Supreme Court No. 99504-4
COA No. 79833-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IMELDA MAGDALENO,

Petitioner,

v.

WALMART STORES, INC., and
DEPARTMENT OF LABOR & INDUSTRIES OF WASHINGTON,

Respondents.

AMENDED PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Imelda Magdaleno, requests this Court accept review of the Court of Appeals' decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS' DECISION

Ms. Magdaleno petitions this Court to accept review of the unpublished decision of the Court of Appeals in *Magdaleno v. Wal-Mart and Department of Labor & Industries of Washington*, No. 79833-2-I filed on November 23, 2020 which found substantial evidence in the record to support the verdict of the jury in contravention of *Clark County v. Maphet*, 10 Wn. App, 420, 451 P.3d 713 (2019) and WAC 296-20-01002. Magdaleno moved the Court to reconsider its November 23, 2020 Opinion which the Court denied on January 15, 2021. Copies of the Court of Appeals' Opinion and Order Denying Reconsideration are attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals err in refusing to follow *Clark County v. Maphet,* 10 Wn. App.2d 420, 451 P.3d 713 (2019) and otherwise ignore WAC 296-20-01002 which provide that when a self-insured employer or Department authorize treatment, they accept the condition treated and instead allowed, and relied upon as substantial evidence, witness testimony that the previously authorized surgical treatment was for a condition not causally related to the industrial injury?

D. STATEMENT OF THE CASE

This matter arises from a workers' compensation claim filed by Ms. Magdaleno in 2007. Ms. Magdaleno injured her back while stacking pallets of frozen chicken in the course of employment with Walmart. While stacking the pallets, she felt a sharp stabbing pain down her leg into her feet. CABR[1] 210. She filed an application for workers' compensation benefits and her claim was allowed. CABR 161.

Ms. Magdaleno received benefits, including time loss compensation and medical treatment. On November 3, 2011, her then attending surgeon, Dr. Ashit Patel, performed a right-sided laminectomy and discectomy for a central herniated disc at L5-S1. This surgery was authorized by the Department of Labor Industries (the Department) and paid by the self-insured employer (Walmart). CABR 212, 308. Six months after the surgery, Magdaleno's radicular symptoms returned. CABR 212. Dr. Patel then recommended a spinal fusion. For a second opinion, she saw Dr. Varun Laohaprasit who recommended and requested authorization for a re-do laminectomy and discectomy for a suspected re-herniation at L5-S1. CABR 212-214. The Department issued an order on October 15, 2014 that denied the surgery recommended by Dr.

[1] The Certified Appeal Board Record (CABR) is identified as "CP 6" of the Designated Clerk's Papers. For ease of reference, this section will reference the CABR page numbers.

Laohaprasit as not necessary and proper. CABR 161. The Department closed her claim on May 4, 2015. (The first terminal date).

After her claim closed, Ms. Magdaleno's condition continued to worsen. She could not return to her job of injury, which was too physically demanding, but returned to work as a credit collector. However, she had increasing pain and spasm and difficulty performing even the lighter duty work. She used her private health insurance to see Dr. Laohaprasit again. CABR 217. After observing her condition had further deteriorated, Dr. Laohaprasit again recommended a re-do laminectomy and foraminotomy on both sides of her L5-S1 disc. She proceeded to have the surgery on March 16, 2016. CABR 554. During surgery, Dr. Laohaprasit observed what he expected -- a right-sided and central L5-S1 disc re-herniation which was the exact location of the 2011 authorized surgery. CABR 554, 556-557. The 2016 surgery was not successful and ended up worsening her condition resulting in a disc extrusion at L5-S1. While Dr. Laohaprosit testified he saw the L5-S1 re-herniation at the beginning of the March 16, 2016 surgery, (objective worsening pre-dating the surgery) all medical witnesses agree that her L5-S1 disc disease objectively worsened after the 2016 surgery. CABR 216, 220, 221, 554, 556-557.

On May 24, 2016 Ms. Magdaleno filed an application to reopen her claim. She was terminated from her job due to her medical issues and Dr. Laohaprasit recommended a fusion surgery after the unsuccessful re-do surgery. CABR 216, 220, 227-228. On August 18, 2016, the Department ordered her claim be reopened based on the worsening of her industrial injury. CABR 162. The self-insured employer, Walmart, protested the order which the Department affirmed on October 20, 2016 (the second terminal date). Walmart appealed the October 20, 2016 order to the Board of Industrial Insurance Appeals. (the Board). CABR 162.

At the Board hearing, Ms. Magdaleno and her husband testified that her condition continued to worsen after claim closure and then further worsened after the March 16, 2016 surgery by Dr. Laohaprasit. CABR 216, 220, 221, 240. She also presented testimony from her two treating orthopedic surgeons, Dr. Ashit Patel and Dr. Varun Lahaoprist. Dr. Patel testified that after he performed the 2011 surgery and Ms. Magdaleno's radicular symptoms returned, he requested authorization for a spinal fusion on November 19, 2014. CABR 596, 601. Dr. Patel never performed the fusion and testified that Ms. Magdaleno's condition would continue to worsen without additional surgical intervention. CABR 598-599.

