COURT OF APPEALS DIVISION II NO. 54939-5

SUPREME COURT NO. 100890-2

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

MICHAEL J. COLLINS PRO SE

PETITIONER

v

STATE OF WASHINGTON
DEPARTMENT OF LABOR
& INDUSTRIES

RESPONDENTS

PETITION FOR REVIEW

BASED ON DIVISION II APRIL 4, 2022 DENIAL OF FEBRUARY 4, 2022 MOTION FOR RECONSIDERATION

On Review Of The Pierce County Superior Court

RAP 13.4(a)(b)(1)(2)(3) - RAP 18.17

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A. IDENTITY OF PETITIONER

Comes forth Michael J. Collins Pro se, to timely file this PETITION FOR REVIEW, to the Washington State Supreme Court.

B. DIVISION II COURT OF APPEALS DECISION

The Division II Court Of Appeals, nowhere in its January 19, 2022 decision, App. Ex.2, then as it denied my February 4, 2022 timely Motion For Reconsideration, ever properly, or substantively addressed the factual/legal argument in my Appeal, since Department adjudication, and since Board, and Superior Court Appeal. App. Ex.1.

This, as illegal 'SEGREGATION' by the Department in the adjudication of my Neck Injury Claim ZB21147, and Neck Injury Claim ZB23273, was Superior Court ignored.

As the basis for my legal argument, my Neck Injury Claim ZB23273, only had to be filed, because the Department would not allow my Right Shoulder and Neck Injuries Claim ZB21147, to be medically adjudicated as a statutory Right Shoulder, and Neck Injuries claim, from my January 30, 2017 Right Shoulder, and Neck Injuries, but only as a Right Shoulder statutory Occupational Disease Claim ZB21147, as if,,, my January 30, 2017 Right Shoulder, and Neck Injuries, never even took place.

See my Superior Court Appellants Opening Brief, as CP at 5-66, as BIIA Docket 17 25495, is specific to Right Shoulder Occupational Disease Claim ZB21147, and BIIA Docket 18 10796, is specific to my Neck Injury

Claim ZB23273, but was illegally 'segregated', based on legally separate Right Shoulder Claim ZB21147, as supported by CP at 5-66 App. Ex. 6., as, ,,,''current medical opinion'',,, is specific to Right Shoulder [only],,, statutory Occupational Disease Claim ZB21147, as the Department would not allow a ,,,''current medical opinion'',,, specific to my timely filed statutory Neck Injury Claim ZB23273.

The Court Of Appeals decision, never legally decided the legal relevance of why the Department's illegal 'segregation' of my Neck Injury, specific to Claim ZB21147, then Neck Injury 'segregation' perpetuated in my also timely filed Neck Injury Claim ZB23273, fulfills my *prima facie* obligation as a Question Of Law and Fact.

C. ISSUES PRESENTED FOR REVIEW

CP at 5-66 App. Ex.s 1,2,3,8,9,10,11,12,13, as Dr. Joan Sullivan's substantive testimony at the Board Of Industrial Insurance Appeals, was all the medical testimony I, Michael J. Collins needed, as Dr. Sullivan App. Ex. 1, at 2-4, supports App. Ex. 2, at 12-15, then supports App. Ex. 3, at 24-25, then will same support App. Ex. 8, at 5-6, and 23-25, then will same support App. Ex. 9, at 19-25, and 1-20, as App. Ex. 9, then will support App. Ex.10 all, then also will same support App. Ex. 11, at 24-25 and all, then as all inclusive will support App. Ex.12, at 1-7, as my January 30, 2017 statutory Neck Injury specific to Claim ZB21147, was never Department adjudicated as a January 30, 2017 Neck Injury, as App. Ex. 8 proves.

Then as the Department ‘Segregation’ of my January 30, 2017 Neck Injury, must be legally based on a prior medical history, known, diagnosed, and treated Neck condition, but for which there is no prior medical history, and fact is supported by what must be a legal interpretation of ,,,’pre-existing’,,, that must, but does not my case support ,,,’Segregation’. And Dr. Joan Sullivans’ Board testimony App. Ex. 9, at 19-25, and next page 1-20 as App. Ex. 9 as specific, presents ‘’pre-existing’’ as specific, and as not open for convenient interpretation, to illegally ‘Segregate’ my January 30, 2017 Neck Injury, as Dr. Sullivan,,, App. Ex. 9 all,,, ,,,’’The reason it was said to be pre-existing was based on the studies that were done of his neck’’… As studies not done until August 23, 2017.

As Dr. Joan Sullivan could not know when she examined me August 21, 2017, whether my Neck condition was ‘active’ or not, or prior to my January 30, 2017 Neck Injury, App. Ex. 3, at 24-25, then she could not know if I had a legal ‘pre-existing’ Neck condition, to then legally ‘segregate’, and as ‘Segregation’ is a ‘legal’ determination to be made by the Department only, not,,, by a medical doctor.

Then as my *prima facie* legal argument is fulfilled, the Department must present an affirmative defense, as the burden now falls onto the Department, to prove with a specific Neck medical exam, that resulted in a known, diagnosed, and treated Neck condition, prior to my January 30, 2017 Neck Injury, to legally ‘segregate’.

As my Issues Presented For Review, must include the Department legal obligation to testify not protected by any deliberative process immunity, or any such privilege to be exempt from testimony, then created an RCW 51.52.115 'irregularity', but Division II January 19, 2022 decision, (this Petition App. Ex. 2.), does not address specific Division II own published opinion, that would only exempt the Department from a testimony obligation, if a claimants' own legal process incompetence, or legal malingering, as not relevant to my case, but was *McDonald s'* neglect.

