

No. 67053-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

HOME DEPOT,

Appellant,

v.

THOMAS ACKLEY and RITE AID, INC. and THE DEPARTMENT OF
LABOR AND INDUSTRIES

Respondents.

BRIEF OF RESPONDENT RITE AID

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ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the Board of Industrial Insurance Appeals was correct in finding that Mr. Ackley sustained an occupational disease in the course of his employment with Home Depot.

STATEMENT OF THE CASE

Mr. Ackley filed Claim No. W-494591 for an industrial injury to his right knee that occurred on December 10, 2002 while working for Rite Aid as an assistant store manager. CABR¹ 44 (Finding of Fact No. 2); Ackley Tr. 9-10, Aug. 20, 2008. In April 2003, Dr. Remington performed right knee arthroscopy consisting of a repair of the medial meniscus. Carter Dep. 14, Oct. 22, 2008. Mr. Ackley underwent physical therapy and recovered from the procedure. His claim was closed with an award of permanent partial impairment on May 30, 2003. Ackley Tr. 7.

Mr. Ackley went to work at Home Depot in May 2005 as a freight team member. Id. at 6. He worked the freight that came into the store at night. Id. at 10. The job consisted of moving freight, using a reach truck, standing forklift, and an electric pallet jack to move freight. Id. at 11. He

¹ "CABR" is the abbreviation for the Certified Appeal Board Record transmitted to the Superior Court from the Board of Industrial Insurance Appeals [Board]. An appeal to Superior Court from the Board is based upon the CABR. RCW 51.52.115.

stood on those machines while operating them, rather than sitting. Id. at 11-12. He also used an order picker which lifted him to the highest shelves in order to push the boxes onto the shelves for storage. Id. at 16-17. On average, thirty percent of his time was spent operating machinery. Id. at 17. The remainder of the time, he loaded product onto the shelves for sale. Id. at 17-18. The boxes and products weighed up to 40 to 50 pounds. Id. at 19. He stayed on his feet all of his shift. Id. at 21. Mr. Ackley worked in this position from May of 2005 to October of 2005, 40 hours per week. Id. at 10 & 25.

In September 2005, he returned to Dr. Stephen Carter for his right knee. Carter Dep. 53, 10-11.

In October 2005, Mr. Ackley became a supervisor at Home Depot. The job still entailed placing products on the shelves as well as customer service, supervising sales associates, and doing a limited amount of paperwork. Ackley Tr. 28-30. He still carried merchandise weighing up to 20 pounds, climbed ladders, and walked on concrete floors almost 40 hours per week. Id. at 20, 28. The bulk of the job still entailed walking and standing. Id. at 31.

Mr. Ackley's right knee condition worsened. When he saw Dr. Stephen Carter on July 27, 2006, his condition had changed. He was now complaining of increased knee pain and new symptoms. He developed

swelling, popping and stiffness. Id. at 52; Carter Dep. 54. He started limping and became bowlegged. Dr. Carter first prescribed narcotic medication then. Carter Dep. 41.

Mr. Ackley filed an application to reopen his 2002 claim with Rite Aid and also filed a new claim with Home Depot for his right knee as an occupational disease. CABR 43, 44.

The Department issued a joint order addressing both claims on July 18, 2007. CABR 138. The order allowed Claim No. W-937542 (the Home Depot claim) as an occupational disease with a date of manifestation of July 27, 2006, and denied Mr. Ackley's application to reopen Claim No. W-494591 (the Rite Aid claim). Id.

Following Home Depot's protest of the July 18, 2007 order, the Department issued a second joint order on October 19, 2007. CABR 55, 65. The October 2007 order denied Claim No. W-937542 against Home Depot for an occupational disease and granted Mr. Ackley's application to reopen Claim No. W-494591 with Rite Aid and denied acceptance of the left knee condition. Id. The Department's order did not address assignment of responsibility between the two claims. CABR 65. Rite Aid appealed to the Board of Industrial Insurance Appeals. CABR 61.

Following evidentiary hearings, the Industrial Appeals Judge of the Board of Industrial Insurance Appeals issued a Proposed Decision and

Order on February 5, 2009, that allowed the claim against Home Depot as an occupational disease and reopened the claim with Rite Aid. The Judge found, in part:

9. By the end of a shift as a supervisor with Home Depot, the claimant would feel pain in his right knee and would barely be able to lift his knees to get out of a chair.
10. By July 2006, the claimant required stronger pain medication to control his right knee pain. He also experienced increasing stiffness, popping and knee pain.
11. The distinctive conditions of claimant's employment, between October 2005 and July 2006, included the requirement that he spend most of the day walking about on a concrete floor. On a more probable than not basis, a proximate cause of the deterioration of the claimant's right knee condition was the claimant's employment with Home Depot during that time frame. CABR 45.

