

COURT OF APPEALS
DIVISION II

09 MAY 14 PM 2:43

No. 38561-9

STATE OF WASHINGTON
BY JW
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PM 5-13-09

RAYONIER, INC., AND THE DEPT' OF LABOR & INDUS., STATE
OF WASHINGTON,

Appellants,

v.

STEVEN R. HULETT,

Respondent.

APPELLANT'S BRIEF

CRAIG, JESSUP & STRATTON, PLLC
Gibby M. Stratton, #15423
Marne J. Horstman, #27339
2102 N. Pearl Street, Suite 204
Tacoma, WA 98406
Telephone: 253/573-1441
Facsimile No.: 253/572-5570
Attorneys for Rayonier, Inc.

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 7

C. STATEMENT OF THE CASE..... 10

D. SCOPE AND STANDARD OF REVIEW 36

E. ARGUMENT..... 40

1. THE OVERWHELMING WEIGHT OF THE EXPERT MEDICAL EVIDENCE ESTABLISHES THAT HULETT HAS NO RESIDUALS FROM THE FEBRUARY 2006 EVENT, AND IS ENTITLED TO NO FURTHER BENEFITS..... 40

2. HULETT ERRONEOUSLY CITED TO AND THE TRIAL COURT ERRONEOUSLY RELIED UPON *INTALCO V. DEP'T OF LABOR & INDUS.* TO SUPPORT CAUSATION..... 44

3. HULETT IMPROPERLY ARGUED FROM AND THE TRIAL COURT ERRONEOUSLY CONSIDERED THE INDUSTRIAL APPEALS JUDGE'S PROPOSED DECISION AND ORDER..... 47

4. THE TRIAL COURT DID NOT UNDERSTAND THE DISTINCTION BETWEEN PERMANENT PARTIAL DISABILITY AND EMPLOYABILITY. 50

5. ANY DISABILITY HULETT HAS IS UNRELATED AND PRE-EXISTING OR POST-DEVELOPING. 55

6. HULETT IS NOT ENTITLED TO WAGE REPLACEMENT BENEFITS. 58

7. THE TRIAL COURT ERRONEOUSLY DEFERRED TO THE OPINIONS OF FAMILY PRACTITIONER ROGER OAKES, M.D..... 65

8. THERE IS NO PROXIMATE CAUSE BETWEEN THE FEBRUARY 22, 1996 HEAD BUMP AND THE DECEMBER 2000 ACCIDENT WHICH CAUSED HULETT'S SON-IN-LAW'S DEATH. 68

F. CONCLUSION 70

TABLE OF AUTHORITIES

CASES

Adams v. Dep't of Labor & Indus., 128 Wn.2d 224, 905 P.2d 1220 (1995).....	60
Allen v. Dep't of Labor & Indus., 30 Wn. App. 693, 697-98, 638 P.2d 104 (1981).....	60
Allen v. Dep't of Labor & Indus., 48 Wn.2d 317, 293 P.2d 391 (1956).....	52, 55
Anderson v. Allison, 12 Wn.2d 487, 122 P.2d 484 (1942).....	70
Anton v. Chicago, 92 Wash. 305, 308, 159 P. 115 (1916)	42, 43
Bennett v. Dep't of Labor & Indus., 95 Wh.2d 531, 532-33, 627 P.2d 104 (1981).....	51
Berndt v. Dep't of Labor & Indus., 44 Wn.2d 138, 265 P.2d 1037 (1954).....	61
Boeing v. Hansen, 97 Wn. App. 553, 985 P.2d 421 (1999)	53, 54
Bonko v. Dep't of Labor & Indus., 2 Wn. App. 22, 466 P.2d 526 (1970).....	59
Bruns v. PACCAR, Inc., 77 Wn. App. 201, 890 P.2d 469 (1995)	68, 69
Cayce v. Dep't of Labor & Indus., 2 Wn. App. 315, 467 P.2d 879 (1970).....	55
Chalmers v. Dep't of Labor and Indus., 72 Wn.2d 595, 434 P.2d 720 (1967).....	61, 66
Clausen v. Dep't of Labor & Indus., 15 Wn.2d 62, 69, 129 P. 2d 777(1942).....	61
Cooper v. Dep't of Labor & Indus., 20 Wn.2d 429, 147 P.2d 522 (1944).....	43
Cyr v. Dep't of Labor & Indus., 47 Wn.2d 92, 97, 286 P.2d 1038 (1955).....	38, 61
Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 471-472, 745 P.2d 1295 (1987).....	1, 9, 50, 51, 52
Dolman Dep't of Labor & Indus., 105 Wn.2d 560, 566, 716 P.2d 852 (1986).....	37

Ehman v. Dep't of Labor & Indus., 33 Wn.2d 584, 206 P.2d 787 (1949).....	38, 39
Enevold v. Dep't of Labor & Indus., 51 Wn.2d 648, 320 P.2d 1096 (1958).....	55
Franks v. Dep't of Labor & Indus., 35 Wn.2d 763 215 P.2d 416 (1950).....	55
Hadley v. Dep't of Labor & Indus., 116 Wn.2d 897, 902-903, 810 P.2d 500 (1991).....	37
Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 761 P.2d 618 (1988).....	1, 65
Harbor Plywood Corp. v. Dep't of Labor & Indus., 48 Wn.2d 553, 295 P.2d 310 (1956).....	41
Hastings v. Dep't of Labor & Indus., 24 Wn.2d 1, 12-13, 163 P.2d 142, 147-148 (1945).....	39, 40
Herr v. Dept. of Labor & Indus., 74 Wn. App. 632, 875 P.2d 11 (1994).....	59, 60
Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980).....	37
Hunter v. Bethel School Dist., 71 Wn. App. 501, 506-507, 859 P.2d 652, review denied, 123 Wn.2d 1031 (1994).....	59
Intalco v. Dep't of Labor & Indus. 66 Wn. App. 644, 833 P.2d 390, review denied, 120 Wn.2d 1031, 847 P.2d 481 (1993).....	1, 8, 45-49, 56
Jackson v. Dep't of Labor & Indus., 54 Wn.2d 643, 343 P.2d 1033 (1959).....	41, 60
Jacobsen v. Dep't of Labor & Indus., 127 Wn. App. 384, 386, n.1, 110 P.3d 253, review denied, 156 Wn.2d 1024, 132 P.3d 1094 (2006).....	58
Jacobson v. Dep't of Labor & Indus., 37 Wn.2d 444, 451, 224 P.2d 338 (1950).....	60
Jepson v. Dep't of Labor & Indus., 89 Wn.2d 394, 401, 573 P.2d 10 (1977).....	37
Kerr v. Olson, 59 Wn. App 470, 798 P.2d (1990).....	70
Kuhnle v. Dep't of Labor & Indus., 12 Wn.2d 191, 120 P.2d 1003 (1942).....	59

Miller v. Dep't of Labor & Indus., 200 Wash. 674, 682-83, 94 P.2d 764 (1939).....	51
Nash v. Dep't of Labor & Indus., 1 Wn. App. 705, 462 P.2d 988 (1969).....	55
Oien v. Dep't of Labor & Indus., 74 Wn. App. 566, 569, 874 P.2d 876, review denied, 125 Wn.2d 1021, 890 P.2d 463 (1995)	59
Olympia Brewing Co. v. Dep't of Labor & Indus., 34 Wn.2d 498, 505, 208 P.2d 1181 (1949).....	38
Page v. Dep't of Labor & Indus., 52 Wn.2d 706, 328 P.2d 663 (1958) ...	55
Parr v. Dep't of Labor & Indus., 46 Wn.2d 144, 278 P.2d 666 (1955)	61
Prince v. Dep't of Labor & Indus., 47 Wn.2d 98, 286 P.2d 707 (1955)...	69
Puget Sound Energy v. Lee, No. 61179-8-I (Slip Op., April 27, 2009).....	9, 53 58, 59
Rambeau v. Dep't of Labor & Indus., 24 Wn.2d 44, 50,163 P.2d 133 (1945).....	58
Ringhouse v. Dep't of Labor & Indus., 2 Wn. App. 814, 470 P. 2d 232 (1970).....	55
Rosales v. Dep't of Labor & Indus., 40 Wn. App. 712, 700 P.2d 748 (1986).....	49, 50
Ruse v. Dept. of Labor & Indus., 138 Wn.2d 1, 8-9, 977 P.2d 570 (1999).....	66
Sacred Heart Med. Ctr. v. Carrado, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979).....	60, 62
Sayler v. Dep't of Labor & Indus., 69 Wn.2d 893, 896, 421 P.2d 362 (1966).....	61
Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764, 767 (1962).....	42
Scott Paper Co. v. Dep't of Labor & Indus., 73 Wn.2d 840, 843-844, 440 P.2d 818 (1968).....	37
Simpson Logging Co. v. Dep't of Labor & Indus., supra, 32 Wn.2d 479, 202 P.2d 448	52
Spring v. Dep't of Labor & Indus., 96 Wn.2d 914, 918, 640 P.2d 1 (1982).....	60

Springstun v. Wright Schuchart, Inc., 70 Wn. App. 83, 88, 851 P.2d 755 (1993).....	37
Stafford v. Dep't of Labor & Indus., 33 Wn. App. 231, 235, 653 P.2d 1350 (1982).....	38
Stratton v. Dep't of Labor & Indus. 1 Wn. App. 77, 459 P.2d 651 (1969).....	7, 47, 49, 50
Voshalo v. Dep't of Labor & Indus., 75 Wn.2d 43, 449 P.2d 95 (1968).....	55
Weyerhaeuser Company v. Tri, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).....	37
Willoughby v. Dep't of Labor & Indus., 147 Wn.2d 725, 735, 57 P.3d 611 (2002).....	58
Windust v. Dept. of Labor & Indus., 52 Wn.2d 33, 323 P.2d 241 (1958).....	38
Zipp v. Seattle Sch. Dist. No. 1, 36 Wn. App. 598, 601, 676 P.2d 538, review denied, 101 Wn.2d 1023 (1984).....	61

STATUTES

RCW 51.08.100	41, 45
RCW 51.08.140	52
RCW 51.08.150	55
RCW 51.08.160	59
RCW 51.32.060	58, 63
RCW 51.32.060(6).....	63
RCW 51.32.080(3).....	51, 55
RCW 51.32.090	58, 59, 63
RCW 51.32.090(3).....	64
RCW 51.32.090(8).....	63
RCW 51.32.100	51
RCW 51.52.020	49
RCW 51.52.104	47
RCW 51.52.106	48

RCW 51.52.115	36, 37, 48
WAC 296-20-01002.....	62
WAC 296-20-240 (1-3).....	56
OTHER AUTHORITIES	
WPI 5th 155.08.01	55
BOARD OF INDUSTRIAL INSURANCE DECISIONS	
In re: Judy M. Fry, Dckt. No. 97 3415 (November 6, 1998)	45
In re: Kenneth Heimbecker, Dckt. No. 41, 998, (August 29, 1975).....	41
In re: Patricia Heitt, BIIA Dec. 87 1100 (1989)	64
In re: Iva N. Jennings, Dckt. No. 01 11763 (2004).....	66
In re: Troy A. Meats, BIIA Docket No. 99 10613 (1999)	65, 66
In re: Barbara K. Rathbun, BIIA No. 98 11716 (2000)	54, 55

RCW 51.52.115	36, 37, 48
WAC 296-20-01002.....	62
WAC 296-20-240 (1-3).....	56
OTHER AUTHORITIES	
WPI 5th 155.08.01	55
BOARD OF INDUSTRIAL INSURANCE DECISIONS	
In re: Judy M. Fry, Dckt. No. 97 3415 (November 6, 1998).....	45
In re: Kenneth Heimbecker, Dckt. No. 41, 998, (August 29, 1975)	41
In re: Patricia Heitt, BIIA Dec. 87 1100 (1989)	64
In re: Iva N. Jennings, Dckt. No. 01 11763 (2004).....	66
In re: Troy A. Meats, BIIA Docket No. 99 10613 (1999).....	65, 66
In re: Barbara K. Rathbun, BIIA No. 98 11716 (2000).....	54

A. ASSIGNMENTS OF ERROR

1. The trial court erroneously relied upon the Proposed Decision and Order, reversed by the Board of Industrial Insurance Appeals (Board) in its Decision and Order, and Hulett's improper argument to the Court from the Proposed Decision and Order.

2. The trial court erroneously based its determination on an occupational disease case, *Intalco v. Dep't of Labor & Indus.*, to support proximate cause in this industrial injury claim and its determination that Hulett was not required to establish the cause of his symptoms.

3. The trial court erroneously based its determination of entitlement on the legally incorrect supposition, based on a legally incorrect reading of *Dennis v. Dep't of Labor & Indus.*, that Respondent Steven Hulett's (Hulett) pre-existing findings and complaints, which evidenced the pre-existing nature of his conditions, were immaterial because the conditions were not causing a loss of function.

4. The trial court erroneously failed to apply the legally required presumption of correctness to the Board's Decision and Order where the Board's Decision and Order is supported by substantial evidence despite acknowledging the existence of the presumption.

5. The trial court applied the attending physician rule set forth in *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618

(1988), in an erroneous manner, affording the testimony of family practitioner Dr. Oakes substantially more weight than any of the other specialists who testified, including specialists who treated Hulett, and to whom Dr. Oakes and Hulett's other witnesses, deferred.

6. The trial court's Finding of Fact No. 3 is unsupported by the record in that the record does not establish that the February 22, 1996 event caused a permanent aggravation of Hulett's pre-existing symptomatic cervical degenerative disc disease.

7. The trial court's Finding of Fact No. 4 is unsupported by the record in that the record establishes the pre-existing nature of Hulett's conditions and complaints, and the issue of his employability in general as to those pre-existing complaints and conditions was not an issue and is immaterial to the issue of permanent partial disability.

8. The trial court's Finding of Fact No. 6 is erroneous in that Dr. Oakes was only one of several attending physicians who testified in the appeal.

9. The trial court's Finding of Fact No. 7 is erroneous in that Dr. Oakes' testimony on cross-examination reflects that Hulett had similar pre-injury complaints.

10. The trial court's Finding of Fact No. 9 is erroneous in that the record reflects that Dr. Oakes deferred to Dr. Weinstein and the program directed by Dr. Weinstein.

11. The trial court's Finding of Fact No. 10 is erroneous in that the record does not support that the February 1996 event was a significant industrial injury or that the event caused the conditions or symptoms listed therein.

12. The trial court's Finding of Fact No. 11 is erroneous in that it is not supported by the medical evidence in the record.

13. The trial court's Finding of Fact No. 12 is erroneous in that the medical evidence in the record does not support that Hulett's cervical degenerative disc disease was asymptomatic before the February 1996 event.

14. The trial court's Finding of Fact No. 13 is erroneous in that per Dr. Weinstein's testimony, Hulett was not placed in the Virginia program because of the effects of the February 1996 event, but to move forward.

15. The trial court's Finding of Fact No. 14 is erroneous in that it fails to note the other potential job goals and that the self-employment goal was selected because that was the goal Hulett wanted to pursue, had

considered pursuing before the injury, and because it involved activities Hulett was already performing and equipment he already had.

16. The trial court's Finding of Fact No. 15 is erroneous in that it is not supported by the medical evidence. Dr. Weinstein approved the job analysis, and the modifications provided were provided as a courtesy and not necessary. Even were Hulett not capable of performing the job, the record establishes that any incapacity is not due to the effects of the February 1996 event.

17. The trial court's Finding of Fact No. 16 is erroneous in that it does not reflect the evidence that Hulett chose to not maximize the business potential of the business.

18. The trial court's Finding of Fact No. 17 is erroneous in that it is not supported by the record. There is no contemporaneous evidence, medical or otherwise, that Hulett was not capable of reasonably continuous gainful employment in the horse boarding business due to the effects of the February 1996 event.