But the Board relied on erroneous case law, as Superior Court affirmed, and that Division II affirmed, as its own published opinion below erroneously cited, ignored this 'conflict' in its January 19, 2022 decision.

And my Writ Of Mandamus as timely filed in Superior Court, must be decided, as specific to Department mandatory, as ministerial, then not,,, discretionary duty, to legally ,,,'SEGREGATE'...

D. STATEMENT OF THE CASE ARGUMENT

As nowhere in the Division II January 19, 2022 decision, does it even care to address its own published opinion[1] *McDonald v Department Of Labor & Industries, 104 Wn. App. 617, 17 P.3d 1195 Division II Court Of Appeals (2001),,,* as must be interpreted by this Supreme Court as a legal inequity, and as Division II remiss, as I, Appellant, made clear since my timely Raised Objections at the Board Of Appeals since Board IAJ, and Department cited *McDonald* as erroneous, to avoid the Department

being compelled to testify, but *McDonald* does not preclude Department testimony as specific to my case, as I have medical testimony complete, to fulfill my Neck Injury not able to be legally 'segregated' as a matter of law. RCW 51.32.080(5), and (3)(a),(5) is the statutory mandate the Department did not fulfill,,, to be able to legally 'segregate' my Neck Injury specific to either Claim ZB21147, or Claim ZB23273.

[2] Then my Writ Of Mandamus as proper to be granted as the Department had no discretion to 'segregate' my Neck Injury because any such statutory scheme specific to RCW 51.32.080, or RCW 51.32.100 does not support my case specific Neck Injury 'segregation'.

The Board, Superior Court, nor Court Of Appeals

ever decided this specific matter of law criteria.

There is no legal scenario, specific to the Department as possessing no discretion to illegally 'segregate' a body part, that has no 'pre-existing' condition as my Neck Injury, and its now known after my January 30, 2017 Neck Injury, subsequent condition, that would either then as a matter of law give the Department discretion to illegally 'segregate' my Neck Injury, or to avoid testimony.

Then my RCW 7.16.160 timely filed in Superior Court Petition For Writ Of Mandamus is proper, as Department had no discretion to illegally,,, 'segregate' my Neck Injury.

1_____
Supra: CP at 5-66
Supra: February 4, 2022 Motion For Reconsideration
RAP 13.4 (a)(b)(2)

2_____
Supra: February 4, 2022 Motion For Reconsideration all.
Supra: CP at 68-69 RAP 13.4 (a)(b)(3)

1. Procedural Facts Legal Argument

My Procedural legal argument originates at the Department, as the Department is Washington State Constitution obligated to provide me as a claimant, Procedural Safeguards, in the adjudication of my Neck Injury Claim ZB21147, and Neck Injury Claim ZB23273.

These Washington State Procedural Safeguards are not discretionary, but are mandatory, and ministerial.

Article 1 Section 3 Washington State Constitution,[3] provides me a 'protected property interest' specific to the Department as the 'original and sole tribunal'.

I possess[ed] as fact *de jure*, 'protected property interest' specific to my Neck Injury Claim ZB23273.

3 Supra: February 4, 2022 Motion For Reconsideration. RAP 13.4 (a)(b)(3)

This, because my Claim ZB21147 was Department approved, then because the Department illegally 'segregated' my Neck Injury Claim ZB23273, but as fact, based directly on Claim ZB21147, CP at 5-66, App. Ex. 6 ,,,''current medical opinion'',,, is factually, as directly speaking of,,, original Right Shoulder, and Neck Injuries Claim ZB21147 ''current medical opinion''.

The Department must provide me, as the claimant, a 'pre-deprivation' process, which must also be the Board Of Appeals Hearing. Then the Board Hearing must also have jurisdiction over both Claim ZB21147 Docket 17 25495, and Claim ZB23273 Docket 18 10796.

But, as of December 12, 2017, the Board did as fact have jurisdiction specific to Claim ZB21147 as

Docket 17 25495, but January 16, 2018, the Department 'segregated' my Neck Injury Claim ZB23273, as directly based on its (Claim ZB21147 rejection, already within the Boards' jurisdiction,,, as of December 12, 2017).

Again, see CP at 5-66 App. Ex. 6, as ''current medical opinion'', is as fact, directly related to Right Shoulder statutory Occupational Disease Claim ZB21147,,, when my Neck Injury Claim ZB23273, is a completely, and legally separate, statutory Injury claim.[4] Because Claim ZB21147 was approved, for whatever reason, I possess Article 1 section 3 Washington Constitution ,,,'protected property interest',,, to demand my approved Claim ZB21147, not be statutorily perverted, for sole intent for Department to 'segregate' my separate

4_____
Supra: February 4, 2022 Motion For Reconsideration
RAP 13.4 (a)(b)(3)

Neck Injury Claim ZB23273, when my timely filed Department Investigation into my January 30, 2017 Right Shoulder, and Neck Injuries Claim ZB21147, was never Department completed. CP at 5-66 App. Ex. 15, proves I claimant, timely requested of the Department to investigate my January 30, 2017 Injuries, but it deprived me my Washington State Constitutional right to a 'pre-deprivation' process.

When state law has not substantively addressed my Washington State Constitutional right to a 'pre-deprivation' process, and 'protected property interest', this court can turn to federal law to support my legal argument, and find the Departments' lack of discretion specific to 'segregation', supports granting Mandamus.

[5] *Goldberg v Kelly 397 U. S. 254 90 S. Ct. 1011 (1970),,, and Mathews v Eldridge 424 U. S. 319, 96 S. Ct. 893 (1976),,,* both support my 'protected property interest', as once a claim is approved, as my Right Shoulder statutory Occupational Disease Claim ZB21147, it cannot be be altered, or statutorily perverted, for the sole intent for the Department to illegally 'segregate' my separate Neck [only] Injury Claim ZB23273, without first providing me a 'pre-deprivation' process,,, but never Department afforded me, but as Washington State Constitution affords me.