Dr. Laohaprasit testified that he believed the MRIs performed before claim closure showed recurrent disc herniation that would and did continue to get worse over time without surgical intervention. CABR 548. He was aware that Dr. Patel recommended a fusion but his preference was to try to resolve the problem with a simple option first rather than a fusion which is a much more significant operation. CABR 542. After the 2016 re-do surgery further worsened her condition, he testified she now requires a surgical fusion. CABR 567, 227-228.

Dr. Laohaprasit testified that the 2016 surgery was causally related to her industrial injury because, if the surgery in 2011 was approved and performed, the recurrent herniation that he observed and operated on in March 2016 was also related. CABR 569-570. He operated on the "same location, the same disease, the same thing." CABR 569-571. He further explained that Ms. Magdaleno had no other accidents, injuries, or falls yet she continued to get worse to the point she could not handle the pain and increased disability and the surgery became necessary. CABR 572, 576.

Walmart presented evidence from three "independent medical examiners" (IMEs) – Drs. Houman Sabahi, James Champoux, and Margaret Wacker. All three IMEs testified Ms. Magdaleno's condition at L5-S1 objectively worsened after the 2016 surgery. CABR 292, 295, 313, 463, 466, 501. Two of the witnesses, Drs. Sabahi and Champoux, gave

testimony directly contrary to the Department's previous adjudication authorizing the 2011 surgery testifying that such surgery was not related to her work injury and should not have been authorized. They testified Magdaleno's L5-S1 pathology was solely caused by the degenerative aging process and that Ms. Magdaleno's work related condition was limited to a lumbar strain. CABR 267, 268, 307, 322. Dr. Sabahi conceded to some causation between the worsening and the industrial injury when he testified that Magdeleno's worsening was not caused **solely** by the industrial injury. CABR 295.

Dr. Champoux performed three IMEs of Ms. Magdaleno. After his July 2016 examination, his diagnoses were the same as Drs. Wacker's and Sabahi's. After being specifically asked to disregard the Department's previous administrative determinations authorizing the 2011 surgery at L5-S1, he testified that Magdaleno's worsened condition at L5-S1 was not related to her industrial injury but rather due solely to the 2016 surgery. He testified that Magdaleno's industrial injury was limited to a low back sprain/strain and disregarded the fact Magdaleno had the surgery in 2011 that was authorized by the Department and paid by Walmart. CABR 430, 442, 449, 462, 486, 494.

Dr. Wacker examined Ms. Magdaleno at the request of Walmart on January 7, 2017. She diagnosed degenerative disc disease at L5-S1

"obviously aggravated" by the industrial injury, recurrent disc herniation caused by the March 16, 2016 repeat surgery, and stable retrolisthesis. She testified there was a clear objective worsening since claim closure. CABR 380, 382. With respect to whether the March 16, 2016 surgery was reasonable and necessary, she testified that both the re-do surgery performed by Dr. Laohaprasit or a fusion had merit. She testified that the scar from the first surgery was the reason for the second surgery and that the surgery was not absolutely indicated or contraindicated. CABR 384. However, she ultimately opined the worsening caused by the 2016 surgery was not causally related to the industrial injury because the Department had administratively denied the surgery in 2014 prior to claim closure. CABR 385, 390. She also testified that the March 2016 surgery was not a supervening cause of worsening. CABR 400-401.

On March 5, 2018, the Board issued a Decision and Order reversing the October 20, 2016 Department order reopening Ms. Magdaleno's claim. CP 6. Ms. Magdeleno appealed the Board's Decision to the trial court. On December 20, 2018 (before the decision in *Maphet*) Magdaleno filed a motion for summary judgment on the basis that, pursuant to WAC 296-20-01002, Walmart was bound to have accepted her L5-S1 disc disease when it authorized the surgery for that condition in 2011. CP 15, 21. As such, defense testimony to the contrary is not

probative to support the determination that the 2016 re-do surgery that resulted in worsening was unrelated to the industrial injury. Walmart responded with a cross-motion for summary judgment. CP 20. Both motions were denied. CP 36. However, during the oral decision, the trial court ordered that the previous Department order dated October 15, 2014 that denied a re-do surgery at L5-S1 at that time was not binding after claim closure when Ms. Magdaleno had the re-do surgery on March 16, 2016. Verbatim Report of Proceedings at 30.

A three-day jury trial commenced on February 26, 2019. CP 43. The jury rendered a verdict in favor of Walmart. On March 8, 2019, Magdaleno filed a post-trial motion for judgment notwithstanding the verdict on the basis there was no probative evidence to support the verdict of the jury. CP 46. On March 19, 2019, the trial court denied Magdaleno's motion. CP 50. Ms. Magdaleno appealed to Division I of the Washington State Court of Appeals which affirmed the trial court in its unpublished Opinion dated November 23, 2020. Ms. Magdaleno moved for reconsideration and, on January 15, 2021, the Court of Appeals denied her motion. Ms. Magdaleno now petitions this Court for review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals held that the trial court properly denied Magdaleno's motion for judgment notwithstanding the verdict because

substantial evidence from the testimony of Drs. Champoux, Sabahi, and Wacker support "a lack of proximate cause" between Ms. Magdaleno's industrial injury and the uncontroverted worsening of her low back condition at L5-S1 because the 2016 surgery was for a condition different from her industrial injury and therefore a superseding cause of her worsened condition. Opinion pp. 5, 8. Remarkably, the Court held that Magdaleno's worsened condition would have occurred regardless of her industrial injury. Opinion p. 8. In so holding, the Court of Appeals disregarded any binding consequence (or evidentiary value) to the Department's previous authorization of Ms. Magdaleno's 2011 surgery for her L5-S1 disc disease. The consequences of treatment authorization was squarely at issue and adjudicated by Division II in *Maphet.*

1. The decision of the Court of Appeals is in conflict with *Clark County v. Maphet*, 10 Wn. App.2d 420, 451 P.3d 713 (2019) a published decision of Div. II of the Court of Appeals.

