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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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NO. 73717-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AUTUMN MATTO,

Plaintiff/Respondent,

v.

HAGGEN, INC.,

Defendant/Appellant.

BRIEF OF APPELLANT

Deborah K. Flynn, WSBA #21570
Jannine M. Myers, WSBA #37408
Attorneys for Appellant

Flynn Law Group, LLC
One Union Square
600 University Street, Ste. 2100
Seattle, WA 98101
(206) 801-0185

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Judgment and Order dated June 5, 2015 reversing the decision of the Board of Industrial Insurance Appeals dated October 29, 2014, affirming the April 4, 2013 order of the Department of Labor and Industries which affirmed its November 15, 2012 order, denying Autumn Matto's (Ms. Matto) Application to Reopen.

2. The trial court's Finding of Fact No. 2 is unsupported by the record in that the record does not establish that on March 4, 2009 the findings on Ms. Matto's imaging studies of degenerative disc disease at L5-S1 were proximately caused by her industrial injury.

3. The trial court's Findings of Fact No. 3 is unsupported by the record in that the record does not establish that on April 5, 2013 the increase in degenerative disc disease of the L4-5 and L5-S1 levels of Ms. Matto's low back were proximately caused by the industrial injury.

4. The trial court's findings of Fact No. 4 is unsupported by the record in that the record does not establish that Ms. Matto's condition proximately caused by her September 16, 2008 industrial injury objectively worsened between March 4, 2009 and April 5, 2013.

5. The trial court erroneously afforded greater weight to the testimony of Dr. Aldrich.

6. The trial court judge improperly relied upon the Proposed Decision and Order by the Industrial Appeals Judge dated June 30, 2014 in reaching her decision on April 2, 2015.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the degenerative disc disease at L4-5 as of April 5, 2013 was proximately caused by the industrial injury? (Assignment of Error 1, 3-4).

2. Whether the increased findings of degenerative disc disease at L5-S1 in Ms. Matto's lumbar spine as of April 5, 2013 were the progression of a naturally occurring and preexisting condition and not evidence of objective worsening of her industrially related conditions? (Assignment of Error 1, 2-4).

3. Whether the trial court erroneously gave greater weight to the opinion of Dr. Aldrich even though his opinion was inconsistent and not supported by substantial evidence? (Assignment of Error 5).

4. Whether the trial court erroneously relied upon the Proposed Decision and Order of the Industrial Appeals Judge because it was rejected by the Board of Industrial Insurance Appeals and therefore has no standing and is not considered to be prima facie correct? (Assignment of Error 6).

III. STATEMENT OF THE CASE

This case arises under RCW Title 51, the Industrial Insurance Act and involves Self-Insured Employer Haggen's (Haggen) appeal from the June 5, 2015 trial court decision following the April 2, 2015 bench trial¹. (CP, 355-358). The trial court determined that Ms. Matto's condition proximately related to the September 16, 2008 industrial injury objectively worsened and was aggravated between March 4, 2009 and April 5, 2013. In doing so, the trial court affirmed the Board's finding of fact that at the time of closure of her claim on March 4, 2009 Ms. Matto only had findings of degenerative disc disease at the L5-S1 level. However, the trial court then also held that as of April 5, 2013, the new findings of narrowing at the L4-5 level in Ms. Matto's low back were proximately caused by the September 16, 2008 industrial injury.

The trial court reversed the October 29, 2014 Decision and Order issued by the Board of Industrial Insurance Appeals, which after a thorough evaluation of the evidence and applicable law found that Ms. Matto had preexisting degenerative disc disease that had objectively worsened, but the findings were not proximately caused by the September 16, 2008 industrial injury. Therefore, Ms. Matto's condition, proximately caused by the

¹ The trial court's Findings of Fact and Conclusions of Law, CP 355-358, and the Court's written letter of decision dated April 2, 2015, CP 332-333, are attached as Appendices A and B, respectively.

industrial injury, did not objectively worsen between March 4, 2009 and April 5, 2013 within the meaning of RCW 51.32.160. (CP, 9-11).

This case concerns whether Ms. Matto's condition proximately caused by the September 16, 2008 industrial injury objectively worsened between March 4, 2009 and April 5, 2013, and whether the condition that allegedly developed subsequent to the industrial injury and the March 4, 2009 closing order, narrowing of the L4-5 disc, was proximately caused by the industrial injury.

Dr. Stephen Aldrich testified on behalf of Ms. Matto, and Dr. Gerald Seligman and Dr. William Stump testified on behalf of Haggen.

Ms. Matto filed a claim for a lumbar strain injury to her low back on September 16, 2008 while working for Haggen. She bent to pick up a box of cucumbers and felt a sharp pinch in her low back, which she stated eventually resulted in radiating pain into her left side and down her leg. (CP, 124-125). Her claim was allowed, an MRI was performed, she received some physical therapy and ibuprofen, and she returned to work without restrictions by November 2008. (CP, 125-127). The Department of Labor and Industries (Department) closed Ms. Matto's claim on March 4, 2009 with no permanent partial disability.

