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No. 93816-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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PEACEHEALTH,

*Petitioner,*

v.

LORI ANN HULL,

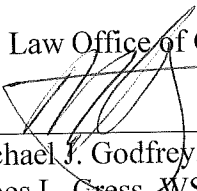
*Respondent.*

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PEACEHEALTH'S RESPONSE TO DEPARTMENT'S ANSWER

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The Law Office of Gress & Clark

  
Michael J. Godfrey, WSBA No. 49098

James L. Gress, WSBA No. 25731

Of Attorneys of Respondent

9020 SW Washington Square Road, Ste 560

Portland, Oregon 97223

(971) 285-3525

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## I. INTRODUCTION:

The Petitioner, PeaceHealth, submits this Response to the Answer to the Petition for Review filed by the Department of Labor & Industries (“Department”) pursuant to RAP 13.4(d). PeaceHealth received the Department’s Answer on January 9, 2017.

The Department’s Answer was contradictory on its face because it agreed with PeaceHealth that the Court of Appeals misapplied the relevant law (Department’s Answer, at 1: *regarding which work exposure a court may consider when analyzing which conditions are compensable as part of an occupational disease*); agreed with PeaceHealth that the Court of Appeals misapplied substantial evidence principles (Department’s Answer, at 11: *regarding whether Ms. Hull’s thoracic outlet syndrome was proximately caused by the employment period in question*); and then argues that the Court should not grant review because there is only a misunderstanding regarding facts. (Department’s Answer at 16). The Department’s brief clearly acknowledges that PeaceHealth’s primary argument to this Court is correct. Additionally, it argues that substantial evidence supports the Trial Court’s decision when viewed through the correct legal framework.

The Department makes two additional arguments. First, that because Dr. Johansen indicated that he considered employment both before and after the relevant time period; PeaceHealth’s argument is

essentially moot. Second, that because PeaceHealth paid for a surgery; it accepted the underlying condition as well as any subsequent consequences, or sequelae, of the surgery under the Compensable Consequences Doctrine. Both of these arguments are meritless. The record reflects that Dr. Johansen was unable to state on a more-probable-than-not basis that Ms. Hull's thoracic outlet syndrome was proximately caused only by employment exposure prior to October 23, 2006. Additionally, the Compensable Consequences Doctrine does not apply because thoracic outlet syndrome was not proximately caused by the industrial injury; nor was it a consequence of the underlying condition for which the claim was filed, bilateral epicondylitis.

Two briefs have now been filed with the Supreme Court arguing that the Court of Appeals' decision in this matter was contrary to the law and the evidence. No party to this litigation has indicated that the Court of Appeals was correct in its legal framework. The Court should grant review of PeaceHealth's Petition for Review and, in doing so, should clarify the legal framework for lower courts and affirm the Trial Court's decision which found in favor of PeaceHealth.

## **II. STATEMENT OF NEW ISSUES RAISED BY**

### **DEPARTMENT**

1. PeaceHealth raised a meritorious justification for review in accordance of RAP 13.4(b)(1); (b)(2); and (b)(4). Alternatively,

PeaceHealth has sought review based upon the Court of Appeals' abuse of discretion.

2. The "Substantial Evidence" principle supports the Trial Court's ruling in favor of PeaceHealth, insofar as the medical testimony overwhelmingly showed that Ms. Hull's thoracic outlet syndrome was not proximately caused by her occupational exposure prior to her filing the claim.
3. The Compensable Consequences Doctrine does not apply because the condition for which treatment was administered, thoracic outlet syndrome, was not proximately caused by the industrial exposure at issue. Therefore, any evidence of whether PeaceHealth paid for the thoracic outlet surgery was properly ruled inadmissible pursuant to Evidence Rule 409 and the Industrial Insurance Act.