This as RCW 51.04.010 ''all phases of the premises'', does not preclude my Writ Of Mandamus as, I have, and am, exhausting all my 'ACT' administrative remedies.

5_____
Supra: February 4, 2022 Motion For Reconsideration
RAP 13.4 (a)(b)(3)

2. Overview Of Legal Facts Argument

[6] Any legal action not,,, originating,,, at the trial court level, such as per the 'ACT",,, is not bound by published opinions only, as would be a legal action origin at the trial court. *In re: Diane K. Deridder Docket* No. 98 22312,,, then allows *In re: Pablo Garcia Dckt.* 05 15239 (March 28, 2006),,, to cite as persuasive legal argument, supporting compelling a Department claims manager to testify, as a Department claims manager is not a policy-maker, and not protected by any such deliberative process privilege.

Then as medical doctor testimony, I have sufficiently obtained, to fulfill my medical testimony legal obligation,

6 Supra: February 4, 2022 Motion For Reconsideration RAP 13.4 (a)(b)(2)

is not the *prima facie* dynamic I need, but a claims manager testimony only, per *In re: Pablo Garcia,,,* then the burden shifts to the Department to provide an 'affirmative defense', to prove a legally 'pre-existing' specific diagnosed, known, and treated Neck condition existed prior to my January 30, 2017 Right Shoulder and Neck Injuries, to legally 'segregate' my Neck in 2017.

This must be the dispositive ministerial mandate for the Department, and from which they will fail.

E. ARGUMENT: WHY REVIEW SHOULD BE GRANTED

Ft. nt. 6 herein, must include *State v Fitzpatrick 5 Wn. App. 661, 491, P.2d 262, Division II Court Of Appeals (1971),,,* as Court Of Appeals, in its January 19, 2022 decision, ignored its RAP 13.4 (a)(b)(2)

[7]
'conflict', *State v Fitzpatrick,,,* as RAP 13.4 (a)(b)(2), as by Division II not discussing *McDonald, v Department Of Labor & Industries, or State v Fitzpatrick,* as I cited since my Raised Objections to *McDonald v Department Of Labor & Industries*, at the Board level, then demonstrates as dispositive, the Division II is at 'conflict' with their own published opinions.

This, as only a Department person,,, can answer to ,,,'SEGREGATION',,, as 'segregation',,, is a 'legal concept',,, to be determined by the Department, not a medical concept determined by a medical doctor.

This is confirmed as written in Chapter 5 pages 38-40, of the Medical Examiners' Handbook, as published by the Department Of Labor & Industries.

7_____
Supra: Superior Court *McDonald* argument RP at 11-18

See my 'Raised Objections', as timely filed in the Certified Appeal Board Record, as filed in Superior Court specific to No. 19-2-09661-1, as my de novo Appeal to Superior Court specific to Docket 17 25495, and Docket 18 10796, as my 'Raised Objections' are specific to my Objections to the Board incorrectly citing *McDonald v Department Of Labor & Industries* to then protect the Department at the Board level.

McDonald never timely requested Department testimony in his BIIA request of witnesses, I did, and *McDonald* never timely Raised any Objections, I did.

In re: Gail Conelly BIIA, Dec., 97 3849 (1998),,, the Department had a 'choice', then 'discretion',,, specific to its decision, not so, specific to Department

'segregation' of my Neck Injury Claim ZB21147, or my separate Neck [only] Injury Claim ZB23273, as with no prior my Neck medical history 'pre-existing' known, diagnosed, and treated neck condition to legally 'segregate'. Without Department discretion to 'segregate',,, Writ Of Mandamus must be granted. *McGuire v Department Of Labor & Industries 179* Wash. 645, 38 P.2d 266 (1934),,, supports my Petition For Review specific to RAP 13.4 (a)(b)(1), as this State Supreme Court reversed the Superior Court, as based on a vital Question Of Law and Fact.

The 'vital issue' in my case specific, is the legal concept of 'segregation',,, as the Question Of Law and Fact, Department illegally implemented.

See *McGuire* CP at 5-66, CP at 12.

See in *McGuire*, ,,,''In answering questions as to the extent of the partial permanent disability resulting solely from the injury, had there been no preexisting arthritis, the doctors necessarily not only passed upon a question of fact, but upon a question of law. Without knowing their opinion on the matter of whether the arthritis was active or inactive prior to the injury, their reports and testimony do not reach the real question in the case''…

See *McGuire* in my February 4, 2022 filed Motion For Reconsideration, presenting a prevailing legal argument for my case specific, as medical testimony in *McGuire*, and in my case specific, is not ultimately

,,,'pre-existing',,, dispositive, but what is, in-context to my case specific argument of ,,,'pre-existing',,, specific to *McGuire*, and specific to my case Department illegal 'segregation' of my January 30, 2017 Right Shoulder, and Neck Injuries Claim ZB21147, and separate subsequent Neck [only] Injury Claim ZB23273, is,,, what was a known, diagnosed, and as in *McGuire,,,* what was active, or not, prior to my January 30, 2017 Neck Injury.

The 'Permanent Partial Disability' determination in *McGuire,*,, becomes not relevant to my legal argument.

But what is directly related as prevailing for me, and as for *McGuire*, is,,, what 'pre-existed' prior to injury?

Refer back to Dr. Joan Sullivan Board testimony

in my case specific, as CP at 5-66 App. Ex. 3, as ''I can't know when I do am IME if something is active''. CP at 5-66 App. Ex. 9, IME Dr. Joan Sullivan, as 2 pages from the Board transcripts as page 25, and (page 26, at 7-14, my question specific to,,, 'anything in your records that shows I had a pre-existing condition in my cervical neck prior to my injury on January 30, 2017'). Dr. Sullivan has no (my claim rejection) answer.

