

No. 72816-4-I

IN THE COURT OF APPEALS, DIVISION I

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ROLAND ANDERSON,

Respondent.

Vs.

DEPT. OF LABOR & INDUSTRIES AND CLARK CONSTRUCTION  
GROUP, INC.

Appellants,

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BRIEF OF RESPONDENT ROLAND ANDERSON

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A. Issues Pertaining to Appellant's Assignments of Error

1. Did the superior court properly weigh the evidence by determining the weight to give to conflicting testimony, giving special consideration to the treating doctors and determining that Mr. Anderson had overcome the presumption that the Board's findings and decision are prima facie correct? (Assignment of Error 1 and 2)
2. Did the superior court make clear and accurate findings based on substantial evidence and apply the proper analysis to whether or not Mr. Anderson required further and necessary treatment after December 23, 2011? (Assignment of Error 1)

B. Statement of the Case

On October 7, 2005, Roland Anderson was injured while working, for Atkinson Construction, on an Interstate 5 expansion project in Everett. CP 254. While jumping over a median barrier, he landed with his left foot on the curb, injured his ankle and fell onto his side. CP 255.

On the day of the injury, Mr. Anderson was treated at the Everett walk-in Clinic, and after taking x-rays, doctors concluded that he had a severe sprain and prescribed a walking boot and pain medication. CP 256.

After using the walking boot for two months, and seeing no improvement, Mr. Anderson went to the orthopedic department at Everett Clinic. CP 256. An MRI was ordered and showed that he had not had a severe strain, but, instead, had suffered a torn ligament on the outside of his ankle and done damage to the second joint of his left big toe. CP 256.

He was seen by Dr. Thiel, at Everett Clinic, who offered two treatments, a fusion of the second joint, or, the less invasive option of having the doctor go in and clean the joint out. CP 256. Mr. Anderson chose the least invasive option and after surgery was put into a cast and was on crutches for three months. CP 256.

His employer provided temporary light-duty jobs, which required less walking and standing, first in the engineering department and then in their Renton office. CP 257. In August of 2006 the claim was closed. CP 257. In August of 2007 he was sent back to the Interstate 5 expansion project and assigned to supervise the road paving subcontractors. CP 257.

The new assignment required Mr. Anderson to spend a lot of time walking and he had a difficult time with his left foot, especially his left big toe. CP 257. He was able to complete the assignment but was eventually sent back to the Renton office. CP 257.

In March of 2008, he discussed the status of his injuries with his supervisor. CP 257. Mr. Anderson was concerned about the implications of reopening the claim but his health insurance company refused to cover the pre-existing industrial injuries. CP 257. In May of 2008 he filed a reopening application and the claim was re-opened by the Department of Labor and Industries (Department). CP 258.

Dr. Bryson, in occupational medicine at the Everett Clinic, helped file the re-opening application and then Mr. Anderson was seen by Dr. Thiel, Dr. Skalley and finally, Dr. James Lee in the podiatry department. CP at 258.

Dr. Lee recommended, and in January of 2009 he performed, surgery to fuse the second joint of his left big toe. CP 258. After surgery, Mr. Anderson was prohibited from bearing weight on the left foot for three months and after recovery developed an infection and problems with scar tissue. CP 258.

To treat the infection, Dr. Lee performed surgery to remove internal dissolving sutures that were causing an infection. CP 259. To treat the scar tissue, Dr. Lee recommended, and, after an independent medical exam (IME) ordered by the employer concurred with Dr. Lee's treatment plan, performed a hammer toe procedure. CP 259.

Mr. Anderson was also experiencing pain in the bottom of the foot, under the left big toe, and Dr. Lee recommended removal of the sesamoid bones in the area. CP 259. On June 1, 2010 Dr. Lee removed the sesamoid bones while removing the screws left behind from the fusion surgery of the second joint. CP 259.

After recovering from the procedures, Mr. Anderson began physical therapy, where he found it painful to push off on his left big toe.

CP 260. He discussed the pain with Dr. Lee and it was decided that the first joint was not able to take the stress put on it now that the second joint was fused and thus a fusion of the first joint was needed. CP 260. On October 12, 2010, Dr. Lee attempted to fuse the first joint. CP 260.

