

69654-8

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NO. 69654-8-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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AVIZENT and CRISTA MINISTRIES

Appellant/Defendant,

v.

ALGANSEH MASHO, individual

Respondent/Ms. Masho.

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REPLY BRIEF OF APPELLANT

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

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**ORIGINAL**

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## **ARGUMENT**

This case is about whether Ms. Masho's experts provided reasonable testimony to find her industrial injury caused her alleged physical conditions on a more probable than not basis. She has failed to do so.

To establish the connection she must have shown evidence in a "sufficient quantum to persuade a fair minded person of the truth of the declared premise." Garrett Freightlines, Inc. v. Dep't of Labor & Indus., 45 Wn. App. 335,340 725 P.2d 463 (1986), quoting Nichols Hills Bank v. McCool, 104 Wash 2d. 78, 82, 701 P.2d1114(1985). The case law provides guidance as to how the medical testimony must be structured to establish the substantial evidence requirement. To further clarify this process, the case law will be laid out in a three step process. These steps will be referred to as the (1) Subjective Assertions, (2) Objective Evidence and (3) the connect-the-dots step.

### **1. Subjective Assertions (Speculation and Surmise)**

The first step is for the doctor to state the condition is related on a more probable than not basis. We have that in this case. Dr. James testifies that each condition is related on a more probable than not basis.

The courts have clarified that merely stating a condition is related is not sufficient to show a causal relationship. See.

Eastwood v. Dep't of Labor & Indus., 152 Wn.App. 652, 661 (2009). (“[T]he pertinent statute and case law **do** require more than a physician’s subjective certitude based on nothing more than vague assurances he was familiar with the patient.” (emphasis added.)) Furthermore, the Trier of fact “may not supply findings or a rationale that the expert witness did not articulate in the record.” Id. at 664.

In this case we have Dr. James’ mere assertion that each condition is related. As pointed out by council Dr. James testified the conditions were related based on her examination, review of the records, claimant’s history and the fact that the events happened after the injury. The next step is to lay out the objective evidence.

## **2. The Objective Evidence**

The second step requires the doctor to there is objective evidence supports a finding of a condition. Dr. James testified Ms. Masho had many conditions. Dr. Watannabe also testified Ms. Masho had frozen shoulder. These testimonies were based on their medical examinations. In Dr. James and Dr. Watannabe’s opinion Ms. Masho had each of these conditions.

However, merely finding a condition does not make it related. Again this falls into the speculation step. This step creates the facts of each examination by each provider. The critical step is the third step.

### 3. Connect-the-dots or (Proximate Cause)

This step requires the expert to state the proximate cause of the condition. That does not mean the expert can simply return to step one and state the injuries are related to the industrial injury. The doctor's mere assertions are not enough.

Proximate cause requires a showing that "but for" the industrial injury, her conditions would not have occurred. Hertog v. City of Seattle, 138 Wn. 2 265, 282-3 (1999). "But for" causation requires an unbroken link between the alleged injury and the conditions complained off. *Id.* It is not enough to simply say this injury caused this condition.

A reasonable trier of fact must take the testimony of Dr. James and Dr. Watannabe and be able to say "this is how the October 2007 injury caused this condition." The explanation must also fit within the accepted medical causes for said condition.

The following example illustrates the process:

Q. Dr. Doe are claimant's conditions caused by this type of injury on a more probable than not basis?

A. Yes. (Without more, mere speculation)

Q. Dr. Doe how can the alleged injury cause these conditions?

A. Claimant's fall caused her to hit the ground such that the force dislocated her knee and caused a tearing in the tendons. (Proximate Cause, or the mechanism of injury is consistent with the alleged complaints).

Q. Did the alleged injury cause the claimant's conditions?

A. Yes. (Connect-the-Dots).

This pattern of questions in any form does not exist in the record. Dr. James only asserts the conditions are related based on her examination, review of the records and the temporal relationship of the conditions (i.e. they happened after the injury.) She does not even seek to explain the three year gap between her findings and the injury.

The one time she tried to explain the process of the injury. She talks about backpacker's palsy or a condition that causes a downward or pushing force on the shoulder. She explained a process of injury that is not what happened to Ms. Masho. It is the exact opposite of what happened as Ms. Masho experienced an outward or pulling force with the lifting of a patient. If the only proximate cause relationship is created by this faulty understanding of the mechanism of injury, how can the trier of fact rely upon her testimony?

#### **4. Testimony Manipulation**

Ms. Masho cannot provide any other support for her claims than miss stated references to the employer's experts and an inappropriate reliance on her own testimony. For example she

states Dr. Jackson and Dr. Provencher said **an** injury can cause these conditions.(CP 7, Jackson Depo., pp. 58:15-59:1 and Provencher Depo., p. 37:20-25.) She uses these statement to relate her condition to the industrial injury. This is a broad stretch of what the doctors stated. Yes. “an” injury can cause these conditions but they did not say this injury could. Therefore, reliance on these opinions to support the court order are misplaced.

Ms. Masho relies on the court holding in Bennett quoting:

Lay witnesses may testify to such aspects of physical disabilities of an injured person as are observable by their sense and describable without medical training, and further that an injured person can testify regarding the subjective aspects of an injury to the limitations of [her] physical movements. Bennett, 95 Wn. 2d 531,532-533.

Ms. Masho tries to infer that all a claimant has to do is say the physical conditions came on after the injury and then the condition can be found related by the trier of fact. This is not true. Ms. Masho’s position would defeat the purpose of a medical testimony and that is not what Bennett proposes. Bennett stands for the proposition that if a doctor states how a condition can be caused by that type of injury, but did not say that injury did cause the condition, the testimony of the lay witness can bridge the gap by stating, “I have that condition and it happened after said injury.”

Bennett found reliance on lay testimony appropriate when the doctor had no records regarding disability prior to the injury and the witness testified as to his lack of those disabilities prior to the injury Id. at 535. The doctor testified the injury did light up the back and could cause the disabilities. Id. Bennett is distinguishable from our case in that no doctor testified how Ms. Masho's conditions could be related to the type of injury Ms. Masho suffered. Therefore, no lay inferences are reasonable in this case.

### CONCLUSION

We ask the superior court order be overturned as there is no evidence showing a proximate cause relationship between the type of injury Ms. Masho had and her alleged conditions.

June 14, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Drew D. Dalton", is written over a horizontal line.

Drew D. Dalton, WSBA 39306  
Attorney for Appellant, Crista Ministries

**CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing **REPLY BRIEF OF APPELLANT** and **CERTIFICATE OF SERVICE** by US Mail transmittal on today's date, addressed as follows:

**ORIGINAL TO:** Court of Appeals Clerk  
600 University St  
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I further certify that I served the foregoing **REPLY BRIEF OF APPELLANT** and **CERTIFICATE OF SERVICE** on the following parties on June 14, 2013, by mailing to said parties to this action a copy thereof, certified by me as such, with postage prepaid, addressed to said parties at their last-known addresses as follows, and deposited in the post office at Spokane Valley, WA on said day:

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