

NO. 67053-1-I

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

THOMAS L. ACKLEY, RITE AID, INC. and the DEPARTMENT OF
LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents,

v.

THE HOME DEPOT, INC.,

Appellant.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT THOMAS L. ACKLEY

GRADY B. MARTIN, WSBA #34875
WILLIAM D. HOCHBERG, WSBA #13510
RACHEL V. HAMAR, WSBA #43683

Law Office of William D. Hochberg
222 Third Avenue North
Edmonds, WA 98020
(425) 744-1220

ORIGINAL

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STATEMENT OF THE CASE

Thomas Ackley was fifty-four years of age at the time of his testimony in this matter and worked as a sales associate, supervisor, assistant manager, and store manager for Respondent Rite Aid, Inc. between 2002 and 2005. CP 25, 40. On December 10, 2002, Mr. Ackley seriously injured his right knee while chasing a shoplifter out of the Rite Aid store where he worked. CP 40. At the time of this injury, Mr. Ackley suffered from a pre-existing degenerative arthritis of the right knee. The Department of Labor and Industries (hereinafter “the Department”) allowed his claim and Mr. Ackley underwent right knee surgery for a meniscus tear. CP 40. Mr. Ackley returned to work at Rite Aid following this industrial injury. CP 25. His claim was closed on May 30, 2003 with an award for permanent partial disability of his right lower extremity. CP 40. Mr. Ackley continued to experience right knee pain and symptoms in 2004, and these symptoms gradually worsened over time.

In 2005, Mr. Ackley went to work for Appellant The Home Depot, Inc. CP 41. On September 22, 2006, he filed an application to reopen his claim with Rite Aid due to his worsening right knee condition. CP 40, 41. Mr. Ackley also filed a new claim for his right knee with his current employer at that time, Home Depot. After some

administrative indecision, the Department issued an Order on October 19, 2007, reopening the Rite Aid Claim and denying the Home Depot claim. CP 39, 40. Rite Aid appealed to the Board of Industrial Insurance Appeals (hereinafter “the Board”). A hearing was held, substantial expert medical testimony was taken, and Industrial Appeals Judge Joan M. O’Connell found the 2002 industrial injury at Rite Aid had worsened and accelerated the pre-existing degenerative condition in Mr. Ackley’s right knee. She affirmed the Department’s decision to reopen the Rite Aid claim. CP 42. Judge O’Connell also found, however, that Mr. Ackley’s distinctive work activities at Home Depot aggravated his right knee condition and the new claim should be allowed. *Id.* Home Depot appealed the Board’s Order to Snohomish County Superior Court. The Superior Court affirmed the Board’s decision.

STATEMENT OF THE ISSUE

Whether the allowance of an occupational disease claim is precluded by the reopening of a previous industrial injury claim for the same or similar medical conditions.

STANDARD OF REVIEW

Where, as here, the only assignment of error addresses an alleged matter of law, the standard of review of this Court is *de novo*. See Appellant's Brief, p. 5; *Watson v. Department of Labor and Industries*, 133 Wn.App. 903, 909, 138 P.3d 177 (2006).

ARGUMENT

A. Mr. Ackley's occupational disease claim with Home Depot was properly allowed.

An occupational disease is a disease that arises "naturally" and "proximately" out of employment. RCW 51.08.140. A disease arises "naturally" out of employment where the particular work conditions caused the condition more probably than the conditions of everyday life. *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987).

A disease arises "proximately" out of employment where the evidence establishes there exists no intervening independent and sufficient cause so that the disease would not have been contracted "but for" the exposure to conditions existing in the employment. *Simpson Logging Co. v. Department of Labor and Industries*, 32 Wn.2d 472, 479, 202 P.2d 448 (1949).

However, industrial insurance benefits are not limited to those workers in perfect health prior to their industrial injuries. *Kallos v. Department of Labor and Industries*, 46 Wn.2d 26, 30, 278 P.2d 393 (1955). The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities. *Wendt v. Department of Labor and Industries*, 18 Wn.App. 674, 682-83, 571 P.2d 229 (1977).