The Court of Appeals' Opinion is contrary to Division II's Opinion in *Clark County v. Maphet,* 10 Wn. App.2d 420, 451 P.3d 713 (2019) which held that authorization of surgery operates to accept the condition treated as well as any consequences from the authorized surgery. Since the Court of Appeals held that *Maphet* is distinguishable, the facts merit detail.

Maphet was a correctional officer at the Clark County jail. She injured herself while at work when she slipped on a piece of paper and fell down a flight of stairs. She injured her right knee. *Id.* at 423-424. The self-insured employer authorized eight surgeries on Maphet's knee. *Id.* The fifth surgery was more extensive than originally planned and resulted in patellofemoral instability. *Id.* She had four additional surgeries to attempt to repair the instability—three of which were authorized by the County. *Id.* The County contested its responsibility for the ninth surgery on the basis the industrial injury did not cause it. *Id.* The Department directed the County to authorize and pay for the ninth surgery and the County appealed to the Board. *Id.* After hearings, the Board affirmed the Department order that the industrial injury proximately caused the patellofemoral instability requiring the ninth surgery and that it was proper and necessary. *Id.* at 427.

The County appealed the Board's decision to the superior court. *Id.* at 428. Maphet and the Department moved the court for judgment as a matter of law on the basis that WAC 296-20-01002 mandates that authorization of the previous surgeries bound the County to have allowed the conditions treated. *Id.* The trial court denied the motion. *Id.*

The jury returned a verdict that the industrial injury did not cause the need for the ninth surgery and it was not proper and necessary. *Id.* at 429.

Maphet appealed to Div. II of the Court of Appeals and the County and the Department cross-appealed. As Ms. Magdaleno here, Maphet argued that the trial court erred when it failed to grant her motion for judgment as a matter of law on the basis that if a self-insured employer authorized surgery for a condition, it has accepted that condition and further that, under the "compensable consequences doctrine", self-insured employers are responsible for the sequelae of treatment they authorize. *Id.* at 432-433. As Walmart here, the County argued that authorization of surgery does not bind the parties to industrial injury claims and that the compensable consequences doctrine requires a causal link between the industrial injury and the condition treated. *Id.* The Court of Appeals agreed with Maphet. The Court held that WAC 296-20-01002[2] expressly states that "authorization" is the self-insured employer's notification that it will provide treatment for an accepted condition. Therefore, based on the plain meaning of WAC 296-20-01002, if the self-insured employer authorizes a surgery, it has accepted the condition treated. *Id.* at 434-435. Since the County authorized the sixth, seventh, and eighth surgeries to

[2]WAC 296-20-01002 provides: "Authorization: Notification by a qualified representative of the department or self-insurer that specific proper and necessary treatment, services, or equipment provided for the diagnosis and curative or rehabilitative treatment of an accepted condition will be reimbursed by the department or self-insurer. Acceptance, accepted condition: Determination by a qualified representative of the department or self-insurer that reimbursement for the diagnosis and curative rehabilitate treatment of a claimant's medical condition is the responsibility of the department or self-insurer."

attempt to correct the patellofemoral instability, the ninth surgery, also treating the instability, the same condition addressed by the surgeries the County previously authorized, it accepted Maphet's condition. *Id.* at 438.

The *Maphet* Court held that the trial court also erred in denying Maphet's motion for judgment as a matter of law based on the compensable consequences doctrine. *Id.* at 438-439. This doctrine establishes that if treatment performed for an industrial injury causes complications or aggravates the injury, the claim covers the sequelae of that treatment. *Id.* at 439. Since the County authorized the fifth surgery (which aggravated her knee) it is therefore responsible for the consequences flowing from that surgery, including the ninth surgery. *Maphet*, at 442-443.

a. The minor factual distinctions between *Maphet* and Magdaleno do not justify the Court of Appeals' disregard of *Maphet* and/or WAC 296-20-01002 or the compensable consequences doctrine.

The Court of Appeals in Magdaleno held that *Maphet* was distinguishable for three reasons. First, "the 2016 surgery addressed a condition different from the industrial injury [so] therefore Walmart's authorization of the 2011 surgery did not mean that it accepted her degenerative disc disease". Opinion p. 11. The Court noted that such distinction was sufficient substantial evidence to support the verdict of the jury so it did not need to "address whether *Maphet* was correctly decided,

or whether WAC 296-20-01002 is binding." Opinion p. 11, footnote 7.[3] Second, the 2016 surgery was a little bit more extensive than the 2011 surgery in that it treated both sides of Magdaleno's central disc herniation at L5-S1. Opinion p. 12. And third, it held *Maphet* was distinguishable because the surgery that resulted in Magdaleno's worsening was not an authorized procedure, as in *Maphet.* Opinion p. 12. *Maphet* is not sufficiently distinguishable to have no application here.

i. The 2016 surgery did not treat a different condition than the industrial injury.