In January of 2011, after three months of bearing no weight on the toe, Mr. Anderson followed up with Dr. Lee. CP 260. X-rays showed a widening of the first joint, not bone healing. CP 261. On February 27, 2011, Mr. Anderson reported pain and movement in the joint and Dr. Lee prescribed the use of a bone stimulator for three months to help the fusion. CP 261. On June 1, 2011 Dr. Lee concluded the fusion attempt had failed and discussed getting a second opinion to determine how to proceed. CP 261. Dr. Lee initiated a consultation and on July 29, 2011, Mr. Anderson was examined by Dr. Brage. CP 262. Dr. Brage ordered an MRI of the foot and on August 12, 2011, after reviewing the results of the MRI, he offered to reattempt the fusion surgery of the first joint. CP 262.

Two more IME's were scheduled for the end of August 2011. CP 262. The first, scheduled for August 24, 2011 was with Dr. Friedman, a psychiatrist. CP 262. The second was scheduled for August 27, 2011 with Dr. Toomey. CP 262.

On November 9, 2011 Mr. Anderson saw Dr. Lee to review the most recent IME's. CP 262. At that time, Dr. Lee informed Mr.

Anderson that a private investigator, hired by the employer, had shown him and Dr. Toomey a short surveillance video containing footage of Mr. Anderson. CP 262. Based on the video and the IME report of Dr. Toomey, Dr. Lee told Mr. Anderson that no further treatment was needed other than an orthotic and that he was being released back to his job of injury. CP 262.

The Department of Labor and Industries closed Mr. Anderson's claim by an order dated December 23, 2011, which was affirmed by a separate order of the Department on February 23, 2012. CP 114. Mr. Anderson filed a timely appeal with the Board of Industrial Insurance Appeals (Board) on March 8, 2012. CP 183-185.

However, the orthotic did not help. CP 278. Mr. Anderson went to Dr. Brage, who had already offered to perform the re-fusion, on January 9, 2012 to see if he would review the IME report and video, and help reopen the claim. CP 263. Dr. Brage did not perform the re-fusion of the first joint because the claim was closed. CP 460.

It was suggested that Mr. Anderson see his primary care provider, Dr. Phillip Smith. CP 264. Mr. Anderson demonstrated the movement of the first joint to Dr. Smith who then referred him to Dr. Mason at Everett Bone and Joint. CP 264. Dr. Mason reviewed Mr. Anderson's medical history, including Dr. Brage's recommendation of a re-fusion of the first

joint and Mr. Anderson again demonstrated movement in the joint. CP 460. Dr. Mason recommended, and on April 25, 2012 performed, a second surgery to fuse the first joint. CP 264. From the date of surgery through July 24, 2012 Mr. Anderson was restricted from bearing weight on the foot and used crutches and a rollabout to get around. CP 295.

Judge Joan M. O'Connell of the Board presided over hearings on the matter on October 24, 2012 during which she heard testimony from Roland Anderson and Debra Anderson. CP 152 *Proposed Decision and Order at 3*. As of the date of his testimony, Mr. Anderson was still under the care of Dr. Mason for recovery from the surgery. CP 296. At the time, Mr. Anderson still required further treatment, including the removal of a two and a half inch screw that had been inserted in his left big toe. CP 296.

Judge O'Connell also heard testimony of several experts by perpetuation deposition. CP 152, 153. She issued a Proposed Decision and Order on February 1, 2013, reversing the portion of the order determining that Mr. Anderson had obtained benefits by means of willful misrepresentation, omission, or concealment of a material fact and affirming the portion of the order which closed the claim with eleven percent impairment of the left leg with the correction that the actual date of medical fixity was December 28, 2011. CP 174-176.

The deadline for filing a Petition for Review was extended to March 18, 2013. CP 115. Mr. Anderson filed a petition for the Board to review Judge O'Connell's Proposed Decision and Order on March 7, 2013. The Board granted Mr. Anderson's Petition on March 22, 2013. CP 138. On June 10, 2013, the Board issued a Decision and Order affirming the Proposed Decision and Order but addressed several problems with the findings and conclusion. CP 115.

In its Decision and Order the Board found that the employer had a continuing obligation to provide replacement orthotics and changed the first terminal date to February 23, 2012, but held that a preponderance of the evidence indicated further surgery was not warranted. CP 115.

