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NO. 36980-3-III

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

JANICE BRINSON-WAGNER,

Appellant,

v.

KENNEWICK SCHOOL DISTRICT and WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

**BRIEF OF RESPONDENT,
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

The same medical condition cannot be both related and unrelated to an injury. The Board of Industrial Insurance Appeals determined that Janice Brinson-Wagner's injury did not cause her need for left knee surgery but that the "aid to recovery" rule authorized the treatment. WAC 296-20-055. This rule allows treatment for a condition unrelated to an injury if the unrelated condition is retarding recovery of a related condition. *Id.* Brinson-Wagner's unrelated knee condition was impeding recovery of her related ankle condition.

In response to the employer's appeal from the Board decision, the superior court entered a final judgment that concluded that the Board correctly directed the Department to authorize the treatment of the knee condition as an "aid to recovery" under WAC 296-20-055. By upholding the Board's decision and by relying on WAC 296-20-055, the superior court necessarily determined that the knee condition was unrelated to the injury. And since Brinson-Wagner did not appeal this decision, it precludes her from arguing that the condition is related to her injury.

The superior court properly dismissed Brinson-Wagner's separate appeal from the Board's decision because the court had already entered a final decision that disposed of the issues that Brinson-Wagner wished to raise. Once the superior court made a final decision that the knee condition

was *unrelated* to the injury, it could not rule in Brinson-Wagner's case that the same knee condition was *related* to the injury, as such a ruling would violate res judicata.

Brinson-Wagner argues in effect that the superior court authorized her knee treatment but did not resolve the underlying basis of its decision. Setting aside that res judicata principles compel preclusion when a party could have raised an issue, this argument contradicts the plain language of the superior court's final judgment, which relied on the aid to recovery rule. The superior court properly dismissed Brinson-Wagner's appeal, and this Court should affirm.

II. ISSUE

Res judicata precludes relitigation of a case that a court has already decided. The superior court entered a final decision authorizing Brinson-Wagner's left knee surgery as an aid to recovery under WAC 296-20-055, a rule applying only to treatment of unrelated medical conditions. Does res judicata preclude Brinson-Wagner from arguing that her knee condition was related to her injury?

III. STATEMENT OF THE CASE

A. Overview of Workers' Compensation System

A Washington employer must either be insured by participating in the state fund managed by the Department or be self-insured.

RCW 51.14.010; WAC 296-15-330; *Boeing Co. v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015). Self-insured employers directly provide

medical treatment and other benefits to their injured workers, subject to the Department's oversight. Kennewick School District is a self-insured employer.

When a worker is injured, the Department or self-insured employer provides proper and necessary medical treatment for the conditions that were proximately caused by the worker's injury. RCW 51.36.010; WAC 296-20-01002 (definition of "proper and necessary" and "accepted condition"); *see Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 605-06, 676 P.2d 538 (1984). Under the definitions in WAC 296-20-01002, treatment cannot be proper and necessary unless it addresses a condition that was caused by the workplace injury. WAC 296-20-01002 (definitions of "accepted condition" and "proper and necessary"). But WAC 296-20-055 allows the Department to authorize treatment to address a condition that was not proximately caused by the injury if that condition is interfering with the ability to treat the accepted medical conditions. When the worker has received all proper and necessary treatment for the conditions caused by the injury, the worker's condition is "fixed" and stable (also known as "maximum medical improvement") and the claim is ready for closure. RCW 51.32.055, .060, .080; WAC 296-20-01002; *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950).

B. Brinson-Wagner Sustained an Ankle Injury While Working for the Kennewick School District

Brinson-Wagner injured her left ankle in 2008 while working for the Kennewick School District. CP 15, 56. The Department allowed the claim, and Kennewick provided Brinson-Wagner with treatment, including surgery for the ankle. CP 56, 101-02.

Brinson-Wagner later sought authorization of a total knee replacement, but the Department denied authorization of the surgery. *See* CP 40. Brinson-Wagner appealed to the Board. CP 50.

C. The Board Concluded That Brinson-Wagner's Left Knee Condition Was Unrelated To Her Injury but That the Left Knee Treatment Should Be Covered as an Aid To Recovery; the Superior Court Affirmed the Board

At the Board, Brinson-Wagner and Kennewick presented conflicting evidence on whether Brinson-Wagner's injury was responsible for her need for a total knee replacement. Kennewick presented three doctors who testified that the industrial injury was not responsible for the need for the left knee surgery: Lance Brigham, MD; Bryan Marchant, MD; and Eugene Toomey, MD. CP 220, 229-30, 233, 264-65, 270, 310.

