prior history of low back treatment and surgeries precluded a "lighting up" scenario. On appeal, the Court disagreed with the Department and Board and affirmed the jury's verdict.

In affirming the Superior Court judgment, the Court relied heavily on testimony establishing Bennett was not "disabled" prior to sustaining the Washington injury and had been able to perform all of his work activities without noticeable difficulty. *Bennett* at 534. The Court determined that although Bennett had a pre-existing weakness in his back, rendering him more susceptible to injury than others, it was the Washington injury which acted upon the pre-existing weakness to cause disability where none existed before. *Bennett* at 533-535.

In *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467,471 (1987), our Court affirmed this principle as follows:

“The worker whose work acts upon a preexisting disease to produce disability where none existed before is just as injured in his or her employment as is the worker who contracts a disease as a result of employment conditions.” *Dennis, supra* at 471.

In stark contrast to *Bennett*, prior to sustaining the November 15, 2011, injury, Taylor had never undergone a hip surgery. Indeed, she had never been diagnosed as having any hip condition which even warranted diagnostic testing. Similar to *Bennett*, Taylor was not disabled prior to sustaining her November 15, 2011, injury. Even the Employer must concede that prior to November 15, 2011, Taylor’s ability to function on the job was not impaired nor restricted until she tore her right hip labrum while working for the Employer. Taylor’s situation is truly a “lighting up” scenario as described by her attending physicians, and as determined by Judge Cooney.

Coverage may also be extended to Washington workers when a pre-existing medical condition is symptomatic and already disabling prior to sustaining an industrial injury. Under this circumstance, having a pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to

produce the ...disability for which compensation is sought. *Harbor Plywood, supra* at 556, citing 1 Larson's Workmen's Compensation Law 170 Section 12.20.

If a pre-existing condition is already permanently and partially disabling prior to the occurrence of an industrial injury, RCW 51.32.080(5) allows the Department to segregate the degree of permanent partial impairment which pre-existed the injury and limit the award to the disability resulting from the later injury. *Bennett v. Department of Labor & Industries, supra* at 533.

However, in order for a pre-existing condition to qualify as disabling, the condition must, in some substantial fashion, permanently impact the worker's physical or mental functioning. *Tomlinson v. Puget Sound Freight Lines*, 166 Wn.2d 105,117 (2009); WAC 296-20-19000. As held in *Miller v. Department of Labor & Industries*, "We are of the view that [the then effective segregation statute] is applicable only to cases in which the workman already is, *in fact*, permanently partially disabled within the meaning of the workmen's compensation act, but that it does not apply when the preexisting weakened or congenital condition, independent of the subsequent injury, has not, in any way, incapacitated the workman or has not, of itself, constituted a disability." *Miller, supra* at 684. (Emphasis in original).

In other words, simply having a degenerative condition alone, without substantial functional impairment, does not mean a worker is disabled.

In the case at bar, Taylor did not even know she had hip arthritis prior to sustaining her right hip injury. She was not limited in her ability to function and worked without restrictions or impairment. BR 231. She did not walk with an antalgic gait or limp. BR 232. No physician had diagnosed her as having hip arthritis or restricted her ability to function. Simply summarized, the mere presence of degenerative arthritis, without accompanying loss of function, does not deprive an injured worker of benefits in the State of Washington.

To hold otherwise conflicts with the premise the worker is taken as she is, with all of her pre-existing frailties and bodily infirmities. *Wendt v. Department of Labor & Industries*, 18 Wn. App. 674, 682-683 (1977). For purposes of coverage under our Industrial Insurance Act, it is sufficient to sustain an injury which aggravates a pre-existing infirmity. *Longview Fibre v. Weimer*, 95 Wn.2d 583,589 (1981). Indeed, in *Longview Fiber*, our Court noted that although Weimer had prior instances of back troubles, the medical testimony established that bending over caused an aggravation of Weimer's preexisting back condition, which sufficiently established proximate causation. *Longview Fibre, supra* at

588-589. Our Court elaborated on this premise in *Tomlinson v. Puget Sound Freight Lines* as follows:

“If a worker is to be taken with all of his or her preexisting frailties and bodily infirmities, it is axiomatic that older, more mature workers will often have bodies experiencing degenerative processes and feeling the effects of wear and tear over the years. It is, of course, the skill and knowledge gained by years of experience that make mature workers so valuable to their employers. A worker’s PPD cannot be reduced merely because x-rays suggest preexisting degenerative arthritic changes at the time of injury without additional evidence that the degeneration resulted in a loss of functionality sufficient to make that degeneration a preexisting PPD. In sum, if an accident or injury is the proximate cause of the disability for which compensation is sought, the previous physical condition of the worker is immaterial”. *Tomlinson, supra* at 117.

In *Ray v. Department of Labor & Industries*, 177 Wash. 687 (1934), our Court addressed a factual scenario remarkably similar to that presented in the case at bar. Ray sustained an injury to his right hip while working in Washington. The evidence showed at the time of injury, Ray had a preexisting arthritic hip which was non-disabling and did not impair function. The evidence established Ray’s hip required treatment. Despite Ray’s need for treatment, the Department closed Ray’s claim, contending

the underlying arthritis required treatment, but the injury did not contribute to Ray's impaired function. The Board affirmed the Department's action.