In an occupational disease case, it is the disability, not the disease that is compensable. *City of Bremerton v. Shreeve*, 55 Wn.App. 334, 777 P.2d 568 (1989). Accordingly, the Washington Supreme Court has concluded “disability resulting from work-related aggravation of a nonwork-related disease may be compensable as an occupational disease.” *Dennis*, 109 Wn.2d at 472.

In this case, Mr. Ackley suffered from pre-existing degenerative arthritis in his right knee that pre-dated both his injury at Rite Aid and his occupational disease at Home Depot. See Board Order dated February 5, 2009, Finding of Fact No. 2. The Board found Mr. Ackley had to walk almost all day on a concrete floor as part of the distinctive conditions of his employment at Home Depot. See Board Order dated February 5, 2009, Finding of Fact No. 8. Standing and moving on hard surfaces for prolonged periods has been found to be a distinctive condition

of employment by the appellate courts. *Simpson Timber Co. v. Wentworth*, 96 Wn.App. 731, 738, 981 P.2d 878 (1999).

The Board also found, based on medical evidence that is undisputed in the Appellant's Brief, that Mr. Ackley's work at Home Depot increased the pain and decreased mobility in his right knee, required stronger pain medication, and caused increased stiffness and popping. See Board Order dated February 5, 2009, Findings of Fact Nos. 9 and 10. Accordingly, the Board correctly found the distinctive conditions of Mr. Ackley's employment at Home Depot proximately caused a work-related deterioration of his pre-existing right knee condition.

B. The reopening of Mr. Ackley's previous industrial injury claim with Rite Aid does not preclude the allowance of an occupational disease claim for employment with Home Depot for the same or similar medical conditions.

The Washington Supreme Court has recognized in a long line of cases that when a sudden injury "lights up" a pre-existing, but latent or asymptomatic condition, the resulting disability is attributable to the injury and compensation is due. See, e.g., *Harbor Plywood Corp. v. Department of Labor and Industries*, 48 Wn.2d 553, 295 P.2d 310 (1956); *Miller v. Department of Labor and Industries*, 200 Wn.2d 674, 94 P.2d 764 (1939).

Similarly, industrial injuries that aggravate a preexisting symptomatic condition are covered under the claim even though the underlying pre-existing condition is not. Rather, it need only be “a” proximate cause or a proximate contributing cause, without which an aggravation or worsening would not have occurred. *Hurwitz v. Department of Labor and Industries*, 38 Wn.2d 332, 229 P.2d 505 (1951).

The Washington Supreme Court has also determined the aggravation of a pre-existing condition by a work-related aggravation may be compensable as an occupational disease. *Dennis*, 109 Wn.2d at 472. In other words, an aggravation of a preexisting condition by an injury, and an aggravation caused by a new occupational exposure are both covered by the Industrial Insurance Act. *Longview Fibre Co. v. Weimer*, 95 Wn.2d 583, 589, 628 P.2d 456 (1981); *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987).

These concepts are not mutually exclusive. The occurrence of an aggravation of a pre-existing condition and the occurrence of a new injury are not mutually exclusive. *In re Robert D. Tracy*, BIIA Dec., 88,1695 (1990). There is no Washington case law requiring the trier of fact to find either an aggravation or a new occupational disease. The

administrative rules governing the Department of Labor and Industries provide a framework for administering such claims, but do not require the Department to choose one employer over the other as the solely responsible employer. WAC 296-14-420.

C. The Appellant has misinterpreted the precedents of the Board of Industrial Insurance Appeals.

There is also no Washington case law mandating a determination of “supervening cause” in order to find an aggravation or a hastening of pre-existing condition (like Mr. Ackley’s degenerative arthritis) by both a work injury and then a new occupational disease. The Appellant’s references to “supervening cause” should be recognized for what they are: a confused attempt to persuade the Court to reach an incorrect result.