The attending physician, Faustin Stevens, MD, who treated Brinson-Wagner's left ankle, did not opine on whether Brinson-Wagner needed left knee surgery as a result of the injury, but did testify that he recommended that the worker have the knee "taken care of" so she could

engage in “therapies that would be good for the ankle.” CP 145, 149, 152-53. Mark Merrell, MD, an orthopedic surgeon who also treated Brinson-Wagner, concluded that the injury aggravated her pre-existing arthritis in her knee and was responsible for her need for a total knee replacement. CP 176, 178, 186-89. But Dr. Merrell acknowledged that it was “[h]ard to know” whether Brinson-Wagner would have needed the knee surgery if the injury had not happened. CP 186.

The Board found that the “great weight of the evidence” before it showed that the worker’s need for knee surgery was because of the natural progression of pre-existing arthritis, which was not aggravated by the injury. CP 15, 17. But the Board concluded that the left knee surgery should be authorized under WAC 296-20-055, a rule that allows for treatment of a condition that is unrelated to the injury if the unrelated condition delays the worker’s recovery from the injury. CP 16-18.

Both Brinson-Wagner and Kennewick appealed the Board’s decision to Benton County Superior Court, with the court assigning Brinson-Wagner’s appeal the cause number 17-2-01893-4, and assigning the cause number 17-2-01960-4 to the employer’s appeal. *See* RP 4; CP 1-3, 336-39. The two appeals were not consolidated. RP 4; CP 336-39, 377-78.

The employer's appeal was heard in July 2018, approximately 12 months before a hearing was held regarding Brinson-Wagner's appeal. *See* CP 337, 351. The trial court concluded in the employer's appeal that the Board properly directed the employer to authorize the left knee surgery as an "aid to recovery" under WAC 296-20-055, and the court entered a judgment that affirmed the Board's decision. CP 336-39. No party appealed that decision.

Then in the current case, Kennewick and the Department sought summary judgment about Brinson-Wagner's appeal, arguing that the final judgment authorizing the knee surgery as an aid to recovery precluded Brinson-Wagner from arguing that the left knee surgery was related to the industrial injury. CP 332-50, 370-74.

The superior court granted Kennewick's motion for summary judgment and dismissed Brinson-Wagner's appeal. CP 377-78.¹ Brinson-Wagner appealed to this Court. CP 379-80.

¹The Honorable Carrie L. Runge, the judge who heard Kennewick's appeal on July 2018, was the same judge who heard and decided the motion for summary judgment in July 2019, though a different court official signed the judgment in the first case. *See* CP 334-35, 361, 381-82. The court's letter erroneously indicates that it is granting the *plaintiff's* motion for summary judgment, but the court meant that it was granting Kennewick's motion.

IV. STANDARD OF REVIEW

At superior court, the court reviews the Board's decision de novo but does so based solely on the record developed at the Board.

RCW 51.52.115. In an appeal from a superior court's decision, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007).

The appellate court does not review the Board decision, nor does the Administrative Procedure Act apply. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

On review of a summary judgment order, an appellate court's inquiry is the same as the superior court's. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Questions of law are reviewed de novo. *Bennerstrom*, 120 Wn. App. at 858.

V. ARGUMENT

When the superior court entered a final judgment that determined that the Board properly directed the Department to authorize knee surgery

as an aid to recovery under WAC 296-20-055, it necessarily determined that the need for the knee surgery was unrelated to the injury. This is because the aid to recovery rule, WAC 296-20-055, applies only to treatment of medically unrelated conditions:

Temporary treatment of an unrelated condition may be allowed, upon prior approval by the department or self-insurer, provided these conditions directly retard recovery of the accepted condition. The department or self-insurer will not approve or pay for treatment for a known preexisting unrelated condition for which the claimant was receiving treatment prior to his industrial injury or occupational disease, which is not retarding recovery of his industrial condition.

....

The department or self-insurer will not pay for treatment for unrelated conditions unless specifically authorized. This includes prescription of drugs and medicines.

WAC 296-20-055.

This rule does not authorize treatment of a medical condition that is related to an injury, only treatment for unrelated conditions. And since the superior court relied on this rule and its decision was not appealed, Brinson-Wagner cannot now argue that its decision was incorrect.

