NO. 99504-4

SUPREME COURT
OF THE STATE OF WASHINGTON

IMELDA MAGDALENO,

Appellant,

v.

WALMART STORES, INC. and WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

ANSWER TO PETITION FOR REVIEW, DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

The routine application of the substantial evidence standard to conflicting opinions from medical experts does not warrant the review of this Court. Imelda Magdaleno argues that the decision in this case conflicts with *Clark County v. Maphet*, 10 Wn. App. 2d 420, 451 P.3d 713 (2019). *Maphet* held that an employer who authorizes medical treatment under a worker's compensation claim is liable if a worker's condition worsens because of that treatment. But here two doctors testified that Magdaleno's condition did not worsen because of authorized treatment. It worsened because of unrelated degenerative conditions and because of an unnecessary surgery to treat those unrelated degenerative conditions.

Since Magdaleno cannot show that the decision is unsupported by substantial evidence, she shows no conflict between the decisions. All of her arguments in the brief amount to an attempt to reweigh the evidence, and as such she does not show an issue of substantial public interest. This Court should deny the petition for review.

II. ISSUE

> Does substantial evidence support the jury's verdict that Magdaleno's condition did not worsen because of authorized treatment?

III. STATEMENT OF FACTS

A. Overview of Workers' Compensation

When a worker is injured, the Department provides medical benefits seeking to return the worker to the worker's pre-injury status. *See* RCW 51.36.010. When it authorizes medical treatment, the Department identifies one or more accepted conditions that the treatment addresses. *See* WAC 296-20-01002. Under the compensable consequences doctrine, the residuals of approved medical treatment are considered residuals of the industrial injury. *See Anderson v. Allison*, 12 Wn.2d 487, 496-97, 122 P.2d 484 (1942).

The Department or self-insurer pays for proper and necessary health care services related to the diagnosis and treatment of an accepted condition. WAC 296-20-01002 (definition of proper and necessary). Proper and necessary treatment is treatment reflective of accepted standards of good practice and curative or rehabilitative. *Id.* Once a worker has received proper and necessary medical treatment for an injury and has reached maximum medical improvement, the Department closes the injured worker's claim. *See* RCW 51.32.055(1).

A worker can apply to reopen a closed claim. RCW 51.32.160. To establish that the claim should be reopened, the worker must present objective evidence showing that the worker's condition worsened since

the claim was last closed and that the worsening was proximately caused by the industrial injury. *Hendrickson v. Dep't of Labor & Indus.*, 2 Wn. App. 2d 343, 353-54, 409 P.3d 1162 (2018).

B. Magdaleno Was Hurt While Working for Walmart and Underwent an Approved Surgery in 2011; She Sought an Additional Surgery in 2014, but the Department Denied It

Magdaleno was injured while working for Walmart in July 2007, developing low-back pain after lifting boxes of meat off a pallet. CP 457. The Department directed Walmart to allow Magdaleno's claim. *See* CP 187. Ashit Patel, MD, performed back surgery on the L5-S1 level of Magdaleno's spine in November 2011 to treat a right-sided disc protrusion at that level. CP 297. Magdaleno's symptoms improved for about six months after the injury, but the symptoms returned. CP 239.

A magnetic resonance imaging (MRI) performed in December 2013 showed that the disc protrusion that was the subject of the 2011 surgery was no longer present. CP 298. The medical witnesses disagreed about whether the December 2013 MRI showed scar tissue, a new disc bulge on the left, or a recurrent lower level herniation. CP 298, 407, 471.

Magdaleno saw a different doctor, Varun Laohaprasit, MD, in January 2014. CP 566. At that time, Dr. Laohaprasit recommended a repeat of the same type of back surgery at the same level done in 2011. CP 568.

In September 2014, the Department denied Dr. Laohaprasit's request to authorize the repeat surgery. CP 195. The Department closed Magdaleno's claim in May 2015. CP 188. Magdaleno appealed both the October 2014 order denying surgery and the May 2015 order closing her claim, but later dismissed both appeals. CP 188.