While recognizing the line of “lighting up” cases (discussed above), and the line of aggravation cases based on *McDougle v. Department of Labor and Industries*, 64 Wn.2d 640, 644, 393 P.2d 631 (1964), the Appellant has misinterpreted the Board’s cases to create a separate, artificial line of Board cases applying some sort of nebulous concept of “supervening cause.”

1. Mr. Ackley’s case falls into the line of cases involving pre-existing conditions aggravated by a later industrial injury or injurious exposure.

When a pre-existing, non-work injury or condition is aggravated or hastened by a later industrial injury or exposure, the resulting disability is attributable to the injury or condition and compensation is due. *Miller v. Department of Labor and Industries*, 200 Wn.2d 674, 94 P.2d 764 (1939); *Hurwitz v. Department of Labor and Industries*, 38 Wn.2d 332, 229 P.2d 505 (1951).

Mr. Ackley's case properly falls under this analysis, as the deterioration of Mr. Ackley's pre-existing knee condition was hastened by his injury at Rite Aid, and then independently hastened further by the distinctive conditions of his subsequent employment at Home Depot. See Board Order of February 5, 2009, Findings of Fact Nos. 5 and 11. Both employers are responsible for hastening Mr. Ackley's arthritis, and therefore the Board properly allowed both claims. After all, an industrial injury or condition may have more than one proximate cause. *Wendt*, 18 Wn.App. at 684.

2. The Board cases relied upon by the Appellant merely interpret *McDougle v. Department of Labor and Industries*, and do not impose upon the Board a duty to make an additional finding of supervening cause.

McDougle involved a work injury followed by non-work aggravation. In finding Mr. McDougle's aggravation compensable, the *McDougle* Court stated, "Aggravation of the claimant's condition caused

by the ordinary incidents of living – by work which he could be expected to do; by sports or activities in which he could be expected to participate – is compensable because it is attributable to the condition caused by the original injury.” *McDougle*, 64 Wn.2d at 644.

The Board’s Significant Decisions *In re Robert D. Tracy*, BIIA Dec., 88,1695 (1990) and *In re Mary L. Wardlaw*, BIIA Dec., 88,2105 (1990), were based on the Board’s interpretation of *McDougle*. Each case involved a work injury, later followed by a non-work injury to the same body part.

In the *Tracy* case, Mr. Tracy’s back was strained at work, and the claim was closed without permanent partial disability. Months later, while he was washing his van, Mr. Tracy experienced soreness in his back, and attempted to reopen his injury claim.

The *Tracy* Board interpreted *McDougle* as providing a framework for analyzing cases, a “shorthand” for asking the “real questions”: “--but for the original industrial injury, would the worker have sustained the subsequent condition? Or, in the alternative, did some subsequent even or events constitute a supervening cause, independent of his industrial injury?” In other words, the Board considered whether Mr. Tracy’s industrial injury was a proximate cause

of his later soreness. As the Board concluded Mr. Tracy would have been sore regardless of his industrial injury, reopening was denied.

In the *Wardlaw* case, Ms. Wardlaw had surgery for an industrial injury (a hernia) that did not heal well and required a second surgery. Ten weeks later, when Ms. Wardlaw was mostly recovered from the second surgery, she was bumped or jostled by police officers entering her home, reinjuring the weakened incision site. The Board found Ms. Wardlaw sustained both a new injury and an aggravation of her pre-existing industrially-related surgical site, and cited *Tracy* for the proposition “the two notions are not mutually exclusive.” Since the later hernia would not have happened “but for” the work injury and resulting surgery, the two incidents combined caused the need for later treatment, and the Board remanded the case to the Department with an order directing the self-insured employer to accept responsibility.

In *In re Leonard Roberson*, BIIA Dec. 89,0106 (1990), and the non-Significant Decision, *In re Donald R. Dolman*, Dckt. Nos. 05 11285 & 05 13293 (September 18, 2006), mistakenly cited as a Significant Decision by the Appellant, the Board extended the interpretation of *McDougle* found in *Tracy* and *Wardlaw* to occupational disease claims with subsequent employers.