Prior to filing her industrial insurance claim, Ms. Matto was seen by Dr. Aldrich on multiple occasions for various medical issues and concerns,

including low back and lower extremity complaints with burning and numbness. (CP 137, 163-164). Dr. Aldrich diagnosed Ms. Matto with chronic back pain in 2004, which emerged without history of any injury. (CP, 163). He also confirmed that only one year prior to the industrial injury, X-rays performed in October 2007 and an October 10, 2007 MRI showed evidence of degenerative disc disease and a disc protrusion at L5-S1 with an annular tear which he thought was “unusual” for a woman of her age and stated her pain was becoming of a “chronic nature.” (CP, 171-172).

Dr. Aldrich ordered a lumbar MRI on September 25, 2008, shortly after Ms. Matto’s industrial injury, and those findings were compared to the findings on the October 10, 2007 lumbar MRI. Dr. Aldrich stated the September 25, 2008 MRI showed the same degenerative disc disease with an annular tear at L5-S1 which was on the 2007 MRI, with no significant change, and he also noted there was no mention or findings at L4-5 on the September 25, 2008 MRI. (CP, 182, 213). The third MRI, which was performed on July 17, 2013, showed progression of degenerative disc disease at L5-S1 and a new change at L4-5 with disc desiccation, annular fissure and small central protruded disc. (CP, 192, 310). Dr. Aldrich then came to the conclusion that although Ms. Matto had little evidence of disc degenerative changes at L4-5 prior the injury or right after the injury, nor

was that level made symptomatic by the September 16, 2008 injury, that the injury may very well have accelerated an underlying degenerative process at L4-5 which took several years to manifest. (CP, 221; 4/2/15 RP 29).

Dr. Aldrich first testified that Ms. Matto's clinical symptoms in 2012 when he saw her for filing the reopening application were different than in 2008 when the claim was open. However, he then later confirmed that the only objective evidence of worsening was the MRI findings because her clinical findings had stayed the same and his perception of her disability in 2012 was due to her subjective complaints of pain. (CP, 198-200, 219). Aside from pain, none of her clinical findings as of April 5, 2013 were attributable to the L5-S1 level. (4/2/15 RP 27). Finally, Dr. Aldrich testified that the L4-5 findings on the MRI in 2013 were new since 2008, and he went on to further state regarding the involvement of L4:

Whether this was in fact precipitated by the incident with the cucumber crate or was this a natural progression of other antecedent injuries or hereditary issues is really hard to pin down and I don't think you can say with any precision one way or the other. (CP, 218).

In addition, when questioned specifically as to whether an injury at the level of L5-S1 could cause levels either above or below it to start having degenerative changes, Dr. Aldrich stated:

I don't think the discreet injuries to the L5-S1 disks contribute directly to the deterioration of the L4-5 disk

[but] because these are actually anatomically different levels given an injury...(CP, 224).

However, he ultimately concluded that the narrowing of the L4-5, L5-S1 disk with associated arthritis as of April 5, 2013 was causally related to her September 16, 2008 industrial injury. (CP, 193 -195).

Dr. William Stump and Dr. Gerald Seligman testified on behalf of the employer. Dr. Stump is a Board Certified neurologist with almost 40 years of clinical practice. (CP, 232). Dr. Seligman is a Board Certified orthopedic surgeon with 30 years of clinical and surgical practice. (CP, 276). Both of these physicians testified that Ms. Matto did have evidence of progressive degenerative disc disease in her low back on April 5, 2013, however it was not the result or consequence of the September 16, 2008 industrial injury. (CP, 255, 306). Rather, Ms. Matto had issues with her back for a number of years with evidence of preexisting degenerative disc disease, specifically at the L5-S1 level, prior to her industrial injury. (CP, 249, 325). The minor strain on September 16, 2008 was not a factor in the development of the degenerative disc disease, and there is no evidence that it altered the degenerative process, but rather caused a temporary aggravation at L5-S1, which resolved, and the progression at the L5-S1 level, as well as the entirely *new* level at L4-5, was the natural progression of a preexisting disease process. (CP, 249-251, 305-306). After a thorough

review and comparison of the MRIs, Dr. Seligman testified that Ms. Matto did not have any neurological issues and the L5-S1 degeneration on the July 2013 MRI, which was also present in 2007 and 2008, was still not affecting any exiting nerve roots, there was still no annular tear, and if there were any changes, they were minimal, and they had just progressed naturally over the years between claim closure and the filing of the reopening application. (CP, 314).

Dr. Seligman's physical examination on October 16, 2012 revealed a glove/stocking type sensation over the entire left foot and leg, not following a dermatome pattern. He stated this was not normal if there was a specific nerve root involved, because there would be more localized symptoms. (CP, 292). Ms. Matto exhibited normal dorsiflexion of the left foot and ankle as well as normal strength of the extensor hallucis longus (big toe tendon), which is specifically associated with the L5 nerve root. (CP, 302-303). Finally, she did have some reduced range of motion with forward flexion and extension without any radicular component and some decreased sensation in the left leg and thigh, but no other neural findings. (CP, 304).