On appeal the trial court reversed the Board, determining Ray's hip condition was caused by the injury. The Department appealed. On review, the Court noted "there is but one question on appeal, and that is whether Ray's disability was due to the injury or a pre-existing arthritic condition, and this is purely a question of fact." *Ray, supra* at 688. The Court held that if a condition is rendered active and disabling by the injury, then the condition is the result of the injury, not the previous arthritic condition. *Ray* at 688,

This is the lower Court's Judgment in the case at bar. Judge Cooney determined the industrial injury caused Taylor's pre-existing, non-disabling hip arthritis to become symptomatic in the form of a labral tear. The injury accelerated the preexisting condition, resulting in arthroscopic surgery which was a proximate cause of Taylor requiring a right hip replacement at the time it was performed. CP 67.

As was the case in *Ray*, the case at bar has essentially one issue on appeal and that is whether Taylor's disability was due to the injury or a pre-existing arthritic condition, and this is a question of fact. The causal

connection between Taylor's hip condition and the injury having been established by substantial evidence, the Employer's arguments fail.

D. The lower court appropriately gave special consideration to the attending physician's testimony.

It is a long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a worker's attending physician. *Hamilton v. Department of Labor & Industries*, 111 Wn.2d 569,571 (1988). A finder of fact is not required to give greater weight or credibility to the attending physician's testimony, only to give it careful thought. Indeed, the trier of facts believes whom it will believe. *Hamilton at 572; Groff v. Department of Labor & Industries*, 65 Wn.2d 35,45 (1964).

This rule of law exists because our Court's recognize "an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case." *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731,739 (1999). An attending physician who sees a patient over a substantial period of time is better qualified to give opinions than a doctor who examined a patient once. *Spaulding v. Department of Labor & Industries*, 29 Wn.2d 115, 128-129 (1947).

The Employer contends "the Superior Court relied almost solely on the opinion of Dr. Lynch." AB 28. The Employer further asserts Dr.

Lynch's opinion goes against the weight of the evidence. AB 30.

Therefore, the Employer again requests this Court reweigh the evidence on appeal.

ER 702 provides a witness may be qualified as an expert by knowledge, skill, experience, training or education. When evaluating the credibility given to expert testimony, Judge Cooney appropriately considered Dr. Lynch's "training, education and experience" which he determined was superior to the Employer's expert witnesses. Finding of Fact 6; CP 65-66; CP 73-74.

Judge Cooney also determined the opinions rendered by the Employer's experts lacked credibility. This is not surprising considering Dr. Porter concluded Taylor did not injure her hip on November 15, 2011. Dr. Porter's testimony was contrary to the opinions rendered by all other expert witnesses and prior Employer medical examiners. Dr. Porter's testimony for the Employer is not surprising given his entire practice consists of performing forensic medical examinations.

The Employer's other examiner, Dr. Hofmeister, concluded Taylor's industrially-related labral tear and resultant surgery had absolutely no impact on Taylor's hip. Yeah right. The arthroscopy removed portions of cushioning and stabilizing cartilage. Dr. Shawen testified Taylor's underlying arthritis was permanently aggravated or "lit up" by the injury.

BR 331; BR 346; BR 350. Dr. Shawen also confirmed medical research establishes a person undergoing a hip arthroscopy has a 5-10 times greater likelihood of undergoing hip replacement surgery. BR 332. And Dr. Lynch, who spends 70% of his time actually treating patients with hip pathology, equated the injury and labral tear to pouring gasoline on a fire. Most importantly, Dr. Lynch is the only expert who has actually seen the inside of Taylor's hip.

Weighing the evidence is a province for the trier of fact. The lower court thoroughly evaluated all the evidence and after considering the training, education and experience of the experts, believed whom it would believe. The Judgment is supported by substantial expert evidence. Giving special consideration to the medical opinions rendered by the worker's attending physicians is warranted under Washington law.

Finally, contrary to the Employer's assertion, Dr. Lynch's opinion that the industrial injury permanently aggravated Taylor's hip, is also supported by Dr. Schmidt, (another attending physician), Dr. Shawen and Dr. Tallerico.

In summary, the Employer's assertion the Superior Court erred in giving special consideration to the opinions rendered by Taylor's attending physicians is nonsense. The Court was required to do so and to

weigh the evidence accordingly. The Employer's request for this Court to reweigh the evidence must be denied.

E. Taylor's injury proximately caused both a labral tear and her right hip replacement.

The Employer contends the causal chain between Taylor's November 15, 2011, injury and her subsequent right hip replacement was broken by her October 30, 2014, injury. AB 31. The Employer contends Conclusion of Law No. 4 is not supported by substantial evidence. AB 30. The Employer's assertion is without merit.

