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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I
SEATTLE

NORTHWEST HARDWOODS, INC., BY WEYERHAEUSER
COMPANY AND SUBSIDIARIES and the DEPARTMENT OF
LABOR AND INDUSTRIES, Appellants

vs.

GILBERTO GUTIERREZ, Respondent

BRIEF OF RESPONDENT

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I. RESTATEMENT OF ISSUES

1. Was the jury's verdict (not a trial court decision as appellant claims) supported by substantial evidence where claimant Gilberto Gutierrez's functional abilities had dramatically worsened in his daily and work activities and there was a new annular tear, a herniation, that was consistent with the worsening?

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worsening should this court review appellant's argument that it was foreclosed from arguing these issues to the jury?

6. Should this court once again re-evaluate the lighting up doctrine to change or overrule decades of precedent that when a preexisting asymptomatic condition is made symptomatic by an industrial injury the underlying condition is not considered a cause but instead the condition upon which the injury acted and is immaterial for purposes of an industrial insurance claim?

7. Was there any prejudicial harm instructing the jury on the segregation rule in the context of appellant's arguments to the jury that Mr. Gutierrez had a preexisting condition or pathology that was the cause of his worsening rather than the industrial injury in this aggravation case?

8. Is Mr. Gutierrez entitled to previously assessed attorney's fees and costs as well as attorney's fees and costs for this appeal?

II. RESPONSE TO RESTATEMENT OF THE CASE

Appellant's summary of the procedural status of this case is largely correct. Its recitation about Mr. Gutierrez's filing of a motion for summary judgment and the denial of that motion is completely irrelevant in this court. The trial court denied Mr. Gutierrez's motion and he has not cross-appealed in regard to that denial. At the start of the trial before Judge Lucas the parties and the court agreed that the order denying that

summary judgment had no preclusive effects on the issues to be tried before the jury. (RP 3)

During trial, as indicated by appellant, Judge Lucas admitted Exhibit 1, over the relevancy objections of the department and the objections of appellant on hearsay, relevance and prejudice. It should be noted that the department had not preserved any objections at the Board of Industrial Insurance Appeals (the Board) to renew at trial. Appellant only preserved authenticity and hearsay at the Board. (CABR 49-57) At trial appellant abandoned authenticity as an objection. (RP 4-9).

The statement of facts provided by appellant is essentially its closing argument to the jury at trial only with citations to the record. As noted below, there was substantial evidence in the record that was not included in appellant's statement of facts that supports the jury's ultimate verdict reversing the decision of the Board.

III. PRELIMINARY STATEMENT

This is a self insured employer appeal from a jury verdict in favor of Mr. Gutierrez, an injured worker with a disabling back injury. The appellant relies on inapplicable standards of review and raises arguments that it waived by not raising them either at the Board or before the trial court. In addition, many of the cases relied upon are not germane to the issues raised or are cited for principles they do not support. The appellant

also asks this court to do a factual review of the record and change law that has been relied upon for decades.

IV. REVIEW STANDARDS

A. Jury Verdict.

Because this was a jury trial, appellant is incorrect citing review standards for bench trial appeals. Here the review is more limited than in those instances.

First, this is an appeal in a workers' compensation claim where the remedial nature of the statute requires that the law be liberally construed *in favor* of the injured worker. Intalco Aluminum Corp. v. Department of Labor and Indus., 66 Wn.App. 644, 654, 833 P.2d 390, (1992) citing Dennis v. Department of Labor and Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). All doubts are to be resolved in favor of the worker. *Id.*

Second, appellant's challenge to the sufficiency of the evidence requires that it admit the truth of Mr. Gutierrez's evidence and all reasonable inferences from the evidence. In addition, the jury verdict is presumed correct.

Simpson also challenges the sufficiency of the evidence supporting the Board's findings. In challenging the sufficiency of the evidence, Simpson must admit the truth of the claimant's evidence and all inferences that can reasonably be drawn therefrom. Intalco Aluminum Corp. v. Department of Labor and Indus., 66 Wn.App. 64, 653, 833 P.2d 390 (1992), *review denied*, 120

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Simpson Timber Co. v. Wentworth, 96 Wn.App. 731, 738, 981 P.2d 878, 882 (1999). When reviewing the evidence on appeal, it is not the function of the appellate court to weigh inconsistencies that may exist between direct and cross examination testimony of a witness or between witnesses. “The function of weighing testimony in this matter is exercised solely by the trier of fact.” Zipp v. Seattle School District No. 1, 36 Wn.App. 598, 606, 676 P.2d 538, 544 (1984) citing Bennett v. Department of Labor and Indus., 95 Wn.2d 531, 627 P.2d 104 (1981).

B. Jury Instructions.

In regard to appellant’s challenge to jury instructions, the review by the appellate court is de novo as indicated by appellant in its brief, but an instruction that contains an erroneous statement of law is reversible error *only* when it prejudices a party. Lewis v. Simpson Timber Co., 145 Wn.App. 302, 318, 189 P.3d 178, 188 (2008). The court looks at the instructions in their entirety to determine if any particular instruction could have confused or misled the jury. *Id.* citing Intalco Aluminum Corp. v.

Department of Labor and Indus., 66 Wn.App. at 663. A jury instruction should allow each side to argue their theories of the case, not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. Lewis v. Simpson Timber Co., 145 Wn.App. at 318.