So even if Department counsel argues that there is no proof of an injury, now we are back to why the Department did not complete the statutory Investigation I requested specific to January 30, 2017, and,,, the Department only,,, must answer as to why my June 21, 2017 timely filed Right Shoulder, and Neck Injuries

Claim ZB21147,,, was not medically adjudicated as a timely filed Injuries Claim ZB21147.

See CP at 5-66 App. Ex.15, as a specific Investigation never to this day completed as requested.

So my Neck (only) Injuries Claim ZB23273, as I timely filed, only because my original Right Shoulder, and Neck Injuries Claim ZB21147 was not medically, then not legally, adjudicated, as a timely filed Injuries Claim ZB21147,,, was rejected based solely on a,,, ,,,''current medical opinion'',,, CP at 5-66 App. Ex. 6, to mean, Dr. Sullivans' IME,,, not based on a Neck Injury. CP at 5-66 App. Ex. 8, as transcript page 81, at 5-6,,, Dr. Sullivan,,, ''I was never asked if he had an injury, I did not address it''… To mean, by the Department.

[8] This proves my point, and yet Dr. Sullivans' August 21, 2017 IME,,, is the ,,,''current medical opinion'',,, my June 21, 2017 timely filed Neck Injury Claim ZB21147 was rejected, and, the ,,,''current medical opinion'',,, my timely filed within 1 'ACT' statutory year January 4, 2018 Neck (only) Injury Claim ZB23273 was rejected, as fact.

See my May 16, 2019 timely filed Board Of Appeals Petition For Review, for my *McDonald v Department Of Labor & Industries* as both Docket 17 25495, and Docket 18 10796 Raised Objections, as CABR 33-61.

See from *McGuire,,,* ''In fact, as already indicated, the evidence offered by the claimant upon the vital issue has not been met by the department''…

8 *Supra:* Superior Court *McGuire* argument RP at 7-11.

McGuire 'vital issue', as my 'vital issue' of, why was my Neck Injury Department 'segregated', with no medical record of a specifically diagnosed, known, or active, or treated, 'pre-existing' Neck condition, prior to my January 30, 2017 Neck Injury, meets RAP 13.4 (a)(b)(1) mandate, as prevailing.

9 As the 'Segregation Rules' must clearly include RCW 51.32.080(5), and RCW 51.32.100, confirmed by Supreme Court in *Dennis v Department Of Labor & Industries 109 Wn. 2d 467, 470 745 P.2d 1295, (1987),,,* as *Dennis* ultimately is an Occupational Disease case, 'injury' must be statutorily distinguished, as *Dennis* at *476,,, specific to RCW 51.32.080(3),,, ''That section requires segregation of the preexisting

9_____
Supra: Superior Court segregation rules argument RP at 8.

disability, from whatever cause''… Even if,,, as in *Dennis*, NOTES [1],,, the Department argues that ''the term ''occupational disease'' may include disability due to aggravation of a nonwork-related disease'',,, to somehow attempt to justify why the Department adjudicated my June 21, 2017 timely filed Neck Injury Claim ZB21147, and January 4, 2018 timely filed Neck (only) Injury Claim ZB23273 as the same Neck Injury, adjudicated only on Neck 'Occupational Disease', the Department must first prove prior to my January 30, 2017 Injuries, any such known, active, diagnosed, 'pre-existing' condition in my Cervical Neck, as legally 'pre-existing', and as disability to be able to ,,,legally,,, 'segregate'. *Dennis*… This will be my claim Department impossible.

And, even if, as the Department can, exercise its discretion, to (same claim) either adjudicate as statutory injury, or statutory occupational disease, the Department must still legally support 'pre-existing' (prior to filed claim), to legally support 'segregation'.

That will be my Neck Injury Claim(s) ZB21147-ZB23273 impossible. Then 'segregation' is not legal.

My Division II February 4, 2022 timely filed Motion For Reconsideration pages 15-16 as *In re: Delores Jean Egerton Docket 87 0932,* and the dispositive significance of RCW 51.32.080(3)(a)(5), and also RCW 51.32.100 ''By resolving the question of allowance of the claim, we make no determination concerning the existence or segregation of preexisting and disabling conditions''… This is powerful from BIIA.

Why? This now once again, directly points to my timely filed (my Neck Injury) Department Investigation request, but which as Department 'abuse of discretion', did not (INJURY) complete. CP at 5-66 App. Ex. 15.

Then this supports specific 'ministerial duty' for the Department as not statutorily discretionary, for the Department to illegally 'segregate' my Neck Injury.

Then my Writ Of Mandamus must be granted, as I have established 'Grounds' specific to RCW 7.16.160.

As I have not received RCW 51.04.010 ''sure and certain relief'', and as fact *de jure* without exception, an 'ACT' 'segregation',,, must have (at least prior active), prior to [filed claim] known, as specifically diagnosed, legally 'pre-existing' condition, to 'segregate',,, then with no [my claim] discretion to 'segregate',,, Mandamus is proper to compel Department action, to adjudicate legally.

See my Superior Court CP at 1-4.

See my Superior Court RCW 7.16.160
Petition For Writ Of Mandamus CP at 68-69.

See my Superior Court CP at 70

I have met my *prima facie* burden that my Neck Injury did take place, and medical testimony proves my Neck Injury was not adjudicated as Injury.

I have met my *prima facie* burden, because there is no prior to my January 30, 2017 Neck Injury, known, diagnosed, or treated Neck condition, or Neck disability, the Department had 'no choice', then 'no discretion', to invoke 'segregation', simply to reject my Neck Injury Claim ZB21147, and (same Neck Injury) Claim ZB23273.