Mr. Anderson filed an appeal of the Decision and Order to the superior court. CP 496-497. A bench trial was held in front of Judge George Bowden on September 12, 2014. CP 102. On September 19, 2014, Judge Bowden sent a written decision to the parties explaining his decision to reverse the Board's decision. CP 72. On October 29, 2014, the superior court entered an Order finding Mr. Anderson was not fixed and stable and required further proper and necessary treatment. CP 64-67. The employer filed a Motion for Reconsideration, which the superior court denied on November 12, 2014. CP 3, 4.

C. Argument

The statutory workers compensation review scheme results in a different role for the Court of Appeals than is typical for appeals of administrative decisions where the Court of Appeals sits in the same position as the superior court. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The Court of Appeals review in workers' compensation cases is akin to its review of any other superior court trial judgment where review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. Id.

**1. The superior court properly weighed the evidence in finding Mr. Anderson was not fixed and stable as of December 23, 2011, and through February 23, 2012:**

**a. The superior court properly determined the weight to give to each doctor's opinion.**

The hearing in the superior court shall be de novo. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 179, 210 P.3d 355 (2009). If the court shall determine that the board has incorrectly found the facts, the decision of the board shall be reversed or modified. Id.

After viewing surveillance video, Dr. Lee, Dr. Brage and Dr. Toomey testified that Mr. Anderson was fixed and stable and Dr. Mason testified Mr. Anderson was not fixed and stable. CP 364, 445, 458.

The short surveillance video contains a collection of even shorter videos of Mr. Anderson taken over six days. Ex 1. The video shown to Dr. Lee and Dr. Toomey was twenty one minutes fifty seconds long. Ex 1. Only three minutes and five seconds of which depicted Mr. Anderson walking. Ex 1. Thirteen minutes and forty seconds showed him loading a refrigerator into a truck, three minutes and ten seconds of the video shows him standing, and several minutes of video is of Mr. Anderson sitting in his truck. Ex 1. Dr. Brage was shown, during his preservation deposition, some selected pieces and “highlights” of the videos. CP 443.

What the video is incapable of depicting is the pain being experienced by Mr. Anderson and what took place during breaks in the footage. Ex 1. For example, the video does not show Mr. Anderson sitting down and resting his foot at Home Depot or laying on a couch for an extended time to recover from loading the refrigerator. Ex 1.

Dr. Lee and Dr. Brage both believed that further curative or rehabilitative treatment was necessary until they were shown the short surveillance video. CP 261, 439. Dr. Lee first treated Mr. Anderson in October 8, 2008. CP 354. Over two years after he started treating Mr.

Anderson, and after performing four different surgeries, on October 12, 2010, Dr. Lee performed a fusion of the left interphalangeal (first) joint of the big toe. CP 354-356. He continued to treat Mr. Anderson after surgery and eventually discussed a re-fusion on May 13, 2011 when he restricted Mr. Anderson from walking more than a half hour at a time. CP 374, 378. But after viewing the surveillance video, Dr. Lee declined to perform the re-fusion stating that based on the surveillance video, Mr. Anderson lacked the clinical findings to warrant the treatment. CP 364. However, Dr. Lee testified that none of the walking depicted in the video was anywhere near a half hour in length. CP 378, 379.

Dr. Brage, relying on diagnostic findings of x-rays showing a failed fusion and clinical findings of Mr. Anderson's reports of pain, recommended a re-fusion. CP 439. Only after viewing the surveillance video did Dr. Brage change his opinion that Mr. Anderson was fixed and stable, however he never stated that Mr. Anderson was capable of returning to the job of injury. CP 445. Additionally, Dr. Brage stated that the surveillance video was not reflective of Mr. Anderson's actual capabilities and that Mr. Anderson would have been expected to have good days and bad days and the surveillance video does not reflect an activity level that Mr. Anderson could have maintained over a regular period of time. CP 450.

The single time Dr. Toomey examined Mr. Anderson, for an IME, followed his viewing of the surveillance video. CP 413. He testified that he has had patients with failed fusions with and without pain and he recommends re-fusion only when pain is present. CP 411. Here, he ignored the clinical complaints and relied upon the short video to decide that Mr. Anderson was not in pain.

Despite the fact that the video is not reflective of Mr. Anderson's sustained capabilities, Dr. Lee, Dr. Brage and Dr. Toomey changed or based their opinions of medical fixity on the surveillance video.

The surveillance video may have been submitted to help the doctors assess whether Mr. Anderson needed further treatment, and not for the Judge's benefit, but the superior court, as the trier of fact, used Dr. Lee, Dr. Brage and Dr. Toomey's reliance on the surveillance video as part of its consideration of the weight to be given to each doctor's testimony.