Dr. Stump's physical examination of Ms. Matto on March 19, 2014 confirmed the findings in Dr. Seligman's examination. Ms. Matto exhibited normal reflexes, she did not have weakness in the legs, she was able to flex

the left foot without pain, did not have difficulties with heel/toe or tandem walking, but did have some decreased sensation in the medial and lateral thigh. (CP, 246). His opinion was that her subjective complaints were not supported by the objective findings, and the most significant difference between the three MRIs was the development of the degeneration at the L4-5 level, which did not have any relationship to the industrial injury. (CP, 247).

During oral argument at the bench trial on April 2, 2015, counsel for Ms. Matto confirmed that the reappearance of sensory loss that Dr. Aldrich documented in 2012 was at a different disc level than the previous injured level, and it had gotten better, and there was primarily an increase in low back pain only. (4/2/15 RP 18). After the bench trial, the trial judge issued a letter of decision dated April 2, 2015 which referred to the 31 page Proposed Decision and Order (PD&O) of IAJ Metzger (IAJ) dated June 30, 2014 as “giving the appropriate special consideration to the opinions of the claimant’s treating physician, Dr. Aldridge” versus the 3 page Decision and Order of the Board of Industrial Insurance Appeals. (CP, 332). The April 2, 2015 letter of decision was the basis for the ultimate Findings of Fact and Conclusions of Law dated June 5, 2015, to which Haggen took exception during hearing on June 5, 2015. (6/5/15 RP).

IV. STANDARD OF REVIEW

In a workers' compensation case, the superior court reviews a decision of the Board of Industrial Insurance Appeals (Board) de novo based on the certified appeal board record. RCW 51.52.115; *Elliot v. Department of Labor & Industries*, 151 Wn. App. 442, 445, 213 P.3d 44 (2009). On review to the superior court, the Board's decision is prima facie correct, the Board's interpretation of the Industrial Insurance Act, although not binding upon this Court, is entitled to great deference, and the burden of proof is on the party challenging the Board's decision. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992); *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991), citing, *Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986); *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968).

The Court of Appeals reviews the superior court's decision in a workers' compensation case under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); see *Rogers v. Department of Labor & Industries*, 151 Wn. App. 174, 179-81, 210 P. 3d 355 (2009). Appellate review is limited to examination of 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.*

Department of Labor & Industries, 81 Wn. App. 123, 128, 913 P.2d 402 (1996).

The Board's decision is considered *prima facie* correct, if there is substantial evidence to support it. *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 903, 810 P.2d 500 (1991), *citing*, *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977). In addition, the Board's factual determinations will be upheld by an appellate court if supported by substantial evidence. *Springstun v. Wright Schuchart, Inc.*, 70 Wn. App. 83, 88, 851 P.2d 755 (1993).

When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the fact finder. *Fox v. Department of Rt. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P. 3d 1221 (2002). In review of an agency's findings of fact, the appellate court reviews under a substantial evidence standard; substantial evidence supports the agency's findings when the record contains evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *R&G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). Review is deferential, requiring the appellate court to view the evidence and its reasonable inferences in the light most favorable to the prevailing party in the highest forum that

exercised fact finding authority. *Johnson v. Washington State Dep't of Health*, 133 Wn. App. 403, 411, 136 P.3d 760 (2006).

Substantial evidence supported the Board's decision in this claim. Ms. Matto failed to prove by a preponderance of competent, credible evidence that the Board's decision should be overturned. The weight of credible medical testimony established that Ms. Matto did not have any objective findings proximately caused by her industrial injury as of claim closure on March 4, 2009. Further, to the extent that she did have findings on diagnostic studies of degenerative disc disease at L5-S1 as of March 4, 2009, she failed to prove that the increased findings at L5-S1 and the *new* findings at L4-5 as of April 5, 2013 were proximately caused by her September 16, 2008 industrial injury. Even if Ms. Matto had worsening of a low back condition between March 4, 2009 and April 5, 2013, it was not proximately caused by the September 16, 2008 industrial injury.

V. ARGUMENT

A. The substantial evidence in this case does not support the trial court's decision that Ms. Matto's condition proximately caused by the industrial injury objectively worsened between March 4, 2009 and April 5, 2013.

RCW 51.32.160 provides that a claimant may reopen his/her industrial injury claim due to aggravation of that condition. The material

issue at the Department level and the Board was whether there was objective worsening of the claimant's industrially related low back condition.

Ms. Matto had the burden to prove, by a preponderance of credible evidence, that she was entitled to benefits because her low back condition related to her September 16, 2008 industrial injury worsened within the meaning of RCW 51.32.160. She was required to prove through medical testimony the causal relationship between the lumbar strain and the subsequent disability, and that based on objective medical findings, an aggravation of the industrially related condition resulted in increased disability between the terminal dates of March 4, 2009 and April 5, 2013. *Cyr v. Department of Labor & Indus.*, 47 Wn.2d 92, 95, 286 P.2d 1038 (1955); *Moses v. Department of Labor & Indus.*, 44 Wn.2d 511, 517, 268 P.2d 665 (1954). The preponderance of credible evidence in this case supports the Board's October 29, 2014 Decision and Order, which affirmed the denial of Ms. Matto's application to reopen her claim because there was no evidence of objective worsening of her *industrially* related low back strain.