19. The trial court's Finding of Fact No. 18 is erroneous in that the record does not provide contemporaneous evidence or medical evidence support that Hulett needed assistance on a daily basis or that any assistance Hulett may have needed was due to the effects of the February 1996 event.

20. The trial court's Finding of Fact No. 19 is erroneous in that the record reflects the relatives moved back to Washington in April 2000 as the business was opening and assisted with the business during a period when there is no contemporaneous vocational or medical evidence that Hulett was having any difficulties.

21. The trial court's Finding of Fact No. 20 is erroneous in that Dr. Stump's and Green's testimony is not inconsistent with the medical facts in this appeal.

22. The trial court's Finding of Fact No. 21 is erroneous in that it fails to account for Dr. Fordyce's and Dr. Weinstein's review and consideration of Hulett's records after they last saw him, records which were not provided to Hulett's witnesses for review by Hulett.

23. The trial court's Finding of Fact No. 22 is erroneous in that Dr. Brzusek, Hulett's forensic witness, did not have the benefit of Hulett's complete records and the Finding fails to account for Dr. Brzusek's admission that he does not have the expertise to provide a rating for seizure disorder, post-traumatic depression or head injuries and his admission that the cervical condition would not prevent Hulett from working.

24. The trial court's Finding of Fact No. 23 is erroneous in that it fails to account for Dr. Oakes' deferral to Dr. Weinstein and places undue reliance on temporal relationship as a basis for causation.

25. The trial court's Finding of Fact No. 24 is erroneous in that it fails to account for Dr. Oakes' deferral to Dr. Weinstein and places undue reliance on temporal relationship as a basis for causation.

26. The trial court's Finding of Fact No. 25 is erroneous in that it implies Dr. Oakes' opinions should be afforded more weight than that to which they are entitled.

27. The trial court's Finding of Fact No. 26 is not supported by a preponderance of the medical or vocational evidence in the record.

28. The trial court's Finding of Fact No. 27 is not supported by a preponderance of the medical evidence in the record.

29. The trial court's Finding of Fact No. 28 is erroneous in that it places undue weight on lay testimony in the absence of findings on two separate sets, eight years apart, of neuropsychological testing for cognitive abilities and deficits.

30. The trial court's Finding of Fact No. 29 is erroneous in that it places undue reliance on the lay testimony on issues that require a preponderance of credible medical evidence to arrive at a determination of total and permanent disability related to the February 1996 event.

31. The trial court's Finding of Fact No. 30 is erroneous in that it is not supported by a preponderance of credible expert medical and vocational testimony.

32. The trial court's Finding of Fact No. 31 is erroneous in that it places undue reliance on the opinions of family practitioner Dr. Oakes over other experts of various specialties, some of whom also treated Hulett, to arrive at the determination that Hulett is unable to engage in regular consistent gainful employment due to the effects of the February 1996 event.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Under *Stratton v. Dep't of Labor & Indus.* 1 Wn. App. 77, 459 P.2d 651 (1969), the trier-of-fact, in this case the trial court judge sitting for a bench trial, is not to be instructed and is not to consider a Proposed Decision and Order of the Board where the Board has reversed the Proposed Decision because the Proposed Decision is not the Board's final decision. Hulett improperly briefed from and cited to the Proposed Decision in oral argument, and the trial court presumably erroneously relied upon those references and arguments in awarding benefits. (Assignment of Error 1).

1. A preponderance of expert medical testimony, stated on a more probable than not basis and based on objective medical findings of

an industrially-related condition, is required to establish proximate cause between an event and a condition or symptoms as well as entitlement to permanent partial disability, temporary total disability and total permanent disability benefits. That preponderance is not present in this record, the Board decision is supported by substantial expert medical and vocational evidence and should be presumed correct, and the Board's and Department's decisions, which determined Hulett has been employable since July 1, 2000, and his claim should be closed as of August 24, 2005, should be reinstated. Although the Court's memorandum decision cites the law regarding the presumption of correctness of the Board's decision absent substantial evidence to the contrary, it is clear that this is not the standard the Court applied. (Assignments of Error 1-31).

A preponderance of the credible expert vocational testimony in this record supports the Board's decision that Hulett has been employable since July 1, 2000.

2. *Intalco v. Dep't of Labor & Indus.* is an occupational disease case upon which the trial court erroneously based its decision, in which the workers were not required to identify which of a number of known neurotoxins to which they were exposed over a number of years caused their conditions and is inapposite to the condition at issue and as to

this industrial injury claim which has an identifiable event as its source. (Assignments of Error 1, 2, 6-31).

3. The court also erroneously relied upon another occupational disease case, *Dennis v. Dep't of Labor & Indus.*, for the proposition that because Hulett's symptoms which predated the February 2006 event were not causing a loss of function in his particular employment at the time, the existence of the pre-existing and medically documented symptoms is immaterial to the issues of proximate cause and pre-existing permanent partial disability. However, evidence of the pre-existing nature of Hulett's complaints was presented to establish the lack of proximate cause and the pre-existing nature of the complaints and conditions, and this position has recently been rejected by *Puget Sound Energy v. Lee*. For example, Hulett had a pre-existing neck condition verified by x-rays, rated as a Category 2, and symptomatic in 1995. Therefore, the evidence is material as to the level of pre-existing permanent partial and lack of causation disability regardless of whether that disability was impacting his level of function in his particular job as well as lack of causation. (Assignments of Error 1, 3, 6-31).

4. The court erroneously afforded substantially greater weight to the opinions of family practitioner Dr. Oakes, over the opinions of multiple specialists involved in evaluation of Hulett at various stages,

including the specialists who treated Hulett, David Fordyce, Ph.D. and Michael Weinstein, M.D., and vocational consultant Camarda, who worked closely with Hulett. (Assignments of Error 1, 5-31).

C. STATEMENT OF THE CASE

This case arises under RCW Title 51, the Industrial Insurance Act and involves Self-insured Employer Rayonier's (Employer) appeal from the October 31, 2008 trial court decision and Memorandum Opinion following the July 23, 2008 bench trial¹, determining that Hulett has no pre-existing conditions and was temporarily totally disabled from July 1, 2000, through August 23, 2005, and was totally and permanently disabled thereafter as a result of a February 22, 2006 incident when he stood up under a beam while wearing a hard hat and bumped his head. CP 24-35, 46-50.² The trial court reversed the April 24, 2006 Decision and Order issued by the Board, which, after a thorough evaluation of the evidence and applicable law, ordered that the claim be closed without further award for wage replacement benefits, permanent impairment or treatment, determined Hulett's pre-existing moderately severe cervical degenerative

¹ The trial court's Findings of Fact and Conclusions of Law and the Memorandum Opinion are attached as Appendices A and B, respectively.

² All references to the Certified Appeal Board Record are to "BR" and the stamped page numbers in the lower right corner. All references to the testimony contained in the Certified Appeal Board Record are to the page numbers of the perpetuation deposition or hearing testimony of each source. The Superior Court Clerk's Papers are designated as "CP." The Verbatim Reports of Proceedings are designated as "VRP."

disc disease, headaches, somatization disorder, syncope, dizziness, irritable bowel syndrome, pre-existing optic neuropathy, and angioma of the left eye socket were not proximately caused by the February 22, 1996 event, and denied his request for a penalty. BR 2-17.³

The threshold issue in this case is whether Hulett has any condition proximately caused by the February 22, 1996 industrial injury that is in need of treatment or renders him totally disabled. Clinical Psychologist David Fordyce, M.D., psychiatrist Michael Weinstein, MD., both treating specialists, psychiatrist Richard Carter, M.D., neuropsychologist Jeffrey Powel, Ph.D., orthopedic surgeon James Green, M.D, neurologist William Stump, ophthalmologist Richard Bensinger, M.D., family physician Roger Oakes, M.D., Guy Earle, M.D., and Daniel Brzusek, M.D., and vocational consultants Andrew Camarda, Jim Hoppe and John Berg provided expert testimony in this case. The Employer provided Hulett with evaluations by these numerous specialties because of the far-reaching nature of his complaints. All of the physicians and neuropsychologists (including treating doctors), except Dr. Oakes, testified that Hulett's cognitive difficulties are unrelated to his 1996 industrial injury.

³ Hulett did not file a Petition for Review from the Proposed Decision and Order, which denied his penalty request. Therefore, that issue is waived. *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 790 P.2d 201 (1990).

Hulett was continuously employed at Rayonier's mill in Port Angeles from April 22, 1963, until the mill shut down in 1997, and he lost his job as a result. Dep. of Hulett, 10-11. He applied for and received unemployment compensation at that time. Id., 13. Prior to the February 22, 1996 industrial injury, Hulett's medical records establish that he suffered from a variety of "weird," "mostly functional" symptoms such as headaches, irritable bowel syndrome, syncope, fuzzy vision, tiredness and dizziness. Dr. Fordyce, 16; Dr. Oakes, 18-27. In fact, his complaints of headaches go back 15 years. Dr. Carter, 63. Contrary to Hulett's representation to the trial court that Hulett did not have a pre-existing symptomatic cervical condition, he also had **moderately severe, multi-level** pre-existing symptomatic degenerative disc disease of the cervical spine as demonstrated by x-rays obtained in 1992. VRP 7; Dr. Stump, 61, Dr. Green, 101, Dr. Oakes, 21.

As to the cervical degenerative disc disease, Hulett was complaining of neck and upper back discomfort per an April 1995 IME and pain in his neck per a 1995 chiropractic record. Dr. Stump, 68, 79, 83-84, 87. Dr. Green testified that the disc condition had progressed and would continue to progress over the course of Hulett's life. Dr. Green, 102.

In addition, Hulett had a car accident in 1969 wherein his head broke the windshield. Dep. of Hulett, 15. Contrary to the contemporaneous medical evidence in the record, Hulett testified during his discovery deposition, published as part of the record, that prior to the industrial injury, he did not have headaches or migraines (with the exception of a brief issue with a pair of safety glasses), blurred vision, neck pain, anxiety, depression, or fatigue, but had spells of irritable bowel syndrome. Dep. of Hulett, 16-18.

On February 22, 1996, Hulett ducked under a beam while at work, came up on the other side, and bumped the top of his head on a pipe. Dep. of Hulett, 11. Although he testified in these proceedings that he was not sure whether he was wearing his hard hat at the time, the contemporaneous records reflect that he was wearing his hard hat. Dr. Oakes, 7; Dr. Fordyce, 6. He also told Dr. Earle that he was wearing a hard hat at the time. Dr. Earle, 12-18. He returned to light duty after the injury. J. Hoppe, 70; Dr. Fordyce, 8. On April 15, 1996, he filed an Application for Benefits under the Industrial Insurance Act.

Following the injury, Hulett complained of symptoms that confounded the doctors and resulted in evaluations by numerous specialists. Ultimately, the Employer arranged for Hulett to participate in the Virginia Mason Neurorehabilitation Program (misleadingly and

pejoratively referred to throughout Hulett's trial court brief as the "head injury" program by Hulett's Counsel), in 1999, first as an inpatient for two weeks, then as an outpatient for twelve weeks. According to his treatment provider in that program, physiatrist Michael Weinstein, M.D., the medical director of the program, he was fully rehabilitated thereafter. Weinstein, 3/31/05, 59-64, *infra*. Dr. Oakes testified that he has a lot of respect for Dr. Weinstein's program and was the reason Dr. Oakes recommended this to Hulett. Dr. Oakes, 28-29. It is important to note that following Hulett's completion of the program, he experienced a traumatic and tragic event on his property. Hulett and his son-in-law were moving a house on the Hulett property. The house fell during the moving, pinning Hulett and his son-in-law under the house for one and one-half hours. Hulett's son-in-law died as a result of this accident, and Hulett feels he is responsible for his son in law's death. Dr. Carter, 26-27.

Hulett owns a 25-acre parcel of property with six buildings including his residence, which he built himself, horse barns and a building for equipment storage. Dep. of Hulett, 22-23; S. Hulett, 3/29/05, 6; Dr. Carter, 46. He testified that he performs some maintenance work on the buildings as well as on the equipment on the farm. Dep. of Hulett, 22-25. He began boarding horses in 1999 after he returned from the Virginia Mason inpatient program. *Id.*, 25. At the time of his discovery deposition,

he had five horses on the property belonging to the Huletts and to their daughter. Id., 26-27. He cares for the horses, including moving 50-pound feed sacks and hay bales, cleaning the horse stalls, and maintaining the buildings, the property and the trails. Id., 27-32.

Clinical psychologist David Fordyce, M.D., works in the Virginia Mason Rehabilitation Medicine Department. He conducted a neuropsychological evaluation of Hulett in June and July 1996 on referral from his treating neurologist, Lynn Taylor, M.D., including the standard battery of tests used for someone with mild concussion. Fordyce, 3/30/05, 3-6, 9. None of the results indicated a pattern consistent with acquired cognitive impairment secondary to head injury. Id., 10. Dr. Fordyce also administered the Minnesota Multi-phasic Inventory 2. Hulett's findings suggested the presence of some mild degree of underlying depression and anxiety and a pattern of test results consistent with individuals who experience stress through physical symptoms or report physical symptoms during times of distress – a somatic focus. Id., 11. Because the tests were normal, Dr. Fordyce determined Hulett's feelings of remaining symptomatic were related to his personality. Id., 12. He felt Hulett could benefit from rehabilitation to improve his recovery. Id., 12. Dr. Fordyce testified that after that program, he was functioning independently, and there was no indication of permanent brain injury with a possible

exception of a question of partial complex seizure disorder, but there was no confirmation of that diagnosis. Id., 14-15. Hulett was functioning and ready to return to work. Id., 21. He noted there appeared to be a severe deterioration a number of months after he left the rehabilitation program, but it is not typical for people with brain injuries to deteriorate over time absent some other active medical condition. Id., 14-16.

Dr. Fordyce reviewed records of Hulett's treatment preceding the industrial injury, which included office visits for headaches, dizziness, some syncopal issues of dizziness and fainting, and gastrointestinal distress. Id., 16. He also reviewed the neuropsychological testing performed by Dr. Powel, referenced below, and noted the results were generally similar. Id., 17. He testified that there were substantial elements of Hulett's function that were consistent with a diagnosis of somatization disorder under DSM-IV, Diagnostic and Statistical Manual, 4th ed. Id., 17. Although Hulett asserts he has "seizures" that incapacitate him, Dr. Fordyce noted none of the records revealed observations of the alleged seizure disorder or spells, and had there been seizures, they would have been documented. Id., 18-20; CP 115. He testified that Drs. Oakes, Taylor, McClean and Patterson, all neurologists except Dr. Oakes, had all prescribed anti-seizure medication, Dr. Taylor started that medication

early in his treatment, and all the neurologists said at some point they were not sure of the diagnosis, or if the medications had any effect. Id., 36.

Dr. Fordyce also noted that he has seen patients who have problems with physical symptoms that are greatly accentuated after tragedies, and the closing of the mill, as well as the death of his son-in-law, could have been significant stressors. Id., 20-21, 42.

As to the recommendation for the Neurorehabilitation program, Dr. Fordyce explained that the injury was extremely mild, and it was not likely permanent sequelae resulted from a concussion that mild. Hulett had a protracted period of symptoms due to his personality and coping skills, and Dr. Fordyce believed the program was appropriate to assist him in becoming more confident, taking risks, and building up stamina and endurance. Id., 21-22.

Dr. Fordyce testified that as to the industrial injury, Hulett was capable of continuous employment from July 1, 2000, to the time of his testimony on March 30, 2005. Id., 25-26. He further testified that he did not believe that the symptoms Hulett manifested after the Neurorehabilitation Program were related to the February 1996 injury. Id., 21. He concluded that Hulett's problems are psychologically based given the consistent set of data, such as the CT, MRIs, serial EEGs, and serial

neuropsychological test results, which indicated no objective indications of structural brain injury. Id., 42.