At the heart of *Maphet* is whether the contended ninth surgery was for a different condition than the industrial injury. The Court in *Maphet* held that WAC 296-20-01002 provides that the County is legally bound to its previous treatment authorizations as well as the sequelae of such treatment. *Id*. at 439. Therefore, testimony that is contrary to the causal relationship between the previous surgical authorizations and sequelae cannot refute such legal causation.

By application, Walmart's authorization of the 2011 surgery for Ms. Magdaleno's central disc herniation at L5-S1 accepted such condition as a matter of law. And, testimony from Drs. Sabahi and Champoux to the contrary is powerless to recast Magdaleno's accepted injury as a mere

[3]Significantly, Walmart argued *Maphet* was incorrectly decided. The Department argued it was correctly decided but distinguishable. The Court simply side-stepped application of WAC 296-20-01002.

sprain/strain. Their 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. Therefore, their testimony cannot support the Court's determination that the 2016 surgery treated a condition different from the industrial injury. The 2016 surgery was for the exact condition operated on in 2011 for a re-herniation at L5-S1. As Dr. Laohaprosit testified, in 2016 he operated on "the same location, the same disease, the same thing." CABR 569 – 571.

ii. The modestly enlarged scope of the 2016 surgery to include a left-sided discectomy at L5-S1 cannot credibly be considered a superseding cause wholly eliminating proximate cause to the industrial injury.

The fact that the 2016 surgery also treated the left side of her central disc disease at L5-S1 does not negate the fact that it also treated the exact condition and location of the 2011 surgery. For the modestly expanded scope of the 2016 surgery to be a factual distinction sufficient to distinguish it from *Maphet,* it would have to be for an entirely unrelated condition. It would have to be a superseding cause of Magdaleno's worsening. However, there is no evidence in the record that such is the

case. Indeed, the 2016 surgery would not have occurred but for the 2011 surgery that failed to satisfactorily treat her central L5-S1 disc herniation. Indeed, even Dr. Wacker testified the 2016 surgery had merit and that the scar damage from the 2011 surgery was the reason for the second surgery. CABR 384.

iii. The fact that the 2016 surgery which resulted in worsening was not pre-authorized as it was in *Maphet*, is an immaterial distinction as to the legally binding consequence of Walmart authorizing the 2011 surgery and application of the doctrine of compensable consequences.

The Court of Appeals wrote that *Maphet* is distinguishable because the surgery there, which caused the worsening, was an authorized procedure. Opinion, p. 12. However, this does not distinguish the application of *Maphet* here. *Maphet* was not a case involving reopening of the worker's case based on worsening but rather an issue concerning treatment authorization while the worker's claim was open. It does not stand for the proposition relied upon by the Court of Appeals that a worker's worsening for reopening her claim must be caused by an authorized procedure. This is nonsense. Worsening was only relevant in *Maphet* for application of the compensable consequences doctrine where the Court concluded the County became responsible for the patellofemoral instability because it resulted as a consequence of previously authorized

procedures. The Court of Appeals' third distinction also does not apply to prevent application of *Maphet* and or WAC 206-20-01002.[4]

b. The doctrine of compensable consequences establishes that the self-insured employer is responsible for the sequelae of the 2011 and 2016 surgeries.

In addition to Walmart being bound to have accepted Magdaleno's L5-S1 disc disease by authorizing the 2011 surgery, it is also bound to accept any worsening or other consequence caused by the authorized 2011 surgery and sequelae. Here, this would include failure of the 2011 surgery to adequately treat Magdaleno's disc herniation which resulted in its re-herniation (or per Dr. Wacker, resulted in the formation of scar tissue) which merited the re-do surgery performed by Dr. Laohaprosit or a fusion. CABR 384. Since the failure of the 2011 surgery resulted in the need for the 2016 surgery to try again to repair the L5-S1 disc herniation, complications from that surgery, which resulted in uncontroverted worsening, are also proximately related to the industrial injury. The proximate chain of causation between the surgeries and the worsening is undeniable.

[4] It is worth noting here that the fact the 2016 surgery was not pre-authorized does not preclude a worker from relying on it as the basis of worsening to support claim reopening. In fact, the Act accommodates retroactive coverage and reimbursement for medical treatment for this exact situation as well as in cases where claims are originally rejected, medical conditions or treatment is denied or segregated but then subsequently deemed causally related to the industrial injury. See WAC 296-20-020; WAC 296-20-125(7). The worker need only claim reimbursement within one year from the date of a final order that reopens a claim or allows a condition or authorizes treatment.

2. The question whether *Maphet* was correctly decided by Div. II presents an issue of substantial public interest that should be determined by the Supreme Court because the self-insured employer argued it was not correctly decided and therefore will likely continue challenging the binding effect of treatment authorization in managing its claims contrary to WAC 296-20-01002 and to the detriment of injured workers.

