

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38561-9

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

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

Appellants,

v.

STEVEN R. HULETT,

Respondent.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY 1

1. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE TRIAL COURT’S DECISION..... 1

2. THE COURT IS ENTITLED TO CONSIDER THE EVIDENCE TO DETERMINE IF SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE TRIAL COURT’S DECISION..... 5

3. THE LIGHTING UP DOCTRINE DOES NOT APPLY TO PRE-EXISTING, SYMPTOMATIC CONDITIONS..... 11

4. INTALCO V. DEP’T OF LABOR & INDUS. DOES NOT DISPENSE WITH THE REQUIREMENT THAT PROXIMATE CAUSE BE ESTABLISHED. 14

5. AGENCY DEFERENCE IS APPROPRIATE. 16

6. STRATTON V. DEP’T OF LABOR & INDUS. APPLIESS..... 17

7. THE BUILDING MAINTENANCE POSITION IS NOT AN ODD LOT POSITION..... 19

B. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

| | |
|--|----|
| Benedict v. Department of Labor & Industries, 63 Wn.2d 12, 385 P.2d 380 (1963)..... | 6 |
| Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) 6, 7 | |
| Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984)..... | 10 |
| Coca Cola Bottling Co. of Black Hills v. Hubbard, 203 F.2d 859 (8th Cir. 1953) | 7 |
| Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992)..... | 13 |
| Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 471-472, 745 P.2d 1295 (1987)..... | 15 |
| Doe v. Boeing Co., 121 Wash.2d 8, 15, 846 P.2d 531 (1993)..... | 16 |
| Double D Hop Ranch v. Sanchez, 133 Wn.2d 793, 797, 947 P.2d 727 (1997)..... | 16 |
| East Gig Harbor Improvement Ass'n v. Pierce County, 106 Wn.2d 707, 709-10 n. 1, 724 P.2d 1009 (1986) | 7 |
| Favor v. Dep't of Labor & Indus., 53 Wn.2d 698, 336 P.2d 382 (1959). 12, 13 | |
| Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923) | 15 |
| Grant v. Boccia, 133 Wn. App. 176, 137 P.2d 20 (2006), rev. denied, 159 Wn.2d 1014, 154 P.3d 913 (2007)..... | 16 |
| Hadley v. Dep't of Labor & Indus., 116 Wn.2d 897, 902-03, 810 P.2d 500 (1991)..... | 9 |
| Harrison Mem. Hosp. v. Gagnon, 110 Wn. App. 475, 40 P.2d 1221, rev. denied, 147 Wn.2d 1011, 56 P.3d 565 (2002) | 5 |
| Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)..... | 5 |

| | |
|--|--------|
| 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) | 15 |
| Kim v. Dean, 133 Wn. App. 338, 135 P.3d 978 (2006) | 7 |
| Kuhnle v. Dep't of Labor & Indus., 12 Wn.2d. 191, 120 P.2d 1003 (1942) | 19 |
| Longview Fibre v. Weimer, 95 Wn.2d 583, 682 P.2d 456 (1981) | 11 |
| Osborn v. Public Hosp. Dist. 1, 80 Wn.2d 201, 492 P.2d 1025 (1972)..... | 7 |
| Peeples v. Port of Bellingham, 93 Wn.2d 766, 613 P.2d 1128, 1132 (Wash., 1980)..... | 10, 11 |
| Phillips v. Kaiser Aluminum & Chem. Corp., 74 Wn. App. 741, 753-54, 875 P.2d 1228 (1994)..... | 7 |
| Puget Sound Energy v. Lee, 149 Wn. App. 866, 205 P.2d 979 (2009) ... | 11, 12 |
| Rambeau v. Dep't of Labor & Indus., 24 Wn.2d 44, 49, 163 P.2d 133 (1945)..... | 8 |
| Scott Paper Co. v. Dep't of Labor & Indus., 73 Wn.2d 840, 440 P.2d 818 (1968)..... | 5, 6 |
| Springstun v. Wright Schuchart, Inc., 70 Wn. App. 83, 851 P.2d 755 (1993)..... | 8, 9 |
| Stampas v. Dep't of Labor & Indus., 38 Wn.2d 48, 277 P.2d 739 (1951) . | 8 |
| State v. Chino, 117 Wn. App. 531, 542, 72 P.3d 256 (2003) | 18 |
| State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) | 18 |
| State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)..... | 18 |
| State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998)..... | 18 |
| State v. Watkins, 136 Wn. App. 240, 148 P.3d 1112 (2006)..... | 17, 18 |

| | |
|--|-------|
| Stratton v. Dep't of Labor & Indus., 1 Wn. App. 77, 459 P.2d 651 (1969) | 17 |
| Superior Asphalt & Concrete v. Dep't of Labor & Indus., 84 Wn. App. 401, 405, 929 P.2d 1120 (1996) | 17 |
| Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959) | 9, 10 |
| Windmill Ranch v. Smotherman, 69 Wn.2d 383, 418 P.2d 720 (1966) | 5 |