Board-certified physiatrist Michael Weinstein, M.D., has been with Virginia Mason since 1986, and is the medical director of outpatient Neurorehabilitation services and the inpatient program, the only accredited program in Washington. Half of the patients he sees are patients who are in the outpatient program for work-related head injuries. Weinstein, 3/31/05, 51-53, 57. Dr. Weinstein participated in the three-day, multi-disciplinary evaluation of Hulett in December 1998. Id., 54. His cervical spine evaluation at that time was unremarkable and without pain complaints. Id., 58. Dr. Weinstein noted that 5 to 15% of people with mild traumatic brain injury still have difficulties a year later. However, Hulett's neuropsychological testing did not demonstrate these problems, and he had no evidence of an unresolved brain injury. However, to move forward with treatment and return him to work, the team gave him the umbrella diagnosis of post-concussion syndrome. Id., 62. He was admitted to the inpatient program for observation to monitor his motivation and his inconsistent complaints. Id., 58.

Notably, as to the alleged seizure disorder, during the two-week inpatient program, Hulett had no evidence of any blackout spells despite his report that they happened frequently. He was not given seizure

medication during his hospitalization. He was given Dilantin for his headaches and was told it could stop his seizures. This was done as a way to behaviorally deal with his complaint. The dose given was insufficient to control seizures. Id., 63. Dr. Weinstein also testified that recurrent seizure or epileptiform disorder would have shown up on a diagnostic study, and it did not show up on Hulett's study. Id., 64. Additionally, Hulett did not report blackout spells during the lengthy outpatient portion of the program. Dr. Weinstein testified that Hulett does not suffer from complex seizure disorder. Id., 74. Hulett also did not show any depression or symptoms of depression during the program. Id., 71-72.

Dr. Weinstein testified that Hulett successfully completed the program. He reviewed the job analyses for horse boarder and building maintenance and testified that Hulett could perform both jobs full-time. Id., 73; Ex. 5; Ex. 6. He testified that if Hulett used the tools he learned in the program, his alleged current state would not be a worsening of his condition, but a failure to follow through. Id., 78. Hulett demonstrated the abilities to work as a horse boarder and should have been able to continue in those abilities indefinitely. Id., 78-79. Dr. Weinstein testified that he could have performed the horse boarder job without the requested job modifications, but approved the modifications to assist him. Id., 81-82. He

also testified that the horse boarder job was not the only one discussed, but it was the only one Hulett wanted to pursue. Id., 83.

Dr. Richard Carter, a psychiatrist, evaluated Hulett. He did not observe memory problems or disturbances in mental status. Id., 51. Dr. Carter explained that the Axis format used for diagnosing mental health conditions, which is consistent with the Diagnostic and Statistical Manual, 4th ed., and prior editions, provides a comprehensive assessment on a number of different planes. Dr. Carter, 54. Axis I is an assessment of acute or florid psychiatric conditions. Axis II is an assessment of long-standing psychiatric issues, personality traits or personality disorders. Axis III involves physical conditions that might impact the Axis I or II diagnoses. Axis IV references psychosocial environmental problems. GAF references a Global Assessment of Functioning, which is meant to integrate all of the information to arrive at a conclusion regarding the level of the individual's functioning from a psychiatric standpoint. Dr. Carter, 54-55. Dr. Carter diagnosed Axis I: depressive symptoms, but doubted he warranted a diagnosis of major depression, Axis II: underlying maladaptive functioning, some somatic focus (a physical way people communicate their mental status with complaints of physical problems unsupported by a medical diagnosis), dependent issues, especially as to his wife, and passive-aggressive functioning, long-standing. Id., 55-62. He noted

Hulett's headaches and somatization with bowel complaints go back 15 years. Id., 63-68. Dr. Carter referenced Hulett's retirement and his son-in-law's death in his Axis IV diagnosis. Id., 68. He also noted that Hulett's relationship with his wife warrants serious reflection. Id., 49. Hulett's Axis V GAF score was 61-70. Id., 69.

Dr. Carter concluded that the diagnoses are not related to or aggravated by the industrial injury, Hulett has no mental health impairment, and he was able to work. Id., 68-73, 114-115. Dr. Carter stressed that Hulett's somatic focus was not caused by the injury, but was a psychological process that began early in his life. Id., 116. He also noted that Hulett's reported memory problems, issues of depression and its impact on functioning and his underlying personality should be considered. He explained as follows:

Clearly, in the way he described the marriage, there is some tension between the two, and this is documented in the records which exist long before my examination. And the individual, Hulett, probably does not want to do everything that his wife wants to do. She's more social, and he has found a way - - his mind has come up with a way for him to resist her wishes to be more social.

And it's probably a combination of unconscious factors that lead him to get tired and be unable to participate in things with her, perhaps some conscious awareness that he just doesn't want to do everything that she wishes him to do, and also the impact of some depression, which can lead an individual to be fatigued. So it's that combination of psychiatric factors that I think impacts Hulett.

Dr. Carter, 61-63.

V.R.C. Andrew Camarda, along with the multidisciplinary team at Virginia Mason, began working with Hulett while he was still an outpatient there. By the time Mr. Camarda joined the process, a number of options had been discussed with the Virginia Mason vocational counselor. Camarda, 3/30/05, 111-113. Hulett raised the idea of horse boarder/trainer. Mr. Camarda was skeptical given the stringent standards applied by the Department of Labor & Industries (DLI) to self-employment, but he gave Hulett the opportunity to prove his motivation to pursue this goal by assigning a number of tasks, including development of a marketing plan, expense and profit projections, and a business plan. Id., 115-116; Ex. 1; Ex. 2. Mr. Camarda went to the property in the summer of 1999 to review the set up and conduct a job analysis, which was approved by Dr. Weinstein. Id., 117, 129; Ex. 6. The property was everything Hulett represented and more. The barn was state of the art, the facility was spotless, the property was picturesque, and Hulett had a lot of equipment. Id., 118; Ex. 4. Hulett was aware of the physical nature of the job and reported he had been doing that aspect of the work all along. Id., 118. The business proposal Hulett submitted to Mr. Camarda involved 8 full-care barn horses at \$275 per month each and 4 full-care pasture horses at \$200 per month each. Id., 121. After permit and other issues were resolved, the

formal plan began in April 2000 and continued through June 30, 2000.

Hulett took a vacation shortly after opening the business. He had no urgency to maximize income. Id., 157.

Mr. Camarda was very involved with Hulett as he progressed through this process and never had any indication from anyone that Hulett was having any difficulties. Mr. Camarda again visited the property in November 2000, and for the first time had contact with Mrs. Hulett. From all appearances, Hulett was doing fine and indicated they had seven full care horses and were expecting more. They expressed satisfaction with the equipment and were appreciative of the work that Mr. Camarda had done. They made no indication that they were not pleased with the situation. Id., 129. DLI supported the plan in their findings of his employability in the vocational goal, which was upheld by the Director following the DLI's dispute resolution process. Id., 130. Mr. Camarda testified that Hulett could have done a number of jobs, including building maintenance and janitorial work, given his skill set, and was employable from July 1, 2000 to the present. Id., 131.

In November 2000, Hulett was boarding seven horses, and there was discussion of boarding dogs. S. Hulett. 3/29/05, 20, 22. He had capacity to stable board 8 horses and pasture board 4 horses. S. Hulett.

3/29/05, 18. He used multiple pieces of farm equipment on a daily basis.

S. Hulett. 3/29/05; 21-22; Ex. 4.

In December 2000, Hulett and his son-in-law were moving a manufactured home onto the property because his daughter and son-in-law were going to move onto the property and help with the business. The building turned as they were putting it on blocks, killing his son-in-law and pinning Hulett under the building. *Id.*, 35-36, 39; S. Hulett. 3/29/05, 23-24. He testified that the event was devastating, and almost immediately thereafter the Huletts decided to discontinue the business. S. Hulett. 3/29/05, 24. He testified that he believes the accident was his fault. S. Hulett, 4/21/05, 59; Dr. Carter 26-27.

Jim Hoppe, M.Ed., reviewed Hulett's medical and vocational records pertaining to this claim, and met with Drs. Oakes and Patterson and with Dr. Weinstein regarding the Building Maintenance Job Analysis he prepared on-site using a local employer, Olympic Memorial Hospital, which Dr. Weinstein approved. Mr. Hoppe testified that the vocational workup of the file prior to his review was very thorough. Hoppe, 3/29/05, 32-38, 44-45, 48; Ex. 5; Ex. 6. He testified that the medical and vocational records revealed Hulett had the physical capacity to work in the medium to heavy category and had a myriad of transferable skills. *Id.*, 38-42. He further testified that Hulett's skills exceeded the requirements for the

building maintenance position, and his review of the labor market revealed an active market for the position with open positions and recent hires. Id., 49-52. Mr. Hoppe concluded Hulett was employable as a building maintenance repairer from July 1, 2000, to the date of his testimony on a more probable than not basis. Id., 62-63. Dr. Oakes deferred approval of the job analysis to Hulett's treatment providers at the Neurorehabilitation Program. Id., 68-69, 97, 103; Dr. Oakes, 33. Mr. Hoppe understood that Dr. Oakes was referring Hulett to mental health treatment related to the death of his son-in-law. Hoppe, 103. Dr. Oakes testified that Hulett could work between July 1, 2000, and August 4, 2004. Dr. Oakes, 35.

Mr. Hoppe also reviewed the local market for horse boarding and found the fees ranged from \$200 to \$375 per month for the more pristine facilities. Id., 55. Noting the difficulties with assessing true income in the self-employment context, he testified that it is conceivable that a business could show a net loss, but still be potentially successful and still provide the owner of the business with an income. Id., 100. Vocational consultant John Berg testified on behalf of Hulett that he was unable to work and would not benefit from retraining. Berg, 31.

Neuropsychologist Jeffrey Powel, Ph.D., evaluated Hulett in April 2004 with a records review, interview and testing. Dr. Powel, 3/31/05, 3-6; Ex. 7. Dr. Powel noted that some of Dr. Fordyce's test results were better

than Dr. Powel's results, which was atypical of a concussive-type injury. He suggested that the cognitive difficulties could be medication effects, mood disturbance, motivation, secondary gain and those types of issues. Id., 11-14. He testified that Hulett's symptoms after Dr. Weinstein's treatment are not related to the concussive event, but could be related to waxing and waning of mood disturbances, and depression, as well as catastrophic events such as the death of his son-in-law, the loss of his job and the loss of his retirement benefits. He noted these events could lead to cognitive complaints and mood disorders. Id. 39-40. He explained that Hulett's MMPI profile revealed a high degree of somatoform anxiety, and physical discomfort is often an indirect way of getting sympathy and support from others. Id., 15-17. He concluded that based on neuropsychological status, Hulett could work. Id., 46.

As noted above, Board-certified psychiatrist Richard Carter, M.D., conducted an intensive psychiatric evaluation of Hulett over two days in March 2004, which will not be summarized in detail here. Carter, 5, 8, 17. He was present for the examination by Drs. Green and Stump, and conferred with those doctors and Dr. Powel after Dr. Powel's evaluation to finalize their opinions. Id., 10. During the evaluation, Hulett revealed that he thought he did things wrong in moving the house on the property, and he blamed himself for his son-in-law's death. He was trapped under the

house with him for one and one-half hours. Id., 26-27. Dr. Carter believed the impact of the event on Hulett was very important and was tempted to call it profound. Id., 30. Dr. Carter also found significant the double loss that Hulett learned he would not be able to retire with full benefits and the plant closure. Id., 30-31. Hulett reported to Dr. Carter that they had a horse boarding business before he got hurt and so continued to do that after the injury. Id., 38.

Board-certified orthopedic surgeon James Green, M.D., evaluated Hulett in March 2004. Green, 3/30/05, 88-89, 91. He diagnosed cervical degenerative disc disease pre-existing based on prior imaging studies of his neck and pre-existing documented symptoms. He also testified that the symptoms after the injury did not suggest any clinically significant change. Id., 94-95. The restriction he offered was avoidance of continuous overhead work, but the restriction was related to the pre-existing cervical condition. He testified Hulett was capable of reasonably continuous gainful employment from July 12, 2000 until the date of his testimony on a more probable than not basis, and he approved the job analysis for building maintenance. Id., 95-96; Ex. 5.

Board-certified neurologist William Stump, M.D., evaluated Hulett in March 2004. Dr. Stump, 3/30/05, 48. The neurological exam was normal. Id., 55-56. Despite Hulett's testimony indicating he did not know

if had been wearing his hard hat or had lost consciousness, Dr. Stump reviewed the records made at the time of the injury which reflected that Hulett had been wearing his hard hat and had not lost consciousness. Id., 57. He diagnosed a closed head injury without loss of consciousness secondary to the February 22, 1996 injury, history of cervical degenerative disc disease pre-existing the injury, reported cervical strain secondary to the 1996 injury and history of prior low back injuries with chronic low back pain. Id., 62.

Notably, Dr. Stump did not diagnose Hulett with a concussion because there was no loss of consciousness. Id., 62-63. He testified that brain injuries do not produce progressively deteriorating symptoms, but a fixed deficit that becomes stable within several weeks or months of the injury. Id., 64. He explained that there was no documentation that Hulett sustained a brain injury on February 22, 1996, and he testified that the symptoms reported at the time of his evaluation were unrelated to that injury on a more-probable-than-not basis. Id., 64-65.

Dr. Stump testified that Hulett's persistent symptoms were difficult to explain in the absence of any abnormality in his EEG, CT scans and MRIs, or any structural changes, and there was no neurological basis for the ongoing complaints. Id., 65-68. The July 1996 MRI showed a left orbital mass (determined to be a cavernous hemangioma), which could be

responsible for his visual complaints but not dizziness or memory dysfunction, but was not related. *Id.*, 69-70. He noted that when Hulett was referred to the Virginia Mason program in 1998, they assessed that he showed disability conviction and a tendency to somatization, meaning that there was a psychological aspect to his complaints. *Id.*, 76. He concluded that Hulett was able to work up to the time of his testimony and approved the job analysis for building maintenance. He also testified that the Category 2 cervical impairment was present as early as 1992, and symptomatic prior to the injury per an April 1995 IME and a 1995 chiropractic record. *Id.*, 68, 79, 83-84, 87.

Board-certified ophthalmologist Richard Bensinger, M.D., evaluated Hulett in 1996 and March 2004. He found no eye condition related to the February 1996 injury, but did note the pre-existing mild optic neuropathy. *Bensinger*, 3/31/05, 100, 106. When Hulett complained of doubling vision, Dr. Bensinger took additional tests, but found no objective basis for the complaint. He determined that Claimant had no limitations on his activities from a visual standpoint. *Id.*, 101-103.

Roger Oakes, M.D., is a family physician who has been seeing Hulett since the mid-1980s. Contrary to the documented medical evidence, he testified that Hulett did not have complaints similar to his post-injury complaints prior to February 22, 1996. *Dr. Oakes*, 4, 6-7. He saw Hulett

the day after the injury, and the contemporaneous record reflects that Hulett reported that he had injured himself the day before when he was moving rapidly with his hardhat on, went under a beam and raised up and hit his head against a pipe. Hulett also told Dr. Oakes at that time that he did not lose consciousness. Id., 7. There were no definite neurological findings noted, no sign of bleeding in his head and the CAT scan that was ordered to review for cerebral contusion was normal. Id., 8. He testified that 'over the years' Hulett has had some cognitive changes and a variety of spells and problems that are hard to characterize despite the various consultations by many specialists. Id., 9, 11. Although he testified that Hulett's symptoms are consistent with post-concussion syndrome, Dr. Oakes conceded that there are other factors in his health that could explain the symptoms. Id., 14. He also conceded that Hulett had chronic diarrhea pre-injury and a variety of bowel symptoms and even reported a spell with fecal incontinence. Id., 9. He also conceded that Hulett listed diarrhea, constant headaches, stomach cramps and spasms, tiredness, eyes sensitive, faintness in getting up, and sore kidneys on a pre-injury Virginia Mason evaluation form, some of the same symptoms he complained of post-injury. Id., 20. Hulett was complaining of left eye fuzziness in 1992. Id., 24. Dr. Oakes also confirmed that Hulett had neck problems before and after the industrial injury. Id., 21. He also referred Hulett to

otolaryngologist Steven Craven, M.D., **in 1992**, and reported in the referral that he has had trouble in the past with functional bowel and “[a]t **times has a had a variety of weird symptoms that I have never been able to put totally together. I think they are mostly functional.**” Id., 22, *emphasis added*. He explained that the terms “functional” and “physical somatization” refer to psychological rather than a physiological response. Id., 23.

