67053-1 67053-1

No. 67053-1-I

WASHINGTON COURT OF APPEALS, DIVISION 1

THOMAS L. ACKLEY,

Respondent/Plaintiff,

v.

THE HOME DEPOT, INC.,

Appellant/Defendant.

APPELLANT'S BRIEF

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INTRODUCTION

The defendant in this Industrial Insurance case appeals a Snohomish County Superior Court decision that allowed both the aggravation of an injury with respondent Rite Aid and a new occupational disease claim with appellant The Home Depot. Both claims involve the worker's right knee. At the Department level, the aggravation of the Rite Aid claim was allowed and the new claim with The Home Depot was denied in a joint order. Neither employer contests Mr. Ackley's current condition is due to an industrial injury. The sole dispute is whether the trial court erred by failing to identify one employer as being responsible for the claim.

Respondents contend it is permissible to have both an aggravation of a prior industrial injury and simultaneously, have an allowed occupational disease for the same body part between successive employers. They make no effort to explain how the cost and responsibility for the claim would be split between the two employers. This interpretation ignores prior Board precedent and the Washington Administrative Code ("WAC").

Pursuant to WAC 296-14-420, when there is a dispute regarding whether benefits shall be paid pursuant to the reopening of an accepted

claim or allowed as a claim for a new injury or occupation disease, the Department shall make a determination in a single order. The Department did so. For reasons that are not clear, the Industrial Appeals Judge declined to follow the Department order and did not address the WAC. The Board of Industrial Insurance Appeals and the Superior Court affirmed the judge but neither issued written rulings explaining their decision. The Home Depot contends the Board and Trial Court failed to apply the relevant WAC and stopped short of completing the necessary analysis to evaluate the issue of "responsibility" for the costs of the claim.

ASSIGNMENT OF ERROR

The trial court erred in failing to determine whether work activities with The Home Depot represented a supervening cause of Mr. Ackley's knee condition and thus, failed to address responsibility.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Both the Department of Labor and Industries and the Board of Industrial Insurance Appeals have mechanisms for determining compensability when addressing whether there is an aggravation of a prior injury with one employer followed by a claim for a new occupational disease claim with another. Contained within the compensability analysis is a determination of which employer is responsible for benefits under the

claim. In sum, the Department and Board must address whether the original injury is worse, whether the worsening is causally related to employment, and finally, who bears responsibility. The trial court determined that each claim was independently compensable without determining which employer bears claim costs. Such analysis is contrary to well-established principles of responsibility and Department rules. Did the court err in completing only two thirds of the analysis?

STATEMENT OF THE CASE

Thomas Ackley ("claimant") is a 54-year-old who worked as a sales associate, supervisor, assistant manager, and store manager at Rite Aid between 2002 and May 14, 2005. CP 25, 40. On December 10, 2002, he injured his right knee while chasing a shoplifter out of the store. CP 40. The Department allowed the claim and claimant underwent surgery to repair his right meniscus. CP 40. Claimant completed a course of physical therapy after the surgery and continued his regular duties with Rite Aid. CP 25. The claim closed May 30, 2003 with an award of permanent partial disability. CP 40.

Claimant left Rite Aid in May 2005 and began working in freight at The Home Depot until October 2005 when he became a supervisor. CP 41.

On September 22, 2006, he filed an application to reopen his claim with Rite Aid as he felt the current knee condition was related to his injury with Rite Aid. CP 40, 41. The Department initially reopened the claim with Rite Aid and, upon protest, allowed the claim as an occupational disease with The Home Depot while denying the aggravation application. CP 39, 40. The Home Depot filed a protest and the Department issued an order denying the claim with The Home Depot and reopening the claim with Rite Aid. CP 39, 40. Rite Aid appealed to the Board of Industrial Insurance Appeals November 26, 2007.

The parties presented the testimony of Dr. Stephen Carter, Dr. Leland Rogge, and Dr. Daniel Fife. Each addressed the issue of whether work activities with the Home Depot represented a supervening cause of claimant's current knee condition. The Board judge issued her Proposed Decision and Order February 5, 2009, determining that the evidence established both an aggravation of a prior industrial injury with Rite Aid and a new occupational disease with The Home Depot. CP 42. The judge failed to address responsibility. The Home Depot appealed and the trial court affirmed the Board decision.

SUMMARY OF ARGUMENT

Appellant raises one assignment of error – the court erred by failing to determine which entity was responsible for the costs of the claims. In reaching its determination, the court was required to assess whether the injured worker's work activities with appellant represented a *supervening* cause of his current knee condition. The decision ignored Department rules and Board cases that clarify when successive employers are responsible for conditions that arise out of an aggravation of a preexisting work-related injury with a different employer. Failure to address responsibility was in error.