STATUTES

| | |
|------------------|------------|
| RCW 51.08.100 | 15 |
| RCW 51.08.140 | 15 |
| RCW 51.24.060(3) | 9 |
| Title 51 | 10, 12, 16 |

A. REPLY

1. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S DECISION.

This is a medically complex case because of the amorphous and far-reaching nature of Hulett's complaints. It is not a factually complex case. Rayonier respectfully submits that no rational trier-of-fact could determine that Hulett's complaints are related to the 1996 event, or that he is unable to work due to any residuals from the 1996 event, even when the evidence is viewed in a light favorable to Hulett. Hence, there is not substantial evidence in this record to support the trial court's Findings of Fact and Conclusions of Law.

With regard to Hulett's summary of and statements regarding the evidence in this record, Rayonier requests that the Court refer back to Rayonier's opening brief and submits that the Court's review of medical evidence in this medically complex case will reveal to the Court that the trial court's decision is not supported by substantial evidence.

Briefly, serial neuropsychological testing, the gold standard for assessing brain injury in conjunction with diagnostic testing such as EEG's and MRIs (negative in Hulett's case) by both Dr. Fordyce and Dr. Powel establish that Hulett does not have a brain injury. This evidence is undisputed. There is no contrary neuropsychological testing or diagnostic

testing suggesting he does have a brain injury. Fordyce, 5, 42-43. Both Dr. Fordyce and Dr. Weinstein, specialists who treated Hulett, determined Hulett's deterioration after he left the Virginia Mason program was unrelated to the February 1996 event. Fordyce, 21; Weinstein, 59-64.

Dr. Oakes, the physician upon whose testimony Hulett so heavily relies, testified Hulett could work from July 1, 2000 to August 4, 2004, and deferred to the opinion of Dr. Weinstein on Hulett's ability to perform the building maintenance position for which there is an active labor market. Oakes, 33, 35-36, Hoppe, 68-69, 97, 103. Dr. Brzusek testified Hulett's neck injury alone would not prevent him from working, and he would have to defer to a psychiatrist as to mental health issues, and Dr. Weinstein as to any head injury issues. Dr. Earle testified Hulett was employable between July 1, 2000, and August 4, 2004. Earle, 35, 49-50.

Dr. Weinstein testified Hulett was fully rehabilitated without evidence of unresolved brain injury, could perform both positions of horse boarder and building maintenance, and he did not need require the job modifications provided by the Employer, but he approved them to assist Hulett. Weinstein, 59-64, 73, 78-79, 81-82; Exs. 5 and 6.

Dr. Fordyce testified Hulett has no acquired cognitive impairment secondary to a head injury, there were no permanent sequelae from the event, he was rehabilitated after the Virginia Mason program, and he

could work in both positions from July 1, 2000 until Dr. Fordyce testified on March 30, 2005. Fordyce, 10, 14-17, 21-22, 25-26. Dr. Powel testified Hulett had no related residuals and was able to work. Powel, 15-17, 39-40, 46. Dr. Carter testified Hulett had no related residuals and was able to work. Carter, 68-73, 114-115. Drs. Green and Stump testified Hulett had no related residuals and was able to work. Green, 94-96, 101-102; Stump, 61-62, 64-68, 79, 83-84, 87. As to the building maintenance position, Dr. Oakes deferred to the employability opinions of Drs. Weinstein and Fordyce. Oakes, 33-34.

Although Dr. Oakes is Hulett's treating physician, he is not the only treating physician who testified, and the record is replete with reasons why his opinions, even after special consideration, do not constitute substantial evidence as opposed to the specialists who evaluated and treated Hulett.