Another MRI was performed in February 2015. CP 301. Houman Sabahi, a radiologist who reviewed Magdaleno's medical records at the request of Walmart's counsel, interpreted the MRI as showing an unchanged epidural scar and some degenerative changes that were unrelated to the 2007 injury. CP 290-94, 301, 325-27. Dr. Laohaprasit believed the MRI showed a recurrent L5-S1 herniation on the right, but other doctors disagreed. CP 393, 586.

Magdaleno returned to work for a different employer, working as a credit collector. CP 242-43. In March 2016, while Magdaleno was working for the new employer, Dr. Laohaprasit performed a laminectomy and discectomy, this time on both the right and left sides at the L5-S1 level, unlike the prior surgery that was right-sided only. CP 239, 297, 581-82. Magdaleno had the procedure paid for through her private medical insurance. CP 244. No MRI was performed after the Department closed the claim in May 2015 and before Magdaleno underwent this surgery.

After the 2016 surgery, Magdaleno's condition worsened. CP 320, 410, 494, 595, 636. An August 2016 lumbar MRI showed a left-sided disc extrusion, a new and worsened finding. CP 320, 410-11, 494, 595, 636.

In May 2016, Magdaleno applied to reopen her claim. CP 188. The Department granted the application to reopen the claim in October 2016. CP 225. Walmart appealed this decision to the Board of Industrial Insurance Appeals (Board). CP 190.

C. The Board Reversed the Department's Order and Directed the Department To Deny Magdaleno's Application To Reopen Her Claim

In testifying at the Board, Dr. Sabahi and Dr. Wacker both concluded that the changes in Magdaleno's condition after the claim closed in 2015, and before March 2016 (when Magdaleno underwent the second surgery), stemmed from degenerative changes unrelated to the industrial injury. CP 323-24, 408-09. And Dr. Champoux testified that there was no change in the worker's condition over that time related to the injury. CP 491, 495. Dr. Sabahi, Dr. Wacker, and Dr. Champoux also testified that Magdaleno's condition most likely worsened after March 2016 because of the March 2016 surgery. CP 320, 322-23, 409-11, 491.

Drs. Sabahi and Champoux testified that the March 2016 surgery was not proper and necessary based on the worker's findings when that

surgery was performed. CP 309, 495. Dr. Patel testified that he would not have performed that surgery, but did not expressly testify that the surgery was not appropriate. CP 634. Dr. Wacker similarly noted that she has not had good experience with performing re-do surgeries of that kind, but did not testify that the surgery was either appropriate or not appropriate. CP 412. Only Dr. Laohaprasit testified that the March 2016 surgery was medically appropriate. CP 583.

The Board reversed the Department's order, concluding that the preponderance of the evidence showed that Magdaleno's condition worsened between May 2015 and September 2016, but that it did so for reasons unrelated to either the 2007 injury or the 2011 surgery. CP 30, 55-67.

D. Magdaleno Appealed the Board's Decision To Superior Court and the Court of Appeals, but Both Courts Affirmed the Board

The jury returned a verdict that the Board had correctly found that the industrial injury did not proximately cause Magdaleno's condition to worsen between May 2015 and September 2016. CP 709-10. The trial court entered a judgment based on the jury's verdict that affirmed the Board's decision. CP 758-59. Magdaleno appealed. CP 755-61.

The Court of Appeals issued an unpublished decision that affirmed the superior court. *Magdaleno v. Walmart*, No. 79833-2-I, 2020 WL

6870503 (Wash. Ct. App. Nov. 23, 2020) (hereafter "slip op."). The Court of Appeals concluded that substantial evidence showed that Magdaleno's condition worsened because of the unauthorized 2016 surgery, not because of either the authorized 2011 surgery or the injury itself. *Id*. at 9-11. The Court of Appeals also concluded that the employer did not accept the condition treated by the 2016 surgery as a result of authorizing the 2016 surgery, because the two surgeries treated different problems. *Id*. at 8, 11. The Court of Appeals concluded that these facts distinguished the case from *Maphet* and affirmed the superior court. *Id*. at 7-11. Magdaleno petitioned for review.