Even the Board concluded "none of the medical experts attribute the need for a hip replacement to the October 30, 2014, injury. A legal theory without medical testimony to support it has no merit." BR 61.

Even the Employer's medical examiner who evaluated Taylor for the October 30, 2014, injury, does not support the Employer's contention. On June 26, 2015, Dr. Hofmeister examined Taylor for the October 30, 2014, injury. BR 219. Dr. Hofmeister testified the need for the total right hip replacement was not caused by the October 30, 2014, injury. BR 221; BR 222. Likewise, Taylor's attending Physician for the October 30, 2014, injury (Dr. Schmidt) agreed. BR 371-372.

The Employer apparently contends the testimony of its own medical examiners and the testimony of the worker's attending physician do not constitute substantial evidence.

The Employer next references what it considers to be substantial evidence that "broke the cause in fact chain." BR 33. The Employer does not correctly apply the standard of review applicable to this appeal.

The issue on appeal is not whether there is substantial evidence supporting the Employer's factual assertions. To the contrary, the issue presented before this Court is whether there is substantial evidence which supports the lower court's judgment. *Young v. Labor & Industries*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996); *Layrite Products v. Degenstein*, 74 Wn. App. 881,887 (1994), review denied 125 Wn.2d 1011 (1994).

The Employer may be frustrated with the trial court's rejection of the testimony of its witnesses. Nevertheless, in an industrial insurance case, credibility determinations are solely for the trier of fact and cannot be overturned on appeal. *Zavala v. Twin City Foods, supra* at 869.

Therefore, it is for the trier of fact to determine which version of substantial evidence is more persuasive. *City of Bellevue v. Raum* at 139; *Gaines v. Department of Labor & Industries*, 1 Wn.App 547,550 (1969). When looking for substantial evidence supporting the lower court's judgment, the appellate court reviews the record in the light most

favorable to the party who prevailed in superior court. *Robinson v. Department of Labor & Industries*, 181 Wn.App. 415,425 (2014).

As this Court is well aware, in Washington, an industrial injury need not be the sole proximate cause of the resulting disability - - it is sufficient if the injury is one of the proximate causes. *Wendt v. Dept. of Labor & Indus.*, 18 Wn. App., 674, 683 (1977). Thus, the issue presented is whether substantial evidence supports a conclusion Taylor's November 15, 2011, injury is one of the proximate causes of her need for a total right hip replacement.

Dr. Lynch opined the injury acted upon an asymptomatic arthritic joint, caused a torn hip labrum, "put gasoline on the fire" and accelerated the process of hip aging necessitating a hip replacement. BR 461; BR 452; BR 453. Dr. Lynch testified Taylor's need for a right hip replacement was multi-factorial and the November 15, 2011, injury was one of the proximate causes. BR 451; BR 452; BR 453. Dr. Schmidt agrees. BR 378. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer a causal connection exists, the evidence is sufficient. *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 205 (2017).

There is substantial evidence in this record from which a trier of fact can infer the required causal connection, and which supports the lower court's proximate cause determination.

VII. ATTORNEY FEES

In the event this Court affirms the judgment of the Spokane County Superior Court order dated May 31, 2019, Taylor respectfully requests an award for reasonable attorneys fees and costs for services rendered before the Superior Court and the Court of Appeals be awarded per RCW 51.52.130 and RAP 18.1.

VIII. CONCLUSION

Kathryn Taylor suffered a work injury to her right hip on November 15, 2011. This work injury proximately caused a labral tear, and permanently aggravated and accelerated her preexisting, non-disabling right hip arthritis, leading to a right total hip replacement. The Department of Labor & Industries correctly ordered the self-insured Employer to accept responsibility for Taylor's right hip replacement. Substantial evidence supports the Superior Court's Judgment which affirms the Department's determination.

The worker respectfully requests this Court affirm the judgment entered by the Spokane County Superior Court on May 31, 2019.

The Respondent should also be awarded reasonable attorney fees and costs pursuant to RCW 51.52.130 and RAP 18.1.

Dated this 3rd day of January, 2020.

Respectfully submitted,

Brian L. Ernst

Brian L. Ernst, WSBA #14654
Beemer & Mumma
Attorneys for Respondent, Kathryn Taylor

BEEMER & MUMMA PS

January 03, 2020 - 8:15 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36920-0
Appellate Court Case Title: Kathryn Taylor v. Maxim Health Care Services
Superior Court Case Number: 18-2-05599-1

The following documents have been uploaded:

- 369200_Briefs_20200103081141D3750599_3718.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 20200103081040620.pdf

A copy of the uploaded files will be sent to:

- anastasia.sandstrom@atg.wa.gov
- brian@beemer-mumma.com
- mgodfrey@sbhlegal.com
- rwatkins@sbhlegal.com
- tberistain@sbhlegal.com

Comments:

Sender Name: Brian Ernst - Email: brian@beemer-mumma.com
Address:
1710 N WASHINGTON ST # 100
SPOKANE, WA, 99205-4769
Phone: 509-324-6411

Note: The Filing Id is 20200103081141D3750599