Home Depot filed a Petition for Review to the full Board of Industrial Insurance Appeals. CABR 4. The Board denied review and adopted the Proposed Decision and Order as its final decision and order.

CABR 1. The Board adopted the Conclusions of Law that:

4. The claimant, Thomas L. Ackley, sustained an occupational disease in the course of his employment with Home Depot which became manifest in July 2006, within the meaning of RCW 51.08.140.
5. Under the industrial insurance laws of Washington, a worker can suffer from both an aggravation of an

industrial injury and a new occupational disease. In re: Leonard C. Roberson, BIIA Dec., 89 0106 (July 5, 1990). CABR 46.

Home Depot filed an appeal to Snohomish County Superior Court. CP 6. At trial, claimant's counsel and the attorney for the Department of Labor & Industries both agreed that the Board's decision allowing the occupational disease claim was correct. Verbatim Report of Proceedings, 12, 28. After a bench trial, the Snohomish County Superior Court affirmed the decision of the Board of Industrial Insurance Appeals. CP 1. Home Depot now appeals to this court. CP 14.

SUMMARY OF ARGUMENT

The preponderance of the evidence presented at hearings supports the decision of the Board of Industrial Insurance Appeals that Mr. Ackley sustained an occupational disease to his right knee as a result of distinctive conditions of his employment with Home Depot. Mr. Ackley's right knee osteoarthritis was aggravated and hastened by his work at Home Depot.

The only issue before the Board, as limited by the provisions of the order on appeal, involving Home Depot was whether claimant's claim against Home Depot qualified as an occupational disease. The Board could not and did not address assignment of responsibility for the costs of the worsened condition between Rite Aid and Home Depot. The sole

issue before this court is whether the Board's decision is correct that the facts qualify as an occupational disease consisting of an aggravation of his pre-existing degenerative condition.

ARGUMENT

A. Standard of Review

Challenges to the Board's interpretation of the Industrial Insurance Act are reviewed de novo under the error of law standard. Littlejohn Const. Co., v. Dep't. of Labor & Indus., 74 Wn. App. 420, 423, 873 P.2d 583 (1994). The Court of Appeals should affirm the Board if substantial evidence supports the Board's findings. Cascade Valley Hosp. v. Stach, 152 Wn. App. 502, 507, 215 P.3d 1043 (2009). Preponderance of evidence is the standard of review. Id.

B. The issue assigned by Home Depot is not within the scope of review.

Home Depot assigns error to the failure of the Board of Industrial Insurance Appeals and Superior Court to address responsibility between two employers for Mr. Ackley's medical condition. App. Br. 2-3. However, neither the Board of Industrial Insurance Appeals nor the Superior Court possessed jurisdiction to address that issue. It is premature to decide apportionment of liability among the employers. The Board of

Industrial Insurance Appeals properly addressed the threshold issue of whether a claim against Home Depot should be allowed as either an industrial injury or an occupational disease. It did not possess authority to take the next step and decide “which employer bears claims costs.” App. Br. 3.

The Board’s jurisdiction is appellate only. Its jurisdiction is circumscribed by the Order issued by the Department of Labor & Industries. The order on appeal of October 19, 2007 rejected the claim with Home Depot and reopened the claim with Rite Aid. CABR 65. In the order of October 19, 2007, the Department of Labor & Industries did not address the apportionment of liability between Home Depot and Rite Aid. It did not assign responsibility for the costs for Mr. Ackley’s current condition.

On appeals to the Board, the Board issues an Interlocutory Order Establishing Litigation Schedule that outlines the issues on appeal. CABR 86. In this appeal, the Board correctly described the issue with regard to Home Depot as “whether the Department, in claim no. W-937542, correctly denied the occupational disease claim for a right knee condition occurring in the course of claimant’s employment with Home Depot.” CABR 86. Home Depot did not contest the description of the issue on appeal. WAC 263-12-045(3). Yet, Home Depot asks this court to

“evaluate the issue of ‘responsibility’ for the costs of the claim.” App. Br.

2.

This Division of the Court of Appeals declared in the oft-cited case Lenk v. Dep’t of Labor & Indust., 3 Wn.App. 977, 982, 478 P.2d 761

(1970), that:

“It is not disputed that the board's and the superior court's jurisdiction is appellate only, and for the board and the trial court to consider matters not first determined by the department would usurp the prerogatives of the department, the agency vested by statute with original jurisdiction. Both parties agree that if a question is not passed upon by the department, it cannot be reviewed by either the board or the superior court.”

The Department of Labor & Industries has not yet passed upon the issue of the assignment of the claims costs. It has only addressed the threshold questions of whether the claim against Rite Aid should be reopened and whether the claim against Home Depot should be allowed. It properly did so in a joint Order under WAC 296-14-420.²

² WAC 296-14-420 does not dictate that only one employer can be responsible for the claimant’s medical condition. The regulation simply creates a mechanism to ensure that decisions on both claims are made at the same time in order to avoid piecemeal or inconsistent appeals. The regulation does not provide that the Department must allow one claim and deny another. It simply states that when a dispute exists regarding reopening of one claim and the filing of a new different claim, the determination shall be made in a single Order. That order provides the framework for the scope of review on appeal.