V. ARGUMENT

A. Appellant's claim that there was insufficient evidence to support the verdict is incorrect and relies on a presumed proof standard that is inaccurate and excessively stringent.

As noted above, Mr. Gutierrez, the injured worker, is initially entitled to a liberal application of the law consistent with the benevolent nature of the workers' compensation system. In addition, the standard of review for challenging the sufficiency of evidence is that appellant must admit the truth of the Mr. Gutierrez's evidence and all inferences that can reasonably be drawn from the evidence. Appellant makes no reference in its brief to the lay testimony presented to the jury. Lay testimony is evidence that appellant must admit is true. This is an accepted source of evidence that can bolster and fill gaps left by the medical testimony.

Bennett v. Department of Labor and Indus., 95 Wn.2d 531, 627 P.2d 104 (1981). Bennett was a lighting up case like here. The medical evidence had rated claimant 60% disabled, 40% of which was related to an older injury for which claimant had received a disability award and only 20% to the work injury itself. The lay testimony was that claimant had been able

to perform his work without apparent physical limitations. The jury found the full 60% disability was related to the work injury. The Supreme Court ruled that it was up to the jury to decide the issue and the jury had both medical and lay witness testimony upon which it could rely to reach its verdict. On the causation issue, like the one presented here, the court stated:

The causal connection between a claimant's physical condition and his employment must be established by medical testimony. (citation omitted) It is not always necessary, however, to prove every element of such causation by medical testimony. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer the causal connection exists, the evidence is sufficient. (citation omitted) This rule is in harmony with our holding in Bitzan v. Parisi, 88 Wn.2d 116, 558 P.2d 775 (1977), that lay witnesses may testify to such aspects of physical disability of an injured person as are observable by their senses and describable without medical training, and further that an injured person can testify regarding the subjective aspects of an injury and to the limitations of his physical movements. The weight of such testimony is for the jury.

95 Wn.2d at 533.

The lay testimony in this case was that Mr. Gutierrez's functioning changed significantly after the original claim closure. (CABR 12:8-17:25)¹ Mr. Gutierrez testified that he started having problems going up and down stairs, and he was not able to help as much with cooking, dishes,

¹ CABR is the certified appeal Board record. Citations to the record are page:line. Mr. Gutierrez and Ms. Racu testified at the Board while Dr. Haller and Dr. Price testified by deposition transcripts filed with the Board.

washing clothes and other household chores. When doing dishes he had to lean over and rest on the sink. He could no longer work on his cars as well as he did before and the tingling into his leg got worse. He no longer was able to sleep in a bed but instead had to sleep on the floor. When lying down he had to hold his legs in a specific position which was different than before. He could not go the length of an 8 hour work day without lying down. He had to be extra careful doing things like showering and he used a scrubber to clean his legs. He found that when he moved wrong on occasion he would hear his back pop and feel needles poking him in the back. He had to take breaks while shaving and leaned on the sink. (*Id.*) Ms. Racu, the woman with whom the Mr. Gutierrez lived confirmed these changes in his activities and abilities. She observed other limitations that had developed as his condition worsened such as not being able to help put up a Christmas tree, Christmas lights, or go dancing (CABR 42-48). Appellant ignores this testimony entirely.

Here appellant relies extensively on the testimony of its medical witness, Dr. Price. Whether or not there is substantial evidence to support the Board decision (and appellant's position), is simply not relevant in this court. The jury is allowed to overrule the Board, as it did here, even if there was substantial evidence to support the Board conclusions in the record.

Furthermore, the trier of fact may disregard the BIIA's findings and conclusions if, even though there is substantial evidence to support them, it believes that other substantial evidence is more persuasive. *Jenkins v. Department of Labor & Indus.*, 85 Wn.App. 7, 13, 931 P.2d 907 (1996)

Lewis v. Simpson Timber Company, 145 Wn.App 302, 315-316, 189 P.3d 178 (2008).

Appellant hinges part of its argument on the lack of proof of a specific date when the new herniated disk occurred. Appellant, however, ignores the requirement that Mr. Gutierrez's evidence is presumed true including all inferences from the evidence. As noted below, Dr. Haller could not identify a specific time when the disk herniated, but believed it occurred in relation to the significant increase of Mr. Gutierrez's low back problems approximately four and a half years after his claim was closed.

A: It could be that the disk itself is getting sicker—One of the problems with this is that they often don't completely heal, so if you have an injury to a disk it often doesn't come back a hundred percent, and then over time they can deteriorate further, either gradually or with another episode. And you can also get secondary changes that can cause symptoms. So if the disk isn't doing its job, then the joints in the bone that the disk is protecting can wear out.

Q: Is that the kind of process you think is going on here with Mr. Gutierrez?

A: Yes.

(Haller dep 23:7-18).

A: That's a somewhat confusing question. The annular tear certainly can result from natural progression of degenerative disk disease. I felt that the patient's

symptoms had worsened, and I was looking for an explanation of his symptoms, and that's one explanation for the worsening of his symptoms. I think that's pretty much all I can say about that.

(Haller dep 35:9-15).

In general, if appellant's argument was correct there would be a failure of proof in nearly every workers' compensation aggravation case. First, as noted in Dr. Haller's testimony, herniations in the setting of low back degenerative changes often develop over time. Second, the dates on which the comparison occurs to show a worsening is dictated by the department actions rather than medical related events.

