NO. 93544-1

SUPREME COURT OF THE STATE OF WASHINGTON

THOMAS A. LUNSCHEN,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

The Court of Appeals applied well-established case law when it concluded that Thomas Lunschen did not present the medical evidence necessary for two jury instructions that he proposed in this workers' compensation case. The Court of Appeals' routine application of the law on "lighting up" and "*McDougle* aggravation" is consistent with this Court's and the Court of Appeals' previous decisions about these principles. Lunschen fails to identify any conflict warranting review.

By its plain terms, a lighting up instruction requires workers to prove they had a condition that was latent or quiescent before their work injury. In fact, although Lunschen now tries to disavow it, at trial he offered an instruction that provided this exact standard—"if any injury lights up or makes active a latent or quiescent infirmity or weakened condition, whether congenital or developmental, then the resulting disability is to be attributed to the injury and not to the preexisting condition." CP 348. The Court should reject his belatedly raised arguments that this is not the lighting up standard.

The Court of Appeals also correctly applied this Court's holdings on *McDougle* aggravation to conclude it did not apply to Lunschen's case. That principle only applies when a worker wishes to reopen a claim where the work injury caused a permanent disability. Because Lunschen failed to establish he had a disability at the time his claim closed, the Court of Appeals correctly determined he was not entitled to the *McDougle* instruction.

II. ISSUES

Review is not warranted in this case, but if review were accepted, the issues presented would be:

1. At trial Lunschen offered an instruction that said that if an industrial injury lights up a "latent or quiescent" condition, then all of the resulting disability is attributed to the injury and not to the preexisting condition.

   Has Lunschen now waived an argument that he should not have to produce evidence he had a prior condition that was asymptomatic?

2. Case law allows a worker to show worsening of his or her department-established disability by proof it was caused by the "ordinary incidents of living." *McDougle v. Dep't of Labor & Indus.*, 64 Wn.2d 640, 393 P.2d 631 (1964); *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 848, 440 P.2d 818 (1968).

   Did the superior court properly decline to give the *McDougle* aggravation instruction because Lunschen failed to establish that his 2005 industrial injury resulted in a disability?

III. STATEMENT OF THE CASE

A. Lunschen Sustained a Work Injury to His Low Back, Which He Had Previously Injured

Lunschen first injured his back at work in 1989 or 1990. CP 100, 111. He experienced low back pain and received chiropractic treatment and was out of work for almost seven months. CP 100, 134. Subsequently, Lunschen developed episodes of low back pain after labor-intensive work that would typically respond to rest. CP 134.

Lunschen suffered another low back injury at work in January

2005. CP 98-99, 188. He applied for industrial insurance benefits and the Department allowed his claim. CP 112. He received nine weeks of treatment including massage, physical therapy, and chiropractic care from his chiropractor, Vernon Kaczmarski. CP 101, 113. Dr. Kaczmarski found Lunschen had no obvious residual impaired function from his 2005 injury and released him to full duty work in May 2005. CP 137, 192.

In June 2005, the Department closed Lunschen's claim without an award for permanent partial disability. CP 16, 60, 113. Lunschen returned to full duty work at his construction job until he was laid off in the 2008 recession. CP 99.

B. The Department Rejected Lunschen's Application to Reopen His Claim and the Board and Superior Court Affirmed

On May 29, 2012, Lunschen was using a rototilling tool in his garden when he experienced a sharp onset of back pain. CP 116-17. For the first time since his 2005 injury claim had closed, Lunschen sought treatment for his back. CP 163, 203. Dr. Kaczmarski applied to reopen Lunschen's claim. CP 194. Dr. Kaczmarski believed that the 2005 work injury contributed to Lunschen's condition following the gardening injury. *See* CP 203.

In December 2012, neurologist J. Greg Zoltani and chiropractor Allen Tanner examined Lunschen. CP 226. Dr. Zoltani and Dr. Tanner made multiple diagnoses but agreed that the only condition related to Lunschen's 2005 work injury was a lumbar strain, and the lumbar strain did not objectively worsen between June 9, 2005, and January 4, 2013. CP

234, 236, 262, 267.[1] Dr. Zoltani and Dr. Tanner agreed that Lunschen had degenerative disc disease before 2005 that naturally progressed independent of his 2005 work injury. CP 234, 263.