Then '**a** proximate cause' of my Neck condition since January 30, 2017, is my on-the-job Neck Injury on that

day, as there is no prior to my January 30, 2017 Neck Injury, any specifically diagnosed, or treated neck condition, to fulfill the legal requisite of ,,,'pre-existing',,, per the 'ACT',,, to then be able to legally ,,,'segregate'...

If no statute per the 'ACT' gives the Department discretion to legally 'segregate' a condition, (even as RCW 51.32.080(5) ''already from whatever cause'',,, [would otherwise be] in Departments' favor, prior to my Neck Injury)), without a prior specifically diagnosed Neck condition, as [would be] legally 'pre-existing',,, prior to my January 30, 2017 Neck Injury, without the Department first legally determining 'pre-existing',,, then the Department had no discretion to 'segregate' my Neck condition, as both timely filed Neck Injury Claim ZB21147,

and my timely filed Neck Injury Claim ZB23273, without statutory discretion, with no prior to my January 30, 2017 Neck Injury, specifically diagnosed ‘pre-existing’.

As this Supreme Court refers to my Brief Of Appellant filed in Division II November 9, 2020, approved as over length, specific ASSIGNMENTS OF ERROR 9., as Issues Pertaining to Assignments Of Error 9., and my reference to ASSIGNMENTS OF ERROR ‘’1,’’2,’’3,’’9,’’10, becomes all inclusive of my entire prevailing legal argument herein.

‘Prejudicial Errors’ below, must include legal fact that Board Of Appeals, nor *de novo* Superior Court, need not have had jurisdiction to determine an act of the legislature unconstitutional, but the Board, and Superior Court, and Division II Court Of Appeals, did possess the jurisdiction

to determine whether or not the Department had the statutory, or WAC discretion, to 'segregate' my Neck or any other body part condition with no 'pre-existing' specifically diagnosed, known, and treated condition, and as my case specific, prior to my January 30, 2017 Neck Injury, Neck condition, if it legally,,, 'pre-existed'.

Then Department 'segregation' of my Neck condition after,,, my January 30, 2017 Right Shoulder, and Neck Injury Claim ZB21147, BIIA Docket 17 25495, and my separate but same date of injury Neck Injury Claim ZB23273, BIIA Docket 18 10796, is not Department legal, and not *stare decisis* supported.

See my Division II Brief Of Appellant Appendix, as App. Ex. C, as my detailed June 27, 2017 Report Of Injury,

to support my June 21, 2017 timely filed Right Shoulder, and Neck on-the-job Injuries of January 30, 2017, as all must be Department Investigated, prior to determining any prior to my January 30, 2017 Injuries, 'pre-existing', and then 'segregation' of my Cervical Neck, that must be specific to a legally,,,'pre-existing',,, determination. See my Investigation Request CP at 5-66 App. Ex. 15.

Department Counsel who must now, but will fail at producing an 'affirmative defense', as the burden falls upon them, to prove, prior to my January 30, 2017 Injuries ,,,'pre-existing',,, to legally ,,,'segregate',,, and also Employer Counsel cite, *In re: Pers. Restraint Deyer 143 Wn. 2d 384,398 20 P.3d 907 (2001),,,* but, as *Deyer* dispositive, Department Of Corrections Official in

Deyer, had specific RCW 72.09.490 discretion,,, to establish, and to then implement 'uniform policy',,, as specific. See *Deyer* in pgs. 61-62 in my Division II Brief Of Appellant filed November 9, 2020, and the Department, and Olympic Counsel absurdity to cite *Deyer* attempting to draw parallels to the Department somehow having after my January 30, 2017 Injuries',,, 'pre-existing' 'segregation' discretion, now compels the Department, by way of an affirmative defense, to prove any prior 'pre-existing', then after 'segregation' statutory discretion to 'segregate' my Neck condition,,, and what exact law supports it,,, after my June 21, 2017 timely filed Right Shoulder, and Neck Injuries Claim ZB21147, and timely separate claim, Neck Injury Claim ZB23273.

Then Corrections Official in *Deyer,* having 'statutory discretion',,, to implement 'uniform policy',,, precluded Mandamus by the opposition. Then this was an absurd attempt to draw parallels to my Petition For Writ Of Mandamus, by both Department, and Olympic Counsel. Mandamus is statutorily proper in my case.

10 Mine need not be 'partial permanent disability' as from *McGuire* legal argument, but RCW 51.32.080(3)(a), or as same, and as RCW 51.32.080(5), ''already from whatever cause', which can even be Neck degenerative anomaly from my birth, but never specifically medically diagnosed, then not a 'fact' Neck condition prior to my January 30, 2017 on-the-job Neck Injury, to prevail as to 'claim allowance', as if no 'pre-existing', then 'segregation'

10_____
Supra: Egerton pg.28 herein, as to 'claim allowance' only.

of my Neck is not legal. Division II January 19, 2022 decision, and as RAP 13.4 (a)(b)(2), 'conflicts' with its own published opinion as *Orr v Department Of Labor & industries10 Wn. App. 697,* 519 P.2d 1334 (1974),,, Court Of Appeals Division II No. 987-2,,, ''If this congenital anomaly, and the resulting degenerative changes, or any other condition did not permanently, and manifestly diminish the claimant's utilization of his natural faculties, which may of course include interference with his working capacity prior to the injury, it would not have been proper to require a segregation of that preexisting condition''...

So because my January 30, 2017 Neck Injury took place doing Department categorized as 'heavy (lifting) work', ie., [hanging] sheetrock, the Department cannot

ever prove a legally, or medically 'pre-existing' Neck condition, to be able to legally,,, 'segregate'. *Orr*...

