SC#931917

No. 73344-3

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

STERLING O. HAYDEN
Respondent

vs.

THE BOEING COMPANY
Appellant

PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF PETITIONER

Sterling Hayden, the injured worker/claimant at the Board of Industrial Insurance Appeals and respondent at the Court of Appeals Division One, seeks review of the decision of the Court of Appeals designated in Part II of this petition.

II. COURT OF APPEALS DECISION

The petitioner asks this Court to review the unpublished decision of the Court of Appeals filed on April 25, 2016, *Sterling O. Hayden, Respondent v. The Boeing Company, Appellant*, Division One, No. 73344-3-I. See Part VII of this petition.

III. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals applied the substantial evidence standard too stringently in reversing the Superior Court's finding that Mr. Hayden's accepted work-related condition aggravated his osteoarthritis.

IV. STATEMENT OF THE CASE

The underlying facts are outlined in the Court of Appeals opinion, the briefing of the parties, the Decision and Order of the Board of Industrial Insurance Appeals and the Department order at issue. For purposes of this petition, the following facts are relevant:

A. Procedural History

This matter originated from a workers' compensation claim filed by Hayden in March 2010 for left shoulder symptoms. CP 20. The claim was allowed as an occupational disease effective March 5, 2010. CP 47. In May 2012, the Department issued an order denying responsibility for Hayden's preexisting condition diagnosed as left shoulder glenohumeral osteoarthritis and closed the claim. CP 33. Following a protest by Hayden, the Department of Labor and Industries issued an order on October 29, 2012 holding Boeing responsible for the preexisting condition diagnosed as left shoulder glenohumeral osteoarthritis. CP 40. The self-insured employer appealed that decision to the Board of Industrial Insurance Appeals. CP 38-39.

An industrial appeals judge reversed the Department's order on September 24, 2013. Hayden sought review of this decision, the three-member Board denied Hayden's petition for review and the judge's proposed decision became the final decision and order. CP 5. Hayden appealed the Board's order to Superior Court. A bench trial was held before the Honorable Richard F. McDermott on November 24, 2014. CP 313. The trial judge was asked to determine whether the Board of Industrial Insurance Appeals was correct in its decision to deny

responsibility for the pre-existing condition described as left shoulder glenohumeral osteoarthritis. CP 313. After reviewing the evidence, in the form of the Certified Appeal Board Record, along with the briefs submitted by counsel and hearing oral argument, the Court found in Hayden's favor, determining that the Board of Industrial Insurance Appeals was incorrect. CP 313 - 318

On March 13, 2015, Judge McDermott issued written Findings of Fact and Conclusions of Law concluding that Hayden's preexisting left shoulder glenohumeral osteoarthritis was aggravated by his occupationally-related left shoulder strain and that he was therefore entitled to further treatment under his claim. CP 313-318.

The employer appealed the Court's decision to the Court of Appeals. The Court of Appeals filed its decision on April 25, 2016.

B. Facts:

Mr. Hayden had been employed by Boeing since January 5, 2007. CP 79. He worked as a factory service attendant performing full-time janitorial work. CP 81-82. In describing his work duties Hayden estimated that he cleaned "an average of 250 to 300 toilets, sinks, urinals, commodes, counter tops, mirrors, complete bathrooms within an eight-hour period at a time". CP 83. In February of 2010, he

began experiencing left shoulder pain when he was trying to wipe a mirror overhead. CP 87. Hayden filed an application for benefits on March 27, 2010. CP 20. The condition was allowed as an occupational disease effective March 5, 2010. CP 47. Hayden treated with cortisone injections with some relief, but thereafter he noticed he was having more and more pain in the left shoulder. CP 122.

Hayden was referred to orthopedic surgeon, Peter Verdin, Jr. M.D., on May 26, 2011 for left shoulder pain. CP 274. After reviewing x-rays, Dr. Verdin made the diagnosis of osteoarthritis of his shoulder. CP 275. Dr. Verdin determined that Hayden would benefit from a resurfacing of his shoulder or total shoulder replacement. CP 275 Dr. Verdin preformed the resurfacing procedure on September 13, 2012. CP 278. Dr. Verdin testified that it was his opinion that Mr. Hayden's work activities as a janitor were a cause for the worsening of Mr. Hayden's left-shoulder condition. CP 279. Dr. Verdin explained that "heavier physical activity tends to make arthritic joints much more symptomatic." CP 279.