In August 2013, H. Richard Johnson, MD, also evaluated Lunschen at Lunschen's attorney's request. CP 132. Dr. Johnson concluded that Lunschen's 1989 injury had caused a progression of degenerative changes in his spine, which the 2005 injury had worsened, predisposing him to aggravation of his low back condition in 2012. CP 170. Dr. Johnson believed Lunschen's 2005 work injury had objectively worsened between June 9, 2005, and January 4, 2013. CP 156.

The Department denied Lunschen's application to reopen his claim. CP 63-64. Lunschen appealed to the Board of Industrial Insurance Appeals, which affirmed the Department's order. CP 16, 70. Lunschen appealed to the superior court, and a jury found that his back condition proximately caused by his 2005 injury did not objectively worsen between June 9, 2005, and January 4, 2013. CP 1-2, 61.

[1] To determine whether a worker's condition has worsened to merit reopening his or her claim, doctors compare the worker's condition between two "terminal" dates to see if there is objective worsening. The first terminal date is the last previous claim closure or denial of an application to reopen a claim for worsening. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The second terminal date is the most recent closure or denial of an application to reopen a claim. *Id.* at 561. In this case, the first terminal date is June 9, 2005, and the second terminal date is January 4, 2013.

C. The Superior Court Declined to Give a Lighting Up Instruction or a *McDougle* Aggravation Instruction and the Court of Appeals Affirmed

At trial, Lunschen proposed a lighting up jury instruction that if a work injury causes a worker's latent or quiescent physical condition to become active, the resulting disability should be attributed to the work injury:

> You are instructed that if any injury *lights up or makes active a latent or quiescent infirmity* or weakened condition, whether congenital or developmental, then the resulting disability is to be attributed to the injury and not to the preexisting condition. Under such circumstances, if the accident or injury complained of is a proximate cause of the disability for which compensation or benefits is sought, then the previous physical condition of the workman is immaterial and recovery may be received for the full disability, independent of any preexisting or congenital weakness.

CP 348 (emphasis added). The trial court declined the instruction, instead giving an instruction on "multiple proximate cause" that a condition can have multiple proximate causes, and a worker can recover benefits as long as the industrial injury was one of them:

> There may be one or more proximate causes of a condition. For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must be a proximate cause of the alleged condition for which benefits are sought. The law does not require that the industrial injury be the sole proximate cause of such condition.

RP (3/10/15) at 169; CP 368. The Court of Appeals concluded that the trial court properly declined the lighting up instruction because the evidence did not establish Lunschen had a latent condition that the 2005

work injury had made symptomatic. *Lunschen v. Dep't of Labor & Indus.*, No. 47483-2-II, slip op. at 20 (Wash. Ct. App. Aug. 2, 2016) (unpublished opinion).

Lunschen also proposed an instruction on *McDougle* aggravation. That instruction requires the jury to consider a claimant's "disability" from a previous work injury to determine whether, in light of that disability, it was reasonable for the claimant to have performed the non-work activity that aggravated a prior work injury:

> A claimant's aggravation of a pre-existing industrial injury condition is compensable when caused by the ordinary incidents of living which *a person with the claimant's disability* might reasonably be expected to be doing, since such an aggravation is attributable to the condition caused by the original injury.

CP 344 (emphasis added). Lunschen argued that this instruction applies even in cases, such as his, where a worker's claim closed without a permanent partial disability award. RP (3/10/15) at 152-53. But the trial court disagreed, declining to give this instruction because Lunschen's claim did not close with a finding of disability. RP (3/10/15) at 153-55.