- A. **Res Judicata Precludes Brinson-Wagner From Arguing That Her Need for Knee Surgery Was Related To the Injury Because the Superior Court Had Decided That the Need for Surgery Was Unrelated To the Injury**

Res judicata precludes litigation of an issue that was previously resolved in a prior appeal that has been resolved through a final and unappealed judgment. *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Res judicata extends both to issues that were litigated in the prior appeal and those that were not litigated but could have been raised in the prior appeal. *See id.* In workers' compensation matters, res judicata applies to unappealed decisions of the Department, unappealed decisions of the Board, and unappealed superior court decisions. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994).

Res judicata has four elements, all of which are met here:

- (1) the two cases involve the identical subject matter;
- (2) the two cases relate to the same cause of action;
- (3) the two cases involve the same persons and parties; and
- (4) the two cases involve the same quality of the persons for or

against whom the claim is made. *Loveridge*, 125 Wn.2d at 763.

The first and second elements are met because both cases involved the same industrial injury and the same issue on appeal: whether the Board properly directed the Department to authorize Brinson-Wagner's knee surgery as an "aid to recovery" under WAC 296-20-055. Though Kennewick and Brinson-Wagner disagreed with the Board's decision for

different reasons, they each appealed the same Board decision, and the question before the superior court in both cases was the same: was the Board's decision correct? So when the superior court entered a final judgment in response to Kennewick's appeal that determined the Board's decision was correct, Brinson-Wagner could not argue in her case that the Board's decision was incorrect.

The third and fourth elements are also met because the two cases involved the same parties and the same quality of persons: the Department, Kennewick, and Brinson-Wagner. Indeed, Brinson-Wagner does not dispute that the third or fourth elements are met. *See* Appellant's Brief (AB) 9-10.

B. The Aid To Recovery Rule Applies Only To the Treatment of Unrelated Medical Conditions; by Relying on the Rule, the Superior Court Necessarily Determined That Brinson-Wagner's Knee Condition Was Unrelated to Her Injury

The Industrial Insurance Act provides workers with the right to receive proper and necessary treatment for conditions that are proximately caused by the injury (RCW 51.36.010; *Zipp*, 36 Wn. App. at 605-06), but no statute provides for the treatment of medical conditions that are *unrelated* to an injury. *See* RCW 51.36.010. Indeed, as the court noted in *Maphet v. Clark County*, 10 Wn. App. 2d 420, 433-37, 451 P.3d 713 (2019), the Department's medical aid rules generally provide that the

Department or a self-insured employer must identify an accepted condition—meaning a condition proximately caused by the injury—when authorizing treatment. *See* WAC 296-20-01002 (defining “accepted condition,” “authorization,” and “proper and necessary”).

But through WAC 296-20-055, the Department created an exception to the general rule, providing for the treatment of medical conditions that were *not* proximately caused by the injury when treating those conditions is necessary to be able to treat the accepted conditions. As noted above, WAC 296-20-055 provides in part:

Temporary treatment of an *unrelated* condition may be allowed, upon prior approval by the department or self-insurer, provided these conditions directly retard recovery of the accepted condition

(Emphasis added).

WAC 296-20-055 has no applicability to whether treatment should be provided for a condition that was caused or aggravated by the worker’s injury. *See* WAC 296-20-055.

The Board found that Brinson-Wagner’s need for knee surgery was not proximately caused by her injury but that it should be authorized as an aid to recovery under WAC 296-20-055 because treating the worker’s left knee was necessary to treat her accepted left ankle condition. CP 16-18.

Considering the Board’s decision, the superior court found:

WAC 296-20-055 address both the Department and Self-Insured Employers, therefore, Ms. Brinson-Wagner had the ability to pursue a denial of a request for coverage of a condition that was retarding recovery.

CP 360.

And then it concluded:

The Board was correct when it instructed the Self-Insured Employer to cover the total knee replacement as an aid to recovery.

CP 360.

So when the superior court found and concluded that the Board's decision was correct and cited WAC 296-20-055 in its final judgment, the superior court necessarily determined that Brinson-Wagner's need for knee surgery was unrelated to her injury. *See* CP 360-61, 377-78. If the superior court had believed that the need for knee surgery *was* related to the injury, it could not have also said that the Board was correct when it directed the Department to authorize the treatment as an aid to recovery under WAC 296-20-055. The court's final judgment thus established that the need for knee surgery was unrelated to the worker's injury.