V. ARGUMENT

The Supreme Court should grant review this appeal because it provides the Court with an opportunity to clarify what evidence is

required for a worker to establish a claim for a work-related aggravation of a preexisting condition. This Court stated in *Dep't of Labor & Indus. V. Lyons Enters., Inc.* No. 91610-1, "The IIA is broad in scope and contains a mandate of liberal construction 'for the purpose of reducing to minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.'" Id. (quoting RCW 51.12.010). The liberal construction of the IIA necessitates that all doubts be resoled in favor of coverage. Id. at 532."

The Court of Appeals found that substantial evidence does not support the Superior Court's finding that the Hayden's preexisting left shoulder glenohumeral osteoarthritis was aggravated by the occupationally-related left shoulder strain.

On appeal to the Superior Court, the Board's decision is prima facie correct and a party attacking the decision must support its challenge by a preponderance of the evidence *RCW 51.52.115; Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2 570 (1999.) The Superior Court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the Board's findings and decision are incorrect. *McClelland v. ITT Rayonier, Inc.* 65 Wn. App. 386, 390, 828 P 2d 1138 (1992). The Court of Appeals reviews the

Superior Court's decision in a workers' compensation case under the ordinary standards of civil review. *RCW 51.52.140* ("Appeal shall lie from the judgment of the Superior Court as in other civil case.") see *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174. 179-81, 210 P.3d 355 (2009).

Review is limited to examining the record to see whether substantial evidence supports the Superior Court's findings and, if so, whether the Court's legal conclusions flow from the findings. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P. 2d 402 (1996). Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise. *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn.App. 335, 340, 725 P. 2d 463 (1986). Where there is disputed evidence, the substantial evidence standard is satisfied if there is any reasonable view that substantiates the trial court's findings, even though there may be other reasonable interpretations. *Garrett Freightlines, Inc.*, 45 Wn. App. At 340. When undertaking substantial evidence review, the appellate court does not reweight the evidence or rebalance the competing testimony presented to the fact finder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d. 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wash. App. 475, 40 P.3d

1221 (2002). Rather, the appellate court views the evidence and all reasonable inference from the evidence in the light most favorable to the prevailing party. *Korst v. McMahoon,* 136 Wn. App. 201, 206, 148 P.3d 1081 (2006)*; Harrison,* 110 Wash. App. At 485. "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Korst,* 136 Wn. App. at 206.

In order to support entitlement to benefits under the Industrial Insurance Act, the causal connection between the worker's condition and his industrial injury must be established by medical testimony. *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979). As the courts have stated in personal injury cases, which carry the same burden of proof, "medical testimony must be relied upon to establish the causal relationship" between the situation and the claimed disability resulting from it. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). The medical testimony regarding that causal relationship must be clear enough that the jury determination does not have to "resort to speculation or conjecture." *Id.*

Courts have repeatedly held that medical testimony is insufficient to prove causation if it "does not go beyond the expression of

an opinion that the physical disability 'might have' or 'possibly did' result from the hypothesized cause." *Id.* In order to prove causation, "the medical testimony must at least be sufficiently definite to establish that the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *Id.* Sufficient testimony has been found where medical experts testified as follows:

1) that "more probably than not, the osteoarthritis in [the injured's] wrists was made symptomatic and disabling by 38 years of repetitive tin snipping [the claimed industrial injury]." *Dennis*, 109 Wn.2d at 477.

2) that improper treatment "must have had an adverse effect on [the injured's] condition," and that "He would have probably less chance of returning to good health and work in view of this." *Ugolini v. States Marine Lines*, 71 Wn.2d 404, 407, 429 P.2d 213 (1967).

3) that "it was very probable that there was brain damage." as a result of an injury. *Orcutt v. Spokane Cnty*, 58 Wn.2d 846, 854, 364 P.2d 1102 (1961).

Courts have even gone so far as to find sufficient testimony where the medical testimony did not include any of the preferred terms. In *Sacred Heart* the Court found sufficient medical testimony where the medical expert simply testified that "there is generally a greater probability that a person in the petitioner's employment will contract hepatitis than there is that someone in another employment will do so."

92 Wn.2d at 637.

A worker is entitled to benefits for any condition or disability that the injury or occupational exposure aggravated, accelerated or in combination with the condition caused the disability or condition. *Harbor Plywood v. Dep't of Labor & Indus.*, 48 Wn.2d 553, 556, 295 P.2d 310 (1956) ("preexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirements if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought").