IV. ARGUMENT

The Court of Appeals' decision does not conflict with *Maphet* because the key facts that drove the decision in *Maphet* are not present in this case. *Maphet* decided that authorization of surgery operates to accept the condition treated as well as any consequences from the authorized surgery. *Maphet*, 10 Wn. App. 2d at 433-38. Magdaleno's arguments derive from the assumption that the 2011 surgery accepted the condition that the 2016 surgery treated: "Walmart's authorization of the 2011 surgery for Ms. Magdaleno's central disc herniation . . . accepted such condition as a matter of law," (pet. 13) and "[t]he 2016 surgery was for the exact condition operated on in 2011 for a re-herniation at L5-S1." Pet. 14

(relying on her doctor's testimony); *see also* Pet. 8-19. But her argument collapses because Walmart presented evidence that the condition the 2011 surgery treated was different from the condition the 2016 surgery treated. CP 297, 320-24, 409-12, 459, 491, 495, 588-90. Walmart also presented medical evidence that Magdaleno's medical condition worsened for reasons unrelated to either her 2007 industrial injury or her 2011 surgery. CP 320-24, 409-11, 491, 494-95. Magdaleno's arguments are just an attempt to reweigh the evidence.

Not only is there no conflict with *Maphet*, but, because the cases are distinguishable, her arguments about the probative value of the medical testimony creating an issue of substantial public interest in this case also fail, as they are also merely a guise to reargue the facts. Pet. 17. The petition for review should be denied.

A. The Court of Appeals' Decision Does Not Conflict With *Maphet* Because the 2011 Surgery Did Not Cause Her Condition To Worsen and the 2016 Surgery Treated a Different Problem Than the One the Employer Accepted

A worker seeking to reopen a claim must show that the worker's condition worsened since the claim was last closed and that the injury proximately caused the worsening. *Hendrickson*, 2 Wn. App. 2d at 353-54. Magdaleno's condition worsened after her claim was closed, but did so because of an unauthorized 2016 surgery, not the industrial injury

or authorized treatment for that injury. CP 297, 320-24, 409-12, 491, 494-95, 589-90.

Maphet recognizes two legal doctrines that are potentially relevant when a worker seeks to reopen a claim: (1) when a self-insured employer authorizes treatment, the employer necessarily accepts the conditions that it relied on to approve of the treatment, and (2) under the compensable consequences doctrine, the consequences of approved treatment for an injury are considered residuals of the injury. *Maphet*, 10 Wn. App. 2d at 433, 438. But the Court of Appeals correctly concluded that there is substantial evidence that Magdaleno has no right to have her claim reopened under either prong, so this Court should deny the petition for review.

1. The first prong of *Maphet* does not apply because there is substantial evidence that the 2011 surgery did not treat the same thing as the 2016 surgery

The first prong of *Maphet* does not apply because there is substantial evidence that the employer authorized the 2011 surgery to treat different problems than the ones that the 2016 surgery tried to address. CP 297, 320-24, 409-12, 459, 491, 495, 588-90; *Maphet*, 10 Wn.2d at 433-38. *Maphet* explains that, under WAC 296-20-01002, an employer could not pay for a surgery under a claim unless it authorized the surgery and an employer could not authorize a surgery unless the surgery was

designed to treat an accepted condition. *Maphet*, 10 Wn. App. 2d at 435-38 (citing WAC 296-20-01002).

Magdaleno concedes, as she must, that under *Maphet* it is the condition that the surgery is designed to cure that is the condition that is accepted. Pet. 11. She argues that the condition treated in the 2011 surgery is the same as the 2016 surgery: "Dr. Laohaprosit testified, in 2016 he operated on 'the same location, the same disease, the same thing.'" Pet. 14. But Dr. Laohaprasit's testimony was rejected by the jury and instead the testimony of Drs. Sabahi and Champoux that the condition was not the same was accepted. CP 297, 320-24, 459, 491, 495, 709. The record documents that the 2011 surgery was designed to address a specific disc herniation at the L5-S1 level and that the 2011 surgery successfully treated that herniation. CP 297, 459. The record also documents medical testimony that the 2016 surgery addressed age-related degenerative problems that arose for reasons unrelated to either the 2007 injury or the approved 2011 surgery. CP 297-98, 301-02, 390-92, 408, 430-31, 436-37, 457-58. The Court should reject Magdaleno's request to reweigh the evidence relied on by the jury to conclude the residuals of the 2011 surgery did not cause the need for the 2016 surgery.