Instead, the trial court gave an instruction on how to establish a need for treatment based on aggravation (worsening) of a work injury:[2]

> To establish that there is a need for further treatment because of aggravation, the worker has the burden of proving . . . 1) That the aggravation resulted in a need for further treatment; 2) That the

[2] Note that in workers' compensation parlance, "aggravation" is used to refer to worsening for the purposes of applying to reopen a claim under RCW 51.32.160 and is also used to mean worsening of a pre-existing condition.

need for further treatment was proximately caused by the industrial injury; and 3) That the aggravation occurred between June 9, 2005 and January 4, 2013. CP 367.

The Court of Appeals concluded that the trial court properly declined the *McDougle* instruction because Lunschen failed to establish his industrial injury resulted in a "condition" or "disability" at the time his claim closed. *Lunschen*, slip. op. at 23. Because substantial evidence did not support the instruction, the Court of Appeals held that the trial court did not abuse its discretion. *Id.*

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should decline review because the Court of Appeals correctly determined that Lunschen did not present the necessary medical evidence to obtain the lighting up and *McDougle* instructions. As the Court of Appeals explained, a superior court "is under no obligation to give a misleading instruction or an instruction unsupported by the evidence." *Lunschen*, slip op. at 17.

A. No Conflict Exists Where Courts Have Consistently Required Evidence of an Asymptomatic Condition to Give the Lighting Up Instruction

1. Lunschen offered an instruction that required him to show that the 2005 injury lit up "a latent or quiescent" condition, and he cannot raise a new theory on appeal that this instruction is incorrect

As this Court has consistently explained, and as Lunschen recognizes in one place in his petition, the lighting up principle in workers' compensation law requires evidence that the work injury "lights

up or makes active a latent or quiescent infirmity or weakened physical condition . . . ." *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 682, 94 P.2d 764 (1939); Pet. at 7. A condition is "quiescent" if it is asymptomatic. *McDonagh v. Dep't of Labor & Indus.*, 68 Wn. App. 749, 755, 845 P.2d 1030 (1993). Although Lunschen later suggests in his petition that the "asymptomatic-symptomatic" distinction is not relevant (*e.g.* Pet. at 10), he offered an instruction that required evidence of a "latent or quiescent" condition. CP 348. He cannot now renounce this proposed instruction. *See State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (party cannot raise new theory on appeal different than proposed jury instruction); *Nania v. Pac. Nw. Bell Tel. Co.*, 60 Wn. App. 706, 709-10, 806 P.2d 787 (1991) (party cannot claim error on jury instruction language that it offered).

The Court should reject Lunschen's attempt to raise a new theory now. *See Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975) (Supreme Court will not consider issues where a party failed to properly raise or preserve the issues at trial or at the Court of Appeals).

2. This Court has consistently applied the "latent or quiescent" standard, and the Court of Appeals' decision accords with prior appellate decisions

Because Lunschen did not preserve the issue, this Court should not consider his argument that the "latent or quiescent" standard is no longer the law. If the Court does consider it, however, the argument fails. Lunschen provides a timeline of appellate cases to argue there is a conflict

here with previous court decisions and a change in position from *Miller*. But this timeline shows the opposite.

***Miller*:** As discussed above, *Miller* held that the lighting up principle in workers' compensation law requires evidence that the work injury "lights up or makes active a latent or quiescent infirmity or weakened physical condition . . . ." *Miller*, 200 Wash. at 682. The Court has not overruled this decision.

***Jacobson*:** Lunschen then suggests incorrectly that *Jacobson v. Department of Labor & Industries*, 37 Wn.2d 444, 224 P.2d 338 (1950), shows a different position than *Miller*. Pet. at 6-8. *Jacobson* followed *Miller* regarding the requirement to show a latent or quiescent condition. *Jacobson*, 37 Wn.2d at 448 (citing *Miller*, 200 Wash. at 674). Nevertheless, Lunschen implies that, under *Jacobson*, whether a preexisting condition was active before an industrial injury is immaterial to whether it was "lit up." *See* Pet. at 8. But although in *Jacobson* there was evidence that the worker's preexisting schizophrenia had previously been symptomatic, unlike in Lunschen's case, there was also medical evidence that the condition was asymptomatic at the time of his work injury. *Jacobson*, 37 Wn.2d at 445. A doctor testified that the worker "was entirely recovered from under treatment and he remained in that recovered state and was working normally" until the work injury caused his condition to recur. *Jacobson*, 37 Wn.2d at 450. *Jacobson* differs factually from Lunschen's case because Lunschen did not present any medical evidence that his prior back condition was asymptomatic, and the Court of