The Board's decision in the non-significant decision *In re Donald R. Dolman* is particularly interesting. Mr. Dolman's work activities with his first Employer of injury caused a right shoulder labrum tear that was repaired by surgery. He was awarded a permanent partial disability and his claim was closed, but his symptoms never completely resolved. Later, while Mr. Dolman was performing particularly heavy labor for a subsequent Employer, the weakened condition of his right shoulder caused the labrum to tear and separate from the glenoid. The Board concluded Mr. Dolman's shoulder condition was caused by a combination of the aggravation and worsening of his pre-existing occupational disease from his first Employer and the distinctive conditions of his employment with his subsequent Employer. Both claims against both employers were allowed.¹

As the Board allowed both claims, if the interpretation of *McDougle* found in *Tracy* applied in Mr. Ackley's case, *Dolman* would support the Board's decision to allow both a reopening of Mr. Ackley's injury claim and a new occupational disease claim.

¹ The Appellant appears to have relied on *Dolman* in the mistaken belief the case was a Significant Decision and the Board reopened the old claim while denying the new claim. See Appellant's Brief, page 15.

However, when the concept of “supervening cause” was discussed in *Dolman*, it was prefaced by the qualification this framework should only be applied “If the claimant’s pre-existing frailty arises out of a workers’ compensation matter.” *Dolman* at 4 (Emphasis added). As previously stated, Mr. Ackley’s pre-existing frailty (degenerative arthritis) was not work-related and did not arise out of a workers’ compensation matter. Accordingly, his case was properly evaluated by the Board under the line of cases addressing when a pre-existing injury or condition is aggravated by a later industrial injury or exposure.

McDougle, as interpreted by the Board in cases like *Tracy* and *Wardlaw*, does not impose upon the Board a duty to make an additional “supervening cause” finding. Instead, it merely provides a framework the Board may use to analyze proximate cause between related work injuries or conditions.

D. How liability should be apportioned between the two properly allowed claims is not before this Court.

An industrial “injury” is defined as “a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.” RCW 51.08.100. An “occupational disease” is a condition that arises naturally and proximately out of distinctive conditions of one’s

employment. RCW 51.08.140; *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987). Both types of medical conditions are covered by the Industrial Insurance Act.

Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 575, 141 P.3d 1 (2006), holds the last injurious exposure rule, which assigns liability to the insurer covering the risk during the most recent exposure bearing a causal relationship to the disability, is not applicable to industrial injury claims. This means that in occupational disease cases, but not injury cases, when two employers have exposed a Claimant to injurious stimuli, the last injurious exposure rule operates to assign responsibility to the employer who last exposed the Claimant.

In this case, however, Mr. Ackley did not have claims for multiple occupational diseases with different employers. His reopening claim involved an injury at Rite Aid, while the Home Depot claim involved a subsequent occupational disease claim.

The involvement of an injury suggests *Clevenger* is not applicable to Mr. Ackley's case; the Board specifically stated the scenario we have here, with an earlier industrial injury with one employer and a later occupational disease claim against another employer, is not a scenario addressed in *Clevenger*. However, the Board remanded the case to the Department to consider issues of apportionment, as the Department had

not yet addressed the issue. Accordingly the Board, and therefore the Court, does not have jurisdiction to address the issue at this time.

E. Doubt regarding the interpretation of the Industrial Insurance Act must be resolved in favor of Mr. Ackley.

“Any doubts and ambiguities in the language of the IIA must be resolved in favor of the injured worker...” *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 8, 201 P.3d 1011 (2009); RCW 51.12.010. This is the legislatively mandated and primary canon of interpretation for the Industrial Insurance Act. If there is any ambiguity in this case, “[w]here reasonable minds can differ,” then the benefit of the doubt belongs to the injured worker. *Harry*, 166 Wn.2d at 8; *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001). The new interpretation of the Industrial Insurance Act urged by the Appellant would harm injured workers and their families in at least 3 ways.