Recognizing that she is bound by the substantial evidence standard of review, Magdaleno seeks to undermine the opinions of the witnesses

that testified against her position. Pet. 13-14, 17-19. She seeks to recast the testimony to say it turns on assumption that the 2011 surgery was only to treat a strain/sprain and should not have been authorized. Pet. 13-14, 18. She argues that "[t]heir testimonies, heavily relied upon by the Court of Appeals, that both the 2011 and 2016 surgeries were for unrelated degenerative disc disease, cannot negate the legal verity that Walmart's authorization of surgery in 2011 for her central disc herniation at L5-S1 deemed that condition proximately caused by Magdaleno's industrial injury." Pet. 14. But the doctors' opinions did not hinge on an opinion that the 2011 surgery treated only a strain/sprain, indeed they recognized that the 2011 surgery successfully treated and cured a disk herniation, and there was nothing more to treat about it. CP 297, 459.

Thus, Magdaleno's statement that when the "evidence is distilled down to only that which is legally competent/probative in terms of being consistent with the applicable law that the L5-S1 central disc herniation was proximately caused or aggravated by the industrial injury, and that the October 15, 2014 order denying the re-do L5-S1 surgery was not binding in 2016 when she had the surgery" (Pet. 19) misses the point. It is correct that the L5-S1 central disc herniation was caused by the industrial injury—but this does not matter because substantial evidence shows that the worsened condition was not caused by the surgery to treat the L5-S1

condition nor was the 2016 surgery the result of the 2011 surgery. CP 297, 320-24, 409-12, 459, 491, 495, 588-90. That Magdaleno got a chance to argue again that the 2016 surgery was necessary and proper because the 2014 order was not dispositive does not change the jury's conclusion that the 2016 surgery was not necessary and proper treatment. *See* CP 709.

Because substantial evidence shows that the two surgeries addressed different problems that arose for different reasons, this case is distinguishable from *Maphet* and there is no conflict.

2. The second prong of *Maphet* does not apply because there is substantial evidence that the authorized 2011 surgery did not cause Magdaleno's condition to worsen

There is also substantial evidence that the second prong of *Maphet*—the compensable consequences doctrine—does not apply, because the record shows that Magdaleno's condition did not worsen because of the approved 2011 surgery. *See Maphet*, 10 Wn. App. 2d at 438-39. CP 300-02, 320-21, 409-11, 491, 494-95. Under the compensable consequences doctrine, the residuals of proper and necessary medical treatment for an injury are considered to be residuals of the injury itself. *Anderson*, 12 Wn.2d at 496; *Maphet*, 10 Wn. App. 2d at 438-40. Magdaleno argues the consequence of the 2011 surgery was the "failure of the 2011 surgery to adequately treat Magdaleno's disc herniation which resulted in its reherniation . . . . which merited the re-do surgery performed

by Dr. Laohaprosit or a fusion," so any worsening caused by that surgery is compensable. Pet. 16. She also states that "[t]he proximate chain of causation between the surgeries and the worsening is undeniable." Pet. 16. But Magdaleno is wrong. First, it is only her view of the facts that the 2011 surgery did not cure the condition it was designed to treat—there was medical testimony that it succeeded. CP 297, 459. Second, it is not undeniable that there was a chain of causation from the 2007 injury or the 2011 surgery to the 2016 surgery. The substantial evidence shows that Magdaleno's condition did not worsen because of the 2011 surgery. CP 320, 409-11, 491. Dr. Sabahi and Dr. Champoux testified that Magdaleno's condition did not worsen because of the 2011 surgery and instead worsened because of a combination of age-related changes and the inappropriate 2016 surgery. CP 297-98, 301-02, 390-92, 408, 430-31, 436-37, 457-58.

