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NO. 93816-4

SUPREME COURT OF THE STATE OF WASHINGTON

LORI ANN HULL,

Respondent,

v.

PEACEHEALTH MEDICAL GROUP

Appellant.

ANSWER TO PETITION FOR REVIEW
DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

The Department of Labor & Industries opposes review in this case. PeaceHealth Medical Group authorized surgery for injured worker Lori Ann Hull and then four years later argued that it was not responsible for the very serious consequences of that surgery. By self-insuring, PeaceHealth voluntarily undertook responsibility for providing medical care to its injured workers and the Court of Appeals correctly determined Hull was entitled to the claimed workers' compensation benefits.

PeaceHealth Medical Group petitions for review but cites no reason under RAP 13.4 to grant review. PeaceHealth attempts to point out a legal error, but the facts demonstrate that this error did not occur. Specifically, PeaceHealth argues that Hull's medical expert only relied on occupational exposure that occurred after Hull filed her workers' compensation claim to inform his opinion that she had an occupational disease. While PeaceHealth is correct that exposure after a worker filed an occupational disease claim is not relevant to whether a condition should be covered, here, Hull's doctor testified that Hull was exposed both before and after she filed her claim. So the record shows no error in this regard.

This Court should deny review.

II. ISSUES

Review is not warranted, but if it were granted PeaceHealth's petition presents the following issue:

1. Did Hull's thoracic outlet syndrome and its sequelae arise naturally and proximately from the distinctive conditions of her employment occurring before she filed her claim on October 23, 2006, when Hull's doctor testified that her condition was caused in part by work she performed before that date?

The following issues are raised by the Department only in the event review is granted:

2. Does substantial evidence support the trial court's finding that thoracic outlet syndrome did not arise naturally and proximately out of employment when a doctor testified her work did not cause the condition?

3. If a self-insured employer authorizes a surgery, is it responsible for the surgery's complications even if the underlying condition that necessitated surgery is later found to be unrelated to the claim when the compensable consequences doctrine requires coverage of the consequences of medical treatment provided to a worker?

4. Did the trial court err by excluding evidence about authorization of the surgery under ER 409 when the industrial insurance system is a statutory benefits scheme, not a liability scheme?

III. STATEMENT OF THE CASE

A. PeaceHealth Authorized Thoracic Outlet Surgery and Hull Suffered Complications

Hull worked for St. Joseph Hospital (PeaceHealth) for 20 years as an admitting representative/registration specialist in the emergency room. CP 231. Her job required gathering and inputting patient information,

assisting patients in wheelchairs, pulling forms and patient charts, affixing labels to documents, assembling and breaking down patient charts, sorting and stacking documents in piles, and cleaning name badges. CP 825.

Hull filed an occupational disease claim in October 2006. CP 250. At that time, Hull's symptoms primarily related to her elbows. CP 251. The Department of Labor & Industries directed PeaceHealth to allow the claim as an occupational disease, with no specific conditions identified as being allowed under the claim. CP 102.[1] Because PeaceHealth is self-insured it administers the claim.

Roughly five months after Hull filed her claim for the elbow condition, she developed symptoms while working in her left shoulder and had shoulder surgery to address those new symptoms. CP 242, 260. The symptoms persisted and she experienced numbness, tingling, and temperature changes in her left upper arm. CP 243. Hull received treatment from Dr. Kaj Johansen for thoracic outlet syndrome. CP 731–33. Thoracic outlet syndrome occurs when nerves exiting the cervical spine into the upper arms become compressed. CP 367. PeaceHealth authorized the two thoracic outlet surgeries. CP 245, 308–09.

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[1] Although it is not in evidence, the parties stipulated in the jurisdictional history stipulation that the Department allowed the claim on December 3, 2007. CP 102.

Hull suffered medical complications caused by the second thoracic outlet surgery, including balance problems, breathing problems, difficulty swallowing, dry heaving, and depression. CP 244–47, 735–37, 826.