In an aggravation case, the claim is supposed to be reopened if there is a worsening of the industrially related condition as substantiated by some objective finding. The worsening is shown by a comparison of the industrially related condition between two terminal dates. Karnis v. Department of Labor and Indus., 39 Wn.2d 898, 239 P.2d 555 (1952). These are typically referred to as T1 and T2. T1 is the department's order that previously closed the claim. T2 is the date of the department's order adjudicating the application to reopen. *Id.* These dates rarely, if ever, coincide with the dates of medical tests or even an examination by a doctor. For example, Wendt v. Department of Labor and Indus., 18 Wn.App. 674, 571 P.2d 229 (1977) was an aggravation case like the

present matter. The claimant appealed from the department's denial of an application to reopen a claim that had been previously closed with a permanent partial disability (PPD) rating. T1 was April 22, 1970, the date the claim had been closed with a PPD rating. T2 was November 27, 1972, the date the application to reopen was denied. 18 Wn.App. at 675-6. The x-rays used as evidence of objective worsening was a comparison of x-rays taken in 1969, a year before T1, with x-rays from sometime earlier in 1972 then the T2 date.

In the present matter the claim was originally closed by order dated February 26, 1998. (See CP 101) After a protest, the department adhered to its original decision by order dated June 24, 1999, which is T1 in this instance. (CP 109) Obviously no treatment was provided anytime between those two dates because the claim had been closed and was under protest. The most recent radiographic study available was a CT scan performed on June 17, 1997 which was the best evidence to establish the status of the Mr. Gutierrez's back as of T1. (Haller dep 17:13-25). In fact the medical history was that Mr. Gutierrez's condition was relatively stable and in some respects had improved during that time frame. (Haller dep 14:5-17:11) Dr. Haller signed the application to reopen the claim February 4, 2005, and had an MRI scan done on September 27, 2005. The

department denied the application by order dated April 29, 2005. Its order adhering to that decision was January 30, 2006. This is T2. (CP 109)

In most of these cases in order to elicit testimony to support the reopening of the claim it becomes necessary for the doctor to rely not only on the tests, but also the history from his patient, and assumed facts based on testimony of other witnesses in the appeal. That is what was done here. (Haller dep 12:15-13:10).

Here the evidence shows that Mr. Gutierrez did not have problems with his back before the September 1995 industrial injury. (CABR 9-10) That work related injury lit up or made active a preexisting asymptomatic degenerative condition in his low back. (Haller dep 39:23-49:9, quoted below) Mr. Gutierrez received conservative care and never missed work because of his injury. (CABR 8-10) There were pain complaints but minimal physical findings other than the radiographic findings showing the degenerative changes in his spine. The claim was closed with a Category 2 PPD. (CP 108) Both medical witnesses in this case agreed that this was an appropriate award where there was only the aggravated preexisting degenerative changes as the medical finding. (Haller dep 41:15-42:2; Price dep 44:15-45:8) Mr. Gutierrez's back condition never did go back to pre-injury baseline. Several years later, in late 2004, it got worse and caused increasing loss of function at work, at home, and with

his avocations. (CABR 12:8-17:25; CABR 42-48). In this instance Dr. Haller was Mr. Gutierrez's attending physician who testified in support of this appeal. He testified that he knew that the time period to prove worsening was between the dates of June 24, 1999, and January 30, 2006. (Haller dep 4:15-24). Dr. Haller's ultimate testimony was that the industrial condition had worsened between these terminal dates.

Q: So as I understand it, your opinion as indicated in the records that we have discussed, did Mr. Gutierrez's condition, his low back, worsen from the date the department closed his claim, June 24, 1999, as compared with the last department order dated January 30, 2006?

A: Yes, I believe it did worsen.

Q: (by Mr. Kohles) and that worsening is substantiated by any objective findings?

A: By his history, which is not objective, and by the MRI.

Q: That MRI finding of a change in his disk?

A: Yes.

Q: Opinions you have given today on a more-probable-than-not-basis?

A: Yes.

(Haller dep 24:24-25:11)

Appellant is also wrong to claim that any hesitancy Dr. Haller had regarding the causation issue supports its position that the testimony was insufficient to support the jury finding. Dr. Haller was repeatedly asked in cross-examination whether he could say on a more probable than not basis that the herniation resulted from a natural progression of the underlying degenerative changes or from the original back strain. He could not

because medically, as well as under the lighting up doctrine discussed below, it is not an either/or question. Mr. Gutierrez's original work injury lit up an asymptomatic preexisting degenerative condition which never returned to baseline and ultimately got worse. This was consistent with the new herniation. There was substantial evidence to support this conclusion in Dr. Haller's testimony.

Q: And if that preexisting condition got worsened or aggravated by a work-related injury, is there anyway medically to tell when that worsening would have stopped or does that set a course in effect that you can't turn back?

A: That's a difficult question. I think that if, you know, he had a work-related exacerbation, and then after a time he became asymptomatic again and remained asymptomatic for several months and then his back started hurting again, then I would say it was probably from his preexisting condition getting worse and that his work exacerbation had—

Q: Come to an end?

A: —come to an end and healed and the reason that I've testified in this case that it was my opinion that he was—that it was related to his exacerbation is that he told me that he never really did fully recover, and so he never did get back to the preinjury state.