### III. ARGUMENT:

1. **PeaceHealth raised a meritorious justification for review by this Court pursuant to RAP 13.4(b)(1)-(2) when it alleged that the Court of Appeals applied Washington law in a manner contrary to decisions from the Washington Supreme Court and Court of Appeals or that it needed to clarify the existing law for lower courts as a matter of public interest. Alternatively, PeaceHealth has alleged that the Court of Appeals abused its discretion by denying its Motion for Reconsideration.**

- a) PeaceHealth assigned error to the Court of Appeals pursuant to RAP 13.4(b)(1)-(2).

In the Department's Answer, it alleges that PeaceHealth did not raise a "meritorious reason" for review under RAP 13.4. (Department's Answer, at 7). However, in its Petition for Review, PeaceHealth indicated that it believed the Court of Appeals erred as a matter of law in regards to its analysis of occupational diseases by creating a false legal framework that allowed work exposure after the date of claim filing to be considered in a manner inconsistent with the existing legal framework. The Court of Appeals' decision was contrary to framework for occupational diseases as defined by RCW 51.08.140 and *Dennis v. Department of Labor & Indus.*, 745 P.2d 1295; 109 Wn.2d 467 (1987) and its progeny.

The Department stated in its answer that "While PeaceHealth is correct that exposure after a worker filed an occupational disease claim is not relevant to whether a condition should be covered ...." (Department's Answer, at 1). This admission means that the Department is in complete agreement with PeaceHealth when it argues that the Court of Appeals erred as a matter of law when it considered occupational exposure that occurred after the October 23, 2006, date of claim filing. But for the Court of Appeals' false legal framework, there is no plausible way that Ms. Hull's thoracic outlet syndrome can be allowed under this claim because no medical provider testified on a more-probable-than-not basis



that her thoracic outlet syndrome was proximately caused by occupational exposure prior to claim filing.

- b) PeaceHealth assigned error to the Court of Appeals pursuant to RAP 13.4(b)(4).

The Court should grant review based on PeaceHealth's reliance on RAP 13.4(b)(1)-(2). If it chooses not to, the Court should grant review based on PeaceHealth's reliance on RAP 13.4(b)(4). In its petition, PeaceHealth asked for review so that the Court may substantiate the law and clarify to lower courts how the legal framework for occupational diseases is to be analyzed. Employment exposure after a worker files an occupational disease claim is not relevant to whether a condition should be accepted. Clearly the Court of Appeals was not aware of this when it drafted its opinion. Accordingly, the Supreme Court should take this opportunity to clarify and substantiate what is an important issue of public interest.

- c) PeaceHealth assigned error to the Court of Appeals by alleging that it abused its discretion by denying its Motion for Reconsideration.

Immediately following the decision from the Court of Appeals, PeaceHealth filed a Motion for Reconsideration with the Court pursuant to RAP 12.4(b). The motion was denied. If the Court of Appeals had granted this motion, it would have avoided the need for Supreme Court review since the error is easily correctible. If the Court of Appeals had analyzed

the record through the proper framework, it would have seen that there was overwhelming medical evidence to support the Trial Court's determination. This is consistent with a point made by the Department in their Answer, when they argue that 'substantial evidence' supports the Trial Court finding that Ms. Hull's thoracic outlet syndrome did not proximately and naturally arise out of her employment. (Department's Answer, at 10-11). If the Court does not grant full review of PeaceHealth's petition, it should remand this case to the Court of Appeals with express directions to consider only the employment exposure prior to the date of claim filing in determining whether thoracic outlet syndrome should be allowed under the claim.

**2. The "Substantial Evidence" principle supports the Trial Court's ruling in favor of the Petitioner, insofar as the medical testimony overwhelmingly showed that Ms. Hull's thoracic outlet syndrome was not proximately caused by her occupational exposure prior to her filing the claim.**

d) PeaceHealth and the Department agree that substantial evidence supports the Trial Court's determination that Ms. Hull's thoracic outlet syndrome did not arise proximately and naturally out of her employment exposure prior to October 23, 2006.