Viewed in the light most favorable to Hulett, the undisputed medical evidence and contemporaneous medical records in the record created at the Board establish that Hulett has had a whole host of symptoms before and after the February 1996 event when he bumped his head while wearing a hard hat, including cervical complaints. The undisputed medical evidence and contemporaneous medical records in the record created at the Board also establish that Hulett's functional

complaints were fully addressed in the Neurorehabilitation Program, he was fully rehabilitated following that program, and there is no contemporaneous medical evidence in the record that he had a relapse of his functional complaints until after the unfortunate and unrelated death of his son-in-law. Likewise, the diagnosis of a seizure disorder and a possible causal relation to the February 1996 event is speculative at best, and Hulett's multiple references to it, despite his caveat at page 6 of his brief, are misleading. Dr. Oakes, although indicating there was enough evidence to say Hulett has a seizure disorder, agreed there is no definitive diagnosis of a seizure disorder and there is no identifiable source or cause for his alleged spells. Oakes, 35-37. Although Dr. Earle suggested a diagnosis of a seizure disorder, he did not relate the condition to the 1996 event, and suggested the diagnosis based on an incomplete set of records and without the knowledge that no neurologist, to which he would defer, had made the diagnosis. Earle, 30-31.

Hulett appears to argue that Rayonier was required to make a motion for judgment as a matter of law before the trial court at the bench trial of this matter in order to argue to this Court that the trial court's findings are not supported by substantial evidence. Respondent's Brief, 21. Rayonier is aware of no legal authority to support this argument.

2. **THE COURT IS ENTITLED TO CONSIDER THE EVIDENCE TO DETERMINE IF SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE TRIAL COURT'S DECISION.**

Rayonier recognizes that the Court in *Harrison Mem. Hosp. v. Gagnon*, 110 Wn. App. 475, 40 P.2d 1221, *rev. denied*, 147 Wn.2d 1011, 56 P.3d 565 (2002), stated that the role of the appellate courts is not to reweigh the evidence or assess the credibility of the witnesses. However, Hulett's assertion that "[o]n appellate review no determination of factual issues should be entertained[,]" citing *Old Windmill Ranch v. Smotherman*, 69 Wn.2d 383, 418 P.2d 720 (1966), does not adequately account for the Court's need to review the evidence in the record, as with review of motions for judgment as a matter of law, to determine whether substantial evidence exists to support the trial court's findings. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). As with motions for judgment as a matter of law, an issue of fact does not preclude reversal of the trial court where substantial evidence does not support the trial court's decision.

On the issue of evaluation of the record, the Washington Supreme Court in *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968), noted as follows:

While appeals in workmen's compensation cases to this court are no longer tried de novo (see *Benedict v. Department of*

Labor & Industries, 63 Wash.2d 12, 385 P.2d 380 (1963), and Groff v. Department of Labor & Industries, supra), it often becomes the duty of the appellate court to evaluate the evidence in a written record in testing conclusions and inferences which have been drawn from the facts-an exploration for sufficiency of the probative evidence to support findings of fact and an analysis of findings when the evidence is undisputed, uncontradicted, and unimpeached. Benedict v. Department of Labor & Industries, supra at 14, 385 P.2d 380. Such is the situation here.

Scott Paper, 73 Wn.2d 840, 844. The Court, in fact, proceeded to evaluate the evidence as follows:

We, therefore, hold that, when subjected to the proper criteria, claimant's conduct was such as could reasonably be expected of a man with his disability. Therefore, appellant failed to sustain the burden of proof, and the findings of the trial court are not supported by substantial evidence and the judgment, therefore, must be reversed.

Scott Paper, 73 Wn.2d 840, 848.

In addition, the Court in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), held that an error is not waived where it is clear from other trial court rulings that additional assertions of the rejected arguments would be futile, noting as follows:

Where, as here, the issue was clearly before the trial court, and its prior rulings demonstrated that a motion to modify the order would not have been granted, a party cannot be reasonably held to have waived the right to assert the error on appeal merely by declining to engage in the useless act of repeating their arguments in a motion to amend the trial court's order. *East Gig Harbor Improvement Ass'n v. Pierce County*, 106 Wn.2d

707, 709-10 n. 1, 724 P.2d 1009 (1986) (“As long as the trial court had sufficient notice of the issue to know what legal precedent was pertinent this court will not refuse to consider the issue.”)(citing *Osborn v. Public Hosp. Dist. 1*, 80 Wn.2d 201, 492 P.2d 1025 (1972)). See also *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 753-54, 875 P.2d 1228 (1994) (where a trial court has ruled before trial that the jury would only consider certain matters, the plaintiff “was not required to propose an instruction that he knew would not be given”).