Appeals' decision here does not conflict with *Jacobson.*

***Harbor Plywood*:** Lunschen cites *Harbor Plywood Corp. v. Department of Labor & Industries*, 48 Wn.2d 553, 556-57, 295 P.2d 310 (1956), for the proposition that he need not prove a latent or quiescent condition. Pet. at 8. But *Harbor Plywood* plainly states the contrary:

> In a long line of cases in this jurisdiction, it has been established that if an injury, within the statutory meaning, lights up or *makes active a latent or quiescent* infirmity or weakened physical condition occasioned by disease, the resulting disability is to be attributed to the injury and not to the pre-existing physical condition, and it is immaterial whether the infirmity might possibly have resulted in eventual disability or death, even without the injury.

48 Wn.2d at 556-57 (emphasis added).

***Austin*:** Next, Lunschen incorrectly claims that *Austin v. Department of Labor & Industries*, 6 Wn. App. 394, 492 P.2d 1382 (1971), conflicts with the Court's holding in *Jacobson.* Pet. at 8. The *Austin* Court followed *Miller* and held that without testimony that the preexisting condition was inactive before the injury, the lighting up instruction was inappropriate. *Austin*, 6 Wn. App. at 395 (citing *Miller*, 200 Wash. 674), 399. Given that *Jacobson* also followed *Miller*, *Austin* did not conflict with *Jacobson. See Jacobson*, 37 Wn.2d at 448 (citing *Miller*, 200 Wash. at 674).

***Wendt*:** Lunschen notes that *Wendt v. Department of Labor & Industries*, 18 Wn. App. 674, 571 P.2d 229 (1977), held it was error not to give the lighting up instruction under the facts of that case. Pet. at 9. He

fails to note, however, that *Wendt* followed *Miller* to require proof of a "latent or quiescent" condition. *Wendt*, 18 Wn. App. at 676 (citing *Miller*, 200 Wash. 674).

***Bennett*:** Lunschen cites, out of context, this Court's analysis in *Bennett v. Department of Labor & Industries*, 95 Wn.2d 531, 535, 627 P.2d 104 (1981), which compared the extent of a worker's disability before and after his injury. *See* Pet. at 9. That worker had a prior condition and his claim closed with disability, so this Court was addressing "whether the evidence would support a finding that the injury augmented an existing physical disability" and therefore preclude "lighting up." *Bennett*, 95 Wn.2d at 533. The Court of Appeals did not hold in *Bennett*, as Lunschen suggests, that a worker with a preexisting condition that is symptomatic but not disabling is entitled to the lighting up instruction. *See id.* at 532 (citing *Miller*, 200 Wash. 674).

***Zipp*:** Contrary to Lunschen's representation, *Zipp v. Seattle School District No. 1*, 36 Wn. App. 598, 607, 676 P.2d 538 (1984), correctly applied established principles to hold that triggering of the lighting up doctrine requires evidence of a preexisting latent condition. *See* Pet. at 9-10.

***Dennis*:** Lunschen points to *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 476, 745 P.2d 1295 (1987), to argue his newly raised theory that his lighting up instruction misstates the law. Pet. at 10. But *Dennis* reiterated the principle that the lighting up doctrine applies only when a condition is latent or quiescent before the work injury. *Id.*