The Court of Appeals noted that the parties took different positions on the application and correctness of *Maphet.* Significantly, Walmart argued it was incorrectly decided. Since the Court refused to adjudicate whether it was correctly decided, Walmart will likely continue to adjudicate its claims contrary to *Maphet* to the disadvantage of injured workers. As a very large self-insured employer, this involves a significant number of injured workers who could potentially be painfully damaged by Walmart's claims adjudication. Other self-insured employers outside of Division II could also make this argument. Therefore, whether *Maphet* was correctly decided by Div. II presents an issue of substantial public interest that should be decided by the Supreme Court.

3. It is an issue of substantial public interest that should be determined by the Supreme Court when the Court of Appeals irrationally relied on evidence as substantial enough to support the verdict when such evidence is based on material erroneous legal and factual assumptions and revisionist history instead of the actual facts and applicable law.

The law requires that expert opinions must be based on accurate and full knowledge of material facts. An expert opinion is without probative value if it is based upon incomplete or inaccurate material facts.

Sayler v. Dep't of Labor & Indus., 69 Wn.2d 893, 896, 421 P.2d 362 (1966) A doctor's testimony as to causal relationship is not sufficient to support a verdict if it is based upon incomplete or inaccurate information. *Parr v. Dep't of Labor & Indus*., 46 Wn.2d 144, 150-151, 278 P.2d 666 (1955), See also, *Weissman v. Dep't of Labor & Indus*., 52 Wn.2d 477, 484, 326 P.2d 743 (1958); *Arthurs v. Nat'l Postal Transp. Assoc.,* 49 Wn.2d 570, 578, 304 P.2d 685 (1956).

The Court of Appeals' Opinion is expressly based on the testimony and ultimate opinions of Drs. Sabahi and Champoux that Magdaleno's industrial injury was limited to a low back sprain/strain and that the 2011 surgery should not have been authorized. Moreover, Dr. Sabahi's ultimate opinion regarding causation assumed that her industrial injury had to be the sole cause of Magdaleno's worsening. And, both of their testimonies expressly disregarded the Department's previous administrative adjudications.

To the extent the Court of Appeals relied upon Dr. Wacker's testimony as substantial evidence to support the verdict (Opinion pp. 8-9), the only evidence supportive of the Court of Appeals' opinion is her ultimate opinion that the worsening from the 2016 surgery was not causally related to Magdaleno's industrial injury because the Department

previously denied the re-do surgery in 2014. This is contrary to the trial court's ruling that the 2014 order denying the re-do surgery had no binding effect in 2016 when Magdaleno actually had the surgery. Therefore, the Court of Appeals cited Wacker's testimony as providing substantial evidence when it legally had no probative value with respect to the causal relationship between Magdaleno's industrial injury and the 2016 surgery. The rest of Dr. Wacker's testimony is supportive of Magdaleno's appeal.

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, the opinion testimony of Drs. Laohaprasit and Patel that Ms. Magdaleno's industrial injury worsened between the terminal dates is uncontroverted. And, the remaining probative testimony of Drs. Wacker, Sabahi, and Champoux, not destroyed by their incorrect assumptions, support evidence of such worsening.

F. CONCLUSION

Based on the foregoing, Ms. Magdaleno respectfully requests this Court accept review of the November 23, 2020 Opinion of the Court of Appeals. If relief is granted, she respectfully requests the Supreme Court determine that the Court of Appeals erroneously refused to follow *Maphet*, WAC 206-20-01002, and/or the doctrine of compensable consequences, conclude that Div. II correctly decided *Maphet* and hold that it is determinative of Magdaleno's case such that the Court of Appeals' decision concluding the trial court properly denied Magdaleno's motion notwithstanding the verdict is wrong and should be reversed, thereby also reversing the March 5, 2018 Board order and ultimately affirming the October 20, 2016 Department order reopening Ms. Magdaleno's claim. This Court should remand this matter to the Department to thereafter take such further action consistent with the Opinion of the Supreme Court. The Court should also award Magdaleno's reasonable attorney fees and costs.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IMELDA MAGDALENO, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, and WALMART STORES, a Washington Corporation, Respondent.	No. 79833-2-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — In 2007, Imelda Magdaleno hurt her back while working for Walmart Stores Inc. The Department of Labor and Industries authorized a surgery, which she underwent in 2011. Later, she continued to experience back pain. She sought authorization for a second surgery, but the Department denied her request and closed her claim. Magdaleno proceeded with the second surgery but afterward her back worsened. She sought to reopen her claim, asserting that a claim-related condition had objectively worsened. The Department reopened the claim, but the Board of Industrial Insurance Appeals reversed, concluding that no claim-related condition objectively worsened between the terminal dates.

Magdaleno appealed to superior court. There, a jury returned a verdict for Walmart, finding that the Board ruled correctly. Magdaleno moved for a judgment notwithstanding the verdict, which motion the trial court denied. On

appeal, Magdaleno says that the trial court erred because substantial evidence or reasonable inferences therefrom do not support the jury's verdict. But the law requires us to view the evidence in the light most favorable to the Department and Walmart. And for the reasons discussed below, we affirm.

I. BACKGROUND

A. 2007 Injury, Claim, First Surgery & Closure

In July 2007, Magdaleno suffered an injury while working at Walmart. As she lifted pallets of frozen chicken, she experienced pain in her back and down her right leg.