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 498-499, 933 P.2d 1036, 1043 (1997). Likewise, in this case, all issues and arguments were made to the trial court and are preserved, and no post-trial motions, motions likely futile, were required to preserve the issues for appeal to this Court.

Moreover, Rayonier respectfully submits that expert medical testimony is required to establish proximate cause and entitlement to benefits, and there is not substantial evidence in this record in the form of expert medical testimony from which a rational trier-of-fact could have arrived at the findings entered. “It is the applicable law which is controlling, and not what the trial court announced the law to be in his instructions.” *Kim v. Dean*, 133 Wn. App. 338, 135 P.3d 978 (2006), quoting *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859 (8th Cir. 1953).

In addition, although Rayonier recognizes the premise that lay testimony can be considered and can sometimes be material in addressing

questions of causation under *Rambeau v. Dep't of Labor & Indus.*, 24 Wn.2d 44, 49, 163 P.2d 133 (1945), the testimony of the lay witnesses upon which the trial court relied in this case, as evidenced by the trial court's reference to the language from the Proposed Decision and Order, is simply insufficient to support medical proximate cause or entitlement to benefits without substantial evidence in the form of expert medical testimony. The Court in *Rambeau v. Dep't of Labor & Indus.*, 24 Wn.2d 44, 49, 163 P.2d 133 (1945), citing to *Stampas v. Dep't of Labor & Indus.*, 38 Wn.2d 48, 277 P.2d 739 (1951), held that the "burden is upon the claimant to establish the incorrectness of the board's decision and ... the probability of a causal connection between the industrial injury and the subsequent physical condition must be established by the testimony of medical experts." The Court in *Rambeau* further noted that a "case for the jury is not made out by expert evidence when it is shown that a condition might have, or could probably have been brought about by a certain happening." *Rambeau*, 24 Wn.2d 44, 49.

Further, Hulett is incorrect that the issue in *Springstun v. Wright Schuchart, Inc.*, 70 Wn. App. 83, 851 P.2d 755 (1993), to which the Court applied the substantial evidence test, was not factual. Respondent's Brief, 18. Although one of the issues on appeal in *Springstun* was whether the employer abused its discretion in refusing to compromise its statutory lien

interest in the claimant's third party recovery (necessarily a factual question of whether discretion was exercised on untenable grounds), the case also involved the factual question of whether the employer had, in fact, considered the statutorily-required factors in reaching its decision to refuse to reduce its lien. The Court stated as follows:

To determine whether the Board has correctly approved a decision on whether to compromise a statutory lien therefore, "[t]he proper question for review ... is whether the Department [or self-insurer] considered the statutory factors and whether" the Department (or self-insurer) abused its discretion by basing its decision on compromising its lien in a way which is contrary to law. *Hadley*, 116 Wash.2d at 902-03, 810 P.2d 500. ... We first consider whether Wright Schuchart considered the factors required for consideration under RCW 51.24.060(3) in making its decision. The Board in this case found that Wright Schuchart specifically considered the required statutory factors in making its decision not to compromise its statutory lien. As a question of fact, this determination of the Board is to be upheld if supported by substantial evidence. *Hadley* 116 Wash.2d at 903, 810 P.2d 500. We find the Board's decision that Wright Schuchart considered the required statutory factors to be supported by substantial evidence.

Springstun v. Wright Schuchart, Inc., 70 Wn. App. 83, 88-89, 851 P.2d 755, 758 (1993). Hence, the Court in *Springstun* appropriately reviewed the record to determine substantial evidence exists to support the Board's decision.

Hulett also contends that Rayonier's appeal constitutes a request that the reverse *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959) because the appeal is a request that the Court reweigh

the evidence and alter the burdens of proof. Respondent's Brief, 17, 44. However, *Thorndike* is inapplicable to the facts of this case. First, *Thorndike* is an adverse possession case having no bearing on the statutory scheme of Title 51. Second, the facts in this appeal, many of which consist of contemporaneous documentation of medical status that cannot now be controverted by self-serving testimony, are contained in the Certified Appeal Board Record. The testimony is what it is. Rather, it is the inferences drawn by trial the court, sitting as trier-of-fact in this bench trial, that Rayonier disputes are supported by substantial evidence in the record. Third, the basis for the *Thorndike* rule, that the trial court is in the best position to assess the credibility of the witnesses, is likewise inapplicable here where the trial court's review was limited to the transcripts of testimony created before the Board of Industrial Insurance Appeals.