The decision of the trial court is not supported by substantial evidence. All three of the medical providers agreed that there was no appreciable difference between the lumbar MRI in 2007 (pre-injury) and the one taken after the industrial injury in 2008. However, presuming there

was a discreet injury or worsening at L5-S1 at the time of her injury, Dr. Aldrich himself stated that an injury at the L5-S1 does not contribute to deterioration of the L4-5 disc because they are anatomically different levels. He further went on to state that even though there were no findings at L3-4 or L2-3 at the time of claim closure on March 4, 2009, those levels could still progress due to the industrial injury because degenerative disc disease is progressive. (CP, 224). This is purely speculation and conjecture with no supported basis in fact. Following this line of reasoning, Ms. Matto could come back at any time in the future with further degeneration of any level of her spine and Dr. Aldrich would relate it back to a minor lumbar strain on September 16, 2008 when Ms. Matto bent over to pick up cucumbers.

Degenerative disc disease is progressive by nature. Ms. Matto has degeneration in her low back and there is no evidence that her September 16, 2008 resulted in any type of disc herniation or nerve root impingement. A minor and temporary flare up of her disease process following her September 16, 2008 injury is a snapshot in time which does not create the foregone conclusion that every bit of subsequent worsening in her low back, no matter what level, is proximately caused by her industrial injury. Dr. Aldrich's testimony that the July 17, 2013 MRI findings and clinical exam findings showed a worsening is just not convincing given that Ms. Matto only missed about one month of work after her September 16, 2008 injury,

received conservative physical therapy, and then returned to full duty work in November 2008 before her claim was closed without any permanent partial disability. Dr. Aldrich's testimony is not sufficient to establish that any changes between the 2008 low back MRI and the 2013 low back MRI (even though after the second terminal date) were due to Ms. Matto's low back industrial injury. It is disingenuous for Dr. Aldrich to state that her low back problems as of April 5, 2013 would not have been as bad had she not had her injury on September 16, 2008, when Dr. Aldrich himself testified about how she had evidence of chronic back pain *prior* to her 2008 injury, and she had degenerative disc disease that was "abnormal" for someone her age *prior* to the industrial injury.

The only credible and supported medical opinions were those presented by Haggen. Both Dr. Stump and Dr. Seligman agree the L5-S1 level of degeneration in Ms. Matto's low back was worse on the July 25, 2012 X-ray compared to the X-ray in 2007 (prior to the injury). However, they also both agreed that, given her preexisting degenerative disc disease and injuries, this particular disease process would have continued absent her injury and was just the progression of a naturally occurring and preexisting condition. Dr. Stump and Dr. Seligman also convincingly supported their opinions by explaining that Ms. Matto did not have any symptoms in 2008 to suggest disc herniation or lumbar root development and by 2013 that had

not changed. They both agree that Ms. Matto had a minor straining injury without any permanent residuals and without any evidence of disc herniation. Therefore, the subsequent L4-5 annular fissure and disc protrusion present on the 2013 MRI were in no way related to the minor strain in 2008. We are fortunate to have multiple MRIs to compare so that we are not left to guess what her spine looked like before, immediately after, and four years after the injury. We are also not left to guess what change occurred as a result of the September 16, 2008 injury. The injury was so minor that there were no changes between the 2007 and 2008 MRIs. As Dr. Seligman testified, Ms. Matto still had the degenerative disc disease when she filed her reopening application, but it was not related to her industrial injury.

In order to be entitled to benefits on reopening of the claim, it is necessary to show aggravation of the condition that was caused by the industrial injury; it is insufficient to show only a worsening of a pre-existing condition that was temporarily lit up by the industrial injury. *In re Arlen Long*, BIIA Dec., 94 2539 (1996). Dr. Seligman did opine that Ms. Matto's symptomatic L5-S1 disc disease was *temporarily aggravated* by the industrial injury, returned to baseline prior to claim closure, and was not permanently aggravated. (CP, 306). His explanation was that the lumbar strain caused some pain and need for conservative care in 2008 after her

injury, however the residuals were not permanent. In fact, she returned to work without any restrictions. Dr. Seligman testified he did not believe Ms. Matto's lumbar spine condition as of April 5, 2013 was in any way related to her industrial injury.

The employer may be responsible for the lighting up of a preexisting condition caused by the industrial injury. However, the employer is not responsible for the preexisting condition itself but only the *effects* of the industrial injury. A work related injury may only have a limited or finite effect on the preexisting condition, and the effects of a work related injury may not contribute to a further deterioration of the part of the body involved. It is proper to inquire whether the industrial injury continues to be a cause of a future need for treatment or a cause of future disability. *In re Arlen Long*, BIIA Dec., 94 2539 (1996); *see also In re Richard Medeiros*, BIIA Dec., 96 6508 (1998). In this case, it was not. The substantial evidence supports the claimant's natural progression of her preexisting degenerative disc disease, not the minor lumbar strain in 2008, is the cause of her current disability and/or need for treatment.