ARGUMENT

A. The trial court erred in failing to determine responsibility between the two successive employers.

1. Standard of Review: Legal determinations are reviewed under an error of law standard.

The only assignment of error challenges the trial court's refusal to assess responsibility by addressing whether work with The Home Depot represented a supervening cause of claimant's current knee condition. A trial court's legal determinations are reviewed under an error of law standard which allows this Court to substitute judgment for that of the

lower court. *Energy Northwest v. Hartje*, 148 Wn.App. 454, 199 P 3d 1043 (2009).

2. Responsibility must be addressed when determining compensability.

There are three aggravation scenarios in which the Department, or trier of fact, must determine whether there exists an aggravation of a prior condition versus a new injury or disease. Necessary to each compensability determination is a determination of responsibility. When deciding compensability of aggravation claims, the questions that must be answered is (1) are there objective findings of a worsening; (2) is such worsening industrially related; and (3) who should bear responsibility?

The first scenario, and most common, involves non-industrially related conditions followed by an industrial injury or occupational disease. *Miller v. Dep't of Labor & Indus.*, 200 Wn 674, 94 P 2d 764 (1939). *Miller* requires that a preexisting condition is to be attributed to an injury when the injury lights up or makes active a latent or quiescent infirmity or weakened physical condition. Whether there is a causal relationship between the injury and active preexisting condition remains one of proximate cause. *Simpson Logging Co. v. Dep't of Labor & Indus.*, 32 Wn.2d 472, 202 P 2d 448 (1949). If the preexisting condition is

proximately aggravated by the injury or occupational disease, full responsibility for the injury rests with the employer.

The second scenario is where a worker sustains a work related injury and a subsequent non-work related aggravation. In such cases, the court must determine whether the aggravation producing activity is something in which an individual might reasonably be expected to participate. *McDougle v. Dept' of Labor & Indus.*, 64 Wn.2d, 640, 393 P 2d 631 (1964). Stated differently, an aggravation caused by activity in which claimant could not, because of the existing disability, reasonably expect to engage without injury, is not compensable. An aggravation caused by reasonably expected activity does not allow an employer to avoid ongoing responsibility from the claim.

Finally, like this case, a worker may have an initial injury followed by a subsequent industrial injury or occupational disease. The issue rests not so much on whether there is a compensable claim, but rather which entity is going to pay for the entire cost of the claim.[1] Though the Board

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[1] Responsibility is also required determination in cases where the Last Injurious Exposure Rule applies. However, as discussed in appellant's brief, the Last Injurious Exposure rule does not apply to injury cases and is therefore inapplicable in this matter.

failed to follow its own precedent in this case, responsibility must be determined and should be evaluated under a supervening cause standard.

3. The Board has created a mechanism for determining responsibility at the time of compensability by assessing whether the new occupational disease represents a supervening cause.

If subsequent work conditions do not constitute a supervening cause of an injured worker's current condition, the prior employer is responsible for all claim costs associated with such condition. *In re Donald R. Dolman*, BIIA Dec., 05 11285 (2006)[2]; *In re Leonard C. Roberson*, BIIA Dec., 89 0106 (1990); *In re Robert D. Tracy*, BIIA Dec., 88 1695 (1990); *In re Milton Fuentes*, Dckt. No 01 32607 (March 7, 2003) *citing In re Stanley Lee*, BIIA Dec., 09 425 (1959). The Court of Appeals has never addressed this scenario.

Furthermore, the last injurious exposure rule does not apply to industrial injury claims. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 141 P 3d 1 (2006). An injury is a discrete and isolated event occurring at a specific moment in time and the problems of proof inherent in occupational disease claims, to which the rule does apply, are not present

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2 The Board of Industrial Insurance Appeals publishes its significant decisions pursuant to RCW 51.52.160. These decisions are non-binding; however, they are persuasive authority for this court. *Weyerhaueuser Co. V. Tri,* 117 Wn.2d 128, 138 P 2d 629 (1991).

in industrial injury cases. *Id.* The last injurious exposure rule was created to address the problems proving how much specific exposure contributed to an underlying occupational disease. In this case, we have an underlying injury with a subsequent occupational disease. The same problems of proof do not exist and thus, the last injurious exposure rule is inapplicable.

In order for The Home Depot to be deemed responsible for the entire cost of the claim, the evidence must have established work activities with The Home Depot were a supervening cause of claimant's condition. Because the evidence establishes work at The Home Depot did not constitute a supervening cause, independent of the prior injury, Rite Aid remains responsible for all claim costs. The trial court erred in failing to follow this analysis.