The next month, Magdaleno applied for workers' compensation benefits and the Department allowed her claim. Magdaleno underwent six lumbar MRIs between September 2007 and September 2011.

The Department authorized a laminectomy and a right-sided discectomy for a herniated disc at L5-S1 as proper and necessary because of conditions caused by Magdaleno's industrial injury. On November 3, 2011, Dr. Ashit Patel performed these procedures on Magdaleno.

While Magdaleno's symptoms at first subsided, she began complaining of more symptoms about six months after her surgery. In December 2013, Magdaleno had another lumbar MRI. Dr. Patel recommended that Magdaleno undergo a fusion surgery to address her back and leg pain.

Magdaleno then consulted Dr. Varun Laohaprasit, who recommended redoing a laminectomy and discectomy at L5-S1, as he considered fusion

surgery a last resort. Magdaleno requested that this surgery be authorized under her claim.

On September 3, 2014, the Department denied authorization, stating, "[T]he self-insured employer is not responsible for the redo right-sided laminectomy and discectomy at L5-S1 as medical evidence supports that this procedure is not proper and necessary as defined by law."

Magdaleno had another MRI in February 2015.

Magdaleno protested the denial order but the Department reaffirmed it. The Department then closed her claim on May 4, 2015. This was the first "terminal date."[1] Magdaleno appealed both the denial and closure orders but dismissed her appeals following a settlement with Walmart.

B. Magdaleno's Second Surgery & Reopening of Claim

After claim closure, Magdaleno continued to experience pain. She returned to Dr. Laohaprasit who recommended that she undergo a L5-S1 laminectomy, medial facetectomy, foraminotomy, and microdiscectomy on her right side and, in addition, recommended an L5-S1 laminectomy and foraminotomy on her left side. Using her private insurance, Magdaleno underwent this surgery on March 16, 2016. No MRI was conducted between the first terminal date and the 2016 surgery.

[1] To decide whether to reopen a claim, the Board—and the courts—examine whether an objective worsening of a claim-related condition occurred between the "terminal dates." Karniss v. Dep't of Labor & Indus., 39 Wn.2d 898, 900–01, 239 P.2d 555 (1952). Here, the terminal dates were the date of closure and the date the Department reaffirmed its order to reopen the claim.

After her second surgery, Magdaleno experienced increased pain and discomfort. She then applied to reopen her claim on May 24, 2016. An MRI taken on August 5, 2016 showed a disc extrusion[2] at L5-S1. On August 18, 2016, the Department reopened Magdaleno's claim. It reaffirmed its order on October 20, 2016 following Walmart's protest. This was the second terminal date. Walmart appealed this order to the Board.

C. Proceedings Before the Board & Reversal

During the Board appeal process, both sides presented expert testimony. Walmart introduced testimony by Dr. Houman Sabahi, a radiologist; Dr. Margaret Wacker, a neurosurgeon; and Dr. James Champoux, an orthopedic surgeon. Magdaleno introduced testimony by Dr. Patel who performed the 2011 surgery, and Dr. Laohaprasit who performed the 2016 surgery. She and her husband also testified.

After the presentation of evidence, an Industrial Appeals Judge (IAJ) issued a Proposed Decision and Order reversing and concluding that the claim should not be reopened. Magdaleno petitioned for Board review. The Board denied the petition and the IAJ's Proposed Decision and Order became the Decision and Order of the Board.

D. Trial Court Proceedings

Magdaleno appealed the Board's decision to superior court, where the parties cross-moved for summary judgment. The court denied both motions and, in doing so, noted that the 2014 denial order (i.e., the Department's order

[2] A type of herniation.

denying authorization for the 2016 surgery) did not have binding effect—through res judicata—on the current litigation.

At trial, the court instructed the jury that, for a worker to establish the need for treatment because of aggravation of a medical condition, the worker has the burden of proving that (1) the aggravation resulted in the need for treatment, (2) the need for treatment was proximately caused by the industrial injury, and (3) the aggravation occurred between May 4, 2015 and October 20, 2016 (i.e., the terminal dates).

The jury returned a verdict for Walmart, finding that the Board was correct in finding that no claim-related condition objectively worsened between the terminal dates. Magdaleno then moved for a judgment notwithstanding the verdict, which motion the trial court denied. Magdaleno appeals.

II. ANALYSIS

A. Denial of Motion for Judgment Notwithstanding the Verdict

Magdaleno says that the trial court erred in denying her motion for judgment notwithstanding the verdict because substantial evidence does not support the jury's finding that no claim-related condition objectively worsened between the terminal dates. The Department and Walmart counter that substantial evidence shows a lack of proximate cause, thus rendering any objective worsening unrelated to the claim. We agree with the Department and Walmart.

To reopen an Industrial Insurance Act (IIA) claim, a worker must establish that their claim-related condition objectively worsened between the terminal dates. See RCW 51.32.160. A worker must support the claimed worsening with objective medical evidence. Felipe v. Dep't of Labor & Indus., 195 Wn. App. 908, 914, 381 P.3d 205 (2016). And the worsened condition must be proximately caused by the industrial injury. Ma'ae v. Dep't of Labor & Indus., 8 Wn. App. 2d 189, 200–01, 438 P.3d 148 (2019).