The evidence may show some worsening of Ms. Matto's degenerative low back condition, but that is not the end of the analysis. Proximate cause must be proven by a preponderance of evidence. The Board's decision that Ms. Matto's industrially related low back

condition/strain had not objectively worsened between the terminal dates is supported by substantial evidence, the trial court's decision is not.

B. Ms. Matto's degenerative disc disease, including the increasing disc space narrowing at L5-S1 and L4-L5 are not due to her industrial injury.

While an industrial injury need not be the sole cause of a worker's disability, the industrial injury must still meet the definition of "proximate" cause. WPI 155.06 (5th Ed.) states:

The term "proximate cause" means a cause which in a direct sequence, [unbroken by any new independent cause,] produces the [condition] [disability] [death] complained of and without which such a [condition] [disability] [death] would not have happened.

There may be more than one proximate cause of a [condition] [disability] [death]. For a worker to recover benefits under the Industrial Insurance Act, the [industrial injury] [occupational disease] must be a proximate cause of the alleged [condition] [disability] [death] for which benefits are sought. The law does not require that the [industrial injury] [occupational disease] be the sole proximate cause of such [condition] [disability] [death].

WPI 155.06 (5th Ed.).

The independent aging process is not compensable. The degenerative disc disease, specifically the increased narrowing at L4-5 and L5-S1 that was present in 2012, was not caused by her industrial injury. Degenerative disc disease is a progressive disease that develops over time, specifically in Ms. Matto it began developing sometime prior to her industrial injury.

There was no evidence presented by any of the doctors that Ms. Matto's disc degeneration at L5-S1, which was observed on her initial MRI after the injury, was *caused* by her industrial injury, although it may have been *temporarily aggravated*. Even Dr. Aldrich did not believe she suffered any acute disc herniation or traumatically induced disc degeneration as a result of the industrial injury. (CP, 182). However, the degenerative disc at L4-5, which was not seen until 2012 at the earliest, was somehow *caused* by an injury on September 16, 2008, even though there was no evidence of any such causation at the time of the injury at that level. The Superior Court relied solely on the finding of decreased disc height in July 2012 at the L5-S1 and L4-L5 levels of the spine and the conclusory, unsupported statement by Dr. Aldrich that in his opinion it was causally related to or aggravated by her industrial injury four years prior. (CP, 332-333). The trial court chose to ignore the substantial evidence to the contrary, including Dr. Aldrich's own statements that he did not find any evidence of disc degeneration at L4-5 in 2008 after the injury, and he could not say with any precision one way or the other whether the findings in 2012 were hereditary or caused by the industrial injury.

More importantly, even if you look solely at the level of L5-S1, which is the level which produced symptoms and was temporarily aggravated by the industrial injury, by 2012 there was increased disc height loss at that

level. The doctors all agree on that fact. However, the substantial evidence does *not* support that Ms. Matto's clinical examination findings supported any actual symptomatic worsening at this level. Dr. Aldrich confirmed that at the time of his November 12, 2012 exam, her findings were more consistent with the L4-5 level rather than L5-S1. (CP, 189-190). The L4-5 level was never implicated at the time of the injury and Dr. Aldrich also testified that he did not believe an injury at one level would cause further degeneration at an adjacent level. So, how can he then make the leap that the L4-5 degeneration in 2012, in a woman with a history of preexisting degenerative disc disease in her low back, was caused by a discreet low back strain in 2008? This leap of logic cannot be the basis for finding that the 2008 industrial injury was a cause of her worsening degenerating low back on April 5, 2013. He is effectively stating that if Ms. Matto had not lifted a box of cucumbers on September 16, 2008 and experienced a minor low back strain, she would not have the degenerative disc disease at the L4 level which was apparent at the time of her reopening application.

C. Dr. Aldrich's testimony should not be given greater weight or credibility since it is inconsistent and not supported by the preponderance of evidence.

While the law requires 'special consideration' be given to the opinions of a claimant's treating physician, it does not require that his/her

opinions be given greater weight or credibility. *Hamilton v. Department of Labor and Industries*, 111 Wn. 2d 569, 761 P.2d 618 (1988). *Groff v. Department of Labor & Indus.*, 65 Wn. 2d 35, 45, 395 P.2d 633 (1964). Furthermore, when the treating physician's opinion is based on erroneous factual data and contradicted by substantial evidence, the fact that the witness is a treating physician is irrelevant. *Chalmers v. Department of Labor & Industries*, 72 Wn. 2d 595, 434 P.2d 720 (1967). Dr. Aldrich's testimony and opinions lack credibility because they are inconsistent and not supported by the evidence. Dr. Aldrich is not Board Certified as a family practitioner and does not have any one specialty or treatment focus. Rather, he refers to appropriate specialists for those problems which require special knowledge. In fact, he testified that the extent of his neurology training was an externship while in medical school in the late 1960's, and his orthopedic training was also while in medical school and when he worked in Nebraska for two years about 40 years ago. (CP, 157-159). Drs. Stump and Seligman are both Board Certified in their medical specialties, and their extensive medical practices focused on neurology and orthopedic surgery, respectively. Therefore, their specialized focus and practice on the spine gives their opinions added weight and credibility versus those of Dr. Aldrich.