This Court's declaration of the nature of the jurisdiction of the Board in Lenk is frequently cited by the Board of Industrial Insurance Appeals. Id. It is consistent with the later decision in Hanquet v. Dep't of Labor & Indust., 75 Wn. App. 657, 879 P.2d 326 (1994), *review denied* 125 Wn.2d 1019, 890 P.2d 20 (1995). In Hanquet, the Department rejected Mr. Hanquet's claim on the basis that he was a sole proprietor or partner at the time of the injury and had not elected coverage under subsection five of RCW 51.12.020. The Board of Industrial Insurance Appeals denied Mr. Hanquet's claim on a different basis. It decided instead that he was excluded from coverage under subsection three of RCW 51.12.020 instead because his work was not in the course of the trade, business, or profession of his employer. The Court of Appeals held that the Board exceeded its proper scope of review. Id. at 663-664. The scope of review was limited to only those issues which the Department previously decided. Since the Department had not passed upon the question of whether Mr. Hanquet's claim was specifically excluded by the subsection involving work in the course of the employer's profession, the Board could not address that exclusion.³ Id. *See also* Ruse v. Dep't of Labor & Indust.,

³ In attempting to avoid the effect of the Board's decision in In re Soledad Pineda, BIIA Dec. 08 19297 (2010), Home Depot argued that the Department already made a determination in Mr. Ackley's claim on who pays the costs. App. Br. 12. Yet, he cites no order that sets forth the assignment of responsibility. None exists.

138 Wn.2d 1, 8, 977 P.2d 570 (1999) [“An appellate court should not address an issue upon which the Department did not rely in denying the claim.”]; Brakus v. Dep’t of Labor & Indust., 48 Wn.2d 218, 223, 292 P.2d 865 (1956).

The Board of Industrial Insurance Appeals and Superior Court recognized that the sole issue before them with regard to Home Depot was whether or not Mr. Ackley’s claim should be allowed as an occupational disease. CABR 42. After finding that the working conditions at Home Depot aggravated the arthritis and accelerated the disability, the Superior Court Judge stated that

“I understand that the Department now has the difficult task of apportioning responsibilities. That’s not before this Court at this time. The Department hasn’t had an opportunity to even act on that issue. When it does, maybe someone will review it again at a later point, but it’s not before the Court at this time.” Verbatim Report of Proceedings 33-34.

Given the evidence presented at hearings, both bodies found that Mr. Ackley’s claim against Home Depot should be allowed as an occupational disease. The focus of this appeal should be on whether that decision was correct. The scope of review does not extend to the question of how to apportion liability.

C. Home Depot concedes allowance of claim.

In its Assignment of Error and Argument, Home Depot has not assigned error to the issue of whether the claim against it for an occupational disease was properly allowed. Parties must state assignments of error together with the issues pertaining to the assignments of error. RAP 10.3(a)(4)(h). Home Depot presented no argument that the preponderance of evidence does not support the existence of an occupational disease at Home Depot. In the absence of such an Assignment of Error and Argument, the decision of the Superior Court should be affirmed.

D. The Department, Board and Superior Court *all* made the correct threshold determination.

Before a worker's compensation claim can be administered and benefits paid, a threshold determination must be made whether a claim is established under the Industrial Insurance Act. It can qualify as either an industrial injury under RCW 51.08.100 or as an occupational disease under RCW 51.08.140. An occupational disease is defined as "such disease or infection as arises naturally and proximately out of employment ..." RCW 51.08.140. Two elements are necessary to prove an occupational disease: 1) the disease arose naturally out of employment; and 2) the disease arose proximately out of employment. In order to establish that a disease arose naturally out of employment, distinctive

work conditions must more probably than not have caused the disease or disease-based disability than conditions in everyday life or all employments in general. Dennis v. Dep't of Labor & Indust., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). In order to establish that the disease arose proximately out of employment, the worker must show that conditions of employment proximately caused or aggravated his condition. Simpson Logging Co. v. Dep't of Labor & Indust., 32 Wn.2d 472, 479, 202 P.2d 448 (1949); City of Bremerton v. Shreeve, 55 Wn. App. 334, 339, 777 P.2d 568 (1989).

Home Depot did not cite or analyze the two landmark cases of Dennis and Simpson that set forth the elements for establishing or refuting the existence of an occupational disease. Home Depot appears to concede that the facts and medical evidence in Mr. Ackley's claim do qualify as an occupational disease. This should be the end of the inquiry given the scope of review.