The trial court found that the accepted occupationally related shoulder strain lit up or made symptomatic the preexisting condition. The trial court relied on Hayden's testimony with respect to a lack of symptoms or problems with his left shoulder up to and until the time he began to compensate for his injured right shoulder to be credible. (Findings of Fact 18.) The Court further found that while Hayden clearly had significant diagnostic findings relating to the osteoarthritis in his left shoulder, according to his testimony and his wife's testimony the left shoulder pain complaints started in 2010. (Findings of Fact 19.)

The record is clear that Hayden's preexisting shoulder condition

was not symptomatic or disabling prior to the accepted work-related shoulder condition. This fact is established by Boeing's own hired medical expert, Dr. Patrick Bays, who examined Hayden in July 2011. CP 203. Dr. Bays agreed that there is no indication that Mr. Hayden received or sought shoulder treatment, during the time period of ten years prior to when he examined him in 2011. CP 249. He also acknowledged that he had no medical restrictions due to his left shoulder condition in the ten years prior. CP 249. The record also establishes that Hayden was able to work full-time without restriction prior to onset of the accepted occupation disease claim. CP 50-51.

Hayden's March 27, 2010 claim for workers' compensation benefits was allowed, without dispute, as an occupational disease, effective March 5, 2010. CP 314 (Findings of Fact 1 and 2) Thereafter, Hayden treated under the claim with cortisone injections, but continued to have more pain in his left shoulder. CP 314 (Findings of Fact 3).

In a Division Three case, *Zavala v. Twin City Foods,* 185 Wn. App. 838, 343 P.3d 761 (2015), the claimant argued that her testimony and the testimony of friends and family that she experienced no pain before her work injury required that trial court find that she suffered from no preexisting condition, despite medical testimony to the contrary.

Zavala at 841. However, the court found that: "Because the trial court has the discretion to believe the testimony of physicians over lay witnesses and because we defer to the trial court's finding, we affirm the superior court." *Zavala at 841.*

The court highlighted an appellate court's role in undertaking a substantial evidence review in a case such as this:

> Washington courts have held in an unbroken line of decisions that if an industrial injury lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition...
>
> ...In many decisions, Washington appellate courts affirm trial court decisions and jury verdicts in favor of the employee to the effect that the work injury caused the employee's entire disability, despite the injury triggering a preexisting condition... Some of the decisions entitled a worker with a preexisting degenerative spine of arthritis. Ana Zavala cites these cases, but fails to recognize the factual nature of each decision. *The trial court could have ruled in favor of Zavala, but we do not agree the trial court necessarily needed to rule for Zavala.* Whether a given disability is the result of injury or solely of a preexisting infirmity is normally a question of fact.

Zavala at 862, emphasis added)

In *Zavala* the trial court ruled against the claimant on the facts and the appellate court appropriately refused to reweight the facts. *Zavala at 775.*

Here, in addition to other testimony, the trial court relied on Dr. Verdin's testimony were he stated: "Well I recorded that I felt that he had a degenerative joint disease of the shoulder, secondary to osteoarthritis. And that the activities that he was doing on the job were exacerbating the underlying condition." Dr. Verdin further stated that "while the assessment was pretty much the same as I had stated before: that he was having pain that started while he was doing heavy janitorial work. It was what brought him to us. And he was continuing to have discomfort." Further, the trial court relied on Dr. Verdin's answer when he was asked whether Hayden's work activities as a janitor aggravated or worsened his shoulder condition on a more probable than not basis. The doctor answered in the affirmative stating, "I feel that it probably did make his overall symptomology in his shoulder worse with time, yes."

These statements are definite assertions of causation and in no way require the fact finder to "resort to speculation or conjecture." *O'Donoghue*, 73 Wn.2d at 814. Therefore, it is legally incorrect to say that Mr. Hayden did not meet his burden of proof on the issue of causation.

Mr. Hayden met the burden of proof required to show a causal

connection between his allowed occupational disease condition and the aggravation of his osteoarthritis. For these reasons Mr. Hayden is requesting the Supreme Court grant his Petition for Review.