4. The Department has a mechanism for addressing responsibility by deciding which entity is responsible in one determinative order.

WAC 296-14-420 requires the Department to make an initial responsibility determination whenever there is a substantial question of whether benefits should be paid pursuant to an aggravation or new occupational disease. The rule reads the following:

> (1) Whenever an application for benefits is filed where there is a substantial question whether benefits shall be paid pursuant to the reopening of an accepted claim or allowed as a claim for a new injury or occupational disease, the department shall make a

> determination in a single order. Where one of the claims is with a self-insured employer and another is with a state fund employer, such determination shall be made jointly by the program managers for claims administration and self insurance, or their respective designees.
>
> (2) Pending entry of the order, benefits shall be paid promptly by the entity which would be responsible if the claim were determined to be a new injury or occupational disease.
>
> (3) The department is required to act under this rule only if:
>
> > (a) There is substantial evidence that the worker will be determined to be entitled to benefits on one of the claims; and
> >
> > (b) There is uncertainty regarding which of the entities is responsible.
> >
> > (c) The Department followed the WAC and issued one joint order in this case.

5. The recent *Pineda* decision is not applicable to this case.

The Board recently reached a decision by concluding the sole focus between an aggravation and a new injury between was simply whether the new event met the statutory requirements necessary to support allowance of the claim. *In re Soledad Pineda*, BIIA Dec., 08 19297 (2010)[3]. Elaborating, the Board stated whether the events are supervening is relevant only in the context of a determination of the responsibility for

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3 This decision is currently on appeal in Benton County Superior Court Cause Number 11-2-00024-6.

the underlying medical conditions, not to a determination if an industrial injury has occurred. However, the Board was addressing two separate injuries between *one* employer. Here we have two successive employers, creating practical problems of responsibility for claim benefits.

Moreover, the procedural posture of *Pineda* involved eight appeals in three separate claims at the Department. An aggravation was filed for a 2007 injury with Gannon's Nursery, while two subsequent injury claims were filed with one employer – Barrett Business Services Inc. The Department did not issue one joint order for the aggravation claim and the new injury claims pursuant to WAC 296-14-420. Rather, the only joint order issued was to acknowledge the two injury claims with Barrett Business Services were being consolidated. Presumably, the Department did not address the issue of responsibility as there was no uncertainty regarding whether Gannon's Nursery or Barrett Business Services was responsible for benefits under each claim. Though the issue of responsibility should be addressed by the Board as part and parcel to compensability, the procedure of this case led the Board to a different decision.

This case is distinguishable on the basis that the Department issued one joint order under WAC 296-14-420, initially assigning responsibility

to The Home Depot and denying the aggravation claim with Rite Aid. Upon protest, the Department reversed its joint order and assigned complete claim responsibility with Rite Aid and denied the new claim with The Home Depot. Moreover, the evidence in this claim addresses one body part and physical condition – there is no distinction between the condition that was caused by both the original injury and arguably aggravated by new occupational disease claim.

To the extent dicta contained in the *Pineda* decision applies to this case, the Court should resolve the dispute in favor of addressing responsibility. The *Pineda* Board noted the supervening cause issue only pertains to responsibility to underlying medical conditions – this is precisely what Rite Aid and The Home Depot dispute in this appeal. Remanding to the Department will only result in the two employers re-disputing which entity remains responsible for benefits. There is no dispute Mr. Ackley will ultimately need an entire knee replacement. In having two open claims with two successive self-insured employers for the same body part, the dispute over who pays remains until responsibility is determined - a determination that the Department already made. By deferring the determination of responsibility, the court delayed benefits to

the injured worker and created uncertainty between two successive employers regarding the payment of such benefits.

6. Clevenger does not establish responsibility.

The Board judge also erred in remanding the claim to the Department to address whether The Home Depot, as the "insurer on the risk," would bear the full costs of the claim and to determine issues of potential apportionment. The Industrial Appeals judge relied on *Clevenger, supra*, in noting The Home Depot is the "insurer on the risk" for purposes of addressing the last- injurious-exposure rule. However, as discussed in *Clevenger*, the last-injurious-exposure rule is inapplicable in industrial injury cases. *Clevenger* addressed an initial injury followed by an occupational disease claim between two successive insurers. Procedurally, this case is no different. As such, it is immaterial to determine the employer on the risk. This claim does not involve one occupational disease with successive insurers. Therefore, the prior employer remains responsible for the entire claim costs unless subsequent employment activities represent a supervening cause. *See Tracy, supra; Clevenger, supra.*

7. *Roberson* and *Dolman* analysis should be followed.