Further, in its Motion for Summary Judgment in Superior Court, Home Depot conceded that, for purposes of the Motion, it "does not dispute the Board's ultimate findings of fact." Employer/Plaintiff's

Motion for Summary Judgment, 3, CP 161.⁴ One of the ultimate findings of fact was that

“The distinctive conditions of claimant’s employment with The Home Depot between October 2005 and July 2006, included the requirement that he spend most of the day walking about on a concrete floor. On a more probable than not basis, a proximate cause of the deterioration of the claimants’ right knee condition was the claimant’s employment with Home Depot during that time frame.” (Proposed Decision and Order, Finding of Fact No. 11, CP 162).

Thus, Home Depot has conceded that the elements of an occupational disease have been satisfied.

E. Evidence establishes an occupational disease.

The definition of an occupational disease includes the aggravation of a pre-existing disease by conditions of employment. Dennis, 109 Wn.2d at 474. The existing disease can be either symptomatic or not symptomatic. Id. at 476. In other words, if a worker is already suffering from a disease such as arthritis and the working conditions aggravate⁵ it to

⁴ Home Depot later withdrew its Motion for Summary Judgment.

⁵ As background, the term “aggravation” is used in two different contexts in workers’ compensation law and has two different meaning which leads to confusion. First, in order to reopen a claim for “aggravation” of an industrial condition under RCW 51.32.160, a worker must show that the industrially related condition has become objectively worse. That type of aggravation requires objective worsening, which is the first question proffered by Home Dept in its incorrect three part framework. App. Br. 6. However, that question is irrelevant in the context of whether Mr. Ackley has established an occupational disease claim against Home Depot. A different concept of aggravation exists in occupational disease cases, i.e. whether distinctive work conditions

the point of disability, the employer is responsible. Id. at 483. The fact that the definition of an occupational disease encompasses aggravation of already symptomatic condition comports with, as the Dennis court phrased it, “the basic aggravation rule”:

“ ‘[p]re-existing disease or infirmity of the employee does not disqualify a claim under the ‘arising out of employment’ requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought.’ (footnotes omitted)(*quoted in Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash. 2d 553, 556, 295 P.2d 310 (1956)) and 1B A. Larson, *Workmen’s Compensation* §41.63, at 7-454 (1987) (most courts hold that when distinctive employment hazards act upon pre-existing weakness, disease, or susceptibility to produce a disabling disease, the result is an occupational disease.)” Id. at 475.

Employers take workers as they find them, with their pre-existing frailties and bodily infirmities and even pre-existing workers’ compensation claim injuries. Thus, it is irrelevant whether Mr. Ackley’s 2002 Rite Aid injury was or was not symptomatic when he went to work for Home Depot [although the evidence showed he had no treatment from October 2004 to September 2005]. Carter Dep. 40. The relevant inquiry is whether the work activities at Home Depot aggravated Mr. Ackley’s

“aggravated” a worker’s pre-existing disease and made it disabling. Dennis, 109 Wn.2d. at 483. Thus, Home Depot is mixing two different concepts of aggravation contained in Industrial Insurance law.

condition and made it disabling. It is sufficient if the working conditions hastened or accelerated the progression of his condition. Harbor Plywood Corp. v. Dep't of Labor and Indust., 48 Wash. 2d 553, 556-58, 295 P.2d 310 (1956); Dennis 109 Wn.2d at 475.

In a claim similar to Mr. Ackley's claim, in Simpson Timber v. Wentworth, 96 Wn. App. 731, 739, 981 P.2d 878 (1999), the court allowed an occupational disease claim for aggravation of a foot condition from walking on a concrete floor. The court stated that the evidence supported the Board's finding that standing for prolonged periods of time aggravated the claimant's foot condition. The employer tried to argue that standing on concrete floors could not be a distinctive condition of employment. The court disagreed. Id. at 736. The court also noted that the worker is to be taken as he or she is. Id. at 738. The court stated that whether prolonged standing aggravated Ms. Wentworth's foot condition is a "question that was properly left to the trier of fact. The L & I, the Board, and the jury found in favor of Wentworth." Id. at 733. The Court accepted the claim as an aggravation of a pre-existing condition. Id. at 739.

Similarly, in Shreeve, the court granted allowance of an occupational disease claim when working conditions aggravated a chronic kidney infection. 55 Wn. App. at 342. The court explained that the "multiple proximate cause theory" is "but another way of stating the fundamental

principle that, for disability assessment purposes, a workman is to be taken as he is, with all of his pre-existing frailties and bodily infirmities.” *Id.* at 340; Wendt v. Department of Labor & Industries, 18 Wn. App. 674, 682-683, 571 P.2d 229 (1977). The pre-existing condition is not the cause of the injury “but merely a condition upon which the ‘proximate cause’ operated.” Shreeve, 55 Wn. App. at 341. The court further explained that, in an occupational disease case, it is the *disability*, not the disease, that is compensable (emphasis in original). *Id.* at 341. Mr. Ackley’s condition became disabling in July 2006; the aggravation caused by prolonged walking on concrete floors and other harmful activities meets the definition of an occupational disease.