Contradictory and polarizing statements by Dr. Aldrich also erode the persuasiveness and credibility of his testimony. In addition to his testimony about his political “falling out” with both the American Academy of Family Practice and the American Board of Family Practice, which he explains is the reason he is no longer Board Certified, he contradicts himself multiple times when discussing Ms. Matto’s examination findings and the causation of her low back condition as of April 5, 2013. Looking closely at his testimony, Dr. Aldrich confirms the “unusual” nature of Ms. Matto’s preexisting lumbar disc disease and how her pain was becoming chronic in nature, *prior* to the industrial injury. However, despite the advancing nature of her chronic lumbar pain prior to her industrial injury, he later states that the progression as seen on April 5, 2013 was also not normal for someone as young as she is and would not have been as bad had she not had the September 16, 2008 industrial injury. In addition, he testified the progression at L5-S1 was worse in 2012 when he saw her to file the reopening application, but he also confirmed the *new* developing problems at L4-5 were *not* present at claim closure in 2009. However, he makes the leap that her progressing disc disease, including a completely new level, which was normal at claim closure on March 4, 2009, is due to her minor lumbar strain in 2008 which resolved after some minimal conservative treatment. He does not adequately explain how the minor strain in 2008

contributed to, or how it could be the proximate cause of, her ongoing degenerative changes in her back.

His own testimony supports that any clinical exam findings she demonstrated at the time of his November 5, 2012 examination were in the L4-5 distribution, including sensory deficits and absent left knee jerk. (CP, 189). However, his testing of the muscle groups that the L5 nerve supplies, specifically dorsiflexion of the feet, was normal. (CP, 190). The MRI evidence of a progressing degenerative process at L5-S1 was not supported by Ms. Matto's clinical examination findings. On the contrary, her examination findings appear to confirm the newly degenerating process at the L4 level, which even Dr. Aldrich stated he could not "pin down" or "say with precision" whether it was precipitated by the industrial injury or natural progression or whether it was hereditary (CP, 217-218). Dr. Aldrich fails to provide any reasonable or credible correlation between the new findings at L4-5 and her industrial injury in 2008. This is arguably the source of her lumbar symptoms as of April 5, 2013, and since there was no evidence of these findings on March 5, 2009, one cannot dismiss these findings without discussing causality. The substantial evidence supports these new findings are in no way related, caused, or aggravated by Ms. Matto's industrial injury and does not support objective worsening of her *industrially related* low back condition.

D. The trial court improperly relied upon the Proposed Decision and Order of the Industrial Appeals Judge in reaching its decision.

This case was originally presented before an Industrial Appeals Judge (IAJ) who issued a Proposed Decision and Order (PD&O). Hagen took exception to the decision and filed a Petition for Review (PFR), which was accepted, and the Board of Industrial Insurance Appeals reviewed the record and rendered its own written decision and order dated October 29, 2014. The October 29, 2014 Decision and Order of the Board was the decision on appeal before the Superior Court and the decision which was presumed correct and which Ms. Matto had the burden of proving was incorrect.

The IAJ is an employee of the Board and, pursuant to RCW 51.52.104, his/her proposed decisions are not the decisions and orders of the Board. Once exception is taken and the Board issues its own written decision with findings of fact and conclusions of law, the IAJ's rejected proposal has no standing. *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P. 2d 651 (1969). In a jury trial, the jury would be restricted to considering only the Board's final decision and order and would be asked to presume the findings and conclusions of the Board order to be prima facie correct. *Id.* This case was not tried before a jury, however the same standard applies when the case is tried without a jury. The Judge hearing the case is

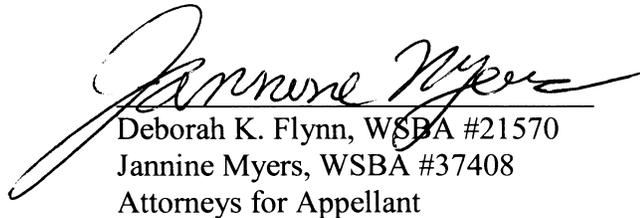
limited to reviewing the record in light of the Board's Decision and Order. The length of the IAJ's PD&O and the explanation by the IAJ as to his decision is not at issue in this case and was not material to any question being decided. Therefore, citing to and relying on the IAJ argument in his PD&O and putting greater weight on the fact that it was 31 pages long was improper and immaterial to the issues being addressed.

VI. CONCLUSION

For the foregoing reasons, Haggen requests that this Court reverse the June 5, 2015 decision of the Superior Court because it is not supported by substantial evidence and affirm the October 29, 2014 Board of Industrial Insurance Appeals Decision which denied Ms. Matto's reopening application because she failed to show that her condition proximately caused by her industrial injury objectively worsened between March 4, 2009 and April 5, 2013.

RESPECTFULLY SUBMITTED this 12th day of November, 2015.