As the Court in *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 613 P.2d 1128, 1132 (Wash., 1980), *overruled on other grounds in Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984) noted:

The Thorndike rule, cited by the port as controlling in the present case, applies in cases where there is a factual dispute. **We have explained that the rule is based upon the theory that there is a conflict in the testimony and that the trial court, having the witnesses before it, is in better position to arrive at the truth than is the appellate court.** For this reason, the rule has no application in a case where there is no

substantial dispute as to the facts and no question as to the credibility of witnesses or the weight to be given to their testimony, but where the sole question on appeal concerns the proper conclusions to be drawn from practically undisputed evidence; **in such situation, this court has the duty of determining for itself the right and proper conclusions to be drawn from the evidence in the case.**

Peeples, 93 W.2d 766, 771-772, *emphasis added, citations omitted.*

3. THE LIGHTING UP DOCTRINE DOES NOT APPLY TO PRE-EXISTING, SYMPTOMATIC CONDITIONS.

Hulett suggests that because he had no documented disability from his pre-existing cervical disc disease as it pertained to his work, the lighting up doctrine applies. Respondent's Brief, 22-23. The trial court erroneously adopted this argument. *Longview Fibre v. Weimer*, 95 Wn.2d 583, 682 P.2d 456 (1981), the case cited by Hulett, is inapposite. Respondent's Brief, 22-23. In *Weimer*, the expert medical testimony established that a specific incident at work caused a specific, objectively identified condition, the claimant's ruptured lumbar disk, not generalized pain complaints from a degenerative condition, or amorphous, ill-defined functional complaints. *Weimer*, 95 Wn.2d 588.

Hulett also erroneously asserts the recent decision of *Puget Sound Energy v. Lee*, 149 Wn. App. 866, 205 P.2d 979 (2009), is inapplicable because the case involves Second Injury Fund relief. Both *Puget Sound Energy* and this case involve the manner in which pre-existing, unrelated

conditions, are considered under Title 51. Rayonier respectfully submits this Court should reject Hulett's arguments that the pre-existing condition must have been causing disability in the workplace and must have been active immediately prior to the industrial event, both propositions the Court rejected in *Puget Sound Energy*, in order to overcome Hulett's lighting up and causation arguments.

In fact, such a claim is nonsensical when the Court considers that an individual with a lower extremity condition, ranging from permanent knee impairment to total amputation, is not disabled in his or her ability to perform keyboarding work, but is obviously affected in his or her ability to function in everyday life. Such a claim, if adopted, would also result in unsound policy and would effectively result in the workers' compensation system being the sole and total insurer for all conditions affected in some manner, even temporarily, by work. As noted by the Court in *Favor v. Dep't of Labor & Indus.*, 53 Wn.2d 698, 336 P.2d 382 (1959),

We have heretofore pointed out that our workmen's compensation act was not intended to provide workmen with life, health, or accident insurance at the expense of the industry in which they are employed. It was intended to provide, at the expense of the industry employing them, a sure and speedy relief for workmen (or their dependents) where disability or death resulted from injuries sustained in the course of their employment or from occupational diseases arising naturally and proximately from extrahazardous employment. ... It is obvious that to prevent imposition upon the fund, created from the

required contributions for the relief of workmen and their families, there must be some tangible and provable relationship between the injury or the disease suffered and the employment. This relationship is not to be established on a purely subjective basis.

Favor v. Dep't of Labor & Indus., 53 Wn.2d 703. Total insurance is not a situation the system was intended to bear and is not a situation the system is likely capable of bearing. Proximate cause must be established.

In fact, the lighting up doctrine requires that the pre-existing condition be latent or quiescent, terms which are undefined by the Industrial Insurance Act. Where a term is not defined by statute, it will be given its plain and ordinary meaning. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992).