B. Four Years After Authorizing the Thoracic Outlet Surgeries, PeaceHealth Contested That Hull's Work Conditions Caused Thoracic Outlet Syndrome

Four years after the surgeries, PeaceHealth argued that an occupational exposure did not cause the thoracic outlet syndrome. CP 10, 102, 151, 294.[2] Now, in seeking this Court's review, it raises the sole issue that Hull's medical expert improperly relied on evidence about occupational exposure that occurred after Hull filed her claim. *See* Pet. at 2, 13–14. PeaceHealth characterizes Dr. Johansen's opinion as based on employment conditions that occurred after the date of claim filing. Pet. at 7 (citing CP 754–55).

Dr. Johansen agreed that there were no symptoms of thoracic outlet syndrome when Hull filed her claim in October 2006, but he opined that, most often, symptoms of thoracic outlet syndrome take months to develop after exposure. CP 721–22, 730, 752. He testified "on a more-probable-than-not-basis, that [the bilateral elbow condition] arose from the

[2] In 2013, PeaceHealth appealed a Department order allowing thoracic outlet syndrome. CP 103, 292. Although not in evidence, this appeal is listed on the jurisdictional facts stipulation of the parties. CP 103.

similar workplace stress that she was undergoing, too, that I believe ultimately led to her developing neurogenic thoracic outlet syndrome." CP 753. In developing his opinion, Dr. Johansen considered work conditions both "before and after November 2006," as thoracic outlet syndrome develops in a long, slow process. CP 755. He agreed that if Hull had not further stressed herself by working after she filed the claim, she might not have developed thoracic outlet syndrome. CP 756–57. But because she continued working, the earlier process that had developed before she filed her claim continued and led to the thoracic outlet syndrome. *See* CP 756–57.[3] In other words, under Dr. Johansen's view, Hull's exposure both before and after she filed her claim worked together to cause the thoracic outlet syndrome. *See* CP 753, 755–57.

As explained below in Part IV.B, Dr. Richard Kremer testified that Hull's work did not cause thoracic outlet syndrome. CP 485–86. This testimony, however, is not relevant to the narrow issue presented by PeaceHealth to justify review, namely that the thoracic outlet syndrome was caused only by work conditions that arose after claim filing. Pet. at 2.

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[3] Dr. Johansen testified that with continued activity, the "process might well have continued, or more likely than not would have *continued*" and so she developed the thoracic outlet syndrome symptoms. CP 757 (emphasis added); *see* CP 753. The "continued" "process" referred to by the doctor was the stress to the body caused by the work conditions that existed before she filed her application. CP 753, 755–56. According to Dr. Johansen, these stresses to the body caused the thoracic outlet syndrome. CP 753.

C. The Court of Appeals Reversed the Trial Court

In 2013, the Department issued three orders appealed by PeaceHealth. CP 3–4. These orders directed PeaceHealth to accept responsibility for post-surgery complications of the thoracic outlet surgery including pulmonary conditions, balance problems, dysphagia, cricopharyngeal spasms, and adjustment disorder with depressed mood, as well as to authorize and pay for the psychiatric medication Cymbalta. CP 3–4, 294. The Department originally accepted thoracic outlet syndrome as covered by the claim, but changed its mind after PeaceHealth's appeal, ordering coverage only of the consequences resulting from the post-surgery complications. CP 103, 292–94. PeaceHealth disagreed with the three orders and appealed them to the Board. CP 3.

The Board affirmed the Department's orders. CP 31, 75. PeaceHealth appealed to the superior court, which reversed the Board's decision. CP 823–29. The trial court determined that 1) the thoracic outlet syndrome did not arise naturally and proximately out of the distinctive conditions of employment and 2) the payment of services associated with Hull's thoracic outlet syndrome surgery did not mean the surgery's consequences were covered under the claim and it struck the related evidence about payment of the surgery. CP 828–29.