Q: So that's the history that you have to work with?

A: Yes.

Q: I want you to add to that history that the department administratively made a determination that he had a Category 2 low back as a rating. Do you understand what that rating is?

A: Yes.

Q: Given the aggravation of the preexisting asymptomatic low back condition and the state of affairs as you can see in the records, does that seem like a

reasonable rating as of June of 1999 given the circumstances?

A: So just for speaking in general for patients of mine that I've rated that have a back injury with some objective findings, such as an abnormal MRI scan or abnormal physical exam that persists, then I think a Category 2 is a reasonable rating for that.

Q: Once that rating is determined, and I want you to assume that's the rating we have here, June of 1999, and that the testimony in this case is exactly what you described, Mr. Gutierrez's back never did go back to baseline, that he was able to continue to work for a period of time, and then he had the increases in symptoms that came on without any new injury in the same areas of his low back, does that support the concept that his industrial injury aggravated a condition that never got back to a baseline, never got better, and now that's what's worse?

A: That's the way I put it together.

Q: (by Mr. Kohles) All right. So that explains the annular tearing that's now visible on the MRI scan and the worsening of his complaints and findings and functionality that he's describe to you in the course of treatment. Correct?

A: Yes. ...

(Haller dep 39:23-42:9).

This was the testimony of Mr. Gutierrez's attending physician, whose opinions are to be given special consideration. Intalco, supra, 66 Wn.App. at 655, citing Hamilton v. Department of Labor and Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). For purposes of this appeal this testimony is presumed correct. Any inconsistencies in Dr. Haller's testimony or between Dr. Haller and the defense expert, Dr. Price, is to be weighed by the trier of fact, not by this appellate court. Zipp v. Seattle

School District No. 1, supra. In addition, these opinions are not “conclusory statements offered without factual support” as appellant implies.² The jury clearly chose to believe Dr. Haller, Mr. Gutierrez, and Ms. Racu. Therefore, there was, substantial evidence to support the jury verdict.

B. Appellant waived its right to appeal on the claim of insufficient evidence to support the verdict.

The trial of this matter was conducted under RCW 51.52.115 which requires use of the certified record of the Board. No new evidence can be introduced. As such, appellant knew all of the testimony word for word before the matter was presented to the jury. Appellant did not make any motion for a judgment in its favor either before or after the jury verdict. A summary judgment motion, motion to dismiss, or a motion for judgment notwithstanding the verdict all would have given the trial court the opportunity to review the record and rule on the issue whether there was substantial evidence to support any particular issue. Appellant’s claim of insufficiency is now raised for the first time in this court. RAP 2.5(a) provides in relevant part:

² Appellant at page 16 of its brief implies the testimony did not reach beyond conclusory statements. Appellant made no such objection on the record below so should not be able to argue lack of foundation here. RAP 2.5(a). In addition, the cases cited by appellant involved declarations filed for summary judgment motions in medical malpractice cases. The requirements of factual statements versus mere conclusions actually stems from the requirements of CR 56(e). See e.g., Guile v. Ballard Community Hospital, 70 Wn.App. 18, 25, 851 P.2d 689 (1993). These cases cited by appellant and the proof standards they discuss are completely inapplicable here.

Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

If there was merit to appellant's argument that the evidence was insufficient the trial court should have been given the task of sorting through the testimony and resolve this claim. This could have been done in a pretrial motion, a motion at trial before the case went to the jury, or even after the verdict by post trial motion. Instead, appellant waited until the jury returned a verdict and judgment was entered upon that verdict. It now asks the Court of Appeals to sort through the Board record, and resolve this claim. This would seem to be an appropriate time to enforce RAP 2.5(a), and Mr. Gutierrez asks this court to do so.

C. The lighting up doctrine was properly submitted to the jury because it was supported by the facts, by the law and by the procedural history of this case.

Appellant argues that the lighting up doctrine should not have been used in this case. Its first argument is that a preexisting pathology, here degenerative joint disease (DJD), should be considered separately from the work related symptoms resulting from the work injury lighting up that pathology. Appellant claims that the symptoms support compensation benefits, and the workers' compensation claim is never responsible for the underlying pathology. This sounds confusing because it is. Appellant's position is forced and inconsistent with case law and medicine. Appellant

cites no cases to support this argument, because there are no appellant cases that actually articulate this concept as the law. Instead appellant relies on semantics and teases out support for its position by cherry picking words used out of published decisions. Appellant's argument has actually been repeatedly rejected by the courts. For example, Dennis v. Department of Labor and Indus., 109 Wn.2d 467, 471, 745 P.2d 1295, cited by appellant, holds the opposite to appellant's position that preexisting pathology is somehow a different legal/physiologic entity than the work related condition.

It is a fundamental principle which most, if not all, courts accept, that, if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.

Dennis relied on established law that whether the work injury "aggravated, accelerated, or combined with the disease or infirmity" the result was a work related condition that occurred within the scope of employment and was covered by workers' compensation. *Id.* at 475 quoting from 1A Larson, *Workmen's Compensation*, §12.21, at 3-336 (1985).