FLYNN LAW GROUP, LLC



Deborah K. Flynn, WSBA #21570
Jannine Myers, WSBA #37408
Attorneys for Appellant

CERTIFICATE

The undersigned, under penalty of perjury under the laws of the State of Washington, certifies:

1. On this date, the original and one copy of the BRIEF OF APPELLANT was filed as follows:

Court of Appeals, Div. I VIA HAND DELIVERY
One Union Square
600 University Street
Seattle, WA 98101

2. On this date, I sent by first-class mail, postage prepaid, a copy of the BRIEF OF APPELLANT to the following:

Brock D. Stiles
Stiles & Stiles, Inc., P.S.
PO Box 228
Sedro Woolley, WA 98284

Anastasia Sandstrom
Office of the Attorney General
800 5th Ave #2000
MS TB-14
Seattle, WA 98104-3188

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements of fact are true and correct to the best of my knowledge and belief.

DATED this 12th day of November, 2015.



Jenica Berube
Paralegal

ORIGINAL

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SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT**

AUTUMN L. MATTO,

Plaintiff,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES FOR THE STATE OF
WASHINGTON, & HAGGEN, INC.,

Defendant.

No. 14-2-01937-1

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
JUDGMENT**

4

JUDGMENT SUMMARY

- 1. Judgment Creditor: Autumn L. Matto
- 2. Attorney for Judgment Creditor: Brock D. Stiles
- 3. Judgment Debtor: Haggen, Inc.
- 4. Attorney for Judgment Debtor: Jannine M. Myers
- 5. Principal Judgment Amount: \$ 0
- 6. Interest : \$ 0
- 7. Attorney Fees: \$ 5,610.00
- 8. Costs: \$ 1,583.00
- 9. Principal Judgment Amount shall bear interest at 12% per annum.
- 10. Attorney Fees, Costs and Other Recovery Amounts shall bear interest at 12% per annum.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - Page 1

STILES & STILES, INC., P.S.
ATTORNEYS AT LAW
P.O. BOX 228 - 925 METCALF STREET
SEDRO WOOLLEY, WASHINGTON 98284
(360) 855-0131 FAX (360) 856-2875

15 9 01367 8

1 THIS MATTER came on regularly for non-jury trial on April 2, 2015 before the
2 Honorable Judge Susan K. Cook on Plaintiff Autumn Matto's appeal to the Board of Industrial
3 Insurance Appeals' Decision and Order dated October 29, 2014 in Docket No. 13 17031. The
4 Plaintiff was represented by her attorney, Brock D. Stiles. The Defendant Department of Labor
5 and Industries filed a notice of non-participation in this case. The Defendant employer, Haggen
6 Inc., was represented by Jannine M. Myers. Both Plaintiff Matto and Defendant employer
7 Haggen Inc. submitted Trial Briefs. Having read the evidence in the form of the Certified
8 Appeal Board Record filed herein, and having heard argument of counsel, the Court now makes
9 the following:
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11
12

13 **FINDINGS OF FACT**

- 14 1. Autumn Matto sustained an industrial injury on September 16, 2008 when she
15 stood up, after picking up some dropped cucumbers, and experienced a sharp
16 pinch in her low back, and began experiencing symptoms down the back of
17 her left leg consistent with MRI finding showing disc bulging at L5-S1.
18 2. On March 4, 2009, Ms. Matto's objective findings proximately caused by the
19 industrial injury were the findings on imaging studies which revealed
20 degenerative disc disease at the L5-S1.
21 3. On April 5, 2013, Ms. Matto's objective findings proximately caused by the
22 industrial injury were the progression of the findings on imaging studies which
23 revealed an increase in the degenerative disc disease of the L4-5 and L5-S1
24 levels of her low back.
25 4. Ms. Matto's condition proximately caused by the industrial injury objectively
26 worsened between March 4, 2009 and April 5, 2013.

27 **CONCLUSIONS OF LAW**

- 28 1. The Skagit County Superior Court has jurisdiction over the parties and to the
29 subject matter of this appeal, which were timely filed.
30

- 1 2. Between March 4, 2009 and April 5, 2013, Ms. Matto's condition proximately
2 caused by the industrial injury objectively worsened within the meaning of
3 RCW 51.32.160.
4 3. The Board of Industrial Insurance Appeals' Decision and Order dated October
5 29, 2014 in Docket No. 13 17031 is incorrect and is reversed.
6 4. The Department Order dated April 5, 2013 is incorrect and is reversed. This
7 matter is remanded to the Department of Labor & Industries to reopen the
8 claim and to direct the self-insured employer to provide Ms. Matto with such
9 benefits as she may be entitled to under the facts and the law.