The Court of Appeals reversed the trial court. *Hull v. PeaceHealth Medical Group*, No. 74413-5-1, slip op. 1 (Wash. Ct. App. Sept. 26, 2016) (unpublished opinion). It held that substantial evidence did not support the superior court's decision that thoracic outlet syndrome was unrelated to occupational exposure. *Id.* at 10–11. However, it upheld the superior court's ruling that excluded evidence that PeaceHealth paid for Hull's surgery under ER 409. *Id.* at 10.

IV. ARGUMENT

A. PeaceHealth Raises No Meritorious Reason Under RAP 13.4 for Review

PeaceHealth cites generally to RAP 13.4 to ask for review, but it does not specify on which ground it relies. Pet. at 1. It only claims legal error, but this Court does not review cases solely to determine if legal error occurred. *See* RAP 13.4(b). Here, PeaceHealth raises no meritorious reason for review.

The Industrial Insurance Act provides coverage for occupational diseases that arise naturally and proximately out of the distinctive conditions of employment. RCW 51.08.140; RCW 51.32.180; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481–82, 745 P.2d 1295 (1987). A typical occupational disease is a condition caused by repetitive stress. *E.g.*, *Dennis*, 109 Wn.2d at 469 (occupational disease caused by repetitive

metal snipping). As the Board recognizes, the Department looks to the occupational exposure before and as of the time of claim filing to determine if an occupational disease exists, and generally does not consider occupational exposure occurring after the claim filing. *In re Mike J. Rasmussen*, 09 14857, 2011 WL 1451199, at *8 (Wash. Bd. Ind. Ins. App. Feb. 3, 2011).[4] Occupational exposure is the work conditions that cause the occupational disease.

If PeaceHealth is correct that the claimed condition—thoracic outlet syndrome—was caused by exposure that occurred only after Hull filed the claim, then PeaceHealth would not be responsible for the condition under this claim. (Hull could, however, file a new occupational disease claim.) But PeaceHealth misstates the record.

Contrary to PeaceHealth's characterization of his testimony, Dr. Johansen opined that the thoracic outlet syndrome was caused by exposure both before and after Hull filed her occupational disease claim. CP 755. So under his testimony the pre-claim filing exposure was a cause of the

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[4] The Court of Appeals misstated PeaceHealth's position to state that PeaceHealth believed the injury should have occurred before claim allowance. *Hull*, slip op. at 9 n.9. But, as *Rasmussen* makes clear, it is work exposure before the date of claim filing that is examined. *Rasmussen*, 2011 WL 1451199, at *8. The Board and the Department follow the correct approach, and the Court of Appeals' stray footnote that obliquely contradicts the Board in an unpublished decision does not merit review. In any event, the court defers to the Board's and Department's interpretation of the Industrial Insurance Act in its decisions. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012).

condition, and Hull's work conditions are a proximate cause of the thoracic outlet syndrome. *See Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 683–84, 571 P.2d 229 (1977) (injury need only be a cause of condition, not the cause). So PeaceHealth does not demonstrate that Hull relied on post-claim filing evidence only, and review should not be granted on this ground.

B. If the Court Takes Review, Which It Should Not, It Should Consider Whether Substantial Evidence Supports the Trial Court's Finding That Thoracic Outlet Syndrome Did Not Arise Naturally and Proximately Out of Employment

The Department does not think the Court should take review for two reasons. First, PeaceHealth has not articulated a reason justifying review as explained above. *See* Part IV.A. Second, the Court of Appeals got the result right in this case. Hull, now pro se, is entitled to her treatment benefits for the reasons explained below in Part IV.C, which discusses how workers are entitled to treatment benefits if their employers authorize the treatment and it goes wrong.

PeaceHealth chose a strategy of seeking review on a claim that Hull's condition was caused solely by work conditions that arose after claim filing. PeaceHealth did not seek review of whether the Court of Appeals correctly applied the substantial evidence standard of review. PeaceHealth should not now be able to raise it as a reason to seek review

as RAP 13.4 does not allow a party to belatedly raise new issues for review.[5] In any event, the Court of Appeals' mistake is just legal error, and does not justify review.