Appellant’s argument that the underlying pathology remains a separate physiologic entity unrelated to the workers’ compensation claim makes little sense. Once a work injury “aggravates”, “accelerates”, or “combines with” the underlying pathology how can the underlying pathology stay a separate physiologic entity and somehow “naturally progress?” This was the basis of Mr. Gutierrez’s summary judgment motion before the trial court. Mr. Gutierrez argued there that in the present reasonably unique factual setting the court should say there could only be one cause—the lit up DJD. The trial court denied the motion leaving causation a factual matter to be determined by the jury. As a factual issue, the question went to the jury. At trial appellant simply failed to prove that Mr. Gutierrez’s underlying preexisting pathology naturally progressed. The appellant’s statement that the lighting up doctrine “has not been applied to preclude current litigation of a causation issue based on a previous disability award” at page 25 of its brief is not what happened here. The jury made a decision based on the facts presented to it and instructions that correctly stated the law.

None of the cases support appellant’s argument that somehow the “preexisting pathology” is something different from the “preexisting infirm condition” or a separate entity. In fact, the cases such as Wendt, Bennett, and Dennis hold that after a work injury lights up the preexisting

pathology making it symptomatic the preexisting condition is immaterial. All of these cases explain that the preexisting condition is not a cause but merely a condition upon which the injury operated. In fact they all rely on the “fundamental principle” that the previous physical condition is immaterial after being lit up by an injury.

Appellant’s argument seems, in part, to rely on a concept that just the **symptoms** caused by lighting up a preexisting condition coheses into some separate entity that becomes the basis for a disability award for which compensation is paid. This makes little sense. The lighting up doctrine is simply a proximate cause concept. Wendt, 18 Wn.App. at 679. As such it is a doctrine that helps determine what medical conditions get coverage under the workers’ compensation act. Coverage for injured workers comes in many different forms as indicated by the many factual settings of these cases. It can be a PPD award, a permanent total disability (PTD or pension), time loss compensation, or even medical benefits. What is paid under the claim, however, does not dictate the application of the lighting up doctrine.

Appellant also argues there is no factual basis for the lighting up doctrine in this case. That is not true. As indicated above, Mr. Gutierrez did not have back problems before the industrial injury. He did have DJD. Dr. Haller specifically testified that the medical history as he knew it

showed that Mr. Gutierrez had an industrial injury that exacerbated this preexisting asymptomatic condition. The claim was closed in June 1999 with a PPD award of Category 2. The underlying condition never returned to baseline (here asymptomatic), but did eventually worsen. This is classic evidence supporting the lighting up doctrine. In this case that doctrine supports the need to have the claim reopened for Mr. Gutierrez. Lighting up was the central issue the jury was asked to determine—whether the claim at issue should be reopened for the medical benefits. Mr. Gutierrez’s entire case was that he had preexisting DJD, the industrial injury lit this condition up and made it symptomatic, the condition remained symptomatic and then worsened consistent with the development of an annular tear. Without the lighting up instruction, Mr. Gutierrez would have been extremely hampered if not foreclosed from arguing his theory of the case.

D. The Wendt court did not reject the instruction used in the present case at trial and the language appellant wanted to excise was in that instruction and numerous other appellate decisions that have discussed the lighting up doctrine.

In regard to the lighting up instruction itself, the appellant makes two arguments: first, that the instruction was rejected by the Wendt court, and second, that appellant’s proposed amendment of the statute to remove the “immateriality” language was error.

In regard to the first claim, appellant completely misstates the ruling in Wendt. The court ruled specifically that claimant in that case was entitled to an instruction on lighting up.

The Department argues, however, that the error [not giving the lighting up instruction] did not prejudice Wendt because the court's other instruction ... permitted him to adequately present and argue his theory to the jury. (citation omitted). We disagree. Such general stock instructions might suffice were a less technical proposition involved. Here, however, a jury of lay persons might well consider the "lighting up" theory esoteric, to say the least. In such a case the law should be explicated by the judge in particular terms to insure that the jury grasps its subtleties. Finally, far from involving a mere fringe or subordinate issue, the requested instruction embodied the gist or substance of Wendt's claim. When such a key issue is involved, a correctly worded and particularized instruction should be given, and general instructions such as the court gave here will not suffice. (citation omitted) We think this is particularly true in workmen's compensation cases where the court is required to give a liberal interpretation of the act in favor of the workmen. (citations omitted)

Wendt, supra, at 679-80. Wendt was actually a case very similar to the present matter. It involved the denial by the department of an application to reopen a claim which had been closed with a PPD rating. The only real difference between Wendt and the present matter was that in Wendt the claimant was seeking reopening of his claim as well as an increase in his disability to permanent total disability. In the present matter, Mr. Gutierrez was seeking treatment for a worsened condition. His condition was not yet stable enough to determine his level of disability. (Haller dep

23:19-24:21) The relief sought does not and should not dictate the application of the lighting up doctrine or the requirement that a jury be given an adequate instruction to understand this “esoteric” lighting up theory. *Id.*

The only criticism of the instruction at issue in Wendt was in footnote 2 at page 680 the court noted:

We do not necessarily approve of the precise wording of that instruction. Upon a retrial, instructions on the “lighting up” theory should be drawn so as to clearly and concisely present the law and Wendt’s theory of the case to the jury.