On referral to Dr. Maclean in 1998, Dr. Oakes reported that Hulett had complicated neurological problems dating “back to even prior to February 22, 1996.” Although Dr. Oakes could not say what the complex neurological problems were to which he was referring, he conceded that the first note in Volume II of his records is from 1986, and it was possible that Volume I was missing. Id., 25-27.

Dr. Oakes testified that he had a great deal of respect for the Neurorehabilitation Program at Virginia Mason. Notably, despite the assertion of ongoing and constant disability, Oakes testified that from the time Hulett was first evaluated for the program in late 1998 up until early 2000, **he did not see Hulett except once in 1999.** Id., 27-28. There was no reference to cognitive difficulties in that record or in a visit for a left knee injury in February 2000. Id., 29. Dr. Oakes conceded that had Hulett made such complaints, he would have probably recorded them. Id., 29. In

December 2002, Dr. Oakes recorded that, “I’ve explained to Steve that I think he’s a person who has a lot of physical symptomology as a manifestation of other stresses.” Id., 30. His September 2002 chart note references “a severe sleep disorder with early morning awakening, trouble getting to sleep, ruminating over some thoughts about a recent severe accident at their place, and not feeling comfortable making decisions any more,” referencing the death of Hulett’s son-in-law. Id., 31-32. He testified that there was no definitive diagnosis for Hulett’s “spells,” and he could have probably performed some type of work between July 1, 2000 and August 4, 2004. Id., 35-36. When asked whether he believes that Hulett has epilepsy, he thought there was enough evidence to make a statement that Hulett has a seizure disorder, a term he uses synonymously with epilepsy, and testified there may be no definitive test. Id., 41-42.

Guy Earle, M.D., saw Hulett at his attorney’s request. Earle, 9. Although the threshold question of causation requires prior medical history, Dr. Earle was not provided with any records prior to February 1997 to review, including Dr. Fordyce’s 1996 report, or the other evidence of Hulett’s pre-existing complaints. Id., 47. Based on the records referenced in Dr. Earle’s testimony, it appears the records he was provided were not complete. For example, it appears he was not provided the records of the pre-existing complaints, including cervical complaints, and

he was thus unaware of Hulett's pre-existing neck condition. Nor did he reference Dr. Oakes' post-injury records, noting the first record he had post-injury was Dr. Hoque's 3/97 report. Id., 12-22. He testified he would rely on the neuropsychologists' interpretation of the MMPIs regarding the assessment of somatic focus. Id., 48.

Hulett told Dr. Earle he was wearing a hard hat when he hit his head and had no loss of consciousness. Id., 12-18. He also told Dr. Earle that he thought his depression began a year after his injury and was due in part with his frustration with his claim and in part to his son-in-law. (Notably, depression was not an issue in the Neurorehabilitation Program and up until the death of his son-in-law). Id., 22. Although Dr. Earle testified that Hulett seemed to have consistently fewer seizures when on anticonvulsants as documented by his providers, it is unclear on which records he is basing that assessment. Id., 25. Dr. Earle diagnosed post-concussion syndrome related to the claim, resolved three to six months after the injury, depression related to injuries sustained and conditions developed as result of the injury, cervical strain with ongoing aggravation of cervical degenerative disc disease and seizure disorder. Id., 30-31. He noted that if the two earlier neuropsychological exams revealed no evidence of organic disease, then the condition probably resolved without

residuals, and the industrial injury was an unlikely cause of any seizure disorder. Id., 46, 48.

Dr. Earle questioned whether there were pre-existing personality characteristics, and could not find a prior diagnosis of depression or treatment. He testified that the death of the son-in-law would contribute to the depression. Id., 32. Notably, Dr. Earle could not testify on a more probable than not basis that the seizure disorder he diagnosed is related to the industrial injury, and testified that condition would be best assessed by a neurologist. His headaches could be associated with his type of head injury and a neck problem. Id., 33, 41. He testified that it was possible Hulett had pseudoseizures rather than true seizures (which could be differentiated with EEG and MRI) caused by emotional issues and conceded Hulett had some incontinence prior to the injury. Dr. Earle had apparently not been provided the report of the March 2004 panel, which included Dr. Carter's evaluation because he found no evaluation by a psychiatrist in the records and recommended an evaluation and suggested neurological assessment, which had already been done. Id., 33-34, 42-43, 53-54. He testified that he would defer to an evaluation by a psychiatrist. Id., 44. He did not have enough information to assess causation for the depression, but thought it was multifactoral and could be caused by ongoing neck problems, the mill shutting down and the death of his son-

in-law. Id., 44-45. He testified that the dizziness could be caused by the neck condition and could be caused by emotional issues, but it was not a remnant of the post-concussion syndrome. Id. 45. Finally, he testified that Hulett was capable of performing some kind of work between July 1, 2000 and August 4, 2004, and Hulett had a Category II cervical impairment, but again, he was unaware of the pre-existing, symptomatic nature of the cervical condition. Id., 35, 49-50.

Daniel Brzusek, D.O, saw Hulett in June 2005 at his attorney's request. Dr. Brzusek, 5, 9. He conceded that he did not have the expertise to provide an impairment rating for seizure disorders, closed head injury, or post-traumatic depression. Id., 22. He also conceded that his focus is musculoskeletal problems, and if he saw someone who suffered head injury/concussion, he would refer them to Dr. Weinstein. Id., 23-24. Although he related a number of conditions to Hulett's industrial injury, he agreed that Dr. Weinstein is really in the best position to express an expert analysis of Hulett's alleged head injury. Id., 25. He also conceded that he would have to defer to a psychologist or psychiatrist for a determination of whether any depression is related to the death of Hulett's son-in-law, but he did not seem depressed at the time of his evaluation. Id, 29. He questioned the seizure disorder diagnosis due to lack of data and substantiating documents and failed to testify to a definitive cause of

Hulett's purported headaches. *Id.*, 16, 25, 30. As to Hulett's alleged balance issues and dizziness, Dr. Brzusek did a number of provocative tests and could not elicit a finding. *Id.*, 13, 28.

Hulett, his wife and his sister-in-law provided lay testimony. That testimony is not summarized here. The issue of causation must be resolved with expert medical testimony.

Following hearings, the Board issued its Decision and Order on April 24, 2006, affirming the Department's closure of the claim with no further benefits and noting the pre-existing conditions and lack of causation. BR, 2-17. Hulett appealed to Clallam County Superior Court, and a bench trial was had before visiting Judge Craddock Verser, followed by a Memorandum Opinion, Findings of Fact, Conclusions of Law and Judgment adverse to the Employer and reversing the Board's and the Department's determinations. CP 24-35, 46-50, 150-151; VRP, 1-89. The Employer's appeal to this Court followed. CP 7-22.

D. SCOPE AND STANDARD OF REVIEW

RCW 51.52.115 provides that in all court proceedings, **the findings and decision of the Board are presumed correct**, and the burden of proof is on the party challenging the Board's findings and decision to establish by a preponderance of competent, credible evidence that the Board's decision should be overturned. The Board's decision is

considered prima facie correct if there is substantial evidence to support it. RCW 51.52.115; *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 902-903, 810 P.2d 500 (1991), citing, *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977), and *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 843-844, 440 P.2d 818 (1968). The Board's factual determinations will be upheld by an appellate court if supported by substantial evidence. *Springstun v. Wright Schuchart, Inc.*, 70 Wn. App. 83, 88, 851 P.2d 755 (1993). The Supreme Court has defined substantial evidence as evidence that would convince "an unprejudiced, thinking mind." *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980).

Moreover, agency interpretation is to be granted some deference by the Courts. Although the Board's interpretation of the Industrial Insurance Act is not binding upon this Court, it is entitled to great deference. *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991), citing, *Dolman Dep't of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986); *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968). In this case, both the Department and the Board, two separate, independent agencies charged with administration of Title 51, determined Hulett's claim should be closed with no further benefits. Those decisions are entitled to deference.

Hulett did not meet his burden of proof to establish entitlement to benefits in this case. In any workers' compensation appeal where the issue is a workers' entitlement to benefits, the ultimate burden of proof is at all times with the worker. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Dept. of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958). This is so regardless of which party has brought the appeal and regardless of the doctrine of liberal construction. *Stafford v. Dep't of Labor & Indus.*, 33 Wn. App. 231, 235, 653 P.2d 1350 (1982) (despite liberal construction in favor of those who come within terms of a remedial statute, persons who claim rights and benefits thereunder should be held to strict proof of their right to receive benefits), *citing*, *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955), and *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498. Hence, Hulett was required to establish his right to benefits.

Moreover, the doctrine of liberal construction of Title 51 is a rule of statutory construction and does not apply to the interpretation of facts. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 206 P.2d 787 (1949). As the Court in *Ehman* stated,

In the case at bar, it must be remembered that workmen's compensation statutes should be liberally construed, and, also, that the rule does not apply to questions of fact but to matters

concerning the construction of the statute, and that the principle does not dispense with the requirement that those who claim benefits under the act must, by competent evidence, prove the facts upon which they rely.

33 Wn.2d at 595, *citations omitted*. In *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 12-13, 163 P.2d 142, 147-148 (1945), the Court held that the giving of a jury instruction directing the jury that the Industrial Insurance Act was to be liberally applied was reversible error. Although noting the case law providing that the Title 51 is remedial and is to be liberally construed, the Court also reiterated the "strict proof" requirement and noted as follows:

The matter of liberal or narrow construction does not apply to matters of fact, but is limited to question of law. The court, in its instructions to the jury, is required to give a liberal interpretation of the workmen's compensation act, but the jury is confined to a determination of the facts of the case from the evidence presented, in accordance with the court's instructions as to the law.

By the instruction above quoted, the jury was directed to *apply* the act 'liberally' and was cautioned against a narrow construction thereof. In other words, the jury was invested with a power that only the court should exercise. **Moreover, the jury was thereby invited, or encouraged, to return the largest verdict possible, rather than a fair and impartial one, according to the evidence in the case. That is not the purpose of the act, for, while its provisions as a legislative enactment are to be liberally construed, the verdicts to be returned thereunder must be fair and impartial in the light of the evidence adduced. The act contemplates a liberal interpretation of its provisions, not a liberal verdict, regardless of the evidence.**

Hastings v. Dep't of Labor & Indus., 24 Wn.2d.2d 1, 12-13, 163 P.2d 142, 147-148 (1945), *citations omitted, emphasis added.*

In this case, Hulett did not present the necessary quantum of evidence to support his claim for further benefits, his claim is not supported by a preponderance of the evidence, the Superior Court's Findings are not supported by substantial evidence, and the Employer submits could only be adduced by an erroneous application of the liberal construction doctrine to the facts. The Board's Decision and Order is entitled to the presumption of correctness and should be affirmed.

E. ARGUMENT

1. **THE OVERWHELMING WEIGHT OF THE EXPERT MEDICAL EVIDENCE ESTABLISHES THAT HULETT HAS NO RESIDUALS FROM THE FEBRUARY 2006 EVENT, AND IS ENTITLED TO NO FURTHER BENEFITS.**

The Employer contends that the trial court erred in reversing the decisions of the Board and the Department, Hulett is not entitled to temporary total disability (time loss) and total permanent disability (pension) benefits, and the claim should remain closed. Notably, Counsel argued to the Court that the Board is not "entitled to make up evidence." VRP 35. The Employer submits that upon this Court's careful consideration of all of the expert medical testimony in this case, the Court will determine the Board did not make up any evidence, in contrast to the

sum of Hulett's briefing and oral argument at the bench trial of this matter, and the Board and the Department were correct.

Whether Hulett's condition is proximately caused by the minor injury he sustained in 1996 (standing up under a pipe with a hard hat on), is a threshold question in this case. This claim presents a classic case of an employer that went well beyond what was medically required in a claim by providing 'treatment' and benefits only to have that the provision of those benefits used against it later to establish causation where none exists.

RCW 51.08.100 defines an industrial injury as follows: "Injury" means 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, *emphasis added*. An injury that aggravates a pre-existing physical condition is to be attributed to such injury. *Harbor Plywood Corp. v. Dep't of Labor & Indus.*, 48 Wn.2d 553, 295 P.2d 310 (1956). As the Board explained in *In re: Kenneth Heimbecker*, Dckt. No. 41, 998, (August 29, 1975), citing *Jackson v. Dep't of Labor & Indus.*, 54 Wn.2d 643, 343 P.2d 1033 (1959), "Every industrial accident does not constitute an industrial injury." The law requires that a causal relationship between the incident and physical condition be established by medical testimony.

The law demands that verdicts rest upon testimony and not upon conjecture and speculation. There must be some proofs connecting the consequence with the cause relied upon. The testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on. *Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 276, 373 P.2d 764, 767 (1962); *Anton v. Chicago*, 92 Wash. 305, 308, 159 P. 115 (1916).

In *Anton v. Chicago*, 92 Wash. 305, 159 P. 115 (1916), the Supreme Court upheld dismissal of a plaintiff's personal injury case based on essentially the same medical testimony. In *Anton*, a plaintiff injured his shoulder and then contracted tuberculosis in the same shoulder. His medical expert, a general practitioner, testified that given the timing, there had to be a causal connection between the shoulder injury and the tuberculosis:

Well it is very natural to attribute [the tuberculosis] to an injury of that kind where we have a very definite injury coming on in a person who has been perfectly healthy and well up to the day of their injury, and from that time on sickness is manifested and that continues. In such a condition as **we find the shoulder joint in, and this sort of a disease coming on in a person who has been perfectly well prior to that time it is the most natural thing to assume that the injury was the determining cause[.]**.

In rejecting this testimony and affirming the dismissal the Court said:

The witness was a general practitioner who assumed no special skill in the science of orthopody The case was taken from the jury after all the evidence was in. **Taking the opinion of the witness for the appellant, as quoted above, at its full worth we think it is no more than a statement of a possibility or possibly a probability, more or less remote, that the tuberculosis is the result of the injury. This is not enough. The law demands that verdicts rest upon testimony and not upon conjecture and speculation. There must be some proofs connecting the consequence with the cause relied upon.** The testimony, whether direct or circumstantial, must reasonable exclude every hypothesis other than the one relied upon.

Id., at 308, *emphasis added*; *see also*, *Cooper v. Dep't of Labor & Indus.*, 20 Wn.2d 429, 147 P.2d 522 (1944) (It is well-established that a physician may not base an opinion as to causation of a physical condition on subjective symptoms and self-serving statements).

In this case, the assessment of causal relationship by the trial court and by Dr. Oakes is based on the self-reported history of increased and different symptoms by Hulett, his spouse, and his sister-in-law after the February 1996 event despite contrary evidence in the medical records. As the Court noted above, timing is insufficient to establish causation.

The vast weight of the medical opinions offered in this case does not support the trial court's determination that Hulett had no pre-existing impairment and complaints, or that he has residuals from the February 2006 event which rendered him totally disabled, first temporarily, then permanently.

2. HULETT ERRONEOUSLY CITED TO AND THE TRIAL COURT
ERRONEOUSLY RELIED UPON INTALCO V. DEP'T OF LABOR
& INDUS. TO SUPPORT CAUSATION.