Referring to the surveillance video, the superior court stated "[i]t's interesting but not overly persuasive evidence" and thus gave Dr. Mason's testimony significant weight. CP 71.

**b. The superior court acted in accordance with the attending physician rule.**

The attending physician rule requires careful thought, it does not require the trier of fact to give more weight or credibility to the attending physician's testimony or to even believe the testimony. Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 45, 395 P.2d 633 (1964).

The trier of fact determines whom it will believe, but it should, in its findings, indicate that it recognizes that special consideration should be given to the opinion of the attending physician. Id.

Here, the superior court did just that by indicating that it found Mr. Anderson had "met his burden of proof" "notwithstanding the special consideration to be given to the testimony of Dr. Lee". CP 68. The fact that the superior court's decision is not the same as Dr. Lee's testimony does not mean that the court neglected to give careful thought to his opinion, it simply means the trier of fact favored contradicting evidence.

The superior court stated "Dr. Mason was also Mr. Anderson's treating physician and hence his opinion was, to my view, entitled to the same special consideration as that of Dr. Lee." CP 69. As stated above, that special consideration requires careful thought, nothing more. Groff, 65 Wn.2d at 45.

In determining the credibility and weight to be given to each medical expert, the trier of fact considers, among other things, the education, training, experience, knowledge and ability of the doctor, the reasons given for the opinion and the sources of the doctor's information together with the factors used for evaluating the testimony of any other witness. Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 573, 761 P.2d 618 (1988).

Nothing in the superior court's decision suggests that the court found the testimony of Dr. Lee and Dr. Mason equally balanced. It was the job of the trier of fact to weigh the testimony of each doctor. Id. Some factors likely weighed in favor of Dr. Lee's testimony and others weighed in favor of Dr. Mason's testimony.

The fact that Dr. Mason did not treat Mr. Anderson for his industrial injury till after his claim was closed goes to the weight given to Dr. Mason's testimony while the fact that Dr. Lee did not examine Mr. Anderson after supplying an orthotic, and thus could not have known if use of the orthotic was successful, goes to the weight of Dr. Lee's testimony.

"The industrial insurance act is a unique piece of legislation; it is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries." Id. at 572. "The case law allowing special

consideration of the attending physician's testimony supports the purpose of the act which is to promote benefits and to protect workers." *Id.* at 572, 573. The superior court's view, that Dr. Mason's testimony was entitled to the same careful thought is consistent with the purpose of the industrial insurance act.

In *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App 644, 654, 833 P.2d 390 (1992), the court stated that one reason for the special consideration given to the attending physician is because they are "not hired to give a particular opinion consistent with one party's view of the case."

As the court stated, Dr. Mason was a treating doctor and not simply a hired expert, and he was the doctor that performed the surgery that is at the center of this case and his testimony therefore deserved careful thought. CP 69, 477.

**c. The superior court properly applied the presumption that the BIIA findings and decision are correct.**

Upon appeal to superior court, the standard of review of the Decision and Order of the Board of Industrial Insurance Appeals (BIIA) is de novo. RCW 51.52.115. The findings and decision of the BIIA are presumed correct until the trier of fact finds from a fair preponderance of

the evidence that such findings and decision of the BIIA are incorrect.

Scott Paper Co. v. Dep't of Labor & Indus., 73 Wn.2d 840, 843-844 (1968).

The superior court indicated that it found Mr. Anderson had “met his burden of proof” “notwithstanding the presumption that the Board’s findings and decision are “prima facie” correct”. CP 68. Additionally there is nothing to indicate that the superior court found the evidence weighed as a whole favored the employer, or, as previously discussed, was equally balanced.

**2. Mr. Anderson required further necessary and proper treatment after December 23, 2011**

**a. The superior court made clear and accurate findings about what surgery was necessary and proper.**

Finding of Fact 7 admittedly has a typographical error, however it is an error of Mr. Anderson’s attorney, not the superior court. The superior court asked Mr. Anderson’s attorney to draft findings and conclusions. CP 70. Mr. Anderson’s attorney then drafted findings and conclusions, circulated them to the employer’s attorney, made agreed upon revisions and submitted the findings and conclusions to the superior court as an agreed order.

The written decision of the superior court also makes clear that the court understood the sequence of events and the month and year on which Dr. Mason performed the re-fusion surgery. CP 69.