Clearly the court did not say that any of the instruction was an incorrect statement of the law in any way. Unfortunately it did not give guidance on how the language could be improved nor has any subsequent case addressed this. As indicated above, the Wendt ruling has been cited in numerous cases since then for its discussion about the lighting up theory and what this doctrine means. A nearly identical instruction to the one in Wendt was approved in Simpson Timber Company v. Wentworth, 96 Wn.App 731, 741, 981 P.2d 878 (1999). The wording is slightly different there because the claim was an occupational disease claim rather than injury. The pertinent wording is the same including the use of the word “immaterial.”

In regard to appellant's second argument, that the trial court should have struck the "immateriality" language, the appellant is simply wrong. At its core, the Wendt instruction on lighting up is a causation instruction. The cases consistently use or refer to this language to make the point clear that the preexisting condition is not a cause of the ultimate work related condition. When a quiescent, asymptomatic preexisting condition is lit up and made symptomatic, the preexisting condition itself becomes immaterial because it is not a cause but a condition the cause acts upon. Appellant may not like the phrase but it was in the instruction approved by Wendt, it is in the cases explaining the true effect of the lighting up doctrine, and, in fact, it is in the instruction approved by the Simpson court as noted above. This legal concept is also consistent with the medical analysis as described by Dr. Haller as noted above. The DJD that Mr. Gutierrez had in his back at the time of injury in 1995 existed prior to that injury but was not causing him any symptoms, limitations, or need for treatment. His injury at work lit this condition up and it never returned to baseline and then eventually got worse. The defendant offered no evidence supported by medical history for Mr. Gutierrez or literature from research that would apply to Mr. Gutierrez why that preexisting condition would have followed its own, separate, or "natural" path after this injury was sustained much less that somehow it reemerged as an independent

cause of the symptoms or the MRI finding of an annular tear. All of the testimony in this case was that the post-injury condition never returned to its baseline status before the industrial injury. It never became a potential separate cause for worsening. It was immaterial.

Appellant's reliance on a Board decision, in Re Long, BIIA Dec. 94 2539 (1996) does not help it. First, the Board does not enforce the workers' compensation statute so cases such as Department of Labor and Indus. v. Allen, 100 Wn.App. 526, 997 P.2d 977 (2000) that hold special consideration should be given to the department interpretations of the Act as cited by appellant do not apply. In fact Board decisions have no precedential value in this court. Romo v. Department of Labor & Indus., 92 Wash.App. 348, 356, 962 P.2d 844 (1998) ("Decisions of the Board of Industrial Insurance Appeals are not precedential"), citing Walmer v. Department of Labor & Indus., 78 Wash.App. 162, 167, 896 P.2d 95, review denied, 128 Wash.2d 1003, 907 P.2d 297 (1995) (A Board opinion is "not controlling authority.") As such, this court is not bound by the Long decision. Long was also a case that was factually distinguishable. This point was argued in plaintiff's summary judgment motion in the trial court below and the arguments there are incorporated here as if fully restated. (CP pp. 278-280) More importantly, however, is the fact that appellant in this case presented no evidence that Mr. Gutierrez's

preexisting DJD condition, once made symptomatic by the industrial injury, ever went back to being asymptomatic again. Mr. Gutierrez had proof that it did not get better as noted above. The condition only got worse. As stated in Long the Board's dicta clearly presumes the existence of evidence showing a limited duration of the aggravation:

Such a preexisting condition may be made symptomatic by subsequent work conditions or injury, but a work related injury **may** only have a limited or finite effect on the preexisting condition. The effects of the work related injury **may** not contribute to a further deterioration of the part of the body involved. (emphasis added)

"Mays" and "mights" are irrelevant in a case like the present matter where there is no evidence that Mr. Gutierrez's injury was of limited or finite time period. Here the evidence was just the opposite. The preexisting condition never returned to baseline. Appellant did try to convince the jury that the underlying DJD, as an independent pathology, could have easily explained Mr. Gutierrez's worsening at condition and new herniation. (RP 57:22-60:11) The jury obviously did not agree with this argument.

E. Giving the segregation instruction and admitting Exhibit 1 were not errors , much less prejudicial errors, but helped the jury understand that part of appellant's arguments were at total odds with the facts and law on lighting up.

Appellant's difficulty arguing to the jury that the lighting up doctrine did not apply in this case occurred because the facts do not

support that argument and the law itself is inconsistent with that argument. Mr. Gutierrez had an asymptomatic preexisting DJD condition in his lower back that the industrial injury made symptomatic. When the department closed the claim with its final order in June 1999 the claims manager explained in a letter, Exhibit 1, the rationale for the PPD rating was the lighting up of this preexisting DJD. Appellant, however, wanted to argue to the jury that this never happened, that there was never any lighting up, and that the worsening of Mr. Gutierrez's condition was solely because the preexisting condition worsened on its own to the point of producing an annular tear.