Hulett cited to and argued from *Intalco v. Dep't of Labor & Indus.* 66 Wn. App. 644, 833 P.2d 390, *review denied*, 120 Wn.2d 1031, 847 P.2d 481 (1993), to support causation, and the trial court erroneously relied upon the argument to find Hulett was entitled to further benefits. VRP 78-82; BR 117-119; CP 49. However, *Intalco* is inapplicable. *Intalco* was an occupational disease claim where, because of the number of **known** chemical neurotoxins to which the workers were undisputedly exposed, the workers were not able to identify which specific chemical or chemicals caused their conditions. The Court held, in that instance, the workers were not required to identify with specificity the particular known neurotoxin which caused their condition.

In fact, there is not one reported Washington case in which a court utilized the *Intalco* chemical exposure causation standard in an industrial injury claim with an identifiable event. In fact, to do so would be contrary *per se* to the statutory requirements to establish an industrial injury, which is defined as follows:

“Injury” means 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. In this regard, the Board in *In re: Judy M. Fry*, Dckt. No. 97 3415 (November 6, 1998), noted the *Intalco* does not dispense with the requirement to establish causation, explaining as follows:

While the *Intalco* case removes the necessity for a claimant to show what specific chemical toxin in the workplace gave rise to a condition or disease, it does not do away with the need to show what toxins existed in the workplace, that those toxins are medically known to give rise to the certain conditions or diseases from which the worker actually suffered, and that the toxins existed in a concentration sufficient to cause the deleterious effect. The lack of any one of those factors is fatal to a medical opinion on causation.

The true basis for Dr. Black's conclusions of causation is a rather simplistic process of elimination. He could find no other cause for the dermatitis by history and the initial flare-up occurred near the time of the workplace remodeling.

In re: Judy M. Fry, Dckt. No. 97 3415 (November 6, 1998).

Even were the *Intalco* standard applicable, the evidence in this record still does not support causation. Like Dr. Black in *Fry*, Dr. Oakes based his opinion of causation simply on a process of elimination and symptoms reported post-injury, despite acknowledging that Hulett has had a variety of medically inexplicable complaints over the years, both before and after the 1996 event and despite the medical documentation of those pre-injury complaints.⁴

⁴ Given Dr. Oakes' office's inability to locate one complete volume of Hulett's pre-injury records, the Employer submits it is likely there are even more pre-injury complaints than those established in this record.

Unlike *Intalco*, Hulett's claim is for an industrial injury, is not a chemical exposure occupational disease claim, and is based on a readily identifiable event - bumping his head while wearing his hard hat. This claim does not involve some amorphous condition with some ill-defined, unknown cause. To be sure, there are real head injuries with identifiable sequelae based on known diagnostic tests – this is just not one of them. Hulett had the diagnostic tests, and he does not have cognitive deficits caused by the 1996 event. Nor does he have a cervical condition proximately caused by the event.

The expert medical witnesses, experts who deal with severe head injuries, are aware of the alleged cause of his symptoms, they just do not agree with Hulett that his symptoms are related to the 1996 event. Additionally, the doctors in this case dispute that there is even an organic condition causally related to the 1996 event.

Accordingly, in the absence of a preponderance of medical evidence to support causation, the Board properly refused to base its decision on the testimony of the lay witnesses in this case when the expert medical testimony overwhelmingly rejected any notion of proximate cause between the claim for further benefits and the 1996 event.

///

///

3. **HULETT IMPROPERLY ARGUED FROM AND THE TRIAL COURT ERRONEOUSLY CONSIDERED THE INDUSTRIAL APPEALS JUDGE'S PROPOSED DECISION AND ORDER.**

In Hulett's trial brief and at oral argument, Hulett improperly cited to and argued from the Proposed Decision and Order over the Employer's objection. CP 110-111, 138; VRP 10-12, 28, 33, 37-38, 86. The trial court judge, acting as the trier-of-fact in this bench trial, erroneously relied upon the improper briefing and argument and the Proposed Decision, as evidenced by the trial court's adoption, with multiple embellishments from Counsel endorsed by the Court through execution of Counsel's Proposed Findings of Fact and Conclusions of Law, of the Findings of Fact and Conclusions of Law of the Proposed Decision and Order. BR 77-81.

In *Stratton v. Dep't of Labor & Indus.* 1 Wn. App. 77, 79-81, 459 P.2d 651, 653-654 (1969), the Court held it was reversible error for the jury to be advised, per the jury instructions, of the findings of the hearing examiner from the Proposed Decision where the Board has rejected the Proposed Decision even if the Board's final decision references the Proposed Decision. The Court noted as follows:

A hearing examiner is merely an employee of the Board. Pursuant to RCW 51.52.104, his proposed decisions and orders are not the decisions and orders of the Board. They do not acquire that dignity until the Board formally adopts them. If, as in this case, a statement of exceptions is filed, the Board is required to review the

record and render its own written decision and order which '...shall contain findings and conclusions as to each contested issue of fact and law' RCW 51.52.106. That document is the decision and order of the Board. The hearing examiner's rejected proposal has no standing.

One who appeals from a decision and order of the Board is entitled to a trial de novo in the superior court. RCW 51.52.115. If the case is tried to a jury, the same testimony which was considered by the Board is to read it. Thereafter, it decides whether the Board's determination of the case was correct. ... An examiner's rejected proposed decision and order are not prima facie correct. Only the findings and decision of the Board are entitled to that presumption. RCW 51.52.115. Yet, such a presumption would be incorrectly accorded an examiner's rejected order if the trial court incorporated it in an instruction as a 'finding' of the Board. As a result, a jury would be confronted with inconsistent 'findings,' each of which would be presumably correct. **The jury would be invited to speculate whether the examiner possessed some special knowledge by supposedly having observed all of the witnesses, a special knowledge unavailable to either the Board or the jury.**

...

In the case at hand, the Board's recitation of the hearing examiner's rejected decision and order was neither a finding on an issue in the case, nor was it material to any question to be decided (e.g. whether the Board's determination of disability was correct; and, if not, what the correct degree of disability was).

The fact that the hearing examiner's rejected proposal was given to the jury in the form of a Board 'finding' was a tactical advantage to the workman in the instant case. ... The trial court should not advise a jury of a hearing examiner's rejected decision and order merely because it has been incorporated in what the Board has denominated as a 'finding.' **The practice only serves to confuse the jury and divert its attention from the duty to determine whether, on material issues presented to them, the evidence preponderates in favor of or against the Board's findings and decision.**

Stratton v. Dep't of Labor & Indus., 1 Wn. App. 77, 79-81, 459 P.2d 651, 653-654 (1969), *emphasis added*.

In this case, Counsel's references to the Proposed Decision and industrial appeals judge, and the Court's apparent reliance on the those references, is even more egregious because Counsel referred to the decision for the very reason explicitly rejected by the Court in *Stratton*, the examiner's observance of the lay witnesses.

In *Rosales v. Dep't of Labor & Indus.*, 40 Wn. App. 712, 700 P.2d 748 (1986), the Court rejected the claimant's argument that the substitution of industrial appeals judges, which resulted in a different judge writing the Proposed Decision and Order than the judge who heard the evidence, deprived him of due process and the use of demeanor evidence, and noting "[d]ue process does not require preservation and consideration of demeanor evidence. Since the decisions and orders of a hearing examiner possess no finality until adopted by the Board, the substitution of hearing examiners did not constitute error." *Id.*, 40 Wn. App. 716. The Court further noted as follows:

The numerous authorities cited by Mr. Rosales support the proposition a trial judge may not be replaced by a successor before a decision has been entered. However, there is a fundamental difference between a judge and a hearing examiner: a judge renders a final judgment; a hearing examiner does not. The Board alone has the "duties of interpreting the testimony and making the final decision and order on appeal cases." RCW 51.52.020. ... The

Board has the power to substitute its judgment for that of the examiner on all issues, including credibility of witnesses observed by the examiner and not by the Board.

Mr. Rosales' claim that the loss of demeanor evidence constituted a denial of due process is contrary to the bulk of judicial authority.

Demeanor evidence has little significance in determining the extent of a disability, since an increase in an award for permanent, partial disability must be established by medical evidence.

Rosales v. Dep't of Labor & Indus., 40 Wn. App. 712, 714-716, 700 P.2d 748, 750-751 (1985), citations omitted, citing *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 459 P.2d 651 (1969), emphasis added, footnote omitted. Hence, Counsel's repeated references to the Proposed Decision, both in briefing and oral argument, and the Court's apparent reliance on those references, especially in terms of proximate cause and permanent impairment, both strictly medical questions, is reversible error.

4. **THE TRIAL COURT DID NOT UNDERSTAND THE DISTINCTION BETWEEN PERMANENT PARTIAL DISABILITY AND EMPLOYABILITY.**

The trial court also erroneously relied upon another occupational disease case, *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 471-472, 745 P.2d 1295 (1987) for the proposition that “[a]ggravation of a preexisting condition that was not causing any loss of function renders the preexisting condition immaterial and the resulting disability is to be

attributed to the industrial injury.” CP 49. The trial court’s reliance on this case for this proposition in this case is flawed for several reasons. First, evidence of the pre-existing nature of many of Hulett’s complaints was presented to establish a lack of causation, and is therefore material. As the Court in *Dennis* noted, “**our decision has at its heart the requirement that the worker's disabled condition must be work related.**” *Dennis*, 109 Wn.2d 467, 474, *emphasis added*.

Second, *Dennis*, like *Intalco*, is an occupational disease case, not an industrial injury case. The Court in *Dennis* cites to *Miller v. Dep’t of Labor & Indus.*, 200 Wash. 674, 682-83, 94 P.2d 764 (1939), for the well-established principle that where an injury makes active a previously **asymptomatic** condition, the injury is deemed to have caused the full disability, and reached its decision on that basis. In this case, Hulett’s condition was not asymptomatic before the February 1996 event, and the reasoning does not apply. Although the Court declined to reach the issue of the symptomatic-asymptomatic distinction in occupational disease cases, the Court noted as follows:

[A] different rule applies where a worker is already permanently partially disabled within the meaning of the Act; in such a case RCW 51.32.080(3) applies. That section requires segregation of the preexisting disability, from whatever cause, and limits the award for any disability resulting from a later injury. *Bennett v. Dep’t of Labor & Indus.*, 95 Wh.2d 531, 532-33, 627 P.2d 104 (1981). *See also* RCW 51.32.100 (setting forth segregation rule

where preexisting disease delays or prevents recovery); *Allen v. Dep't of Labor & Indus.*, 48 Wn.2d 317, 293 P.2d 391 (1956) (in which segregation rule applied). **Where a claimant establishes a disease-based disability arising naturally and proximately out of employment**, we are inclined to view the “symptomatic-asymptomatic” issue in terms of whether segregation rules apply, rather than to perceive a bar to any award if a preexisting disease was symptomatic prior to work-related aggravation of that disease. ... Our analysis here does not, in any way, modify the longstanding requirement that a claimant satisfy the “proximately” requirement of RCW 51.08.140. See *Simpson Logging Co. v. Dep't of Labor & Indus.*, *supra*, 32 Wn.2d 479, 202 P.2d 448. We reiterate that this requirement is not at issue here.

Dennis, 109 Wn.2d 476, 481-482. Notably, the Court recognized the materiality of the evidence and the rules of segregation in the context of an already-established work-related condition.

In addition, although the trial court in Hulett's case determined the pre-existing complaints were not material evidence because there was no loss of function, loss of function and employability are not even referenced by the Court in *Dennis* as factors the Court considered. Hulett had a pre-existing neck condition verified by x-rays, rated as a Category 2, which was symptomatic prior to the February 1996 event, as well as out prior complaints. Therefore, the evidence is material as to causation and the level of disability.

As to the trial court's misplaced reliance on a lack of evidence that the cervical condition was causing a loss of function, the Court in *Puget*

Sound Energy v. Lee, No. 61179-8-I (Slip Op., April 27, 2009), recently addressed this issue in the Second Injury Fund context.

Neither the statute nor the common law requires that a worker be continually symptomatic, require accommodation, or be limited in his ability to perform his particular job *at the time of the injury* as the Department argues. By removing the word “infirmity” from the statute, the legislature merely ratified the primary holdings of *Lyle* and *Rothschild*, which require that the worker have a “disability” rather than a latent, nondisabling condition. While this excludes conditions that have never caused symptoms prior to the industrial injury, the legislature has not excluded disabilities characterized by intermittent symptoms that happen to be temporarily latent at the time of the injury. ... The argument that Lee's previous bodily disability was not a disability because it was not a total disability, i.e., that it did not prevent him from working, begs the question whether the previous disability was a contributing factor in his total disability. By definition, a previous bodily disability must be partial.

Id.

For these same reasons, Counsel’s references to *Boeing v. Hansen*, 97 Wn. App. 553, 985 P.2d 421 (1999), a case which is inapplicable to the facts of this case, in briefing and argument, caused the trial court to confuse the issues of permanent partial disability and employability. VRP 41-46, 77-78; BR 127-128, 134. The trial court, admitting it had reviewed few workers’ compensation matters, grappled with the distinction between permanent partial disability and loss of function in the workplace and failed to understand that a determination of permanent partial disability does not require and is not based on physical restrictions, documented or

undocumented, in the workplace, as noted by the Court in *Lee*. VRP 44, 76.

In *Hansen*, Boeing asserted that the claimant's surgery was proof of a pre-existing condition. The Court held that surgery alone, without subsequent symptomatology, cannot form the basis of a determination that a condition is pre-existing. *Hansen* is inapplicable to this case where Hulett has objective x-ray findings of pre-existing cervical degenerative disease and evidence in the record that the condition was symptomatic prior to the 1996 event. In fact, in a more recent Board case, *In re: Barbara K. Rathbun*, BIIA No. 98 11716 (2000), the Board clarified that even subjective reporting of difficulties following a laminectomy would be sufficient to establish a pre-existing permanent partial disability. The Board acknowledged the *Hansen* decision but felt that the evidence presented by the Employer in *Rathbun*, the testimony of three doctors who all said the claimant had a pre-existing condition, was sufficient to support a finding of a pre-existing permanent partial disability. The Board described the evidence of a pre-existing disability presented in *Rathbun* as "significant contrasts" to the evidence that was found lacking in *Hansen*. The difference was that the three doctors in *Rathbun* testified that the pre-existing rating was **not** based on the fact of the surgery alone, but on the fact of the surgery **plus** "the normally

expected residuals” and “radiographic findings . . . which would corroborate the anatomic changes we would see postoperatively.” *Id.*

Even if the Court determines Hulett has some permanent partial disability resulting from the 1996 event, it is well-established case law in Washington that a claimant’s ability to return to the job of injury or similar employment is not a factor to be considered in the assessment of permanent partial disability. WPI 5th 155.08.01; RCW 51.08.150; *Cayce v. Dep’t of Labor & Indus.*, 2 Wn. App. 315, 467 P.2d 879 (1970); *Nash v. Dep’t of Labor & Indus.*, 1 Wn. App. 705, 462 P.2d 988 (1969); *Franks v. Dep’t of Labor & Indus.*, 35 Wn.2d 763 215 P.2d 416 (1950); *Page v. Dep’t of Labor & Indus.*, 52 Wn.2d 706, 328 P.2d 663 (1958).

5. ANY DISABILITY HULETT HAS IS UNRELATED AND PRE-EXISTING OR POST-DEVELOPING.

As noted above, pre-existing, symptomatic permanent partial disability is to be segregated from a workers’ compensation claim regardless of whether that disability was impacting a claimant’s employment. RCW 51.32.080(3) ; *Voshalo v. Dep’t of Labor & Indus.*, 75 Wn.2d 43, 449 P.2d 95 (1968); *Enevold v. Dep’t of Labor & Indus.*, 51 Wn.2d 648, 320 P.2d 1096 (1958); *Allen v. Dep’t of Labor & Indus.*, 48 Wn.2d 317, 293 P.2d 391 (1956); *Ringhouse v. Dep’t of Labor & Indus.*, 2 Wn. App. 814, 470 P. 2d 232 (1970). Hulett was rated a Category 2 of

permanent cervical impairments under WAC 296-20-240 which provides as follows:

296-20-240. Categories of permanent cervical and cervico-dorsal impairments.