We review a trial court's denial of a motion for judgment notwithstanding the verdict applying the same standard as the trial court. Chaney v. Providence Health Care, 176 Wn.2d 727, 732, 295 P.3d 728 (2013); CR 59(a)(7). Such a denial is proper when "substantial evidence or reasonable inferences" support the jury's verdict. Indus. Indem. Co. of the Nw. v. Kallevig, 114 Wn.2d 907, 915–16, 792 P.2d 520 (1990). The substantial evidence standard requires that the evidence is enough to convince "'an unprejudiced thinking mind'" or persuade a "fair-minded rational person." In re Estate of Dormaier v. Columbia Basin Anesthesia, PLLC, 177 Wn. App. 828, 861–62, 313 P.3d 431 (2013) (quoting Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)). We view the material evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. Kallevig, 114 Wn.2d at 915–16.

Neither Walmart nor the Department disputes that there was an objective worsening of some condition between the terminal dates. This dispute centers

on whether the worsened condition was claim-related (i.e., whether proximate cause exists).

Magdaleno advances three theories on appeal: (1) the L5-S1 extrusion, which appeared after her 2016 surgery, resulted from her industrial injury through a "chain of proximate causation," beginning with her injury; (2) the compensable consequences doctrine requires that Walmart be responsible for the consequences of her 2011 surgery, namely her current worsened condition; and (3) WAC 296-20-01002 requires that once Walmart authorized her 2011 surgery, it accepted responsibility for her underlying lumbar condition, which the 2016 surgery was intended to treat. We address each in turn.

1. Chain of proximate causation

Magdaleno says that the "chain of proximate causation" from her industrial injury to her current worsened state is unbroken and thus her objectively worsened condition is claim-related. Walmart and the Department counter that two intervening causes, aging and an unauthorized surgery, broke the chain of causation and thus Magdaleno's worsened condition is not claim-related.[3] We conclude that substantial evidence supports the assertion that Magdaleno's degenerative disc disease and not the industrial injury led to the 2016 surgery, and therefore her subsequent worsening was not caused by the industrial injury.

[3] Walmart also says that the trial court erred in giving jury instructions that the Department order finding the second surgery not proper and necessary was not binding. Walmart contends that because the order is binding, it prevents Magdaleno from arguing that the 2016 surgery was related to the claim. Because we affirm, we do not address this issue.

In the context of industrial insurance, the law defines proximate cause as a series of sequential events in which the cause produces a condition, and without the cause, the condition would not have occurred. Street v. Weyerhaeuser Co., 189 Wn.2d 187, 194, 399 P.3d 1156 (2017).

Substantial evidence shows that Magdaleno's current worsened condition would have occurred regardless of the industrial injury. She suffered from an unrelated degenerative disc disease. Drs. Champoux, Wacker, and Sabahi testified that they saw a degenerative disc disease present in Magdaleno's MRIs from before the 2011 surgery. Drs. Wacker, Sabahi and Champoux opined that the disease was not caused by the industrial injury.

Magdaleno says that her subjective symptoms after the 2011 surgery were caused by a re-herniation, and that therefore her symptoms were tied to the industrial injury. But we may look at only objective medical evidence. And Dr. Wacker testified that Magdaleno did not suffer a re-herniation.

Instead, substantial evidence shows that the 2016 surgery was intended to treat symptoms arising from the degenerative disc disease, not the industrial injury. The degenerative disc disease, not any claim-related pathology, explains Magdaleno's symptoms after the 2011 surgery. Dr. Sabahi testified that "everything had remained stable" after the 2011 surgery and there was no real pathology aside from the degenerative disc disease. Drs. Sabahi, Wacker, and Champoux noted a progression of the degenerative disc disease after the 2011 surgery. Also, the 2011 surgery addressed a bulge on her right side, with the

resultant scarring also appearing on the right side. Meanwhile, the degenerative disc disease was asymmetric towards the left. The 2016 surgery treated both the right and left sides of the spine while the 2011 surgery treated only the right.

Magdaleno was objectively worse after the 2016 surgery. Substantial evidence shows this. The experts identified an extrusion[4] on Magdaleno's post-2016 surgery MRI that was not present in her earlier imaging. As mentioned above, Walmart and the Department do not dispute her worsening.

But substantial evidence shows that the 2016 surgery caused the objective worsening. Drs. Wacker, Champoux, and Sabahi testified that Magdaleno's objective worsening was most likely caused by the 2016 surgery. These three physicians testified that an extrusion is more likely to occur soon after a surgery in which the annulus[5] is cut, before it has a chance to heal. So, they opined that the 2016 surgery, during which her annulus was cut, caused the extrusion, given its temporal proximity to the objective worsening.
Dr. Laohaprasit testified that the objective worsening occurred before the 2016 surgery but cited only Magdaleno's subjective complaints as a basis for his conclusion.

Given the foregoing, viewing the facts and reasonable inferences therefrom in the light most favorable to the Department and Walmart, substantial evidence supports the jury's finding no claim-related condition objectively

[4] The record refers in some portions to "extrusions" and in others to herniation. An extrusion is a type of herniated disc, but not all herniated discs are extrusions.

[5] The annulus provides a rigid structure for a lumbar disc and when it is cut—for instance during a laminectomy—the structural integrity of the spine is affected and the spine can suffer extrusions in which the inner filling of a disc is squeezed out.

worsened between the terminal dates. Substantial evidence shows that the unrelated degenerative disc disease, which led to the 2016 surgery, caused the objective worsening between the terminal dates.