The facts demonstrate that the Board correctly allowed an occupational disease claim against Home Depot. The facts show that Mr. Ackley worked as a store manager at Rite Aid until May 2005. He began work as a night shift freight team member at Home Depot in May 2005 which required him to put away merchandise which varied greatly in weight and size, ranging from power tools to kitchen cabinets. *Ackley Tr.* 6, 11, 13. The weights ranged from 6 pounds to 60 pounds. *Id.* at 19. He spent 30 percent of his time on average working on machinery such as an order picker in which he is strapped onto a platform while standing and then lifted to high shelves to unload product. *Id.* at 12, 17. When he was

not on the machinery, he would open boxes and put products on shelves. Id. at 17-18. He climbed ladders about ten times per shift. Id. at 22-23.

In October 2005, his job shifted to a supervisory position at Home Depot. Id. at 19. In that capacity, he continued to stand and walk on concrete floors. Id. at 31. He only completed paperwork for three hours per week. During the remainder of the time, he continued to climb ladders and continued to shelve UPS freight items weighing up to 20 pounds. Id. at 28. He supervised sales associates, provided customer service and oversaw the stocking of shelves. During lunch breaks while employed at Home Depot, he went to his truck and put his feet up, an activity that did not take place while he was still working at Rite Aid. Id. at 29. He continued to stand and walk on concrete floors. Id. at 31. He walked “all day.” Id. at 31.

Mr. Ackley told one of the doctors who examined him, Dr. Walter Fife, that at the beginning of his shift at Home Depot, he was able to climb up and down ladders, but by the end of his shift, he was “barely able to lift his leg to get out of a chair.” Fife Dep 30, Sept. 17, 2008; CABR 12.

The medical testimony shows that the work activities at Home Depot aggravated his right knee. Dr. Fife reviewed the most complete records of both Mr. Ackley’s medical condition and the nature of his work duties at Home Depot. He read Mr. Ackley’s discovery deposition

recording his work activities at Home Depot; he read Mr. Ackley's recorded statement describing his duties; and he reviewed the most complete set of medical records including records of knee problems before 2002 and diagnostic films. CABR 12-13, 15, 17, 24, 31, 32-33, 39. Dr. Fife testified that Mr. Ackley's condition worsened because "he was on his feet all day." Id. at 29. When asked to elaborate, he explained that the records he reviewed showed that Mr. Ackley's knee was affected by being on his feet at work. He also relied on Mr. Ackley's own statements to him. Mr. Ackley told Dr. Fife that :

"At the beginning of his shift he was able to get up and down ladders, but at the end of his shift he was barely able to lift his leg to get out of a chair. And at the end of the day he would go home and rest his knees, although they didn't keep him up at night." Id. at 30.

Dr. Fife concluded that the work activities at Home Depot impacted the progression of the osteoarthritis. Id. at 41-42. Importantly, he determined that distinctive work conditions at Home Depot had a "hastening effect or worsening effect." Id. at 42-43. Dr. Fife also testified that being on his feet on concrete floors all day did not do Mr. Ackley's right knee "any good." Id. at 70. Mr. Ackley's attorney asked Dr. Fife about the effect of activities of Home Depot work on Mr. Ackley and Dr. Fife replied that "He found that the more he was on his feet, the

more difficulty he had with his knees.” Id. at 71. Home Depot’s attorney then tried to reverse Dr. Fife’s opinion by asking: “...Now, just to clarify, Mr. Ackley didn’t exactly report that his activities at Home Depot were causing a worsening of symptoms; is that right?” Dr. Fife answered:

“Well, he said that in the beginning of the morning, you know, his knee was doing pretty good and by the end of the day he couldn’t hardly, you know, lift his leg, so during the course of a day the symptoms would be worse. They would improve at night. The following morning he would feel better and he would go to work. That’s the way he worked out his life at the Home Depot.” Id. at 74.

The opinion of Dr. Stephen Carter, a family physician treating Mr. Ackley, basically echoed Dr. Fife’s opinion that the work at Home Depot aggravated Mr. Ackley’s right knee. Dr. Carter began treating Mr. Ackley in April 2004. Carter Dep. at 7. He saw Mr. Ackley three times before Mr. Ackley began working at Home Depot, ending in October 2004. Id. at 7-9. There was a gap in treatment for almost one year until September 2005. Id. at 10, 52. However, four months after he started working at Home Depot, Mr. Ackley returned to Dr. Carter with increased complaints in September 2005. Id.