As his flawed analysis of *Dennis* demonstrates, Lunschen conflates the lighting up theory, which involves aggravation of a preexisting latent (or asymptomatic) condition, with aggravation of a preexisting *symptomatic* condition. His failure to distinguish these separate doctrines pervades his petition. *See, e.g.,* Pet. at 8, 13. While he correctly states that a preexisting condition does not disqualify a worker from receiving benefits for that condition if it is aggravated by a work injury, in this case the Court of Appeals addressed a different issue: whether his 2005 work injury "lit up" a preexisting condition. *See Dennis*, 109 Wn.2d at 476. If the condition was already disabling before the work injury, the worker cannot attribute *all* of the resulting disability to that injury. RCW 51.32.080(5) (limiting partial disability award to disability resulting from work injury); RCW 51.32.100 (segregating preexisting disease from permanent partial disability award); *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 117-18, 206 P.3d 657 (2009) (where worker had a previously disabling condition, worker only recovers benefits for the disability caused by the work injury). By contrast, if a condition is lit up, then the worker can attribute all of the resulting disability to the injury. *Miller*, 200 Wash. at 682 (if condition is lit up, then the resulting disability is to be attributed to the work injury and not to the preexisting condition).

This means that Lunschen's jury instruction is incorrect in the context of aggravating his symptomatic back condition because it said if the condition were lit up "then the resulting disability is to be attributed to the injury and not to the preexisting condition." CP 348. But, if the

condition is not latent, not all the resulting disability is attributed to the injury, and Lunschen's instruction misleadingly suggested otherwise. *See Tomlinson*, 166 Wn.2d at 117-18; RCW 51.32.080(5), .100.

The *Dennis* Court held that even if a worker had a prior symptomatic condition, the worker can receive workers' compensation benefits if his or her occupation aggravates that condition and causes disability. *Dennis*, 109 Wn.2d at 474. It did not hold, as Lunschen asserts, that the symptomatic-asymptomatic distinction is irrelevant to whether the work injury "lit up" the preexisting condition. *See* Pet. at 10, 13; *Dennis*, 109 Wn.2d at 476. Rather, the Court reiterated that if the preexisting condition was symptomatic, then the worker's condition was not "lit up," resulting in the Department limiting any disability award to the extent of permanent partial disability resulting from the work injury. *Dennis*, 109 Wn.2d at 476; RCW 51.32.080(5), .100.

Moreover, *Dennis* is factually distinct from Lunschen's case. The Court declined "to resolve the symptomatic-asymptomatic issue" because the parties in *Dennis* did not dispute that the worker's preexisting condition only became symptomatic as a result of his occupation. 109 Wn.2d at 476. The opinion did not state anywhere that the symptomatic-asymptomatic issue was irrelevant to the lighting up theory. Thus, the Court of Appeals acted consistently with *Dennis* when it reasoned that the lighting up theory requires evidence of a previous latent condition. *Lunschen*, slip. op. at 20.

Dobbins: Contrary to Lunschen's argument, the Court of Appeals'

opinion is consistent with *Dobbins v. Commonwealth Aluminum Corporation*, 54 Wn. App. 788, 776 P.2d 139 (1989), which required evidence that the prior condition was asymptomatic before the work injury. *See* Pet. at 6. In *Dobbins*, the worker had a prior condition, an arthritic right knee, that went from occasionally symptomatic to persistently symptomatic after his industrial injury. *Dobbins*, 54 Wn. App. at 793. Lunschen suggests that because the *Dobbins* Court found sufficient evidence to support that the injury lit up the worker's right knee despite the worker having a history of intermittent symptoms, a worker's eligibility for a lighting up instruction does not depend on whether a preexisting condition was symptomatic. Pet. at 10-11. But this misstates the analysis in *Dobbins*, as the court required evidence that the preexisting condition was asymptomatic at the time of the worker's injury. 54 Wn. App at 793 (citing *Miller*, 200 Wash. 674). The court held sufficient evidence supported the lighting up theory "[a]ssuming the industrial injury occurred and Mr. Dobbins' *condition was asymptomatic* prior to [the date of his industrial injury]." *Dobbins*, 54 Wn. App. at 793-94 (emphasis added). The Court of Appeals acted consistently with *Dobbins* when it determined Lunschen provided insufficient evidence for the lighting up instruction because he had not presented evidence of a latent preexisting condition that his work injury made symptomatic.