VI. CONCLUSION

This Court should grant review because the decision by the Court of Appeals has applied the substantial evidence test too stringently. Substantial evidence exists to support the Superior Court's interpretation of the evidence. The Court should affirm its longstanding precedent in applying the substantial evidence test.

Mr. Hayden also requests this Court award reasonable attorney fees pursuant to RCW 51.52.130 as the statute provides that when a decision and order from the Board is reversed or modified on appeal and the additional relief is granted to a worker or a beneficiary, then a reasonable fee for the services of the worker's attorney shall be fixed by the Court.

VII. APPENDEX

A copy of the Court of Appeals decision is attached hereto.

Dated this 25th day of May, 2016.

Patrick C. Cook, WSBA#28478
Attorney for Respondent Sterling Hayden

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STERLING O. HAYDEN,	)	No. 73344-3-I
Respondent,	)	DIVISION ONE
v.	)	
THE BOEING COMPANY,	)	UNPUBLISHED
Appellant.	)	FILED: April 25, 2016

Cox, J. — The Boeing Company appeals the superior court's decision reversing the order of the Board of Industrial Insurance Appeals (BIIA) that denied workers compensation benefits to Sterling Hayden. Because substantial evidence does not support the superior court's critical findings and the supported findings do not support the court's conclusions of law, we reverse.

Sterling Hayden worked as a janitor for Boeing from January 2007. In March 2010, he filed a claim for benefits. The Department of Labor and Industries accepted this claim as an occupational disease of his left shoulder. The Department later segregated this accepted claim from Hayden's pre-existing left shoulder condition of glenohumeral osteoarthritis. But the Department later reversed itself. It ordered Boeing to assume responsibility for Hayden's pre-existing left shoulder glenohumeral osteoarthritis.

Boeing appealed this order to the BIIA. An administrative law judge reversed the Department's order in a proposed decision and order that denied benefits. Hayden petitioned for review, which the BIIA denied.

Hayden then sought judicial review of the BIIA's decision. The superior court reversed the BIIA's decision. The court concluded that Hayden's accepted shoulder strain condition aggravated his glenohumeral osteoarthritis, entitling him to benefits.

Boeing appeals.

STANDARD OF REVIEW

Boeing argues that substantial evidence does not support the superior court's findings and that its findings do not support its conclusions. At issue is whether the record before the BIIA establishes a causal connection between Hayden's accepted work condition and his left shoulder glenohumeral osteoarthritis.

The Industrial Insurance Act, title 51 RCW, governs the standard of review in workers' compensation cases.[1] Hayden had the burden of establishing a prima facie case for relief before the BIIA.[2] The superior court reviews the BIIA's decision de novo, based solely on the BIIA record.[3]

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[1] RCW 51.52.115.

[2] RCW 51.52.050(2)(a).

[3] Potter v. Dep't of Labor & Indus., 172 Wn. App. 301, 310, 289 P.3d 727 (2012).

In the superior court, Hayden had the burden of proving the BIIA's findings and decision were not prima facie correct.[4] We review the BIIA record to see whether substantial evidence supports the superior court's findings and whether the conclusions of law flow from the supported findings.[5] "Evidence is substantial if [it is] 'sufficient to persuade a fair-minded, rational person of the truth of the matter.'"[6]

A worker with an "occupational disease" is entitled to workers' compensation benefits.[7] An "occupational disease" is one that "arises naturally and proximately out of employment . . . ."[8] Workers are entitled to benefits if their employment causes a new disease or "aggravates a preexisting disease so as to result in a new disability."[9]

Here, the critical findings of fact of the superior court that are at issue are:

> 21. Exacerbation of the underlying pre-existing condition is what the plaintiff has to prove in this case. The testimony of Dr. Verdin establishes that Mr. Hayden's work activities did exacerbate the underlying condition.
>
> 22. Under the law of the State of Washington, the Plaintiff does not need to show that the work activities created a whole new condition. We are not perfect as human beings. Every single one

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[4] Id.

[5] Id.

[6] Id. (quoting R & G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413 (2004)).

[7] RCW 51.32.180.

[8] RCW 51.08.140.

[9] Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 7, 977 P.2d 570 (1999) (emphasis omitted).