- (1) No objective clinical findings are present. Subjective complaints may be present or absent.
- (2) Mild cervico-dorsal impairment, with objective clinical findings of such impairment with neck rigidity substantiated by x-ray findings of loss of anterior curve, without significant objective neurological findings.

This and subsequent categories include the presence or absence of pain locally and/or radiating into an extremity or extremities. This and subsequent categories also include the presence or absence of reflex and/or sensory losses. This and subsequent categories also include objectively demonstrable herniation of a cervical intervertebral disc with or without discectomy and/or fusion, if present.

- (3) Mild cervico-dorsal impairment, with objective clinical findings of such impairment, with neck rigidity substantiated by x-ray findings of loss of anterior curve, narrowed intervertebral disc spaces and/or osteoarthritic lipping of vertebral margins, with significant objective findings of mild nerve root involvement.

WAC 296-20-240 (1-3).⁵ The Category 2 cervical rating is for a condition that was pre-existing and symptomatic and must be segregated from the claim.⁶

The overwhelming medical evidence in this case establishes that Hulett has no cervical or cognitive residuals from the 1996 event. As to

⁵ There is no evidence in this record that Hulett should be rated a Category 3. The Employer has included it merely for comparison.

⁶ There is also reference to a Category 2 mental health rating from Dr. Winnet for the alleged cognitive deficits. Dr. Winnet did not testify, and that testimony is hearsay.

the post-concussion syndrome, Dr. Stump would not even diagnose a concussion, and Dr. Weinstein gave the diagnosis only to move forward. All of the physicians and neuropsychologists (including treating doctors) except Dr. Oakes testified that Hulett's "cognitive difficulties" are unrelated to his 1996 industrial injury. Hulett's Category 2 cervical impairment was based on pre-existing degenerative disc disease evidenced by 1992 x-rays and pre-injury symptom reporting, was pre-existing and symptomatic, his post-concussion syndrome, if any, fully resolved three to six months post injury, his depression is related to other causes, his headaches are due to his unrelated neck condition and/or are somatic, and only Dr. Oakes and Dr. Earle supported a diagnosis of seizure disorder. As to the alleged seizure disorder, Dr. Earle provided the diagnosis without knowledge of the thorough evaluation already provided to Hulett and in any event he did not relate the diagnosis to the 1996 injury. Even if Hulett has epilepsy or seizure disorder or pseudoseizures, only Dr. Oakes thinks it is related to the industrial injury. However, by his own admission, Dr. Oakes concedes he is not an expert on this issue, and in fact the record reflects that Dr. Oakes consistently referred Hulett to specialists to address these symptoms. What remained after the industrial injury was somatic or functional, and Hulett was fully rehabilitated from these functional issues following the Neurorehabilitation Program at Virginia Mason. The

medical evidence regarding this type of injury is undisputed; head injury residuals do not deteriorate over time but stabilize within three to six months. For almost a year following successful completion of the program at Virginia Mason, Hulett was tending his property and running his horse boarding business. Despite the claim that he was not functioning during this period and was constantly injuring himself, the actual record in this case establishes the contrary – he was not seeking treatment, not even with Dr. Oakes, or voicing any complaints. VRP 82-83. Accordingly, any deterioration Hulett suffered after his discharge is unrelated to this claim.

6. **HULETT IS NOT ENTITLED TO WAGE REPLACEMENT BENEFITS.**

Even if the Court determines that Hulett has some residuals from the 1996 event, which he does not, per RCW 51.32.060 and RCW 51.32.090, the wage replacement statutes attached as Appendices C and D respectively, and surrounding case law, the wage loss must be proximately caused by the industrial injury in order for a claimant to be entitled to wage replacement benefits. *Rambeau v. Dep't of Labor & Indus.*, 24 Wn.2d 44, 50,163 P.2d 133 (1945); *Jacobsen v. Dep't of Labor & Indus.*, 127 Wn. App. 384, 386, n.1, 110 P.3d 253, *review denied*, 156 Wn.2d 1024, 132 P.3d 1094 (2006); *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 735, 57 P.3d 611 (2002).

"Temporary total disability" is disability caused by a condition that temporarily precludes a worker from performing any work at any gainful employment. RCW 51.08.160; RCW 51.32.090; *Oien v. Dep't of Labor & Indus.*, 74 Wn. App. 566, 569, 874 P.2d 876, *review denied*, 125 Wn.2d 1021, 890 P.2d 463 (1995). "Total permanent disability" is defined by RCW 51.08.160 as such ". . . condition permanently incapacitating the worker from performing any work at any gainful occupation." RCW 51.08.160.

The only difference between temporary total disability and total permanent disability is duration. *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 120 P.2d 1003 (1942); *Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 466 P.2d 526 (1970). RCW 51.32.090 requires the insurer to end time loss payments when the worker's earning power is completely restored 'at any kind of work' generally available, or when it is determined the worker is entitled to a pension. *Hunter v. Bethel School Dist.*, 71 Wn. App. 501, 506-507, 859 P.2d 652, *review denied*, 123 Wn.2d 1031 (1994). The courts have expressed numerous times that an inability to perform one's customary duties does not constitute total disability. *Herr v. Dept. of Labor & Indus.*, 74 Wn. App. 632, 875 P.2d 11 (1994); *Hunter v. Bethel School Dist.*, 71 Wn. App. 501, 859 P.2d 652, *review denied*, 123 Wn. 2d 1031, 877 P.2d 695 (1994). In fact, "[t]he ability of a worker

injured on the job to do light or sedentary work **precludes** a finding of total disability.” *Adams v. Dep’t of Labor & Indus.*, 128 Wn.2d 224, 905 P.2d 1220 (1995), *emphasis added, citing, Herr v. Dep’t of Labor & Indus.*, 74 Wn. App. 632, 875 P.2d 11 (1994); *see also, Allen v. Dep’t of Labor & Indus.*, 30 Wn. App. 693, 697-98, 638 P.2d 104 (1981).

To establish a *prima facie* case for total permanent disability benefits, Hulett must prove that 1) he was able to work before the industrial injury, 2) he is unable to obtain or perform work consistent with his qualifications or training, and 3) **the incapacity is caused by the industrial injury.** *Spring v. Dep’t of Labor & Indus.*, 96 Wn.2d 914, 918, 640 P.2d 1 (1982).

Medical testimony is required to establish, **on a more probable than not basis**, that an industrial event caused the subsequent disability or condition, and the worker is entitled to time loss. *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979); *Jackson v. Dept. of Labor & Indus.*, 54 Wn.2d 643, 343 P.2d 1033 (1959). Testimony that goes no further than to indicate that the injury might have caused the condition is insufficient; there must be some evidence of probative value that removes the question of causal relation from the field of speculation and surmise. *Jacobson v. Dep’t of Labor & Indus.*, 37 Wn.2d 444, 451, 224 P.2d 338 (1950); *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598,

601, 676 P.2d 538, *review denied*, 101 Wn.2d 1023 (1984); *Chalmers v. Dept. of Labor & Indus.*, 72 Wn.2d 595, 434 P.2d 720 (1967). Circumstantial evidence, or evidence based on mere conjecture, speculation, or theory is insufficient to establish entitlement to benefits. *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 69, 129 P. 2d 777(1942).

Moreover, the law is clear that an expert medical opinion concerning causal relationship between an industrial event and a subsequent disability must be based upon full knowledge of all material facts. *Saylor v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966). An expert opinion based on an incomplete hypothetical, an incomplete history or incomplete facts has no probative value. If the medical expert has not been advised of a vital element, his or her conclusion or opinion does not have sufficient probative value to support an award. *Berndt v. Dep't of Labor & Indus.*, 44 Wn.2d 138, 265 P.2d 1037 (1954); *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 286 P.2d 1038 (1955); *Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 278 P.2d 666 (1955).

The Employer recognizes that lay and expert medical opinion can be combined to establish entitlement to wage replacement benefits under Washington law. *Sacred Heart Medical Center v. Carrado*, 92 Wn.2d 631,

600 P.2d 1015 (1979). However, Hulett, who has the ultimate burden of strict proof, must still establish, based on expert medical opinion, that his condition is the proximate cause of his lost wages on a more probable than not basis. Without this quantum of proof, his case fails notwithstanding the testimony of his lay witnesses. The disability must be supported by objective medical findings. Specifically, WAC 296-20-01002 provides in pertinent part that “[a]ll time loss compensation must be certified by the attending doctor based on objective findings.”

Contrary to Hulett’s assertion that “even the Board recognized Steven Hulett is disabled,” the Board explicitly determined, after reviewing the record, that he is not permanently totally disabled. CP 135; CP 13. The preponderance of credible medical evidence establishes that Hulett was released to medium duty work and was physically capable of working as a horse boarder and as a building maintenance operator. Dr. Weinstein approved both of these job analyses, as did Drs. Stump, Green, Bensinger, Powel, and Carter. Even assuming there is some validity to Dr. Oakes’ reluctance that Hulett can sustain an eight-hour day, that issue is unrelated to this claim, and **Dr. Oakes deferred to these experts on the employability issue**. In addition, Dr. Oakes conceded he supposed Hulett could do some form of work between July 2000 and August 2004, and the major problem during that period were his ‘spells’ (undiagnosed and

medically unsubstantiated). Dr. Oakes, 35. Dr. Earle believed Hulett could work, and Dr. Brzusek also conceded he would defer to Dr. Weinstein. The Board correctly determined that the positions of horse boarder and building maintenance were determined by his physicians to be within his physical capabilities, and building maintenance work was present in his labor market. Even assuming the experts' opinions regarding employability are wrong, if Hulett is unable to work, as noted above, that inability is not proximately caused by the industrial injury.

In addition, even assuming Hulett has some residuals from the 1996 injury, which the credible medical evidence in this case establishes that he does not, RCW 51.32.060 and RCW 51.32.090 preclude payment of wage replacement benefits where the claimant has voluntarily withdrawn from the workforce. RCW 51.32.060(6), RCW 51.32.090(8). The statutes, on their face, mandate that wage replacement benefits be denied to those who voluntarily remove themselves from the workforce when they are determined to still be capable of working. Dr. Weinstein, Hulett's treating physician, and the specialist to whom Dr. Oakes, Hulett's family doctor, and Dr. Brzusek, a physician hired by Claimant's Counsel, deferred, determined Hulett was capable of medium level work, contrary to Counsel's assertions to the trial court that Hulett was only released to sedentary-light work. VRP, 87. Hulett ceased pursuing the horse boarding

business and did not pursue other employment. Therefore, he voluntarily withdrew from the workforce, and his wage loss is not proximately caused by the industrial injury.

In addition, Hulett is not entitled to loss of earning power benefits. To be entitled to such benefits, there must be a causal connection between the industrial injury and the lost earnings. RCW 51.32.090(3); *In re: Patricia Heitt*, BIIA Dec. 87 1100 (1989). Dr. Weinstein and Andrew Camarda, the experts actively involved in 1999 and 2000 with Hulett's rehabilitation process and self-employment plan, are the witnesses with the most probative evidence on this point. Hulett was doing well and was actively engaged in the process of establishing his business. Although not maximizing the business's potential, the business was growing to his satisfaction. His choice to not maximize the business potential, the difficulties with assessing true income in a self-employment context where various accounting methods can be used to diminish income, the death of his son-in-law and any other subsequently developing mental health and medical conditions are unrelated to this claim and render the ability to assess lost earning capacity or to relate any lost earning capacity to this claim impossible.

///

///

7. **THE TRIAL COURT ERRONEOUSLY DEFERRED TO THE
OPINIONS OF FAMILY PRACTITIONER ROGER OAKES, M.D.**

The trial court erroneously afforded greater weight to the opinions of family practitioner, Roger Oakes, M.D., over the myriad of specialists who also treated and evaluated Hulett, accepting Hulett's argument that Dr. Oakes was the attending physician under this claim. CP 31-35, 46-47. Contrary to Counsel's argument and the trial court's apparent reliance on that argument, the opinions of the attending physician are not to be "favored" over the testimony of an examining physician. In *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988), the Court held that the jury instruction at issue in that case regarding the weight to be given to treating physician's opinions does not require the jury to give more weight or credibility to the attending physician's testimony, but to give it careful thought.

Special consideration need not be given to the opinion of a doctor who is an attending physician if there are good reasons for not doing so. *In re: Troy A. Meats*, BIIA Docket No. 99 10613 (1999). Where an attending physician's opinion is based on inaccurate facts, ignorance of medical records of pre-existing problems, or a misinterpretation of the law, it is not

entitled to special consideration. *Id.*; see also, *Ruse v. Dept. of Labor & Indus.*, 138 Wn.2d 1, 8-9, 977 P.2d 570 (1999).

Moreover, there is no basis to afford the opinions of an attending physician greater weight when dealing with questions of causation. The Board also recently addressed the consequence of the *Hamilton* rule on this issue in *In re: Iva N. Jennings*, Dckt. No. 01 11763 (2004), and stated as follows:

In this appeal, the medical opinions were required in order to decide whether Ms. Jennings exposure to household cleaning chemicals caused her interstitial pneumonitis. ... **In most instances, an attending physician is not in a better position to determine causation than an examining physician because they both must rely almost entirely on the history of the exposure and the claimant's prior medical history to make such a determination.** Dr. Huseby's testimony did not demonstrate that he had a better understanding of the exposure to chemicals or the claimant's medical history than Dr. Ostrow. Dr. Ostrow testified that his review of medical studies revealed that the chemicals to which Ms. Jennings was exposed have not been shown to be a cause of interstitial pneumonitis. Additionally, he testified that the disease is seen frequently in middle-aged to older men and women without a specific exposure considered as a cause. Dr. Huseby admits that the most common cause of interstitial pneumonitis is unknown and admits that he does not know that anybody can contract the disease from exposure to the cleaning chemicals, adding that he does not know that they do not contract it either. We were not persuaded by Dr. Huseby and after providing his opinion special consideration we, nevertheless, find the opinion of Dr. Ostrow persuasive.

Id., *emphasis added*. In *Chalmers v. Dep't of Labor and Indus.*, 72 Wn.2d 595, 434 P.2d 720 (1967), the Court also noted that a treating physician's

opinion, which is based on an erroneous factual basis, is insufficient to establish causal relationship despite the status of ‘treating physician.’

In this case, there were three treating doctors who testified: Dr. Fordyce, Dr. Weinstein and Dr. Oakes. In weighing the evidence presented, the Employer submits the Court should not rely only on whether a physician was treating Hulett, but must consider all of the factors that make the testimony credible or persuasive. Such factors include, but are not limited to, whether the physician reviewed a complete set of Hulett’s voluminous medical records, whether the history Hulett reported to the providers and evaluators was supported by medical documentation, whether there were any objective findings to support a diagnosis, and whether a diagnosis was based upon reasonable medical probability, or merely a “plausible theory.” Dr. Oakes’ testimony is not entitled to greater weight than that of the experts in this case, some of whom (Dr. Fordyce and Dr. Weinstein) were also treating physicians, and to whom Dr. Oakes deferred. In fact, Dr. Oakes has the least expertise of any of the physicians testifying concerning head injuries and seizure disorders, yet Dr. Oakes was the **only** physician to testify in support of Hulett’s case regarding his cognitive difficulties and his ability to work. If greater weight is to be given to the treating physicians in this case it should be given to Dr. Weinstein and Dr. Fordyce, doctors who specialize

in the sort of cognitive difficulties Hulett alleges and who provided extensive treatment to Hulett in order to move forward.

8. **THERE IS NO PROXIMATE CAUSE BETWEEN THE FEBRUARY 22, 1996 HEAD BUMP AND THE DECEMBER 2000 ACCIDENT WHICH CAUSED HULETT'S SON-IN-LAW'S DEATH.**

Hulett tests the outer bounds of logic and reason by asserting that his current condition is proximately caused by the 1996 event because some unidentified mistake on his part, which he suggests was caused by his industrially-related condition, was the cause of his son-in-law's death, and his son-in-law would not have been on the property but for the industrial injury. CP 115-116, 135-137; VRP 8-9. Hulett presented no testimony as to the nature of the unidentified mistake and no expert medical testimony relating any alleged mistake to any condition alleged by Hulett to be related to the 1996 event. There is no support in the record for this contention. Two elements make up proximate cause, legal causation and factual "but for" causation.