2. Compensable consequences doctrine

Magdaleno says that the 2011 surgery necessitated the 2016 surgery and thus her worsened condition is compensable as the consequence of treatment. Walmart counters that because the 2016 surgery treated conditions distinct from the industrial injury or the result of the 2011 surgery, the worsening after the 2016 surgery was not a compensable consequence of treatment. The Department argues similarly, noting that the 2016 surgery was not approved. Because application of this doctrine turns on whether the worsened condition is "proximately traceable" to the industrial injury, and we conclude above that no proximate causation exists, we reject Magdaleno's argument.

If treatment for an industrial injury complicates or aggravates a condition, then the claim covers the consequences of treatment. Clark County v. Maphet, 10 Wn. App. 2d 420, 438, 451 P.3d 713 (2019). A worker who suffers from medical malpractice or negligent treatment can recover for the costs of correcting such treatment. Id. at 439. The key question is whether the condition is "proximately traceable" to the industrial injury. Id. (quoting Ross v. Erickson Const. Co., 89 Wash. 634, 648, 155 P. 153 (1916)). "Proximately traceable" does not mean the complained-of condition has to arise from the industrial injury. Maphet, 10 Wn. App. 2d at 440. Rather, it means that the complained-of

condition arose from treatment that was administered to address the industrial injury. Id.

As discussed above, the record contains substantial evidence to find that Magdaleno's worsened condition is not proximately traceable to the industrial injury or the 2011 surgery, and thus is not a consequence of treatment.[6]

3. WAC 296-20-01002 and Maphet

Magdaleno says that, based on WAC 296-20-01002's definitions of "authorization" and "accepted conditions," when Walmart authorized her 2011 surgery, it necessarily accepted her underlying lumbar condition, and is therefore responsible for the condition and for the results of the 2016 surgery, which she claims was a treatment for the accepted condition. And she says that this argument prevailed in Maphet. Walmart responds that WAC 296-20-01002 is an interpretive, and not a binding, rule; Maphet was incorrectly decided; and the 2016 surgery treated conditions different than the 2011 surgery address. The Department says that while Maphet was correctly decided, it is distinguishable from this case. We conclude, based on the analysis above, that substantial evidence existed for the jury to find that the 2016 surgery addressed a condition different from the industrial injury, and therefore Walmart's authorization of the 2011 surgery did not mean that it accepted her degenerative disc disease.[7]

[6] No objective medical findings support the argument that the 2011 surgery caused an objective worsening after the first terminal date and before the 2016 surgery. Between claim closure and the 2016 surgery, there is only subjective proof of worsening, the objective proof of worsening comes only after the 2016 surgery.

[7] Thus, we do not address whether Maphet was correctly decided, or whether WAC 296-20-01002 is binding.

WAC 296-20-01002 defines "authorization" as notification by the self-insured employer that "proper and necessary treatment . . . of an accepted condition will be reimbursed." It defines "accepted condition" as a determination by the self-insured employer that "reimbursement for the diagnosis and curative or rehabilitative treatment of a claimant's medical condition is the responsibility" of the self-insured employer. The court in Maphet held that when an employer authorizes treatment for a condition, it accepts responsibility for that condition. 10 Wn. App. 2d at 435.

WAC 296-20-01002 does not apply here because, based on our analysis above, substantial evidence supports finding that the 2016 surgery was intended to treat a different problem (i.e., degenerative disc disease) than the 2011 surgery treated (i.e., industrial injury). Also, the 2016 surgery treated both the right and left sides of the spine while the 2011 surgery treated only the right.

And Maphet is distinguishable because the surgery there, which caused the worsening, was an authorized procedure. 10 Wn. App. 2d at 424. In Maphet, five separate surgeries were authorized to treat an industrial knee injury. Id. During the fifth surgery the surgeon released knee ligaments, which caused a patellofemoral instability, unrelated to the industrial injury. Id. Thus, an authorized surgery caused the new condition. The employer authorized three more surgeries aimed at fixing the instability, not the original industrial injury. Id. But the employer refused to authorize a ninth surgery for the instability, and Maphet sought to have the employer pay for it after the surgery was performed.

Id. Magdaleno says that her case is like Maphet in that the 2011 surgery, which was authorized, caused her worsening. There is substantial evidence, however, that Magdaleno's worsening was caused by the 2016 surgery. And the 2016 surgery was not authorized.

B. Attorney Fees

Magdaleno requests an award of attorney fees under RCW 51.52.130. Because we affirm the trial court's ruling, we deny her request.

We affirm.

Chun, J.

WE CONCUR:

Leach, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IMELDA MAGDALENO, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, and WALMART STORES, a Washington Corporation, Respondent.	No. 79833-2-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Imelda Magdaleno moves for reconsideration of the opinion filed on November 23, 2020. Respondent Department of Labor and Industries and Respondent Walmart Stores filed separate answers. A majority of the panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

CERTIFICATE OF SERVICE

SIGNED at Seattle, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 17th day of February 2021, the document to which this certificate is attached, Imelda Magdaleno's Amended Petition For Review, was served to each of the following recipients in the manner stated:

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