First, a worker whose ability to work has been impaired due to a work injury or condition may be entitled to either temporary total disability benefits, called timeloss, or loss of wage earning capacity benefits for those able to continue working at a reduced capacity. RCW 51.32.090. These compensation benefits are usually calculated based on the worker’s wages at the time of injury. RCW 51.08.178. Generally, a worker’s wage increases over time. Allowance of both an injury claim

against one employer and an occupational disease claim against a subsequent employer would give workers access to benefits based on higher wages that more accurately represent the worker's earnings.

Second, workers who experience an anatomic or functional loss after maximum medical improvement may be entitled to an award for permanent partial disability (PPD). PPD is either scheduled, meaning it is a specified disability listed in RCW 51.32.080, like the amputation or loss of function of a limb, or unscheduled. The schedule of benefits in RCW 51.32.080 changes every year based on the consumer price index.

For industrial injuries, the applicable schedule is determined by the date of injury. In occupational disease cases, the schedule is determined by the manifestation date of the impairment. *In re Kenneth Alseth*, BIIA Dec., 87, 2937 (1989). In cases like that of Mr. Ackley, allowance of both claims gives the worker not only access to a higher wage, but also an updated schedule of benefits under the later claim.

Finally, in cases where the worker has an aggravation of a pre-existing injury or condition more than seven years after the original claim was closed, the worker is not entitled to compensation upon reopening, but only to those benefits provided at the Department's discretion. RCW 51.32.160. In these cases, allowance of a second claim would allow the

worker to receive timeloss for missed work, or a PPD award for a loss of function, instead of potentially being limited only to medical benefits.

F. Mr. Ackley is entitled to reasonable attorney fees.

The award of attorney fees in this appeal is controlled by RCW 51.52.130, which applies to fees in both the superior and appellate courts when Board decisions are reviewed. *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn.App. 351, 363-64, 115 P.3d 1031 (2005). Under RCW 51.52.130, Mr. Ackley is entitled to attorney fees for this appeal if his right to relief is sustained. *Brand v. Department of Labor and Industries*, 139 Wn.2d 659, 669-70, 989 P.2d 1111 (1999). Mr. Ackley's attorney fees are payable directly by Home Depot because it is a self-insured employer. RCW 51.52.130.

CONCLUSION

Mr. Ackley's pre-existing knee condition was aggravated and hastened by both his work injury at Rite Aid and his work activities at Home Depot, as demonstrated by the medical testimony. As such, the Board properly determined the claim against Home Depot for an occupational disease of the right knee should be allowed, and properly remanded the case to the Department for a determination regarding apportionment. The Superior Court's decision upholding the Board should be affirmed.

Respectfully submitted this 14 day of October, 2011



GRADY B. MARTIN, WSBA No. 34875
Attorney for Respondent Thomas L. Ackley



WILLIAM D. HOCHBERG, WSBA No. 13510
Attorney for Respondent Thomas L. Ackley



RACHEL V. HAMAR, WSBA No. 43683
Attorney for Respondent Thomas L. Ackley

CERTIFICATE OF SERVICE

Pursuant to RAP 18.5, I hereby certify that I served the Brief of Respondent Thomas Ackley to the below persons at the addresses indicated by mailing a true copy of the same to said persons with postage prepaid by regular mail on October 14, 2011.

ORIGINAL TO: Washington Court of Appeals – Division 1
One Union Square
600 University St.
Seattle, WA 98101-1176

COPY TO: Mr. Thomas Ackley
1294 S Elder Pl.
Cornelius, OR 97113

Mr. Steve Vinyard
Office of the Attorney General
PO Box 40121
Olympia, WA 98504-0121

Ms. Mary E. Shima
Reeve Shima, P.C.
500 Union Street, Ste. 800
Seattle, WA 98101-4051

Mr. Aaron J. Bass
Sather, Byerly & Halloway
111 SW Fifth Ave., Suite 1200
Portland, OR 97204

Dated this 14th day of October, 2011 in Edmonds, Washington by:



Rachel V. Hamar

ORIGINAL¹⁸