The superior court, in its written decision, refers to Dr. Lee's failed surgery, Dr. Lee providing Mr. Anderson an orthotic and then to Dr. Mason's re-fusion. CP 69. From this, it is clear the superior court was clear regarding the sequence of events.

Regarding the date of Dr. Mason's re-fusion surgery, the superior court refers to Mr. Anderson's testimony in October of 2012 and states "[s]ix months had passed since the surgery by Dr. Mason." CP 69.

It is clear that the superior court was not influenced by the typographical error or the lack of a specific mention of the re-fusion surgery by Dr. Mason and therefore the conclusions of law flow from the findings of fact and the written decision of the superior court.

**b. Proper analysis was applied in determining the re-fusion surgery was proper and necessary.**

As discussed above, the superior court weighed the conflicting medical testimony and gave substantial weight to the testimony of Dr. Mason. The superior court also commented on the outcome of the re-fusion surgery stating that while "Mr. Anderson testified in October of

2012 that his pain was generally unchanged despite that surgery,” and, that six months had passed since the surgery, “he still had a two and one-half inch screw through his toe,” and it was “unreasonable to expect Mr. Anderson to have any significant pain relief until that screw was removed.” CP 69, 296.

In In re Zbigniew Krawiec, 1991 WL 281081 (Wash. Bd. Of Indus. Ins. Appeals Oct. 17, 1991), the Board first introduced the hindsight method of analysis in holding

We will act with the advantage of hindsight and allow this surgery where the claimant has proven by a preponderance of the credible medical evidence, some of it based on objective findings, that the surgery was medically necessary. We recognize that the Department of Labor and Industries, however careful, deliberate, and well intentioned, will err from time to time in evaluating a given claimant’s need for surgery. To fail to provide recourse for the claimant and physician who proceed with a successful surgery, despite an absence of authorization and/or a consulting opinion, is to place simplistic, mechanical adherence to the medical aid rules above the requirement that the Industrial Insurance Act be liberally construed. Such a purely mechanical approach is ill founded and will not be followed here.

The Industrial Insurance Act shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring in the course of employment. RCW 51.12.010. The entire statute shall be liberally construed to advance the remedy

provided by the Act to conform to the spirit of as well as the letter of the Act and that any doubt as to the meaning of the statute should be resolved in favor of the claimant for whose benefit the Act was passed. In re Zbiegniew Krawiec, BIIA Dec., 902281(1991) citing Gaines v. Dep't of Labor & Indus., 1 Wn. App 547, 552, 463 P.2d 269 (1969).

The history and reasoning for the hindsight method of determining if a surgery is proper and necessary is at odds with the contention that a claimant must prove that a surgery is successful before the surgery is necessary and proper. See, In re Zbiegniew Krawiec, BIIA Dec., 902281(1991).

Authorization of treatment is not dependent on a good result from that treatment in any one particular case. In re Susan Pleas, BIIA Dec., 96 7931 (1998). Nor should treatment authorization be delayed until after the treatment has been provided and proven to be effective. *Id.*

However, to further the purpose of the Industrial Insurance Act, in situations where the treatment has been provided prior to it being authorized, the Board has held that a determination that surgical treatment was medically proper and necessary *may* be based on 20-20 hindsight provided from findings of the surgery itself (emphasis added).

Even if one uses the hindsight method, it is not clear that the surgery was unsuccessful. Mr. Anderson identified his pain prior to the

surgery as a three to six on a scale of one to ten and described that the pain fluctuated. CP 283. He testified the average pain had remained unchanged, not that surgery had been unsuccessful. CP 305. Dr. Mason testified that the re-fusion had worked, there was objective evidence that the surgery had succeeded, in that the joint was now fused, and that the surgery had provided some benefit to Mr. Anderson. CP 477.

However, here, hindsight is not 20-20 because, at the time of Mr. Anderson's testimony, Mr. Anderson remained under the care of Dr. Mason and there was a two and one-half inch screw in his toe that still needed to be removed. CP 296. When Mr. Anderson's claim was closed he was not required to prove that the re-fusion surgery was successful to prove that he needed further necessary and proper treatment, he did that by medical testimony. The hindsight method is simply a tool to help further the purpose of the Industrial Insurance Act and here it is not appropriate because the treatment was not yet finished.

c. **Substantial evidence supports the superior courts findings that Mr. Anderson required further necessary and proper treatment.**

Before the superior court, the appellant must produce sufficient substantial facts, as distinguished from a mere scintilla of evidence, to make a case for the trier of fact. Sayler v. Department of Labor & Indus., 69 Wn.2d 893, 896, 421 P.2d 362 (1966).