And as from *McGuire,* "'Prior to the accident, the claimant engaged in the hardest kind of manual labor, cont., ,,,which work he did without suffering any pain or inconvenience''… *McGuire* was fifty-two years old. I was 61, on January 30, 2017. See prevailing parallel for me, specific to *McGuire,* RAP 13.4 (a)(b)(1), and *Orr*, RAP 13.4 (a)(b)(2), as Department 'duty' to prove my Neck 'pre-existing' condition, prior to my January 30, 2017 Neck Injury, which is medically/legally impossible. Then I have met/surpass my *McGuire prima facie* burden.

And as the Department does have broad subject-matter jurisdiction, I do not need to legally argue Department

Orders at issue herein, as void. Then if the type of controversy is within the Board's or Departments' subject-matter jurisdiction, then all defects, or errors go elsewhere.

Then the Department's January 16, 2018 Neck injury Claim ZB23273 'Segregation' Order as Docket 18 10796, but 'segregated' specific to Neck/Right Shoulder Injury Claim ZB21147, is as a 'matter of law', legally erroneous.

As while my Neck/Right Shoulder injury Claim ZB21147 as Docket 17 25495 remained on appeal, within the Board's jurisdiction as of December 12, 2017, the Department could not logically adjudicate 'allowance',,, because determination of Neck Injury Claim ZB23273 as a 'matter of law', depended on resolution of the Claim ZB21147 'pre-existing', and 'segregation' issue, as a legal prereq-

uisite for that determination, Department, Board ignored.

Then again, I meet, and surpass, my *prima facie* burden as proving no 'pre-existing', to 'segregate', prior to my January 30, 2017 Neck Injury, as a 'matter of law', and as Department legal adjudicatory error.

As the Department Claims manager is not protected by any Qualified Official Immunity, as is only available for a Department discretionary act, but for which the 'segregation' of my January 30, 2017 Neck Injury, is not discretionary, as with no prior ,,,'pre-existing',,, my Petition For Writ Of Mandamus is proper, to compel 'duty', as law supports be granted, and per *McGuire*, I did not 'suffer any pain, or inconvenience',,, in my Neck prior to my January 30, 2017 'manual labor' Neck Injury.

F. CONCLUSION

I ask my Petition For Writ Of Mandamus be granted, and merits (not 'segregation' issue precluded) of my Neck Injury Claim ZB23273 ultimately remanded to the Department, to be Neck Injury medically, and legally adjudicated, to include completion of my requested Department Investigation, as ,,,'segregation' issue merits,,, of my correct statutory Neck Injury Claim ZB23273. As even though 'segregation' of my Neck Injury was decided by the Department in its Orders on Review at the Board, and then within the Boards' scope of review, as was my Appeal, was not 'segregation' specifically decided below.

PETITION FOR REVIEW

COURT OF APPEALS DIVISION II NO. 54939-5

SUPREME COURT NO._____

APPENDIX

RAP 13.4(c)(9) - RAP 18.17

Exhibit 1. Division II April 4, 2022 Decision

Exhibit 2. Division II January 19, 2022 Decision

Exhibit 3. RCW 7.16.160
Washington State Statute

Exhibit 4. Article 1 section 3 - Washington State
Constitutional Provision

NOTE: Appendix documents will be same day
U. S. mailed to both Supreme Court, and
to Department Counsel, as original Petition
For Review may be e-filed to Division II, but
irrespective of which, all same day mailed.

NOTE: $200 filing fee will either be completed on-line
or U. S. mailed same day as this Petition filed,
to the Washington State Supreme Court.

PETITION FOR REVIEW

COURT OF APPEALS DIVISION II NO. 54939-5

SUPREME COURT NO._____

CERTIFICATE OF COMPLIANCE

I Michael J. Collins Pro se, pursuant to the laws of the State Of Washington, and under penalty of perjury, hereby declare that I have complied with RAP 18.17(c)(10),,, specific to Microsoft Sans Serif equivalent to Arial, as font size 14, and that my Petition For Review total text word count herein,,, is **4,337** words...

PETITION FOR REVIEW

COURT OF APPEALS DIVISION II NO. 54939-5
SUPREME COURT NO._____

DECLARATION OF SERVICE

I Michael J. Collins Pro se, pursuant to the laws of the State Of Washington, and under penalty of perjury, do hereby declare I have timely filed to Washington State Supreme Court, and to Department counsel of record as addressed below, my Petition For Review as compliant with RAP 13.4, and RAP 18.17.

Original e-filed to:	Appendix U. S. mailed to:
Division II Court Of Appeals 909 A Street - Suite 200 Tacoma, Wn. 98402	Wn. St. Supreme Court Clerk's Office Temple Of Justice PO Box 40929 Olympia, WA. 98504-0929

Copy by U. S. mail to:
Valerie K. Balch AAG – Office Of The
Attorney General For Washington State
800 Fifth Avenue - Suite 2000
Seattle, WA. 98104-3188

E-filed signed this day Michael J. Collins April 29, 2022
Michael J. Collins Pro se
PO Box 111483 Tacoma, WA. 98411
(253) 348-5842 email: michael.collins29@comcast.net

Filed
Washington State
Court of Appeals
Division Two

January 19, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL J. COLLINS, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF LABOR & INDUSTRIES and OLYMPIC INTERIORS, INC., Respondent.	No. 54939-5-II UNPUBLISHED OPINION

VELJACIC, J. — Michael Collins worked as a drywall installer when he experienced shoulder and neck pain. He filed a workers' compensation claim with the Department of Labor and Industries (the Department), claiming work-related injuries to his shoulder and neck. An independent medical examination concluded that Collins's shoulder condition was a work-related occupational disease, but that his neck pain was not work related. The Department compensated Collins for his shoulder disease, but segregated his neck pain from such claim. Collins appealed that order. Collins also separately filed an injury claim for his neck pain. The Department rejected such claim because Collins failed to produce evidence that the neck pain was caused by an injury or was work related. Collins also appealed the order denying the neck pain claim. The Board of Industrial Insurance Appeals (the Board) heard both appeals and dismissed them after finding that Collins had failed to prove his neck pain was either an occupational disease or an injury. Collins appealed to the superior court, and that court affirmed the Board's dismissal of the appeals. He appeals the superior court's order. We affirm.