Appellant argues here that the Category 2 PPD rating was based on a strain with clinical findings not relating to x-ray findings. There is no citation in this record to anything that supports that statement because the statement is not true. No witness testified that the Category 2 rating was based on clinical findings rather than the radiographic findings.³ A Category 2 closure, however, means that an injured worker has a PPD rating, which is 5% of the whole body. WAC 296-20-680(3). When there is a ratable disability the department is obligated to determine if it is

³ Even the exhibits which were not admitted do not support this. Exhibit 2 to Dr. Haller's deposition is a clinic note dated August 25, 1999, which was approximately two months after the closing order. The clinical examination was completely normal although claimant continued to experience pain with no radicular symptoms. (See Haller dep 14:5-24)

causally related to the industrial injury or not. RCW 51.32.080(5), the segregation statute, creates this obligation. A preexisting PPD must be segregated from the work related injury. Appellant wanted to argue and did argue to the jury that Mr. Gutierrez had a preexisting degenerative change unrelated to the industrial injury. Its medical witness, Dr. Price, testified that the original injury of September 1995 resolved within weeks or months of the original 1995 injury. (Price dep 12:13-21; 45:13-23). He also testified that even the annular tear shown in the MRI scan of September 2005 could have been caused by an incident that predated claim closure. He claimed a fall, noted in the medical records of October 11, 1998 (Price dep 25:3-11), could have been the cause of this annular tear herniation first seen on the MRI seven years later. The problem is that this argument and testimony is inconsistent with the segregation statute and how that statute is enforced. If Mr. Gutierrez had a PPD that predated his industrial injury and was not affected by the injury the department's obligation would have been to close the claim segregating that PPD. That would have resulted in at most a work related Category 1 (zero disability per WAC 296-20-680(3)) with a preexisting Category 2. WAC 296-20-220(h). Dr. Price even admitted that this was the only other alternative. (Price dep 44:15-25-45:8). Dr. Haller gave similar testimony (Haller dep 12:15-13:10). In short, appellant wanted to argue something

that was inconsistent with the facts and law. The jury instruction on segregation simply explained how the statute works and provided a back drop why that argument should fail.

In regard to Exhibit 1, if it was error to admit this letter the error was harmless. The jury already had the facts from the medical testimony that the industrial injury aggravated a preexisting, asymptomatic condition and then the claim was closed with a Category 2 rating. There was absolutely no testimony of any other medical finding to support a Category 2 rating other than the DJD. The jury was also given the lighting up instruction. Given the facts presented to the jury and the lighting up doctrine the jury already knew what was stated in this letter. Its contents were not new information. Appellant cannot show prejudicial error.

The letter, however, was properly admitted. In this regard, this court's review of a trial court's evidentiary rulings is for abuse of discretion. The appellant must establish that the trial court's ruling was manifestly unreasonable or exercised on untenable grounds or untenable reasons. Lewis v. Simpson Timber, Co., 145 Wn.App. 302, 328, 189 P.3d 178 (2008). The trial court acts in an appellate capacity reviewing the evidentiary objections preserved on the record and preserved from that record in the trial court. Ruff v. Department of Labor and Indus., 107 Wn.App. 289, 295, 28 P.3d 1 (2001). Here, appellant only preserved

hearsay and authenticity objections at the Board. (CABR 49-57) It did not preserve the relevance and prejudice objections that it argued at the trial court. The department did not participate at the Board in any of the proceedings and preserved no objections. At the trial court the department conceded the letter was an admission of party opponent. (RP 4) It argued relevance. (RP 4-5) Appellant also argued relevancy. It also tried to claim that the department and appellant were not “aligned.” (RP 5) This objection was also not preserved at the Board and appellant never articulated to the trial court how it and the department were not aligned when they were both defending the Board’s decision which Mr. Gutierrez was trying to get reversed.

A litigant in a workers’ compensation appeal has to preserve all objections on the record during the Board appeal or those objections not raised are waived and cannot be considered by the trial court much less the Court of Appeals. Sepich v. Department of Labor and Indus., 75 Wn.2d 312, 316, 450 P.2d 940 (1969). In addition, objections preserved at the Board level but not renewed at trial are also waived. *Id.* at 319. The only objection appellant preserved, therefore, was hearsay and the statement of a party opponent is not hearsay. ER 801(d)(2). Here Exhibit 1 contains the statement of the claims manager handling the claim on behalf of the department, and is clearly the statement of a party in this litigation and as

such is not hearsay. ER 801(d)(2). The department was certainly a party to this litigation and actively participated during the trial. It was not just a nominal party and was actually aligned with appellant defending the Board's ruling.

Appellant claims that it should be allowed to argue that the claim was originally closed on some other basis besides the lighting up doctrine because the letter was not a determinative order, and thus without res judicata effects. The cases appellant cites, however, do not support this argument. In Lee v. Jacobs, 81 Wn.2d. 937, 506 P.2d 308 (1973) a Board order required that the department pay the claimant benefits. An employee at the department refused to pay benefits. The department's argument on appeal was that the writ of mandamus requested by the claimant was inappropriate because claimant's relief was limited to appeals to the Board to overrule the department's letters denying benefits. The department argued that procedural avenue, not mandamus, was the only appropriate avenue. The Court of Appeals disagreed stating that it was nonsense to say that every letter from the department had to be scrutinized to see if it was an appealable order. In addition the letters were not delivered to all "parties" as required by the RCW 51.52.050 requirements for orders. In the present case the letter at issue was not "just every letter." It was sent from the department to the only parties

involved in the claim, Mr. Gutierrez and appellant. It was also a letter dated and sent the same day as a closing order containing a PPD award. It explained the basis for the rating contained in the order.