The Appellate Courts function is to review for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court. The Appellate Court is not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion. Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App 475, 485, 40 P.3d 1221 (2002).

Taking the testimony here in the light most favorable to Mr. Anderson, there is substantial evidence, as opposed to a mere scintilla of evidence, that the re-fusion surgery was proper and necessary and that Mr. Anderson was therefore not fixed and stable.

Dr. Mason, is a board certified orthopedic surgeon who testified that as of the date of closure, Mr. Anderson had a failed fusion of the left interphalangeal joint of the first toe and that a re-fusion would be considered further curative treatment. CP 458. As discussed previously,

Dr. Mason is a treating doctor and as such his testimony deserves more consideration than an expert hired to testify for trial.

Mr. Anderson testified that since the workplace injury on October 7, 2005 and up to and through the date of closure, he was unable to perform the job of injury due to the effects of the workplace injury. CP 273. He tried the orthotic but it did not help. CP 279. Dr. Mason testified that orthotics are proper and necessary treatment but are not always successful. CP 461.

As discussed previously, Dr. Brage and Dr. Lee changed their opinions after viewing the short surveillance video. CP 364, 445. Both doctors testimony, of events prior to viewing the video, establishes support that the re-fusion surgery was necessary and proper and that Mr. Anderson was not fixed and stable.

Dr. Brage, relied on diagnostic findings of a failed fusion and clinical findings of Mr. Anderson's reports of pain and recommended a re-fusion and offered to perform the surgery himself. CP 439.

Dr. Lee's testimony established that he had performed five surgeries on Mr. Anderson based in part on subjective complaints of pain, including the failed fusion of the left interphalangeal joint of the first toe, and he eventually discussed the possibility of a re-fusion. CP 374, 378. As the superior court pointed out, Dr. Lee obviously felt that a fusion of

the joint in his left large toe was necessary and proper when he performed the surgery. CP 69.

After viewing the surveillance video Dr. Lee changed his mind and decided that there were insufficient clinical findings of pain to support the re-fusion surgery. CP 364. Thus Mr. Anderson's reports of pain and his credibility are important and there is substantial evidence that Mr. Anderson had strong credibility.

Mr. Anderson has previously chosen less invasive treatment when offered fusion as a treatment for this industrial injury suggesting that he is not looking for a free ride and is not trying to take advantage of the system. CP 256.

Dr. Taylor, a psychologist called by the employer, testified that Mr. Anderson is a man that largely defines himself or his self-worth through the work that he is able to do. CP 334. As the superior court pointed out, he reported many of his projects to his treating physicians and he did not try to withhold that information. CP 68.

Additionally, neither Dr. Taylor nor Dr. Friedman, who performed a psychiatric evaluation, believed Mr. Anderson was malingering. CP 340.

Dr. Lee, Dr. Brage and Dr. Mason all agreed that the fusion of the left interphalangeal joint of the first toe had failed. All three doctors also

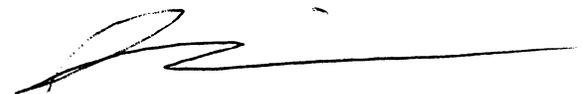
agreed, while accepting Mr. Anderson's complaints of pain, that a re-  
fusion was proper and necessary. There is substantial evidence of Mr.  
Anderson's strong character and the superior court made a determination  
based upon that evidence and therefore substantial evidence supports the  
superior court's decision.

D. Conclusion

The superior court properly applied the law and made factual  
findings supported by substantial evidence. This Court should reject the  
challenge to the well-reasoned opinion of the superior court and affirm the  
superior court's decision and order.

Dated March 25, 2015

Respectfully submitted,



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Attorney for Respondent

**CERTIFICATE OF SERVICE**

I certify that on March 25, 2015 I caused to be mailed the following documents via US Mail or through service accomplished as otherwise specified below:

DOCUMENTS: Brief of Respondent Roland Anderson.

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J. Scott Timmons, Board of Industrial Insurance Appeals  
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Snohomish County Superior Court

DATED this 25th day of March, 2015

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