FACTS

Collins worked as a drywall installer for approximately 40 years. After feeling pain in his shoulder and neck during a job, he submitted a workers' compensation claim for a neck/right shoulder occupational disease (claim number ZB-21147). The Department sent Collins to undergo an independent medical examination (IME).

The doctor diagnosed Collins's disease as right shoulder rotator cuff arthropathy that was work related. Collins also presented with neck issues, which the doctor described as "cervical disc degeneration" and concluded that this was not work related. Clerk's Papers (CP) at1278. The Department compensated Collins for his right shoulder rotator cuff arthropathy, classifying it as an occupational disease, but the Department segregated that disease from his cervical disc degeneration. Collins appealed the segregation order to the Board.

Collins also submitted a separate claim for an alleged neck injury (claim number ZB-23273). Collins testified that his second claim was submitted because his "cervical neck was not adjudicated as an injury" in his prior claim. CP at 2756. He did not provide evidence of a medical examination that shows he was evaluated for an injury. The Department rejected this injury claim. Collins appealed the rejection order to the Board.

Collins requested to have his claim manager testify at his appeal hearings. The Board denied Collins's request, concluding that the claim manager's testimony would improperly probe the decision-making process of an administrative officer.

At both his segregation order and rejection order hearings, the only medical testimony presented came from the doctor who examined Collins for his IME. The doctor testified that it was her opinion that cervical disc degeneration is not work related. She also testified that she evaluated Collins for occupational disease and determined his right shoulder rotator cuff

arthropathy was caused by his employment, but that she had not examined Collins for his injury claim and could therefore not state an opinion about it.

The Board found that Collins had failed to prove his cervical disc degeneration was work related or that an injury had occurred and was work related. The Board then concluded that Collins had failed to satisfy his duty of establishing a prima facie case for both claims and dismissed them. Collins appealed to the superior court.

After a hearing, the superior court found that Collins failed to present sufficient evidence that his cervical disc degeneration was work related or that he sustained an injury. The court concluded that the Board did not err in its decision because Collins failed to meet his burden of providing evidence to establish a prima facie case. The court also ruled that the Board did not err when it determined the claim manager's testimony was not relevant to whether Collins could establish his prima facie case. The superior court affirmed the Board's decisions. Collins appeals the superior court order affirming the Board's orders segregating the shoulder condition and rejecting the shoulder claim and the order denying his motion for reconsideration.

ANALYSIS[1]

I. STANDARD OF REVIEW

We review workers' compensation claims to determine "'whether substantial evidence supports the findings made after the superior court's de novo review, and whether the [superior] court's conclusions of law flow from the findings.'" *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 205, 399 P.3d 1156 (2017) (internal quotation marks omitted) (quoting *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999)).

II. APPEALS UNDER THE INDUSTRIAL INSURANCE ACT

The Industrial Insurance Act (IIA), Title 51 RCW, guarantees compensation for workers injured or suffering from occupational disease resulting from their employment. RCW 51.32.010; RCW 51.32.180; *Ma'ae v. Dep't of Labor & Indus.*, 8 Wn. App. 2d 189, 199, 438 P.3d 148 (2019); *Weyerhaeuser*, 189 Wn.2d at 193-94. The IIA differentiates between occupational disease and on the job injuries. Under RCW 51.32.180, workers "who suffer[] disability from an occupational disease in the course of employment" are entitled to "the same compensation benefits" as injured workers. An occupational disease "arises naturally and proximately out of employment." RCW

[1] Collins mentions several issues that were not fully briefed and lacked citations to the record or legal authority. He argues that the Department had a financial interest in segregating his cervical disc degeneration and rejecting his injury claim, claiming the Department had an ulterior motive to protect his employer, that the Department's decision was not discretionary because segregation is a legal concept that his claim manager was incapable of reaching, that the Board improperly accepted the medical opinion of a lay witness, and that the Department violated his equal protection, due process rights, and property rights. Collins fails to cite relevant legal authority for any of these arguments. Because we do not consider claims unsupported by the record or legal authority, we refuse to address them. *See Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004).

Collins argues that he exhausted his administrative remedies before the superior court heard his case on the merits, so he is entitled to mandamus. But exhaustion of administrative remedies is irrelevant because chapter 51.52 RCW provides that Collins may only seek relief by appealing to the Board and then to the superior court. RCW 51.52.050(2)(a); RCW 51.52.110.

51.08.140; *Weyerhaeuser*, 189 Wn.2d at 194. Under RCW 51.08.140, a claimant must produce evidence showing that employment proximately caused such disease and would not have occurred but for employment. *Weyerhaeuser*, 189 Wn.2d at 194.

Under RCW 51.08.100, an injury "means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." "The causal connection between a claimant's condition and his employment must be established by competent medical testimony that shows that the condition is probably, not merely possibly, caused by the employment." *City of Bellevue v. Raum*, 171 Wn. App. 124, 140, 286 P.3d 695 (2012) (footnote omitted).