> of us has something wrong with us at one time or another. Some of us have permanent injuries.
>
> . . .
>
> ***The record establishes that Mr. Hayden sought medical attention for new pain in his left shoulder after he aggravated his condition by work, because he had hurt his right shoulder, so he's putting more pressure on his left.***
>
> 26. The activities of Mr. Hayden's employment did light up the otherwise non-symptomatic condition. Whether that condition would always permanently remain non-symptomatic we don't know. Most likely, at some point in his life Mr. Hayden would have experienced a deterioration of the shoulder. According to all the medical testimony his joint was in really bad shape. It would have, at some point in his life, been a problem. But the condition was lit up or made active ***and accelerated*** due to his job or work related activities.
>
> . . .
>
> 28. Because of the occupational disease, the pre-existing condition was ***lit up or made active. For this reason Mr. Hayden is eligible for benefits, including allowance of the glenohumeral osteoarthritis of the left shoulder.***
>
> . . .
>
> 30. [The BIIA's] Finding of Fact No. 3 is incorrect. ***Mr. Hayden's pre-existing left shoulder glenohumeral osteoarthritis was aggravated by his accepted shoulder strain condition.***[10]

The parties do not dispute that Hayden's glenohumeral osteoarthritis preexisted both his employment and his left shoulder strain, which he reported in March 2010 and the Department later accepted. The legal question is whether substantial evidence supports the superior court's findings that Hayden's accepted work-related condition either accelerated or aggravated his osteoarthritis condition to create a new disability.

To show that his disease arose "proximately" from his employment, Hayden was required to establish "by competent medical testimony" that his

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[10] Clerk's Papers at 315-17 (emphasis added).

employment "probably, as opposed to possibly," caused his claimed condition.[11] This causal link must be removed "from the field of speculation and surmise."[12]

We give special consideration, as we must, to the testimony of Hayden's treating physician.[13]

In this case, Hayden's treating physician is Dr. Verdin. Dr. Verdin testified by deposition at the hearing before the administrative law judge of the BIIA. He is an orthopedic surgeon who first saw Hayden in May 2011. He testified with the assistance of chart notes from Hayden's medical records.

At the time of the first examination, Hayden complained of left shoulder pain. Dr. Verdin obtained Hayden's medical history from him and also had x-rays of his shoulder available. Dr. Verdin diagnosed Hayden as having "degenerative joint disease of his [left] shoulder secondary to osteoarthritis."[14]

Dr. Verdin testified as follows:

> Q. And do you have an opinion as to whether or not Mr. Hayden's work activities as a janitor aggravated or worsened his shoulder condition on a more-probable-than-not basis?
>
> A. I feel that it probably did make his overall symptomatology in his shoulder worse with time, yes.
>
> Q. Do you have an opinion as to whether or not the distinctive work conditions of working as a janitor for The Boeing Company could have ***accelerated*** the progression of the shoulder condition?

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[11] Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 477, 745 P.2d 1295 (1987).

[12] Zipp v. Seattle Sch. Dist. No. 1, 36 Wn. App. 598, 601, 676 P.2d 538 (1984).

[13] Potter, 172 Wn. App. at 312.

[14] Clerk's Papers at 277.

> A. I don't think that it ***accelerated*** it.
>
> Q. Do you have an opinion as to whether or not those work conditions were a cause for the worsening of Mr. Hayden's left-shoulder condition?
>
> A. Yeah. I think they were a factor.
>
> Q. Can you tell us about that. What is it that makes you think that they were a factor?
>
> A. I think it has to do with the fact that in general, taking care of patients who have had arthritic conditions in joints—hips, knees, shoulders—heavier physical activity tends to make arthritic joints much more symptomatic. Some joints that otherwise, you know, might be manageable at one level of activity get much worse at a different level of activity.[15]

Boeing argues that no medical testimony in the record supports finding that Hayden's employment ***accelerated*** his glenohumeral osteoarthritis. We agree.

Findings of Fact 26 states, among other things, that Hayden's shoulder condition "was lit up or made more active ***and accelerated*** due to his job or work related activities."[16] This finding is incorrect.

As shown above, Dr. Verdin's testimony shows he concluded that Hayden's work did not accelerate the progression of his osteoarthritis. Moreover, no testimony from either of the two other medical experts who testified support finding that Hayden's work activities accelerated his pre-existing glenohumeral

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[15] Id. at 278-79.

[16] Id. at 317.

osteoarthritis. In sum, substantial evidence does not support this portion of the finding.