PeaceHealth contends that if the Court of Appeals had used the proper legal framework for its analysis of this occupational disease, then it

would have affirmed the Trial Court and held that the claimant's thoracic outlet syndrome was not proximately caused by the employment exposure prior to October 23, 2006. PeaceHealth specifically indicated in its Petition for Review that this was supported by "substantial evidence." (Petition for Review, at 13).

In its answer, the Department states that "if the Court takes review, it should reverse the Court of Appeals' ruling that substantial evidence did not support the Trial Court's decision." (Department's Answer, at 10). PeaceHealth agrees that substantial evidence supports the Trial Court's decision. Moreover, it is known that the record is reviewed upon appeal in the light most favorable to the party who prevailed in Superior Court. *Ramos v. Dep't of Labor & Indus.*, 361 P.3d 165, 166 (2015) citing *Harrison Mem'l Hosp. v. Gagnon*, 40 P.3d 1221 (2002). As discussed in PeaceHealth's initial Petition for Review, there is substantial evidence in the record showing that the employment exposure prior to the date of claim filing did not proximately cause Ms. Hull's thoracic outlet syndrome. Accordingly, the Trial Court's decision should be affirmed.

**3. The Compensable Consequences Doctrine does not apply because the condition for which treatment was administered, thoracic outlet syndrome, was not proximately caused by the occupational exposure under consideration. Therefore, any evidence of whether PeaceHealth paid for the thoracic outlet surgery was properly**

**ruled inadmissible pursuant to Evidence Rule 409 and the  
Industrial Insurance Act.**

- a) The ‘Compensable Consequences Doctrine’ does not apply in this situation because thoracic outlet syndrome was not proximately caused by the occupational exposure under consideration.

The Compensable Consequences Doctrine requires that consequences or complications of treatment for a workers’ compensation injury are considered part of the underlying injury, absent an intervening and superseding cause. *Anderson v. Allison*, 12 Wn. 2d 487 (1942); *Ross v. Erickson Construction Co.*, 89 Wash. 634 (1916). That doctrine is not applicable in this situation because the underlying condition in Ms. Hull’s circumstance is not thoracic outlet syndrome. As the record shows, Ms. Hull filed this claim for bilateral epicondylitis, which was proximately caused by the occupational exposure prior to October 23, 2006. CP at 94, 239, and 251. In order for the Compensable Consequences Doctrine to apply in this situation, then Ms. Hull’s thoracic outlet syndrome must have been proximately caused by the occupational exposure under consideration. As discussed in PeaceHealth’s petition, there is overwhelming evidence that suggests the thoracic outlet syndrome was not proximately caused by the employment exposure prior to October 23, 2006. Accordingly, thoracic outlet syndrome is not the underlying condition and the Compensable Consequences Doctrine does not apply.

If Ms. Hull had developed thoracic outlet syndrome as a consequence to a surgery related to her bilateral epicondylitis, then the doctrine could potentially apply. However, there is absolutely no evidence in the record indicating that the thoracic outlet syndrome and its sequelae were of consequence to any treatment for bilateral epicondylitis. Thus, the Compensable Consequences Doctrine does not apply.

- b) The Industrial Insurance Act precludes admission of payment of treatment as evidence of an employer's acceptance for a condition.

The Department argues that because the Industrial Insurance Act directs self-insured employers to self-administer the act, then employers are required to pay for proper and necessary treatment regardless of fault or liability. (Department's Answer, at 15). This is true. However, there is still a requirement that conditions under a claim must be proximately caused by the industrial injury or occupational disease prior to acceptance under a claim. Accordingly, RCW 51.32.190(2) states "the payment of compensation shall not be considered a binding determination of obligations of the self-insurer as to future compensation payments." For context, the term "compensation" appears frequently in the Industrial Insurance Act. The Washington State legislature has defined compensation to include "proper and necessary medical and surgical services." RCW 51.36.010(2)(a).