But if the Court takes review, it should reverse the Court of Appeals' ruling that substantial evidence did not support the trial court's decision. Under the substantial evidence standard of review, the court will not reweigh the evidence. *Raum v. City of Bellevue*, 171 Wn. App. 124, 151, 286 P.3d 695 (2012). The court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014).

The trial court found that Hull's thoracic outlet syndrome did not proximately and naturally arise out of her employment. CP 828.[6] Substantial evidence supports this finding. Dr. Kremer testified that Hull's work conditions did not cause thoracic outlet syndrome. CP 485–86. The Court of Appeals discounted Dr. Kremer's testimony because he "testified that the working conditions of hairdressers and carpenters would cause

[5] RAP 13.4(d) allows a reply to the new issues in the Department's answer. But this does not permit PeaceHealth to belatedly seek review on those issues.

[6] This is actually incorrectly denominated as a conclusion. CP 828. The judgment is confusing in that there is also a finding that suggests that the thoracic outlet syndrome arose out of employment. CP 826. But reading the judgment as a whole shows that this was likely reflecting what the procedural history of the claim was and not the trial court's ultimate ruling.

thoracic outlet syndrome, but he denied that Hull's out in front and overhead use of her arms caused it." *Hull*, slip op. at 9. It also criticized his reliance on electrodiagnostic testing. *Id.*

But considering the evidence in the light most favorable to the prevailing party, as is done on substantial evidence review, shows that Dr. Kremer's testimony should not be disregarded. He took into account Hull's job duties when rendering his opinion. CP 471, 478. Part of her work duties were to use her arms in front and overhead, but this work was only one portion of her work as she did a number of tasks. CP 825–26. Dr. Kremer was specifically asked whether her work retrieving empty files on shelves (the overhead work) and building a chart at waist height would cause thoracic outlet syndrome. CP 478. He replied, "It was not an activity that I would expect to be seen with thoracic outlet syndrome symptoms." CP 478. He said her work was not comparable to hairdresser's work. CP 479.

It is unusual for the Court of Appeals to misapply substantial evidence principles, and this legal error does not merit taking review. But if review is taken, the Court of Appeals' ruling on this point should be reversed.

C. If the Court Takes Review, Which Again It Should Not, Then It Should Grant Review to Consider the Compensable Consequences Doctrine's Applicability

Review should not be granted. But if review is granted, the Court should apply the compensable consequences doctrine. PeaceHealth authorized the surgery and then four years later claimed it was not responsible for the consequences of the surgery because it claimed that the thoracic outlet syndrome was not caused by the occupational disease. But having authorized the surgery, under the compensable consequences doctrine it is responsible for the serious consequences that it is undisputed that the surgery caused.

The trial court erroneously concluded that, in industrial insurance cases, an employer's payment for treatment does not mean that the employer is responsible for the consequences of that treatment, absent proof the condition that the treatment provided was itself related to the occupational disease:

> The payment for medical treatment or service for a condition does not remove the requirement that such condition, medical treatment or service be proximately related to the industrial injury/occupational disease and the employer is not estopped from challenging ultimate responsibility for such condition, medical treatment or service where such previous payment has occurred.

CP 837–38. As Hull argued below, this ruling and the concomitant decision to strike evidence was in error. *E.g.*, Br. of Appellant, at 1, 11–12.

This Court has recognized that if treatment for an occupational disease causes complications, treatment for those complications is covered under the claim. *Ross v. Erickson Constr. Co*, 89 Wash. 634, 647, 155 Pac. 153 (1916); *see also Anderson v. Allison*, 12 Wn.2d 487, 498–99, 122 P.2d 484 (1942); *In re Arvid Anderson*, No. 65170, 1986 WL 31849, at *1 (Wash. Bd. Ind. Ins. App. July 22, 1986). This is known as the compensable consequences doctrine. 1 Arthur Larson et al *Larson's Workers' Compensation Law* 10-1, 10-23 to 10-25 (2002). The Board has also found that this doctrine applies to surgery authorized by the Department or self-insured employer for a condition later found to be unrelated to the occupational disease. "[I]t is well-established that when . . . the worker reasonably relies on the advice of her doctors, the consequences of treatment are compensable, even if the treatment later turns out to be ill-advised or not necessitated by a condition covered under the claim." *In re Ladonia M. Skinner*, No. 14 10594, 2015 WL 4153105, at *3 (Wash. Bd. Ind. Ins. App. June 12, 2015) (quotations omitted). Here, PeaceHealth authorized the surgery, even though it had the opportunity then to contest whether the condition was occupationally related; it should