We turn to the other apparent basis for the superior court's findings: that Hayden's employment "aggravated" his pre-existing left shoulder glenohumeral osteoarthritis condition. Findings 21 ("exacerbate"), 26 ("lit up or made active"), 28 ("lit up"), and 30 ("aggravated") are most reasonably read to be based on aggravation.

The superior court found that Hayden's accepted work-related condition aggravated his pre-existing glenohumeral osteoarthritis. This finding is also unsupported in the record.

In this case, Hayden's accepted condition was a left shoulder strain. Hayden sought and received treatment for this condition, which the Department accepted as work-related, and Boeing did not dispute.

No medical testimony supports finding that this shoulder strain aggravated Hayden's glenohumeral osteoarthritis. Neither Dr. Verdin nor any of the other doctors who testified stated that Hayden's left shoulder strain aggravated his glenohumeral osteoarthritis. Thus, this finding is also unsupported.

Another apparent basis for the superior court's conclusion was Findings of Fact 22, which states in relevant part:

> The record establishes that Mr. Hayden sought medical attention for new pain in his left shoulder after he aggravated his condition by work, because he had hurt his ***right*** shoulder, so he's putting more pressure on his left.[17]

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[17] Id. at 316.

We cannot agree that substantial evidence supports this finding. Hayden testified that he injured his right shoulder in 2009. But no medical testimony establishes any link between Hayden's right shoulder injury and his left shoulder glenohumeral osteoarthritis.

First, there was no medical evidence by Dr. Verdin, the treating physician in this case, or any other medical expert who testified, that Hayden's right shoulder injury in any way contributed to his pre-existing left shoulder condition. Dr. Verdin was quite clear that the focus of his testimony centered on Hayden's left shoulder, not his right. This is dispositive.

Second, even if we look further, the only testimony in the record about increased use of the left shoulder due to an injured right shoulder came from Hayden. He testified that after he injured his right shoulder he began to use his left shoulder more and, after one or two years, began experiencing pain in his left shoulder. But even if this evidence is accepted as true, it does not meet the evidentiary standard. Without any medical testimony on the effect of this right shoulder injury on Hayden's left shoulder condition, any causal link between the two is in the nature of speculation, not probability.

Some of the court's findings could also be read as determining that Hayden's work activities—as opposed to his accepted shoulder strain condition—aggravated his glenohumeral osteoarthritis. But this reading is also unsupported. The BIIA considered only whether Hayden's allowed shoulder strain aggravated his glenohumeral osteoarthritis. It did not consider whether his work activities aggravated this preexisting condition. And on appeal, Hayden argues only that

his shoulder strain aggravated his glenohumeral osteoarthritis, not that his work activities did so.

In sum, substantial evidence does not support the superior court's critical findings. In this absence of substantial evidence, the court's conclusions of law cannot be sustained. Specifically, the conclusion that "Hayden's pre-existing left shoulder glenohumeral osteoarthritis was aggravated by his accepted shoulder strain condition"[18] cannot be sustained.

The sole issue before the BIIA appears to have been proximate causation. Accordingly, we have limited our review to that issue on appeal.

ATTORNEY FEES

Hayden argues that he is entitled to attorney fees on appeal. We disagree.

In Washington, parties may recover attorney fees if a statute, contract, or recognized ground of equity authorizes the award.[19] Under RCW 51.52.130, if "a party other than the worker or beneficiary" appeals and "the worker's or beneficiary's right to relief is sustained" the worker is entitled to an award of attorney fees.

Here, we reverse and do not sustain the superior court's award. Thus, Hayden is not entitled to an award of attorney fees on appeal.

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[18] Id. at 317.

[19] LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 117, 123, 330 P.3d 190 (2014).

We reverse and deny Hayden's request for attorney fees on appeal.

COX, J.

WE CONCUR:

Leach, J.

Lippoldt, J.

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

STERLING O. HAYDEN, Respondent, v. THE BOEING COMPANY, Appellant.	COURT OF APPEALS NO.: 73344-3 DECLARATION OF SERVICE OF PETITION FOR REVIEW TO SUPREME COURT

I hereby certify under penalty of perjury under the laws of the State of Washington that the **PETITION FOR REVIEW TO SUPREME COURT by Respondent Sterling O. Hayden** was filed with the Court of Appeals on May 25, 2016, and served by hand delivery via Legal Messenger on May 25, 2016, on the following:

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SIGNED this 25th day of May 2016.

Patrick C. Cook, WSBA #28478