10 Based on the foregoing, and there being no post-trial motions having been interposed, and
11 the court being fully advised, NOW, THEREFORE,

12 **JUDGMENT**

13 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the October 29, 2014
14 Decision and Order issued by the Board of Industrial Insurance Appeals, which reversed the
15 Industrial Appeals Judge's Proposed Decision and Order of June 30, 2014 as the Board's final
16 order under Docket No. 13 17031, is REVERSED, and the April 5, 2013 Order issued by the
17 Department of Labor & Industries, which affirmed the order dated November 15, 2012 which
18 denied Ms. Matto's application to reopen her claim, is REVERSED, and this claim is
19 REMANDED to the Department of Labor and Industries with direction to reopen the claim and
20 to direct the self-insured employer to provide Ms. Matto with such benefits as she may be
21 entitled to under the facts and the law.
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25 IT IS FURTHER ORDERED that Autumn Matto recover from the Defendant employer
26 Hagen, Inc., pursuant to RCW 51.52.130, attorney fees in the amount of \$5,610.00, and her
27 costs and disbursements herein in the amount of \$240.00 for the filing fee, \$900.00 for Dr.
28 Stephen Aldrich's expert witness fee, and \$443.00 for court reporting fee for Dr. Aldrich's
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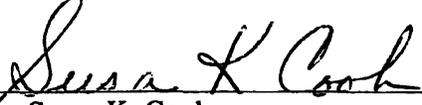
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31 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT – Page 3

STILES & STILES, INC., P.S.
ATTORNEYS AT LAW
P.O. BOX 228 – 925 METCALF STREET
SEDRO WOOLLEY, WASHINGTON 98284
(360) 855-0131 FAX (360) 856-2875

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deposition, for a total amount of attorney fees and costs of \$7,193.00, plus interest at the rate of 12% per annum from the date of entry of this judgment pursuant to RCW 4.56.110.

Dated this 5 ^{June} day of ~~May~~, 2015.



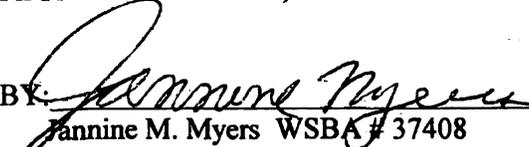
Judge Susan K. Cook

Presented by:
STILES & STILES INC. P.S.

BY: 

Brock D. Stiles WSBA # 15707
Attorney for Plaintiff

Copy Received and Notice
of Presentation Waived:

FLYNN LAW GROUP, LLC
BY: 

Jannine M. Myers WSBA # 37408
Attorney for Defendant Employer Haggen, Inc.



Skagit County Superior Court

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SKAGIT COUNTY, WA

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14-2-01937-1

Skagit County Courthouse
205 West Kincaid Street, Room 202
Mount Vernon, WA 98273

Phone: (360)336-9320
Fax: (360)336-9340
E-mail: superiorcourt@co.skagit.wa.us

JOHN M. MEYER
JUDGE, DEPARTMENT NO. 1

MICHAEL E. RICKERT
JUDGE, DEPARTMENT NO. 2

SUSAN K. COOK
JUDGE, DEPARTMENT NO. 3

DAVE NEEDY
JUDGE, DEPARTMENT NO. 4

G. BRIAN PAXTON
COURT COMMISSIONER

DELILAH M. GEORGE
COURT ADMINISTRATOR

April 2, 2015

Brock Stiles
Stiles & Stiles, Inc., P.S.
P.O. Box 228
Sedro Woolley, Washington 98284

Jannine M. Myers
Flynn Law Group, LLC
One Union Square
600 University St., Ste. 2100
Seattle, Washington 98101

RE: Matto v. Dept. of Labor & Industries, et. al. – Cause No. 142-01937-1

Dear Counsel,

2

I have now reviewed the Board record submitted in connection with this appeal of the BIIA Decision and Order dated October 29, 2014. In its Decision and Order the Board concluded that between March 4, 2009 and April 5, 2013, the claimant's condition proximately caused by her industrial injury did not objectively worsen. The Board decision is reversed and the claim is remanded to the Department to re-open.

On June 30, 2014 Industrial Appeals Judge Michael E. Metzger filed a 31 page Proposed Decision and Order reversing the Department and remanding for the claim to be re-opened. That Proposed Decision and Order gave the appropriate special consideration to the opinions of the claimant's treating physician, Dr. Aldridge. The 3 page Decision and Order from the Board does not do so. Instead, the Board finds that "Dr. Aldrich never adequately explained how the minor strain in 2008 contributed to (the claimant's) ongoing degenerative changes in her low back."

The Board's Decision and Order ignores Dr. Aldrich's testimony that when he saw the claimant on September 22, 2008, she was experiencing symptoms down the back of her (L) leg which were consistent with the MRI findings showing disc bulging at L5S1. He later testified that when he reviewed her x-rays from July, 2012, he found a loss of disc height at L5S1 from 1.11 centimeters in 2007 to 0.66 centimeters in 2012. He also found arthritic changes as a result of the disc thinning. He says "(s)he definitely had objective evidence of worsening, narrowing of L4-5, L5-S1 disk with associated arthritis...(s)o

I think there is significant roots of this symptom that come about from the industrial injury of a box lifting in September of 2008."

He also says, when asked whether the claimant's low back condition as of April 5, 2013 was causally related to or aggravated by the industrial injury, "(o)n a more probable than not basis I have to absolutely say yes."

The Board erred in rejecting this testimony.

Sincerely,

A handwritten signature in cursive script that reads "Susan K. Cook". The signature is written in black ink and is positioned above the typed name.

Susan K. Cook, Judge
Department Three

SKC:en