The Department has original and exclusive jurisdiction to determine whether workers' compensation claims are compensable. *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 220-21, 292 P.2d 865 (1956). A claimant may appeal the Department's decision to the Board. RCW 51.52.050(2)(a). The claimant carries the burden of providing sufficient evidence "to establish a prima facie case for the relief sought in such appeal." RCW 51.52.050(2)(a). The Board reviews an appeal from the Department's decision de novo. RCW 51.52.100; *Coaker v. Dep't of Labor & Indus.*, 16 Wn. App. 2d 923, 930, 484 P.3d 1265, *review denied*, 198 Wn.2d 1020 (2021).[2] A claimant may appeal adverse decisions of the Board to the superior court. RCW 51.52.110.

A. Department Jurisdiction

Collins argues that the Department lacked jurisdiction to issue a rejection order on his injury claim because the Board had accepted an appeal of the segregation order. We disagree.

[2] Collins argues that the Board should have reviewed his case under an abuse of discretion standard. Because the standard of review for the Board is de novo, we reject his argument. RCW 51.52.100; *Coaker*, 16 Wn. App. 2d at 930.

Collins fails to cite to any legal authority that prohibits the Department from adjudicating a claim when a separate claim from the same claimant has been appealed. Under *Brakus*, the Department has original and exclusive jurisdiction to hear all claims under Title 51 RCW. 48 Wn.2d at 220-21. Because he does not provide authority or argument that overcomes *Brakus*, Collins's argument fails.

B. Segregation and Rejection Orders

Collins argues that the segregation order is not legally supported. He argues that no statute supports such segregation and that his condition could have been "[l]it up" by his work at Olympic Interiors, which would allow for recovery under a workers' compensation claim. Br. of Appellant at 16-17. Further, he argues that his rejected injury claim should have been compensated. We disagree.

In his brief, Collins incorrectly argues that his claims should not have been segregated or dismissed because the Department did not produce evidence to prove the claims were not work related. Collins misstates which party bears the burden of proof. Under RCW 51.52.050(2)(a), Collins bears the burden of proving his claims. To prevail on appeal, Collins must establish a prima facie case that his cervical disc degeneration or his alleged injury were work related. *See* RCW 51.52.050(2)(a). To do so, Collins must provide medical testimony that such conditions resulted from his work. *Weyerhaeuser*, 189 Wn.2d at 194-95; *Raum,* 171 Wn. App. at 140.

Collins fails to satisfy his burden because he did not present sufficient evidence that his cervical disc degeneration and his alleged injury were work related. The only evidence presented about the causes of his occupational disease and injury was testimony from the doctor who examined him. Collins argues that Dr. Sullivan's testimony was not enough to segregate his cervical disc injury and deny his injury claim. However, Dr. Sullivan unequivocally testified that

it was her opinion and the consensus of the medical community that cervical disc degeneration is not related to employment. Additionally, she testified that she was not asked to evaluate Collins for injury and therefore could not offer an opinion on his injury claim. Collins did not offer any evidence that disputes Dr. Sullivan's testimony. The Board found that Collins had failed to prove his cervical disc degeneration was work related or that he had suffered an injury at work. The superior court examined the Board's findings and the evidence submitted by Collins and found that Collins failed to present evidence sufficient to establish his cervical disc degeneration was work related or that he suffered an injury at work. The court affirmed the Board's decision to dismiss Collins's claims.

Substantial evidence supports the superior court's findings, because Collins did not provide any evidence to show his cervical disc degeneration was work related or that he suffered an injury. By failing to provide such evidence, Collins did not establish a prima facie case. We affirm the superior court's ruling because its findings are supported by substantial evidence and Collins therefore failed to satisfy his duty under RCW 51.52.050(2)(a) to establish a prima facie case.

C. Claim Manager's Testimony

Collins argues that the superior court erred when it rejected his request to have his Department claim manager testify. He argues that the claim manager mishandled his case, and accuses him of duplicitous conduct, which he argues was an abuse of discretion. We disagree.

We conclude Collins was not entitled to have his claim manager testify, because such testimony would not help him establish his prima facie case. The superior court found that the Board did not err when it determined the claim manager's testimony was not relevant to whether Collins could establish his prima facie case. Substantial evidence supports such finding because

Collins failed to argue how the claim manager's testimony would prove his cervical disc degeneration was work related or that he suffered an injury. We affirm the superior court's ruling.

III. SPOLIATION

Collins argues that his employer committed spoliation of evidence, including forging timesheets and providing intentionally inconsistent testimony at his hearings. We conclude that the issue of spoliation is irrelevant to the case before us.

A party commits spoliation by intentionally destroying evidence. *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). The doctrine allows the trial court to sanction a party that commits spoliation, but "for a direct sanction to apply the spoliation must in some way be connected to the party against whom the sanction is directed." *Id*. at 606.

Here, Collins only argues that his employer committed spoliation, not the Department or the Board. Under spoliation, sanctions are proper only against the party responsible. *Id*. Therefore, even if his employer committed spoliation, sanctions would be improper against the Department. Collins also fails to identify his requested remedy. The only remedy we could provide to Collins in this case is to conclude that the superior court erred in affirming the Board's findings and ruling. *See Weyerhaeuser*, 189 Wn.2d at 205. Collins fails to argue how evidence of spoliation would assist us in evaluating the superior court's decision. Further, he fails to show how the evidence that was destroyed would assist him in establishing his prima facie case, which is the issue Collins must prevail on to succeed here. *See* RCW 51.52.050(2)(a). Collins's spoliation argument is irrelevant to his appeal.

CONCLUSION

We conclude that the superior court's findings are supported by substantial evidence because Collins failed to provide sufficient evidence to prove his cervical disc degeneration was work related or that he suffered a work injury. Due to the lack of evidence, Collins failed to satisfy his statutory burden of establishing a prima facie case. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Worswick, P.J.

Price, J.

MICHAEL COLLINS - FILING PRO SE

April 29, 2022 - 9:31 AM

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