Factual causation exists when the injury would not have occurred but for the defendant's act; this requires a physical connection between an act and an injury. Legal causation rests on policy considerations as to how far the legal consequences of a defendant's act should extend.

Bruns v. PACCAR, Inc., 77 Wn. App. 201, 890 P.2d 469 (1995), *citations omitted*. In *Bruns*, PACCAR asserted that the plaintiffs failed to prove cause in fact because they did not present expert medical testimony to

establish, on a more probable than not basis, the connection between the plaintiffs' injuries and the alleged defect. In response, the Court stated as follows:

Whether or not causation must be shown with expert testimony depends on the nature of the injury. Expert testimony is required to establish causation when an injury involves obscure medical factors that would require an ordinary lay person to speculate or conjecture in making a finding.

This required expert testimony must provide proof that the defect "more probably than not" caused the Drivers' injuries. Less certain evidence, such as may, might, could or possibly, does not provide enough guidance to the jury to remove the decision making process from speculation and conjecture. Although this more probable than not standard does not require absolute certainty, if the evidence shows that the injury is equally or else with reasonable certainty attributable to other probable causes, [the plaintiffs] must also exclude other causes.

Id., 214-215, *citations omitted*. When evaluating disability from an injury, a doctor may not consider subsequent conditions that are completely unrelated to the injury. *Prince v. Dep't of Labor & Indus.*, 47 Wn.2d 98, 286 P.2d 707 (1955).

In this case, in addition to not providing evidence regarding the alleged mistake that led to his son-in-law's death, Hulett offered no expert medical testimony that such an alleged mistake in December 2000 was caused by the 1996 event. Likewise, the contention that but for the industrial injury, the son-in-law would not have been on the property or preparing to live on the property is purely speculative. In addition, the

cases cited by Hulett for the “incidental to the original injury” test are inapposite. The cited cases deal with sequelae of treatment rendered for an industrial injury. “The treatment of the injury is in the chain of causation.” *Anderson v. Allison*, 12 Wn.2d 487, 122 P.2d 484 (1942). *Kerr v. Olson*, 59 Wn. App 470, 798 P.2d (1990), is another treatment case where the provider was claiming he was immune from tort liability for potential medical malpractice under the exclusive remedy provision of Title 51. These cases do not stand for the broad proposition for which they are cited.

F. CONCLUSION

Based on the foregoing points and authorities, the Employer respectfully requests that the Court affirm the Decision and Order of the Board of Industrial Insurance Appeals which affirmed the Department’s closure of this claim with benefits as provided.

RESPECTFULLY SUBMITTED this 13th day of May, 2009.

CRAIG, JESSUP & STRATTON,
PLLC

By Marne J. Horstman
Gibby M. Stratton, #15423
Marne J. Horstman, #27339
Attorneys for Appellant,
Rayonier, Inc.

09 MAY 14 PM 2:44

STATE OF WASHINGTON

BY _____
DEPUTY

Claimant: Steven R. Hulett
Claim No. T-952217
Superior Court Cause No. 06-2-00425-9
Court of Appeals Case No. 38561-9

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May, 2009, I served the foregoing Appellant's Brief and this Certificate of Service upon all parties of record in this proceeding by mailing a copy thereof properly addressed with postage prepaid, to each party or his attorney or authorized representative listed below as set forth below:

ORIGINAL AND ONE COPY TO:

David C. Ponzoha [VIA FIRST-CLASS MAIL]
Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

COPY OF BRIEF AND VERBATIM REPORTS OF PROCEEDINGS TO:

Carol L. Casey [VIA PRIORITY MAIL/DELIVERY
Casey & Casey, P.S. CONFIRMATION]
Attorneys at Law
219 Prospect
Port Orchard, WA 98366

COURTESY COPY OF BRIEF AND VERBATIM REPORTS OF PROCEEDINGS TO:

John Wasberg [VIA FIRST-CLASS MAIL]
Senior Counsel - Assistant Attorney General
Office of Attorney General
800 5th Avenue,
Suite 2000
Seattle, WA 98104-3188

DATED this 13th day of May, 2009, at Tacoma, Washington.

Olesya V. Kiforishin
Olesya V. Kiforishin

APPENDIX A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SCANNED

CRAIG, JESSUP & STRATTON
NOV 25 2008
COPY RECEIVED

FILED
IN SUPERIOR COURT
2008 OCT 31 P 4:00
Jefferson County
Clerk's Office

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STEVEN HULETT,)	CAUSE NO. 06 2 00425 9
)	
Plaintiff,)	
)	FINDINGS OF FACT/CONCLUSIONS OF
v.)	LAW
)	
RAYONIER, INC. and DEPARTMENT OF)	
LABOR & INDUSTRIES OF THE STATE)	
OF WASHINGTON,)	
)	
Defendants.)	

THIS MATTER, having come before this Court for trial, this Court makes the following Findings of Facts and Conclusions of Law with regard to the above-reference cause number:

FINDINGS OF FACT

1. On April 15, 1996, the Claimant, Steven R. Hulett, filed an Application for Benefits with the Department of Labor & Industries in which he alleged that an injury occurred on February 22, 1996, during the course of his employment with Rayonier, Inc. The claim was thereafter allowed, and benefits provided the claimant. On March 23, 2004, the Department issued an order in which it stated:

On 12/31/03 and 3/9/04, Gerald L. Casey, legal counsel for Steven Hulett, requested penalties against Rayonier, Inc., a self-insured employer, alleging unreasonable delay in

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

payment of time loss and loss of earning power benefits effective 1/1/00.

Steven Hulett completed a thoroughly researched and viable self-employment plan during 4/1/00 through 6/30/00. Rayonier, Inc., is responsible for payment of loss of earning power benefits effective 7/1/00.

There is legal doubt as to Steven Hulett's monthly earnings effective 7/1/00.

The 12/31/003 and 3/9/04 requests for penalties for delay in payment of loss of earning power benefits are denied.

On March 24, 2004, the Department issued an order in which it stated:

Steven Hulett completed a thoroughly researched and viable self-employment plan during 4/1/00 through 6/30/00. Rayonier, Inc. is responsible for payment of loss of earning power benefits effective 7/1/00.

Steven Hulett is directed to provide Rayonier, Inc., with documentation of monthly earnings for the period effective 7/1/00 through 12/31/03 and continuing.

Rayonier, Inc. is responsible for payment of loss of earning power benefits to Steven Hulett effective 7/1/00, based on documentation of monthly earnings received.

On March 31, 2004, the claimant file a Notice of Appeal from the March 23, 2004 Department order with the Board of Industrial Insurance Appeals. On April 15, 2004, the Board issued an order in which it granted the claimant's appeal, and assigned Docket No. 04 13307.

On April 21, 2004, the self-insured employer filed a Protest and Request for Reconsideration of the March 23 and March 24, 2004 orders with the Department. On May 7, 2004, the self-insured employer filed a Notice of Appeal from the March 23, 2004 Department order with the Board of Industrial Insurance Appeals. On May 27, 2004, the Department issued (an order) in which it held its order of March 24, 2004, in abeyance. This order was not communicated to the self-insured employer until November 4, 2004. On June 1, 2004, the Board issued an order in which it denied the self-insured employer's appeal from the Department order of March 23, 2004, and assigned Docket No. 04 13307-A.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

On August 4, 2004, the Department issued an order in which it affirmed its March 23 2004 order. On August 17, 2004, the self-insured employer filed a Notice of Appeal from the August 4, 2004 Department order with the Board of Industrial Insurance Appeals.

On August 23, 2004, the claimant filed Notices of Appeal from the May 27, 2004 and August 4, 2004 Department orders with the Board of Industrial Insurance Appeals. The appeal of May 27, 2004 order was received by the Department of June 25, 2004, and forwarded to the Board as a direct appeal.

On August 26, 2004, the Board issued an order in which it granted the self-insured employer's appeal from the August 4, 2004 Department order, assigned Docket No 04 20408, and ordered that further proceedings be held in this matter. On August 26, 2004, the Board granted the claimant's appeal from the May 27, 2004 Department order, assigned Docket No. 04 20800, and ordered that further proceedings be held in this matter.

On September 15, 2004, the Board issued an order in which it denied the claimant's appeal from the August 4, 2004 Department order, and assigned Docket No. 04 20801. On October 11, 2004, the Board issued an order in which it vacated the order granting the claimant's appeal from the Department order issued March 23, 2004, in Docket No. 04 13307, and issued an order in which it denied the claimant's appeal.

On October 12, 2004, the Board issued an order in which it vacated the order denying the claimant's appeal from the August 4, 2004, Department order in Docket No. 04 20801. On October 13, 2004, the board granted the claimant's appeal from the August 4, 2004 Department order, reassigned Docket No. 04 24500, and ordered that further proceedings be held in this matter.

On November 4, 2004, the self-insured employer filed a Notice of Appeal from the May 27, 2004 Department order with the Board of Industrial Insurance Appeals. On November 30, 2004 the Board issued an order in which it granted the employer's appeal, subject to proof of timeliness, assigned Docket No. 04 24500, and ordered that further proceedings be held in this matter.

On January 24, 2005, the Department issued an order in which it closed the claim with time-loss compensation as paid to June 30, 2000, without award for either additional time-loss compensation or permanent partial disability, and stated that the self-insured employer cannot pay for

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

medical services or treatment received after the date of closure. On January 28, 2005, the claimant filed a Notice of Appeal from the January 24, 2005 Department order with the Board of Industrial Insurance Appeals. On February 15, 2005, the Board granted the claimant's appeal, assigned Docket No. 05 10908, and ordered that further proceedings be held.

Hearings were held and evidence presented. On January 27, 2006 a Proposed Decision and Order was entered in Board Docket Nos. 04 20408, 04 20800, 04 20801, 04 24500 and 05 10908. From the January 27, 2006 Proposed Decision and Order a timely Petition for Review was filed. On March 31, 2006 the Board issued an Order Granting Petition for Review and indicated that a final decision and order would be issued after the Board review. On April 24, 2006, the Board issued its Decision and Order in Board Docket Nos. 04 20408, 04 20800, 04 20801, 04 24500 and 05 10908. From the Board April 24, 2006 Decision and Order the plaintiff filed a timely Notice of Appeal to Clallam County Superior Court. The Notice of Appeal was assigned Superior Court Cause No. 06 2 00425 9.

- 2. The May 27, 2004 Department order, in which the Department affirmed its March 23, 2004 order, was not communicated to the self-insured employer until November 4, 2004.
- 3. On February 22, 1996, while wearing his hard hat, Mr. Hulett was crouching low while moving under some timbers. He rose up and struck his head on a pipe on the other side of those timbers. He felt immediate pain in his head and neck. This sudden traumatic event proximately caused a condition diagnosed as cervical strain with aggravation of cervical degenerative disc disease.
- 4. At the time of the industrial injury Mr. Hulett had worked for Rayonier for over thirty years. There are no pre-existing disabling conditions which were affecting his employment or employability.
- 5. At the time of the industrial injury Mr. Hulett's primary work responsibility for Rayonier, Inc., was as a building maintenance person. Mr. Hulett's job duties included installing insulation, pipe fitting, replacing windows, sheet metal working, carpentry, installing electrical outlets, making minor electrical repairs, and roofing. The job involved lifting in excess of forty pounds, carrying in excess of forty pounds, climbing, stooping, bending, twisting, and working on ladders.

///

- 1 6. Dr. Oakes is a family practitioner who is Board certified in family practice
2 and Board certified in geriatrics. Dr. Oakes has seen and treated Steve
3 Hulett since the mid-1980's. Dr. Oakes is the attending physician under
4 Mr. Hulett's industrial injury claim.
- 5 7. Prior to February 1996 Dr. Oakes did not identify problems similar to
6 what occurred after the February 22, 1996 industrial injury.
- 7 8. On February 23, 1996 Dr. Oakes examined Steve Hulett. The industrial
8 injury was reported along with complaints of visual fuzziness, ringing in
9 the ears, a severe headache and neck pain.
- 10 9. Dr. Oakes has directed a significant component of the medical care and
11 attention concerning Steve Hulett and the effects of the industrial injury
12 on Steve Hulett.
- 13 10. As a result of the significant February 22, 1996 industrial injury, Steve
14 Hulett has experienced headaches, seizures, neck pain, dizziness, ringing
15 in his ears, numbness in his hands, difficulty finding words, transposing
16 numbers or letters, fatigue, memory problems and difficulty
17 concentrating.
- 18 11. Prior to the February 22, 1996 industrial injury, Steve Hulett did not
19 suffer from any significant headaches, seizures, neck pain, dizziness,
20 ringing in his ears, numbness in his hands, difficulty finding words,
21 transposing numbers or letters, fatigue, memory problems or difficulty
22 concentrating.
- 23 12. Prior to February 22, 1996 Steve Hulett had degenerative disc disease in
24 his neck. This condition was asymptomatic prior to February 22, 1996.
- 25 13. As a result of the effects of the industrial injury, Steve Hulett underwent a
26 twelve week rehabilitation inpatient program at Virginia Mason
Neurological Rehabilitation Clinic. The inpatient clinic was followed by
several weeks of outpatient treatment.
- 14. At the Virginia Mason Neurological Rehabilitation Clinic various job goals
were explored. A job goal for a home based program of boarding horses
was developed for Mr. Hulett.
- 15. The horse boarding business, as that job is typically done, is not
something that Steve Hulett was physically capable of as a result of this
industrial injury. The job required substantial modification and
intervention, including various lifts and hoists, in an attempt to minimize

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

the physical demands of the horse boarding job. Modifications to the job were authorized up to the financial maximum permitted under the L&I rules. The modifications were a result of the effects of the industrial injury.

16. Steve Hulett was fully motivated for return to work. Steve Hulett's efforts at the horse boarding position demonstrate full motivation.
17. In the spring of 2000 the horse boarding business opened. Family members and others substantially participated in the horse boarding business. Steve Hulett was not capable of reasonably continuous gainful employment in the horse boarding business on his own because of the effects of the industrial injury.
18. Steve Hulett required assistance on a daily basis to attempt to manage the horse business. Assistance was needed because of the effects of the industrial injury.
19. In an effort to make the horse boarding business viable, the Hulett's invited relatives to live on their property. The reason the Hulett's invited relatives to live on the property to assist with the horse business is because of Mr. Hulett's disabling symptoms from the industrial injury which prevented him from being able to work fully in the horse business and prevented him from effectively working independently.
20. Dr. Stump and Dr. Green testified that the industrial injury of February 1996 was minor and resolved relatively soon. This is inconsistent with the facts, Mr. Hulett's need for a retraining program, the rehabilitation clinic, and the continuing disabling symptoms experienced by Mr. Hulett proximately caused by the February 1996 industrial injury.
21. Dr. Fordyce did not have contact with Steve Hulett since 1996. Dr. Weinstein had not seen Mr. Hulett since 1999.
22. Dr. Bzrusek evaluated Mr. Hulett and found that the effects of the February 1996 industrial injury caused permanent and total disability.
23. The only medical practitioner who saw Steve Hulett before the industrial injury and after the industrial injury is the treating physician, Dr. Oakes. This places Dr. Oakes in a unique position to evaluate the effects of the industrial injury on Steve Hulett.
24. Dr. Oakes has seen Steve Hulett over decades and has had multiple contacts with Steve Hulett. Dr. Oakes is in a position to evaluate the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

effects of the February 1996 industrial injury on Steve Hulett on a long term basis.

25. Dr. Oakes has monitored and directed medical care on behalf of Steve Hulett. Dr. Oakes did not identify any curative medical treatments available for Steve Hulett.