C. Brinson-Wagner's Arguments Lack Merit

Brinson-Wagner's arguments about the meaning of the superior court's decision lack merit. Brinson-Wagner argues that the superior court did not decide whether she needed the knee surgery because of the injury

and suggests that it just rejected Kennewick's arguments about the "aid to recovery" rule. AB 8-9. But the superior court did not just reject Kennewick's arguments about that rule without deciding whether the rule applied; the court concluded that the rule did apply, and it upheld the Board's decision on that basis. *See* CP 16-18, 360-61.

And contrary to Brinson-Wagner's argument (at AB 7), the fact that the next sentence in that conclusion of law says that Brinson-Wagner "is allowed to pursue" her appeal does not negate the fact that the court upheld the Board's decision to authorize the treatment as an aid to recovery. *See* CP 360-61. The judgment's statement that Brinson-Wagner could "pursue" the appeal meant that it did not directly dispose of her appeal in the case about the employer's appeal, but it did not strip the judgment's other findings or conclusions of their legal effect. *See* CP 360.

In essence, by including the language that Brinson-Wagner could still pursue the appeal, the court recognized that, as it only decided the one appeal at that time (Kennewick's), it could not properly dispose of the other appeal (Brinson-Wagner's). *See* CP 360. The two cases were never consolidated, and Kennewick's appeal was the only one for which a motion for summary judgment had been filed. *See* CP 332-39, 351. So the judgment properly recognized that it only disposed of one of the two cases. *See* CP 360.

In pursuing her appeal, Brinson-Wagner would presumably have asserted an argument that her need for surgery was related to the injury. At that point, it would be up to Kennewick and the Department to raise the defense of res judicata. If they had not raised the defense, they would have waived it. *See Karlberg v. Otten*, 167 Wn. App. 522, 532, 280 P.3d 1123 (2012) (recognizing that a party can waive res judicata if it is aware that there are two suits regarding the same cause of action yet it does not raise res judicata as a defense). But here Kennewick and the Department raised the affirmative defense, and Brinson-Wagner cannot obtain the relief she wants.

And although Brinson-Wagner does not couch her argument in these terms, under her theory of the case, the superior court concluded that she should receive the knee surgery without deciding *why* the surgery should be authorized. *See* AB 6-9. Brinson-Wagner argues that the court made no decision about whether the need for the knee surgery was caused by the injury or not, and she suggests that the court did not decide that the treatment should be authorized *only* as an aid to recovery. *See id.* So under her view of the case, the superior court's decision offers no basis for its ruling that Brinson-Wagner should receive knee surgery. This argument is contrary to the unambiguous language of the court's decision, and it would

not make sense for a court to dispose of a case without giving a basis for its decision.

The superior court concluded that “[t]he Board was correct when it instructed the Self-Insured Employer to cover the total knee replacement as an aid to recovery.” CP 360 (CL 3). This statement establishes that the court concluded not only that Brinson-Wagner should undergo knee surgery, but also that the treatment should be authorized as an aid to recovery and that the Board was correct to authorize the treatment on that basis. *See* CP 360.

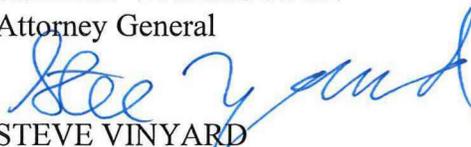
There is no genuine issue of material fact about whether res judicata precludes Brinson-Wagner from arguing that her need for knee surgery was proximately caused by her injury, so the superior court properly disposed of the case on summary judgment. Brinson-Wagner argues that summary judgment was inappropriate because there was a genuine issue of fact as to whether her injury aggravated her knee condition. AB 7-8. But summary judgment is proper when no material fact is in dispute, and a material fact is one that affects the outcome of the case. *See Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164-65, 273 P.3d 965 (2012). The issue of whether the knee was aggravated is not a material fact because res judicata disposes of the case.

VI. CONCLUSION

When the superior court determined that the Board properly directed Kennewick to authorize treatment of the left knee as an aid to recovery, the superior court necessarily determined that the left knee condition was not proximately caused by the injury. Because Brinson-Wagner did not appeal that decision, res judicata precludes her from arguing that her knee condition was proximately caused by the injury. The superior court properly granted summary judgment to the employer, and this Court should affirm.

RESPECTFULLY SUBMITTED this 18 day of February 2020.

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The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service in the below described manner:

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