Latent is defined as “present and capable of becoming though not now visible, obvious, active, or symptomatic[.]” Quiescent is defined as “1: marked by inactivity or repose : tranquilly at rest; 2: causing no trouble or symptoms[.]” www.merriam-webster.com. Because Hulett’s conditions, as documented by the contemporaneous medical records, including his cervical condition, were not latent or quiescent prior to the February 1996 event, he is not entitled to the benefit of the lighting up doctrine, or to have the presence of the conditions excluded from considerations of causation. In particular and contrary to Hulett’s representation to this

Court that “no medical records support a symptomatic neck condition immediately prior to the industrial injury,” the cervical condition was not latent or quiescent. Respondent’s Brief, 34-35. Dr. Oakes testified he had neck problems before and after the injury. In 1992, he diagnosed a cervical strain and ordered cervical x-rays which evidenced degenerative disc disease. Oakes, 21. In addition, Hulett was evaluated in April 2005 for the condition, just 10 months before the event at issue per the evaluations of Drs. Green and Stump. There is no legal authority for the proposition that the condition must be symptomatic “immediately” prior to the industrial injury, nor is there a definition or bright line test of what constitutes “immediately” in the industrial insurance context or otherwise. Likewise, there is no requirement that a claimant be undergoing any active or regular treatment as suggested by Hulett. Respondent’s Brief, 3.

4. **INTALCO V. DEP’T OF LABOR & INDUS. DOES NOT DISPENSE WITH THE REQUIREMENT THAT PROXIMATE CAUSE BE ESTABLISHED.**

Contrary to Hulett’s assertion, Rayonier is not arguing that the standards to establish causation between industrial injuries and occupational diseases are different. Respondent’s Brief, 30-31. Both require expert medical testimony presented on a more probably than not basis and, with the exception of mental health conditions, based at least in

part on objective medical findings. What differs are the elements to establish an industrial injury versus an occupational disease. Per RCW 51.08.100, “ ‘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.” Per RCW 51.08.140. “‘Occupational disease’ means such disease or infection as arises naturally and proximately out of employment[.]” Hulett does not have a disease or infection. Even if he did, such disease or infection would not meet the added requirement that it be caused by the distinctive conditions of employment. *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 471-472, 745 P.2d 1295 (1987). Bumping one’s head is not a distinctive condition of employment as opposed to life in general.

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), is neither on point or instructive on the issue of brain injury in this case where there is an identifiable event in 1996 as well as medical test procedures (neuropsychological tests, MRIs, CTs, EEG’s – all of which were within normal limits in Hulett’s case) which are used, and competently so, to diagnose brain injury. The Court should note Hulett never objected to the use of these test procedures and results under *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923), the scientific standard that Washington

continues to use per *Grant v. Boccia*, 133 Wn. App. 176, 137 P.2d 20 (2006), *rev. denied*, 159 Wn.2d 1014, 154 P.3d 913 (2007). In fact, he would have had no basis to do so.

5. AGENCY DEFERENCE IS APPROPRIATE.

Hulett is also incorrect that the agency deference standard is inapplicable because the Board's Decision and Order is purely factual. Respondent's Brief, 18; BR, 2-17. That the Board was applying the law, Title 51, in this case is patent from the Board's decision. Although there is no deference due when the agency's interpretation conflicts with the plain language of a statute and the deference accorded is not binding on an appellate court, the Courts in Washington do defer to agency interpretation given that the agencies at issue routinely handle the cases within the agency's purview and are familiar with the issues and the application of the nuances of the law to the facts in any given case, as was the case with the Board's application of the law to the facts of Hulett's case. *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 797, 947 P.2d 727 (1997) ("We review the Board's interpretation of the Industrial Insurance Act de novo to determine whether it has erroneously interpreted or applied the law. Deference to an agency's interpretation of a statute is appropriate when the agency is charged with administering the statute."). *See also*, *Doe v. Boeing Co.*, 121 Wash.2d 8, 15, 846 P.2d 531 (1993); *Superior*

Asphalt & Concrete v. Dep't of Labor & Indus., 84 Wn. App. 401, 405, 929 P.2d 1120 (1996).

6. STRATTON V. DEP'T OF LABOR & INDUS. APPLIES.

Hulett also contends that *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 459 P.2d 651 (1969), and its proscription of the trier-of-fact's consideration of a Proposed Decision and Order reversed by the Board, applies only to jury trials. Respondent's Brief, 19-20. There is no legal authority to support this argument. Moreover, although there was no 'legal presumption,' as asserted by Hulett, that the IAJ, through the Proposed Decision, should be presumed correct in this case, Hulett, through repeated references to the Proposed Decision in argument and briefing, presented the Proposed Decision as if it were the correct outcome, which provided an improper, prejudicial, reversible inference to the trier-of-fact, who in this case admitted he was unversed in workers' compensation matters. VRP, 44, 76.