not be allowed to now disavow the consequences of the surgery several years later.[7]

The Court of Appeals erred in holding that the trial court correctly excluded testimony about payment under ER 409. ER 409 provides that "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." This rule does not apply to workers' compensation matters. The rule is concerned with showing "liability" for an injury. But there is no "liability" for industrial injuries. RCW 51.04.010, which makes employers responsible for all injuries occurring in the course of a worker's employment irrespective of any question of fault or liability, removes any concern about fault from workers' compensation litigation. *Stertz v. Indus. Ins. Comm'n*, 91 Wash. 588, 595, 158 P. 256 (1916). Thus, the statutory scheme pays benefits due to workplace injuries and occupational diseases, and liability is not a consideration. RCW 51.04.010.

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[7] WAC 296-15-266(c)(i) requires a self-insurer to notify the worker and medical provider in writing within 60 days of receiving a treatment bill if the self-insured employer believes a condition is not caused by the occupational disease and disputes payment. If the worker contests denial of the payment, WAC 296-15-266(c)(ii) requires the self-insured employer to notify the Department. PeaceHealth presented no evidence that it complied with this regulation. It had 60 days to contest payment of the bill and the in absence of contesting the bill, the surgery is its responsibility and any consequences flowing from that surgery fall within the ambit of the authorization for the surgery. *See also* RCW 51.36.035 (self-insured employer must pay medical bills within 60 days of receipt).

The Industrial Insurance Act directs the Department to pay for proper and necessary treatment regardless of fault or liability. RCW 51.36.010; RCW 51.32.010; RCW 51.04.010. A self-insured employer administers this no-fault scheme and provides the same benefits to injured workers that the Department would pay for if the employer insured through the state fund. *Boeing Co. v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015) ("Self-insured employers are generally responsible for all disability and medical costs associated with their workers' compensation claims.").

RCW 51.36.010 allows the Department to adopt rules that govern the provision of proper and necessary treatment. One such rule, WAC 296-20-03001, requires authorization for surgery by the self-insured employer. PeaceHealth authorized the surgery, and is now responsible for it. *Skinner*, 2015 WL 4153105, at *3. PeaceHealth argues that under RCW 51.32.190 it can offer treatment here without it creating a binding obligation. Resp't's Br. at 17. This statute only applies to payment of compensation before allowance of the claim. Even assuming this statute applied, which it does not, it would only mean that authorizing the treatment does not automatically equate to allowance of the condition (thoracic outlet syndrome) under the claim. But authorizing the surgery creates responsibility for the consequences of the surgery. If review is

granted, the Court should hold that under the compensable consequences doctrine, PeaceHealth is responsible for the consequences of the treatment it offered.

V. CONCLUSION

PeaceHealth states no reason for review under the RAP 13.4 standards, and only claims legal error based on a misunderstanding about the facts. Under these circumstances, this Court should not grant review. If review is granted, the Department requests consideration of the substantial evidence and compensable consequences doctrine issues.

RESPECTFULLY SUBMITTED this 5th day of January, 2017.

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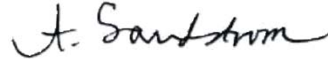
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SUPREME COURT OF THE STATE OF WASHINGTON

PEACEHEALTH MEDICAL GROUP, Petitioner, v. LORIANN HULL and DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	CERTIFICATE OF SERVICE

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

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