A comparison of his findings before and after Mr. Ackley worked at Home Depot is telling. In April 2004, Mr. Ackley had no swelling; he had no laxity showing any stretched or torn ligament; he had a negative

anterior drawer sign so there was no ACL instability. Id. at 49-50, 53. His chart notes do not mention any limping or bowleggedness before Mr. Ackley worked at Home Depot. In July 2006, after working at Home Depot for over a year, Mr. Ackley reported ongoing pain, popping stiffness, and swelling by the end of his work day. Id. at 54; Ackley Tr. 52. On examination, Dr. Carter found that Mr. Ackley was now bowlegged and that he now walked with a limp. Id. These are dramatic changes. These were symptoms Mr. Ackley had not experienced prior to working for Home Depot. The condition had advanced to the point that Dr. Carter decided to take X-rays of his knees. Id. at 55. He prescribed narcotic medication for the first time. Id. at 41. Mr. Ackley received an ever-increasing series of pain medications. Id. at 18. Mr. Ackley's objective findings continued to worsen in subsequent visits. Id. at 18, 21.

Dr. Carter testified that the activities that he assumed Mr. Ackley performed at Home Depot could be harmful to his knee. Id. at 58. Those harmful activities included walking all day on hard surfaces and climbing ladders, according to Dr. Carter. Id. As he described it, activities at Home Depot were not activities that he would advise him to do. Id. Mr. Ackley also told him that he had pain after walking all day at work. Id. Thus, the work conditions at Home Depot are the type of activities that can worsen

an arthritic knee condition and Mr. Ackley stated that they did indeed worsen his condition.

Last, the witness presented by Home Depot, Dr. Leland Rogge, also confirmed that the working conditions at Home Depot caused his current problem. First, he stated that his arthritis instigated his current problem more than the 2003 surgery. Rogge Dep.11, Oct. 6, 2008. Then, Dr. Rogge testified that “Nobody asked me if his duties caused him to have arthritis. Just ask me. I’ll answer.” Id. at 22. When specifically asked whether his activities at Home Depot caused his pain and swelling, Dr. Rogge replied, “I think it did, yes.” Id. Later when asked the key question, “Is it your testimony that the conditions at Home Depot aggravated his right knee condition and degenerative arthritis of the right knee?,” he answered “I think it probably did, yes.” Id. at 23.

The Board was correct in finding that the claim should be allowed as an occupational disease. The conditions of employment at Home Depot aggravated his pre-existing osteoarthritic condition and made it disabling. He did not need to take narcotic medication until July 2006 after he had been working at Home Depot. CABR 44; Carter Dep. 18, 41. He did not have difficulty lifting his leg to get out of a chair due to the activities at work until he worked at Home Depot. CABR 40, 45. He did not elevate his leg during his lunch hour until after he had worked as a freight team

member at Home Dept. Ackley Tr. 29. He did not complain of stiffness or popping until after he worked at Home Depot. CABR 45. He did not limp until he worked at Home Depot. CABR 41. He had no laxity until after Home Depot work. CABR 41, 44. He was not bowlegged until prolonged walking aggravated his condition sufficiently to change the structure in his knee. CABR 44. He did not spend a couple of hours in his recliner at the end of the work day to let his knees rest. Rogge Dep. 36. The work activities caused a disease-based disability, as set forth in Dennis, 109 Wn.2d at 481. The conditions of his employment at Home Depot, including prolonged walking on polished concrete floors, stocking shelves, climbing ladders multiple times a day, pushing boxes, moving products, and operating reachers, standing forklifts and pallet jacks aggravated his pre-existing degenerative knee condition.

The decision of the Board of Industrial Insurance Appeals is presumed to be correct. RCW 51.52.115. The burden is on Home Depot to overcome that presumption of correctness. RCW 51.52.115; WPI 155.03. The evidence in this case supports the Board's decision. The Snohomish County Superior Court Judge affirmed the Board's decision as correct. He reasoned:

“The evidence here supports the findings that both the injury at Rite Aid and the working conditions at Home Depot contributed to the disability of Mr. Ackley. And I

would find that Home Depot has not met its burden of proof to warrant overturning the decision of the Board.

I think the medical testimony is clear that the working conditions at Home Depot would have aggravated the arthritis, even without the injury, and would have resulted in disability and certainly accelerated the disability.

And with the question of whether there needs to be a supervening cause, I think with the parallel conditions of both the occupational injury and the occupational disease, there is no need for the Board to have found that one was a supervening cause over the other. I think it is sufficient, and I think there's plenty of evidence to support the fact that the but-for test has been met here. But for the conditions at Home Depot, Mr. Ackley's condition would not have worsened at the time it did and to the extent that it did." Verbatim Report of Proceedings 33.

The Court should affirm the Superior Court, and hold that the claim against Home Depot for an occupational disease should be allowed.

F. Analysis of Supervening Cause.

The concept of reopening an existing claim and, at the same time, allowing a new claim, is accepted in workers' compensation law. It is not "theoretical" as Home Depot suggests. App. Br. 15. The Board has repeatedly declared that the notions of reopening one claim and allowing another claim for the same medical condition for the same body part are not mutually exclusive. In re Robert Tracy, BIIA Dec. No. 88 1695

(1990): “A new injury and an aggravation of a pre-existing condition are not necessarily mutually exclusive.”