26. Since February 1996 the headaches have been persistent, cognitive changes have been persistent, difficulties with memory, fatigue ability and seizures have been persistent. These symptoms have been disabling.

27. Steve Hulett's disabling symptoms are proximately related to the effects of the February 22, 1996 industrial injury.

28. Lay persons who knew Steve Hulett before and after the February 1996 industrial injury have verified a change in Mr. Hulett's cognitive abilities.

29. The testimony of the lay witnesses is consistent with the testimony of the attending physician, Dr. Oakes. This testimony demonstrates that the effects of the industrial injury on Steve Hulett has been such that Steve Hulett is totally and permanently disabled as of the date of claim closure.

30. Since July 1, 2000, Steve Hulett has not been able to engage in regular continuous gainful employment. This is a result of the industrial injury at issue here.

31. The opinion of the attending physician, Dr. Oakes, is accepted. Dr. Oakes has verified that the effects of the industrial injury on Steve Hulett have left Steve Hulett unable to engage on regular consistent gainful employment. The effects of the industrial injury on Steve Hulett are such that his employment efforts have been sporadic, inconsistent, irregular despite full motivation and effort on behalf of Steve Hulett.

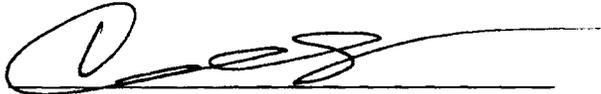
CONCLUSIONS OF LAW

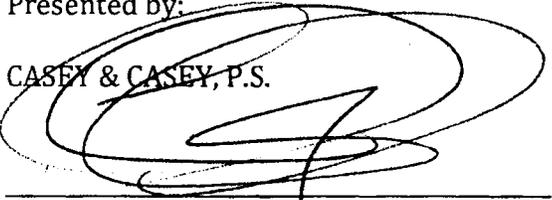
- 1. This Court has jurisdiction over the parties and the subject matter here.
- 2. As of January 24, 2005 the effects of the industrial injury of February 22, 1996 on Steve Hulett rendered Steve Hulett totally and permanently disabled.
- 3. From July 1, 2000 through January 23, 2005, the effects of the industrial injury of February 22, 1996 resulted in temporary total disability of Steve Hulett.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- 4. The industrial injury aggravated a pre-existing asymptomatic cervical degenerative disc disease which has caused a loss of function and resulting disability. The aggravation continued through January 24, 2005.
- 5. Attorney's fees in the amount of \$16,945.00 and costs in the amount of \$4,365.27 are reasonable pursuant to RCW 51.52.130.

DATED this 31st day of October, 2008.


 JUDGE CRADDOCK VERSER

Presented by:

 CASEY & CASEY, P.S.

 CAROL L. CASEY, WSBA #18283
 Attorney for Plaintiff

Approved as to form and content:

 GIBBY STRATTON, WSBA #15423
 Craig, Jessup & Stratton
 Attorney for Rayonier, Inc.

Approved as to form and content:

 PAT DeMARCO, AAG, WSBA #16897
 Office of the Attorney General
 Attorney for Dept. of Labor & Industries

APPENDIX B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STEVEN HULETT,

Plaintiff,

vs.

RAYONIER, INC., and the DEPARTMENT OF
LABOR & INDUSTRIES, STATE OF
WASHINGTON.

Defendants.

Case No.: 06-2-00425-9

MEMORANDUM OPINION AND
ORDER AFTER TRIAL

This matter came before the Court for trial on July 23, 2008. Plaintiff Steven Hulett appeared personally and through his attorney, Carol L. Casey of Casey & Casey, P.S. Defendant Rayonier, Inc., appeared through its attorney, Gibby M. Stratton, of Craig, Jessup & Stratton, PLLC. The trial consisted of the court's review of the Administrative Record certified by the Board of Industrial Insurance Appeals, in the matter of Steven R. Hulett, Claim No: T-952217, a review of the pleadings filed in this matter, and consideration of the oral argument of counsel.

Mr. Hulett appeals the decision and order by the Board of Industrial Insurance Appeals (Board) dated April 24, 2006. Mr. Hulett suffered an industrial injury on February 22, 1996. The Board's decision and order determines that Mr. Hulett was not a temporarily totally disabled worker from July 1, 2000 through January 24, 2005, and was not entitled to loss of earning power compensation during the same time. In addition the Board decision and order finds that Mr. Hulett was capable of gainful employment on a reasonably continuous basis effective July 1, 2000 and that he has not suffered a loss of earning capacity as a result of the February 22, 1996

CRADDOCK D. VERSER

JUDGE

Jefferson County Superior Court

P.O. Box 1220

Port Townsend, WA 98368

1 injury effective July 1, 2000. The Board based its decision on its
2 conclusion that "...rather than being caused by the residual effects of the
3 injury, we believe that Mr. Hulett's permanent total disability arose from a
4 supervening cause. The supervening cause was the tragic accident in
5 December 2000, which resulted in the death of Mr. Hulett's son-in-law." [D&O
6 p. 3-4].
7

8 STANDARD OF REVIEW
9

10 The superior court reviews the Board's determination de novo in an
11 appellant capacity considering only the record before the board. The
12 Board's decision is presumed *prima facie* correct and the burden of proof is
13 on Mr. Hulett. RCW 51.52.115. *Prima facie correct* means there is a
14 presumption on appeal that the decisions of the Board are correct until the
15 court as trier of fact finds from a fair preponderance of credible evidence
16 that the Board's finding and decision is incorrect. Allison v. Department
17 of Labor and Industries, 66 Wn. 2d 263, 268, 401 P.2d 982 (1965). An
18 Appellant, here Mr. Hulett, can attack the Board's decision in two ways (1)
19 by showing that the evidence is insufficient to support one or more of the
20 Board's essential findings and (2) by demonstrating at trial in superior
21 court that the evidence preponderates against those findings. Harrison
22 Memorial Hosp. v. Gagnon, 110 Wn. App. 475, 481-82, 40 P.3d 1221 (Div. II,
23 2002). Mr. Hulett contends that the evidence preponderates against the
24 finding of the Board that a supervening event, i.e. the death of his son in
25 law, caused his permanent disability. If the evidence is "evenly balanced"
26 the Board's decision will be upheld by the Superior Court. Harrison
27 Memorial, at 110 Wn. App. 485.
28

29 FACTS
30

31 The essential facts are really not in dispute. As of February 22,
32 1996, Mr. Hulett had worked for Rayonier for over 30 years. On February 22,
33 1996 he suffered an industrial injury striking his head on an overhead pipe.
34 Dr. Roger Oakes, Mr. Hulett's family doctor examined him the next day.
35 Since the injury Mr. Hulett has suffered from headaches, seizures, neck
36 pain, dizziness, ringing in his ears, numbness in his hands, difficulty
37 finding words, transposing numbers or letters, fatigue, memory problems, and
38 difficulty concentrating. Prior to the incident on February 22, 1996
39 Mr. Hulett did not suffer from these symptoms, and despite some degenerative
40 disc disease, he was fully able to work before the February 22, 1996 injury.
41

42 After completing a twelve week rehabilitation program at Virginia
43 Mason neurological rehabilitation clinic from February 22, 1999 through May
44 20, 1999 a "return to work goal" of home based training and boarding of
45 horses was developed. With assistance from L & I, Mr. Hulett began his
46 attempt at operating the horse boarding/training business in April, 2000.
47 The Board makes the determination that as on November, 2000 Mr. Hulett
48
49
50

CRADDOCK D. VERSER
JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

1 "...appeared to be faring well with this endeavor until a tragic accident in
2 December, 2000." [D&O p. 6]. From this determination the Board makes the
3 finding that "During the period from July 1, 2000 through January 24, 2005,
4 inclusive Mr. Hulett's earning power was not impaired due to any residuals
5 causally related to this February 22, 1996 industrial injury". [D&O, p. 15,
6 Finding of Fact No. 9].
7

8 The medical testimony available to the Board was not conclusive. On
9 the one hand, for Rayonier, Dr. Stump testified that the February 22, 1996
10 injury was minor and would certainly have resolved prior to July 1, 2000.
11 Dr. Green echoed Dr. Stump's conclusion that Mr. Hulett was capable of work.
12

13 Dr. Fordyce, who had no contact with Mr. Hulett since 1996, testified
14 that at the end of the rehabilitative program at Virginia Mason, it looked
15 like Mr. Hulett was functioning independently and that anything from that
16 point on would be difficult to ascribe to the February 22, 1996 injury.
17 Dr. Weinstein believed Mr. Hulett was much improved by the rehabilitation
18 program and was capable of employment with the horse boarding/training job
19 or a maintenance worker job. Dr. Weinstein had not seen Mr. Hulett since
20 1999. Dr. Brzusek testified essentially that Mr. Hulett suffered a
21 concussion or cerebral contusion on February 22, 1996, along with
22 aggravation of a preexisting condition, possible seizure disorder.
23 Dr. Brzusek testified that all conditions were related to the February 22,
24 1996 incident and that Mr. Hulett was permanently and totally disabled as a
25 result of the aggravation of the preexisting degenerative arthritis.
26

27 Dr. Oakes, Mr. Hulett's treating physician, and the only physician who
28 knew Mr. Hulett before and after the February 22, 1996 injury treated
29 Mr. Hulett for persistent headaches, cognitive changes, problems with
30 memory, fatigability, and seizures. Dr. Oakes testified that the symptoms
31 Mr. Hulett described and which rendered him disabled were a result of the
32 February 22, 1996 injury.
33

34 Jean Simmons, Mr. Hulett's sister-in-law, testified as to the
35 headaches, confusion, seizures, and disabilities she observed in Mr. Hulett
36 between July 1, 2000 and August 4 of 2004. Her testimony confirmed that
37 Mr. Hulett was not capable of employment. Ms. Elva M. Hulett who has been
38 married to Steven Hulett for 33 years also testified as to her observations
39 of Mr. Hulett and the incapacity which he has experienced since the February
40 22, 1996 injury. For example she describes the headaches Mr. Hulett
41 experienced, difficulties with speech, seizures, falling down, and the fact
42 that Mr. Hulett was not able to keep up with the requirements of the horse
43 training/boarding venture. From her testimony it is clear that Mr. Hulett
44 had to have assistance on a daily basis to attempt to manage the horse
45 business. Mr. Hulett also testified as to the symptoms he suffered, the
46 disabling nature of the symptoms and his inability to be employed since the
47 February 22, 1996 injury.
48

49
50
CRADDOCK D. VERSER
JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

1 The testimony of the vocational experts was likewise inconclusive.
2 While Mr. Hoppe testified that Mr. Hulett should have been able to be
3 employed in the horse business, he was unaware of the problems as described
4 by Ms. Hulett, Ms. Simmons and Mr. Hulett which precluded this form of
5 employment, indeed any employment for Mr. Hulett. Mr. Berge concluded that
6 Mr. Hulett was unemployable as a result of the February 22, 1996 injury.
7

8 ANALYSIS
9

10 The opinion of Dr. Oakes, as Mr. Hulett's treating physician, as well
11 as the doctor who had the most contact with Mr. Hulett both before and after
12 the injury, should be entitled to great weight and special consideration.
13 Intalco Aluminum v. Labor and Industries, 66 Wn. App. 644, 654-655, 833 P.2d
14 390 (1992). While there is some question regarding causation of the
15 symptoms Mr. Hulett experienced, "The evidence is sufficient to prove
16 causation if, from the facts and circumstances and the medical testimony
17 given, a reasonable person can infer that a causal connection exists."
18 Intalco, at 66 Wn. App. 655, citing Douglas v. Freeman, 117 Wn. 2d 242, 252,
19 814 P.2d 1160 (1991). Dr. Oakes testified that Mr. Hulett was disabled and
20 that the disability was a result of the February 22, 1996 industrial injury.
21

22 In addition to reach the conclusion that Mr. Hulett's disability was a
23 result of his son-in-law's death, the Board had to ignore the fact that the
24 symptoms (disabling headaches, seizures, fatigue, and loss of ability to
25 concentrate) were present before his son-in-law died. In fact the Hulett
26 had invited their relatives to live on their property to assist in the horse
27 training/boarding business because of the disabling symptoms Mr. Hulett was
28 experiencing which prevented him from being able to work at the horse
29 business.
30

31 While Rayonier argues that there is no evidence to connect
32 Mr. Hulett's disability with the February 22, 1996 injury that is not the
33 case. Dr. Oakes as well as the lay testimony satisfies Mr. Hulett's burden
34 on this issue. Dr. Oakes testimony is more than "speculation or surmise" it
35 is based on years of treatment of Mr. Hulett and satisfies the requirement
36 that Mr. Hulett show a causal connection between the February 22, 1996
37 injury and his current condition. In addition Dr. Earl and Dr. Brzusek all
38 note aggravation of Mr. Hulett's preexisting neck condition as a result of
39 the February 22, 1996 injury. There is no indication that the preexisting
40 neck problem was causing any lack of function for Mr. Hulett on his job or
41 in any other way prior to the February 22, 1996 injury. Aggravation of a
42 preexisting condition that was not causing any loss of function renders the
43 preexisting condition immaterial and the resulting disability is attributed
44 to the industrial injury. Dennis v. L & I, 109 Wn. 2d 467, 471-472, 745
45 P.2d 1295 (1987).
46
47
48
49
50

CRADDOCK D. VERSER
JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

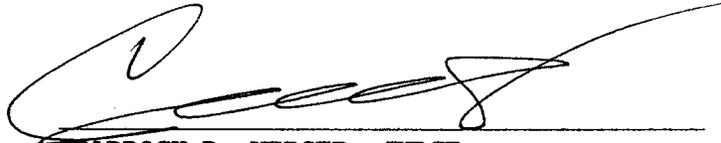
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50

CONCLUSION

This court is satisfied that the evidence presented to the Board in this matter preponderates against the Board's finding that Mr. Hulett's permanent disability was caused by the supervening event of his son-in-law's death. A clear preponderance of the evidence presented to the Board demonstrates that Mr. Hulett is permanently disabled and has been permanently disabled since February 22, 1996 as a result of the injury he suffered that date. The Board's conclusion to the contrary is incorrect.

The matter is remanded to the Board to find that Mr. Hulett is totally disabled from July 2000 through the point of claim closure and he has so remained.

Dated this 28TH day of August, 2008.



CRADDOCK D. VERSER, JUDGE

CRADDOCK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

APPENDIX C

51.32.060. Permanent total disability compensation--Personal attendant

(1) When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly during the period of such disability:

(a) If married at the time of injury, sixty-five percent of his or her wages.

(b) If married with one child at the time of injury, sixty-seven percent of his or her wages.

(c) If married with two children at the time of injury, sixty-nine percent of his or her wages.

(d) If married with three children at the time of injury, seventy-one percent of his or her wages.

(e) If married with four children at the time of injury, seventy-three percent of his or her wages.

(f) If married with five or more children at the time of injury, seventy-five percent of his or her wages.

(g) If unmarried at the time of the injury, sixty percent of his or her wages.

(h) If unmarried with one child at the time of injury, sixty-two percent of his or her wages.

(i) If unmarried with two children at the time of injury, sixty-four percent of his or her wages.

(j) If unmarried with three children at the time of injury, sixty-six percent of his or her wages.

(k) If unmarried with four children at the time of injury, sixty-eight percent of his or her wages.

(l) If unmarried with five or more children at the time of injury, seventy percent of his or her wages.

(2) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workers, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(3) In case of permanent total disability, if the character of the injury is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues, but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of chapter 51.36 RCW and RCW 51.04.105.

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury.

(5) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under

the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if a worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (5)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

The limitations under this subsection shall not apply to the payments provided for in subsection (3) of this section.

(6) In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

(7) The benefits provided by this section are subject to modification under RCW 51.32.067.

APPENDIX D

51.32.090. Temporary total disability--Partial restoration of earning power--Return to available work--When employer continues wages--Limitations

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power benefits are calculated upon reopening the claim.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be

assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

(7) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (7)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.