The *Roberson* and *Dolman* cases involved allowed industrial claims cases followed by a subsequent occupational disease. Both cases

involved significant questions of whether to allow a new occupational disease versus an aggravation of a prior injury. Thus, the Board had to determine whether to reopen the prior claim or allow a new occupational disease.

The judge noted that a new injury and an aggravation of a prior claim are not necessarily mutually exclusive. However, neither the *Roberson*, nor *Dolman* cases resulted in the Board allowing both a new injury and an aggravation. The facts of this case do not warrant that result.

In *In re Leonard C. Roberson*, BIIA Dec., 89 0106 (1990), the Board established that a worker's condition may qualify as a worsening that requires reopening and as a new claim. However, in *Roberson*, the Board specifically found that claimant's "subsequent employment * * * constituted a supervening cause" and denied reopening of the old claims and allowed a new claim. *Roberson* at 5.

In *Dolman*, the claimant had an allowed claim for a shoulder condition while employed with Asplundh Company. After closure, the claimant began working for Superior Electric and later filed an aggravation of the prior claim as well as a claim for a new occupational disease with Superior Electric. The Board found the claimant's condition was a result of both the prior claim and the distinctive conditions of employment with Superior Electric. However, the evidence established

employment with Superior Electric was not a supervening cause of the claimant's condition. The Board noted, "The question could be framed as 'but for the original industrial injury, would the worker have sustained the subsequent condition? Or, in the alternative, did some subsequent event or events constitute a supervening cause, independent of his [original] industrial injury.'" *Citing Tracy, supra* at 6-7. Therefore, Asplundh remained responsible for all claim costs associated with the claimant's condition.

8. Responsibility framework should be applied.

Analyzing the *Clevenger*, *Roberson,* and *Dolman* decisions results in the following framework. First, *Clevenger* makes it clear that the last-injurious-exposure rule does not apply to this case as it does not apply to injury cases. Second, *Roberson* and *Dolman* stand for the proposition that though a worker may theoretically simultaneously have a reopened claim and a new claim, the new claim is allowed only if employment with the second employer is a supervening cause. In *Roberson*, the Board concluded the second employment was a supervening cause and therefore denied the reopening requests and allowed the new claim. In *Dolman*, the Board concluded the second employment was not a supervening cause and therefore allowed the reopening of the old claim and denied the new claim.

Moreover, this case is indistinguishable from a non-significant Board decision *In re Richard A. Heuschekel*, Dckt No. 93 1760 (July 1, 1994). The claimant in *Heuschekel* sustained an industrial wrist injury in 1990 while working for American Boiler, Inc. The claim closed and the claimant moved to Moses Lake to begin new employment in maintenance. In 1993, the claimant's wrist became objectively worse. The Board, in reopening the 1990 injury, determined that while the claimant's condition could be a new injury or occupational disease, there was little evidence to support the existence of a subsequent and supervening injury. In addition, the Board cited *McDougle, supra*, to conclude that it was reasonable for the claimant to have worked in maintenance after the injury and therefore, the symptoms and need for treatment would not be present "but for" the effects of the 1990 injury. *Id.* at 2. Likewise, but for the effects of the injury with Rite Aid, claimant would not have current disability and need for treatment.

Applying that rationale to the current case, if there is a worsening of claimant's condition and the employment at The Home Depot is a supervening cause then a new claim is allowed and the reopening request denied. If there is a worsening of claimant's condition and the employment at The Home Depot is not a supervening cause, then the new claim is not allowed and the Rite Aid claim should be reopened. The

Judge did not find that the employment at The Home Depot was a supervening cause. Therefore, the Department correctly denied Claim W-937542 and the Department's October 19, 2007 order should be reinstated.

CONCLUSION

The trial court erred in affirming the Board's decision and refusing to make a responsibility determination between the two successive employers. Doing so ignores prior Board precedent and WAC 296-14-420. The Court should determine whether work activities with the Home Depot represent a supervening cause and thus, assign claim responsibility.

Dated: August 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the original and one copy of **APPELLANT'S BRIEF** via first class mail, postage prepaid, with the United States Postal Service to the following the following:

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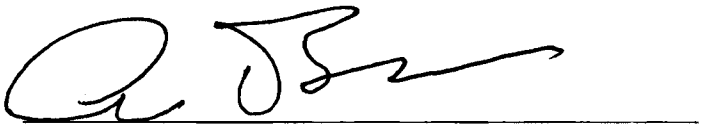

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