Home Depot insists that two such claims cannot exist at the same time. Home Depot suggests instead that, even if the elements of an occupational disease are met, the new claim cannot be allowed unless the Home Depot activities amount to a supervening cause. In doing so, Home Depot discounts the importance of the more recent Significant Decision of the Board of Industrial Insurance Appeals in In re Soledad Pineda, BIIA Dec. 08 19297 (2010) and instead relies on an older case in In re Leonard Roberson, BIIA Dec. 89 0106 (1990).

In Pineda, the worker had a pre-existing knee condition covered under a claim with a state fund employer Gannon’s Nursery. That claim was closed. Ms. Pineda went to work for a self-insured employer Barrett Business Services. In the course of that employment, her knee buckled. She fell on her knee twice and filed a claim each time. Pineda, at 3-4. Barrett Business Services contended that the two events injuring her knee were not “supervening” events but were instead aggravations of her pre-existing industrial injury. Barrett argued that while an event may be construed as either an aggravation of a pre-existing condition or a new injury, it cannot be both. Id. at 6. The Board rejected that contention. It held that the falls at work at Barrett could be both a new injury and an

aggravation of an old injury. The Board held that the correct analysis is whether the events at Barrett constituted compensable claims. The only issue was whether the events “meet the statutory requirements necessary to support allowance of the claim.” The Board declared:

We believe the proper focus of the inquiry is not on whether the events were supervening events or an aggravation. In other words, we need not determine whether the events are supervening events in order to determine whether the events can be considered industrial injuries. Nor do we need to determine whether the events must be considered an aggravation. Rather, the focus is entirely on whether the events of August 13, 2008 and September 12, 2008 meet the statutory requirements necessary to support allowance of a claim. Id. at 6.

The Industrial Appeals Judge at the Board of Industrial Insurance Appeals addressed this issue in Mr. Ackley’s claim and stated:

Under Board precedent, whether a worker has an aggravation of a pre-existing industrially related condition or a new occupational disease is not necessarily an ‘either/or’ analysis. As the Board pointed out in In re Robert D. Tracy, Dckt. No. 85 1695 (Feb. 2, 1990), at page 6:

“A new injury and an aggravation of a pre-existing condition are not necessarily mutually exclusive.” CABR 39.

The Board Judge dealt with the precise argument that Home Depot is offering in this appeal, i.e. that a condition cannot constitute both an aggravation of a prior claim and a new occupational disease under In re Leonard Roberson. The Judge stated:

Although Roberson upheld only the allowance of the new claim and reversed the allowance of the aggravation application against the former employer, I find that the decision clearly contemplates the possibility that a worker's condition may qualify as both, as the Board stated:

“So what is the difference between a new occupational disease and an aggravation of a pre-existing symptomatic condition which had been the basis of a prior claim? Under certain circumstances, the answer may be ‘none.’” CABR 39.

Although the Industrial Appeals Judge recognized that the Board decided in Roberson that the reopening application would be allowed and the new claim denied, that result did not mean that both claims cannot be open at the same time for the same condition. Id. The Board Judge in this appeal explained that in In re Margaret E. Wynalda, Dekt. No. 06 21292 (January 16, 2008), the Board “reiterated its view that Roberson had held that a compensable worsening of a condition can constitute both an aggravation and a new occupational disease, and remanded the claim back to the Department for a determination of whether Ms. Wynalda's claim constituted both.” Id. The Board of Industrial Insurance Appeals evidently agreed with this description of its view because it adopted the Proposed Decision and Order as its final decision. In Mr. Ackley's claim, the Industrial Appeals Judge did not have the benefit of the Board's decision in Pineda decided later in November 2010 but applied the same approach and reasoning.

Application of a “supervening” causation analysis may be difficult or impossible when the second claim is the type of occupational disease created in Dennis v. Dep’t of Labor & Indust., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987), in which employment conditions worsen or aggravate a pre-existing disease.⁶ An occupational disease can be simply an acceleration or hastening of degeneration. Simpson Timber v. Wentworth, 96 Wn. App. 731, 739, 981 P.2d 878 (1999). The nature of the disease presumes the existence of a prior medical condition which the conditions of employment worsen or accelerate. Given the definition of a supervening cause as a cause which is independent of the original injury, the type of occupational disease which constitutes an aggravation of the original injury may never really be an “independent” cause. Thus, the employer with the first claim would be responsible for all future worsening even if the condition would not have worsened at that time or at that rate in the absence of the subsequent work conditions. Workers would be consigned to the schedule of benefits applicable to the date of the very first injury or disease and the temporary total disability rate of the first original injury, even though he or she may be missing work 20 years

⁶ A question exists whether a supervening cause analysis even applies in occupational disease claims, particularly those consisting of an aggravation of a prior condition. Instead, does the last injurious exposure rule apply? Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 141 P.3d 1 (2006), is not determinative. It is distinguishable because no occupational disease claim was filed or allowed.

later at a job with far greater wages. The approach championed by Home Depot involves far-reaching implications.