In this regard, Hulett seems to argue that there was no error that was reversible in this appeal. Respondent's Brief, 20-21. Even were the Court to decide that no one error is reversible, Rayonier submits that the cumulative effect of the errors resulted in an erroneous outcome and constitute reversible error. As the Court in *State v. Watkins*, 136 Wn. App. 240, 148 P.3d 1112 (2006), noted, "[w]here several errors standing alone

do not warrant reversal, the cumulative error doctrine requires reversal because the combined effects of the errors denied the defendant a fair trial.” *State v. Watkins*, 136 Wn. App. 240, 248, 148 P.3d 1112 (2006), citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). “It is well-settled that an accumulation of discrete harmless errors may ultimately warrant reversal where ‘the cumulative effect of those errors materially affected the outcome.’” *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). “The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Chino*, 117 Wn. App. 531, 542, 72 P.3d 256 (2003), citing, *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Likewise, in this case, the cumulative effect of what may appear to be relatively minor errors, standing alone, resulted in Rayonier not receiving a fair trial in this matter, and in the trial court’s erroneous decision.

Hulett seems to suggest Rayonier was required to assign error to the trial court’s Conclusions of Law. Respondent’s Brief, 21. To the extent it requires stating beyond the sum of Rayonier’s briefing, Rayonier challenges each of the trial court’s Conclusions of Law that are contrary to the Board’s Decision and Order.

7. **THE BUILDING MAINTENANCE POSITION IS NOT AN ODD LOT POSITION.**

Hulett appears to argue he is entitled to wage replacement benefits under the odd lot doctrine as set forth in *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d. 191, 120 P.2d 1003 (1942). Rayonier's primary argument is that if Hulett is totally disabled, that disability is not proximately caused by the February 1996 event. Hence, the odd lot analysis is immaterial.

If the Court determines Hulett has residuals from the 1996 event that have caused a loss of function, the fact that Hulett continued to board and tend five of his own horses and maintain his property and trails on the property as of the time of his testimony establishes he is capable of performing this work, he has simply chosen not to do so for income. The evidence also establishes, through the testimony of Mr. Camarda and Mr. Hoppe, that had he pursued the work as planned, it would have been a profitable venture.

In addition, contrary to Hulett's suggestion that the horse boarding option was pursued because Hulett had no transferable skills with which to perform other work or the physical ability to perform other work, it is undisputed that Rayonier permitted the self-employment plan for horse

boarding to proceed, rather than pursue other viable options, because it was Hulett's desire. Respondent's Brief, 37; Camarda, 113-115, 130-132.

It is also undisputed that even if the Court finds substantial evidence in this record to support Hulett's claim that he was physically unable to perform the horse boarder job, and the job was odd lot work, substantial evidence which Rayonier maintains does not exist, Hulett nonetheless had the transferable skills to perform building maintenance work, work that was available in his labor market, work which he had the ability to perform, and work that cannot be considered odd lot work per the transferable skills identified and required for the medically approved position, available in Hulett's labor market. Weinstein, 73; Oakes 33, Fordyce, 35-36; Powel, 46; Carter, 68-73, 114-115; Green 95-96, Stump, 68, 70. 83-34, 87; Brzusek, 23-24, 27 (neck injury alone would not have prevented work and deferral to Weinstein and Carter as to head and mental); Earle, 36-37, 49-51; Camarda, 130-132; Hoppe, 39-59, 68-69, 97, 103. Hence, in addition to being able to work from a medical standpoint, Hulett is also employable from a vocational standpoint.

B. CONCLUSION

Based on the foregoing points and authorities and those set forth in Rayonier's opening brief, Rayonier 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 previously provided.

RESPECTFULLY SUBMITTED this 31st day of August, 2009.

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COURT OF APPEALS
DIVISION II

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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 31st day of August, 2009, I served the foregoing Appellant's Reply 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:

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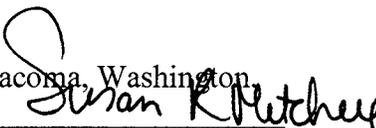
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Susan R. Mitchell