Finally, the Department's argument regarding payment of treatment establishing acceptance of a condition violates public policy in a manner contrary to the Industrial Insurance Act. If the Court were to hold that an employer accepts responsibility for a condition by simply providing payment for treatment, self-administered employers would be far less likely to provide upfront payment for treatment until its responsibility is established via a final and binding Department order, thus delaying treatment. Providing payment of needed treatment is consistent with the goal of the Industrial Insurance Act, which is to provide the injured employee with "sure and speedy relief." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138; 814 P.2d 629 (1991) (quoting *Favor v. Dept. of Labor & Industries*, 53 Wn.2d 698, 703, 336 P.2d 382 (1959)).

- c) The Trial Court and the Court of Appeals properly excluded evidence of PeaceHealth's payment of surgery under Evidence Rule 409.

Washington Evidence Rule 409 states that "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." Of note, the Washington ER 409 is an exact replica of the Federal rule. According to the Advisory Committee for the Federal Rules of Evidence, the rationale for this rule is that "generally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is

usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.” 20 A.L.R.2d 291, 293 (1951).

The Department argues that ER 409 is not applicable in this circumstance because workers’ compensation is a no-fault, administrative system. (Department’s Answer, at 14). ER 409 is designed to prevent creating an inference that payment is based on responsibility or liability. Here, the Department is clearly trying to use PeaceHealth’s payment of medical treatment to show it is responsible for a host of conditions that would otherwise not be covered under Ms. Hull’s workers’ compensation claim.

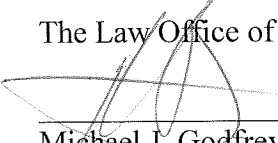
The Court of Appeals was correct to affirm the Trial Court’s ruling to exclude evidence of PeaceHealth’s payment of surgery for thoracic outlet syndrome as substantive proof of its acceptance of the condition. Moreover, for the same reasons, the payment would also be inadmissible to show responsibility for the sequelae. Accordingly, the Supreme Court should not grant review of this issue.

#### **IV. CONCLUSION:**

PeaceHealth seeks review because the Court of Appeals applied an incorrect legal framework when it considered employment exposure subsequent to the date of filing in its decision to assign PeaceHealth responsibility for Ms. Hull’s thoracic outlet syndrome. The Supreme Court has the opportunity to rectify this substantial error and clarify to lower

courts which employment exposure they must consider in determining which conditions are allowed under an occupational disease. When the correct legal framework is used, substantial evidence shows that PeaceHealth is not responsible for thoracic outlet syndrome under this claim.

The Law Office of Gress & Clark



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Michael J. Godfrey, WSBA No. 49098  
James L. Gress, WSBA No. 25731  
Of Attorneys of Respondent  
9020 SW Washington Square Road, Ste 560  
Portland, Oregon 97223  
(971) 285-3525



**CERTIFICATE OF MAILING**

I hereby certify that I caused to be served the foregoing **PETITIONER'S RESPONSE TO DEPARTMENT'S ANSWER** on the following individuals on January 24, 2017, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

**VIA EMAIL FILING:**

Susan L. Carlson  
Supreme Court Clerk  
Supreme Court  
supreme@courts.wa.gov

**VIA FIRST CLASS UNITED STATES MAIL, POSTAGE PREPAID  
TO:**

LoriAnn Hull  
9478 Delta Line Rd  
Blaine, WA 98230

Anastasia Sandstrom  
Office of The Attorney General of Washington  
800 Fifth Ave, Suite 2000  
Seattle, WA 98104-3188

And deposited in the post office at Portland, Oregon, on January 24, 2017.

**LAW OFFICE OF GRESS AND CLARK, LLC**

A handwritten signature in black ink, appearing to be 'Michael J. Godfrey', is written over a horizontal line.

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MICHAEL J. GODFREY, WSBA #49098  
JAMES L. GRESS, WSBA #25731  
Of Attorneys for Petitioner, PeaceHealth