Here, the only issue is whether the claim meets the statutory definition of an occupational disease. In Mr. Ackley's claim, at this time, it is not necessary for this Court (or the Board or Superior Court) to determine whether Mr. Ackley's work activities were a supervening event.

G. If supervening cause is required, the activities at Home Depot constituted a supervening cause.

In light of the fact that employers take workers as they find them, an occupational disease is rarely truly independent. A key legal construct in workers' compensation law states that if an injury or disease accelerates or hastens a medical condition, the employer is responsible for that condition even if the pre-existing condition would have progressed over time. Harbor Plywood, 48 Wash.2d at 556. A person's pre-existing frailty may be the product of a prior industrial injury. However, if the conditions of employment cause that pre-existing frailty to develop into a disability more quickly than it would naturally progress, the employment conditions are an independent cause of the aggravation or worsening, i.e. an independent cause of the hastening or acceleration of the disease.⁷

⁷ As Superior Court Judge explained, there is no need to analyze separately whether Home Depot was a supervening cause once "there's plenty of evidence to

Factually, Mr. Ackley's right knee already suffered from a degenerative condition before 2002. Mr. Ackley first sustained an injury to his right knee when he slipped and fell on ice in 2000, injuring both knees. Ex. 6. He had an abrasion of his right knee. Carter Dep. 46-47. Dr. Carter testified that the fall on ice could start the progression of arthritis. Id. at 39. Degenerative arthritis was evident at the time of the 2002 injury. Id. at 48; Rogge Dep. 15. When he had surgery on his right knee in 2003, he actually underwent surgery on his left knee at the same time for the same condition. Thus, the degeneration in both knees was progressing at the same rate to require surgery at the same time, even in the absence of the Rite Aid injury.

Like so many claims, Mr. Ackley's knee condition following his injury at Rite Aid stabilized. Carter Dep. at 45. His claim was closed. He was assigned a permanent partial disability award in recognition of the fact that it caused a permanent disability that would cause symptoms from time to time. He did take some over the counter medication after his claim was closed.

support the fact that the but-for test has been met. Verbatim Report of Proceedings 33. Since the evidence demonstrates that but for the work at Home Depot, he would not have reached his current status, Home Depot work operates as a supervening and independent cause of that degree of worsening.

Then, Mr. Ackley began working for Home Depot first as a freight team member and then as a supervisor. His jobs required prolonged walking on concrete floors, climbing ladders, lifting freight, working pallet jacks, and other strenuous activities. After one and one half years working at Home Depot, his knee condition flared up and worsened. He developed stiffness, popping, swelling, limping, bowleggedness, and limping.

The Home Depot working conditions caused the increase in findings resulting in disability involving at least limping and bowleggedness. That work was an independent cause of the worsening. Dr. Fife testified that if he never worked at Rite Aid, the work at Home Depot aggravated and hastened the disability. Fife Dep. 42-43. If he never had the injury at Rite Aid, he would still require the same need for treatment after 2006. Thus, the activities at Home Depot constitute an independent cause of the status of his condition in 2006 and 2007.

One can acknowledge that the definition of a supervening cause is not readily understood by individuals outside the legal community. However, Dr. Fife adequately described a supervening cause when asked if the working conditions at Home Depot constituted a supervening cause. The following questioning of Dr. Fife occurred:

“Q. And how would you define supervening, sir?”

A. It would have – Something would happen irrespective of something else happening. It would be independent.

Q. Okay. So was the occupational disease at Home Depot a supervening or independent cause of Mr. Ackley's diagnosis of aggravation of osteoarthritis of the right knee?

A. Yes.

Q. Did the distinctive conditions of Mr. Ackley's work at Home Depot constitute an aggravation of the right knee osteoarthritis independent of the Rite Aid injury of December 10, 2002?

A. Yes." Fife Dep. 45.

The question is not really whether the Home Depot activities constitute a supervening cause of the underlying knee disease; the question is whether the activities constitute an independent cause of the disability – the disease-based disability - beginning in July 2006. The Home Depot job duties that caused the additional progression above and beyond the natural progression of his degenerative condition constitute a supervening cause independent of his prior injury at Rite Aid. He would not have experienced the acceleration of symptoms in the absence of the job activities at Home Depot. The acceleration or hastening of symptoms that would not have occurred but for the Home Depot job equates to a supervening cause.

CONCLUSION

The decision of the Board of Industrial Insurance Appeals that Mr. Ackley sustained an occupational disease in the course of his employment at Home Depot is correct and should be affirmed. The claim should be remanded to the Department of Labor & Industries to take further action.

Dated this 14th day of October, 2011.

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