***McDonagh*:** Lunschen cites to *McDonagh* as establishing a more "liberal construction" of the lighting up theory than the Court of Appeals' decision in this case. 68 Wn. App. 749; Pet. at 11. But *McDonagh* only

addressed the issue of whether a personality characteristic qualifies as a preexisting condition. *Id.* at 755. Nowhere did *McDonagh* abate the requirement that a preexisting condition be "quiescent or asymptomatic." 68 Wn. App. at 750-55.

Tomlinson: Lunschen then implies that *Tomlinson* somehow requires a minimum quantum of evidence to determine that a preexisting condition is symptomatic. Pet. at 11-12. But the court in that case examined what happens if a worker had a preexisting symptomatic condition and held that where the condition had been partially disabling, the worker only recovers benefits for the disability proximately caused by the work injury. *Tomlinson*, 166 Wn.2d at 117-18.

Cooper & Zavala: Lunschen's argument that *Cooper v. Department of Labor & Industries*, 188 Wn. App. 641, 649, 352 P.3d 189 (2015), and *Zavala v. Twin City Foods*, 185 Wn. App. 838, 859, 343 P.3d 761 (2015), conflict with previous decisions lacks merit. Pet. at 12. These cases correctly applied the rule that the lighting up doctrine only applies when a worker's condition is quiescent or latent before the work injury.

Contrary to Lunschen's assertions, no decision has abrogated the requirement to prove that the condition was "latent or quiescent," and the decision here did not conflict with any appellate decision.

3. No issue of substantial public interest is presented by a case where a party did not preserve his issue

This case does not present a matter of substantial public interest. This case involves the application of established law to conclude that

Lunschen was not entitled to the lighting up instruction. Under the Court of Appeals' decision, a worker who did present evidence of a preexisting latent condition would have received the instruction. Evidence that Lunschen's previous injury in 1989 caused continuing residuals belies his arguments that this was merely a matter of occasionally sore muscles. *See* Pet. at 15; CP 100, 111, 134. But more to the point, it was Lunschen's burden to show his condition was latent, and he failed to present medical testimony to that effect. *See Cooper*, 188 Wn. App. at 649.

Lunschen overstates the consequences of this lighting up requirement, implying that it would unfairly deny benefits to injured laborers. *See* Pet. at 14-15. But such workers can still reopen their claims by establishing the elements of worsening, as the trial court instructed the jury in this case. CP 367. Because the Court of Appeals' decision does not implicate a substantial public interest, this Court should deny review.

This Court should also disregard Lunschen's arguments that he provided evidence of lighting up. Lunschen argues that evidence of a prior "weakened condition" alone is sufficient to support the lighting up instruction. *See* Pet. at 14. But he cites no case that the existence of a preexisting "weakened condition," without evidence that it was latent or quiescent before the work injury, is sufficient. Lunschen also argues without merit that he presented evidence of a latent condition. *See* Pet. at 14. But while Dr. Johnson testified that the 1989 injury caused degenerative changes in Lunschen's back, neither he nor any other medical witness testified that those changes were asymptomatic. CP 170.

B. Consistent with *McDougle* and *Scott Paper*, Lunschen Was Not Entitled to the *McDougle* Aggravation Instruction

Lunschen was not entitled to a *McDougle* aggravation instruction because the instruction is appropriate only when the worker had a previously established disability from the most recent industrial injury. *Scott Paper,* 73 Wn.2d at 848. Because Lunschen did not establish he had a disability from his work injury when his claim was last closed, his case is a standard worsening case, and he could argue his theory of the case with the trial court's multiple proximate cause and worsening instructions.[3]

In *McDougle*, the worker's claim closed with a 30 percent permanent partial disability award for his back. 64 Wn.2d at 641. He applied to reopen his claim, alleging that his industrially-related low back condition had worsened as a result of moving sacks of ground feed while assisting his brother-in-law outside of work. *Id.* at 641-42.