Since there is substantial evidence that the 2016 surgery was unnecessary as a result of the residuals of the approved 2011 surgery, the compensable consequences doctrine cannot be used to link the 2016 surgery to the 2007 injury. There is therefore no conflict between *Maphet* and the decision here, and the petition for review should be denied.

B. No Issue of Substantial Public Interest Is Presented by the Routine Application of the Substantial Evidence To the Record

Magdaleno argues that there is an issue of substantial public interest because the evidence relied on is "based on material erroneous legal and factual assumptions and revisionist history instead of the actual facts and applicable law." Pet. 17. It is Magdaleno that engages in revisionism.

Magdaleno argues that the testimony of Walmart's medical experts is insufficient because she alleges that the doctors incorrectly refused to acknowledge that the 2011 surgery had been approved, and she also alleges they incorrectly insisted that her injury consisted solely of a strain/sprain. Pet. 17-19. The record supports neither of those arguments.

First, Dr. Sabahi and Dr. Champoux based their opinions that the changes shown in the December 2013 and February 2015 MRIs were because of aging rather than the 2007 injury on the nature of the changes that were shown by those imaging studies, not based on an insistence that the 2011 surgery should not have been authorized. CP 297-98, 300-02, 458. And while it is true that Dr. Sabahi did not think the 2011 surgery was warranted, he recognized that it had been approved, and expressly based his opinions in the case on the assumption that the surgery was approved. CP 328, 351. Similarly, Dr. Champoux testified that, if he

assumed the 2011 surgery was administratively approved and that this was binding, his opinions about the case would be the same. CP 479-80.

Second, neither Dr. Sabahi nor Dr. Champoux testified that they based their opinions in the case on the assumption that Magdaleno's injury consisted solely of a strain/sprain. In fact, nowhere did Dr. Sabahi testify that Magdaleno had only a strain/sprain. And while Dr. Champoux's testimony suggests that he did believe her injury caused only a strain/sprain, he also testified—as noted—that assuming that the 2011 surgery was approved, he would not change his opinions. CP 469-70, 479-80.

And several doctors testified that Magdaleno's condition worsened only because of the 2016 surgery, not because of the residuals of either the 2011 surgery or the original injury. CP 320-24, 409-12, 491, 494-95. Dr. Sabahi, Dr. Wacker, and Dr. Champoux all agreed that it was most probable that Magdaleno's condition worsened after the claim was closed because of the 2016 surgery. CP 320-24, 409-12, 491, 494-95. Substantial evidence therefore shows that, while Magdaleno's condition did worsen after her claim was closed in 2015, it worsened only because of the 2016 surgery. CP 320-24, 409-12, 491, 494-95. And since the 2016 surgery was not approved and since there is substantial evidence that it was not proper

and necessary treatment, Magdaleno has no right to have her claim reopened based on problems attributable to that surgery. CP 309, 322, 495.

Magdaleno had a chance to try to discredit the adverse medical testimony before the jury. She was unsuccessful and her efforts now do not show an issue of substantial public interest.

Magdaleno also argues that there is an issue of substantial public interest because Walmart questioned the correctness of *Maphet* in this case and Walmart might argue against *Maphet* in the future. Pet. 17. But it is always the case that a future party may challenge a case's holding and it is not necessary to speculate about what parties might argue in the future in cases presenting substantially different facts. Since *Maphet* is inapplicable under the facts of the case, this Court need not and should not take review to address the correctness of that decision here.

V. CONCLUSION

Substantial evidence supports the jury's verdict that Magdaleno's condition worsened after the Department closed her claim for reasons that were unrelated to her industrial injury. Magdaleno thus fails to show either a conflict with Maphet or an issue of substantial public interest warranting review. The petition should be denied.

RESPECTFULLY SUBMITTED this 19th day of April, 2021.

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IMELDA MAGDALENO, Appellant, v. WALMART STORES, INC. and WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES Respondents.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Answer to Petition for Review, Department of Labor and Industries and this Declaration of Service in the below described manner:

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DATED this 19th day of April 2021, at Olympia, Washington.

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April 19, 2021 - 3:27 PM

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Appellate Court Case Number:	99504-4
Appellate Court Case Title:	Imelda Magdaleno v. Walmart Stores and Department of Labor & Industries

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