In addition, appellant cites several cases that really only stand for the proposition that if a department order does not explicitly adjudicate an issue then the issue is not subject to the finality given to final orders. For example, in Somsak v. Criton Technologies/Health Tecna, 113 Wn.App. 84, 52 P.3d 43 (2003) the factual basis for a wage order was not stated in the order so the basis was not res judicata. King v. Department of Labor and Indus., 1, 528 P.2d 271 (1974) did not even involve a department order. In that case the claimant had litigated the denial of his request to reopen his back injury claim in an earlier proceeding through the superior court level. His later attempt to reopen the claim to cover a new psychiatric condition was denied at the trial court level. The Court of Appeals reversed because the earlier trial court findings did not specifically address the psychiatric condition so there could be no res judicata effect from those previous findings about that condition.

Appellant is also wrong that the letter could not have been appealed under RCW 51.52.050. The statute specifically allows a protest or Board appeal of **any** determination made by the department.

Whenever the department has taken **any** action or

made **any** decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. (emphasis added)

RCW 51.52.050(2)(a). In fact, it is common practice to appeal a department letter simply because what a letter communicates is often an “action” or “decision.”

Here the letter accompanied the closing order and certainly put all parties on notice what the closing order was intended to mean. The fact that it did not have protest or appeal language in bold print does not make it irrelevant. It was a statement by a party. The simple truth is that appellant at that time did not appeal the closure because it was clearly supported by the facts under existing law as explained in the letter itself. It was certainly relevant to the jury that appellant knew what the closing order was based upon. Appellant was arguing that this claim in no way and at no time involved the lighting up of a preexisting, quiescent condition. The jury needed to know this was not the position of the co-defendant who made that PPD determination.

Appellant also makes the argument that the standards used in a criminal trial where a defendant has the right to exercise his Sixth Amendment rights to confrontation apply equally here, citing Bruton v. U.S., 391 U.S.123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Obviously

there is no equivalent confrontation right for a civil case and no case law that actually supports this due process argument made by appellant. In fact, if there is anything fundamentally unfair it is the idea that appellant wants to exclude the claims manager's letter that explains the basis for the closing order, and appellant's knowledge of this basis, yet allow the appellant to argue that the claim was not closed under the lighting up doctrine. To allow appellant to freely argue this to the jury without allowing the jury to see the contradictory evidence seems fundamentally unfair to Mr. Gutierrez.

In the end, Exhibit 1 was just a letter and just evidence considered by the jury with other evidence that was consistent with what the letter said. This letter did not preclude appellant from arguing its theory of the case to the jury or prevent the jury from simply disregarding what the department personnel had stated years before in a letter sent to the appellant. Appellant can show no prejudice much less error.

F. Mr. Gutierrez's award for attorney's fees at the trial court should be upheld and a further award of fees should be made for work at the appellate level.

When Mr. Gutierrez prevailed on an appeal to the Superior Court and Court of Appeals he is entitled to an award of attorney's fees and costs under RCW 51.52.130. Mr. Gutierrez requests attorney fees be awarded to him in this court pursuant to that statute as well.

VI. CONCLUSION

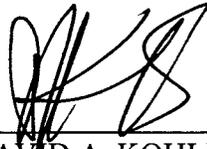
There are many appellate decisions that espouse the principle of this state's workers' compensation statute: An injured worker is entitled to benevolence and sure and simple relief under the act. Mr. Gutierrez and his doctor asked to have this claim reopened in February 2004. This request was denied by the department after nearly a year delay. Mr. Gutierrez won the right to reopening with the original industrial appeals judge's decision nearly a year after that. That favorable decision was reversed by the Board after a petition was filed by the self insured employer, appellant here. A jury reversed that decision nearly a year after that. Appellant then appealed. This is not sure and simple relief.

The lighting up doctrine has been part of the fabric of workers' compensation law for many decades. The doctrine at its core is simple. When an industrial injury or occupational disease acts upon that particular worker's susceptibilities then the workers' compensation system takes care of that worker. The preexisting susceptibility is not seen as a cause of the worker's medical problems and is irrelevant for causation purposes. Appellant here makes the same argument rejected by the courts for both injury and occupational claims as well as under numerous factual and procedural settings in which these cases are litigated. Without actual facts to support its claim, appellant wants to deny this injured worker the

benefits to which he is entitled and needs because of the way his work related injury has affected his infirmities. The appellant does this by seeking this court's help carving out a new concept of "preexisting pathology" from "previous infirmity" as that phrase is used under the lighting up doctrine and even though the medical condition is the same. In addition, appellant asks this court to allow it to argue before a jury facts that are contrary to the actual facts of this case while denying to Mr. Gutierrez the jury instructions and correspondence that show appellant's position was not true.

This court is respectfully requested to deny appellant's request and leave the jury verdict in that place allows Mr. Gutierrez to receive the workers' compensation coverage he needs and deserves.

Respectfully submitted this 15th day of July, 2009.



DAVID A. KOHLES, WSBA #7678
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby on the date given below caused to be served the foregoing

Brief of Respondent on the following individuals in the manner indicated:

Craig Staples PO Box 70061 Vancouver, WA 98665-0035	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Hand Delivery
Richard Johnson, Clerk Court of Appeals, Division I 600 University St. Seattle, WA 98101-1176	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Hand Delivery
John Wasberg Office of the Attorney General 800 5 th Ave., Suite 2000 Seattle, WA 98104-3188	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Hand Delivery

DATED this 15th day of July, 2009.



Rebecca R. Marlow

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