The Court concluded that McDougle could reopen his claim even though the incident occurred outside of work because the permanent disability from his original injury was a cause of his back condition after moving the feed. *See id.* at 644. When "incidents of ordinary living" aggravate a worker's disability related to his or her work injury, the test to determine whether those incidents were an independent intervening cause

[3] Lunschen cites no authority for his argument that a person who does not receive a permanent partial disability award may still have a permanent partial disability of less than five percent at the time of claim closure. And WAC 296-20-680(3) specifies that a category one permanent impairment of the low back is equivalent to zero percent total body impairment, not "from 0-4% impairment" as Lunschen asserts. Pet. at 18.

is "whether the activity which caused the aggravation is something that the claimant might reasonably be expected to be doing, or whether it is something that *one with his disability* would not reasonably be expected to be doing." *Id.* at 645 (emphasis added). This is known as the "reasonably expected conduct" test.

Thus, the *McDougle* Court established that a worker must have a preexisting disability award established at claim closure before this "reasonably expected conduct" test applies. The Court remanded the case for the Department to consider whether McDougle's everyday activities were reasonable in light of his previously-established 30 percent permanent partial disability. *McDougle*, 64 Wn.2d at 645-46. After remand, this Court held in *Scott Paper* that McDougle's claim should be reopened because his conduct moving the feed was reasonable in light of that established disability. *See Scott Paper*, 73 Wn.2d at 848.

As this Court explained, "*when subjected to the proper criteria*, [the] claimant's conduct was such as could reasonably be expected of a man *with his disability*." *Id.* (emphases added). The *Scott Paper* Court explicitly analyzed McDougle's everyday activity "within the scope of the prior award" he received, and it explained that the proper criteria for assessing reasonableness was the "department-established disability," not the "claimant's subjective personally known condition." *Id.* at 847-48.

Here, consistent with these principles, the Court of Appeals held that the *McDougle* aggravation instruction requires a claimant to establish his or her industrial injury had resulted in a disability. *Lunschen*, slip. op.

at 23. Lunschen argues he did so because he received "*temporary* total disability" wage replacement benefits while his claim was open. Pet. at 18, 20. But his *temporarily* disabled status had resolved by the time of claim closure. CP 99, 113, 137, 192; RCW 51.32.090. He presented no evidence he was disabled when his claim closed, which is the relevant point in time. *Scott Paper,* 73 Wn.2d at 848. The evidence supports the Court of Appeals' decision that Lunschen had no disability at that time: his 2005 work injury left him with no obvious residual impaired function, he returned to full duty work, and he did not seek further treatment for his back until his 2012 injury. CP 137, 163, 192. The Court of Appeals' decision is consistent with both *McDougle* and *Scott Paper*'s requirement of a permanent disability.

Lunschen argues that the Court of Appeals denied the instruction on the basis that he has no permanent partial disability award, but he is incorrect. As just discussed, the court denied it because he did not previously establish "a disability or condition resulting from the original industrial injury." *Lunschen*, slip. op. at 23. In any event, it would have been proper to deny the instruction on the basis that Lunschen had no permanent partial disability award. *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 883, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006 (2013) (holding that a permanent partial disability award was necessary to show "department-established disability").

From a policy standpoint, courts must restrict the *McDougle* reasonableness test to injured workers whose claims closed with disability.

The existence of a disability is critical. *McDougle* provides an exception to common-sense reasoning that where an everyday, non-work-related activity worsens a worker's condition, that activity breaks the causal chain between the work injury and the worsened condition. A causal connection between the worsened condition and the work injury is only retained in that situation where the worker has a prior work-related disability. Applying the test to workers without a work-related disability leads to the absurd result of strict liability to the Department whenever someone with a prior claim reinjured themselves in everyday life, even if their work injury left no lasting disability.

V. CONCLUSION

Lunschen cannot escape the "latent or quiescent" language in the lighting up jury instruction that he himself offered. The Court should not consider his belatedly raised arguments. The Court of Appeals correctly applied well-accepted principles of workers' compensation law to conclude that Lunschen did not present the medical evidence necessary for the lighting up instruction and the *McDougle* instruction. This Court should deny review.

RESPECTFULLY SUBMITTED this 22nd day of November, 2016.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THOMAS A. LUNSCHEN, Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Answer to Petition for Review and this Certificate Service in the below-described manner:

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DATED this 23rd day of November, 2016, Seattle, Washington.

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