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COURT OF APPEALS

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No. 40471-1-II

**COURT OF APPEALS, DIVISION II**

**STATE OF WASHINGTON**

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**THE HOME DEPOT, INC.,**

**APPELLANT,**

**V.**

**ROBERT D. TSCHABOLD, and THE DEPARTMENT OF LABOR  
AND INDUSTRIES,**

**RESPONDENTS.**

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**APPELLANT'S BRIEF OF  
THE HOME DEPOT, INC.**

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## I. INTRODUCTION

Employer in this workers' compensation case seeks review of a Superior Court decision that reversed determinations by an Industrial Appeals Judge (IAJ) and the Board of Industrial Insurance Appeals (Board) and substituted a decision awarding claimant additional compensation in the form of additional temporary disability benefits and an award for permanent and total disability.

The Superior Court accorded determinative weight to the opinion of the only medical expert who attributed claimant's ongoing disability solely to the work injury/basal ganglion hemorrhage. In contrast, the IAJ and the Board had rejected that same expert's testimony because it squarely contradicted an opinion he had previously endorsed and the record provided no explanation or other basis to reconcile his contradictory opinions.

The crux of employer's appeal is that the Superior Court's decision reversing the Board was not supported by substantial reason or substantial evidence. In particular, neither the record nor the Superior Court Judge's analysis supported his anomalous finding that the expert "explained why" he had endorsed such contradictory opinions. Absent such an explanation, the record contained no basis for this Court to determine that a "rational,

fair-minded person” could have deemed the expert’s conflicted opinions sufficiently persuasive to support the Superior Court’s determinative causation and disability findings.

## II. ASSIGNMENT OF ERROR

Assignment of Error. The Superior Court Judge erred in reversing the Board's disability determinations because neither he nor the record provided an adequate explanation for his reliance on one of two, directly contrary disability assessments offered by the expert whose lone opinion he deemed controlling and persuasive.

### Issues.

1. Did Dr. Sekhar admittedly express an opinion addressing causation and this worker’s disability in a previous medical report that directly contradicted the opinion he provided during his deposition in this case?

2. Was the Superior Court’s comment in oral proceedings that Dr. Sekhar “explained why” he endorsed the contradictory opinions itself adequately explained or supported by substantial evidence in the record?

3. Without an adequate explanation, could a “rationale, fair-minded person” deem Dr. Sekhar’s conflicted testimony persuasive and determinative on the issues of causation and disability in this case?

4. Did the record or the Superior Court's decision communicate adequate reasoning for this Court to conduct an effective review of its analysis and findings?

### III. STATEMENT OF THE CASE

#### A. Uncontested or Established Findings

On April 9, 2005, this 62-year-old Home Depot employee experienced a basal ganglion hemorrhage in the thalamic portion of his brain while he and co-workers were unloading a riding lawn mower from the back of a truck. (CABR 49-50; Sekhar Depo., p. 9) The IAJ and the Board ultimately found the evidence sufficient to establish that striking his head during the work incident proximately caused that hemorrhage. (CABR 3, 51) Employer does not challenge that finding in this appeal.

Claimant was immediately hospitalized after the work incident and underwent a number of rehabilitative therapies, both before and after his discharge from the hospital on April 29, 2005. (CABR 50; Wray Depo., p.12; Sekhar Depo., pp. 9-12) The record contains deposition testimony referencing contemporaneous descriptions of his progress and status, as discussed further below.

During the course of claimant's treatment and recovery, imaging studies revealed an aneurysm in the "communicating artery" in a separate part of claimant's brain. (CABR 50; Sekhar Depo., p. 9) This prompted a

referral to Dr. Sekhar, a brain surgeon. (*Id.*) He examined claimant on May 18, 2005 and then, on May 24, 2005, Dr. Sekhar performed surgery to “clip” and remove the communicating artery aneurysm. It ruptured during the procedure, however, resulting in an intercerebral hemorrhage and the formation of two hematomas. (Sekhar Depo., pp. 16-19; Ang Depo., pp. 30-31) As a result, claimant was hospitalized for intensive care over a period of two months and underwent an additional cranial surgery, subsequent to which it is uncontested that he exhibited permanent and seriously disabling cognitive impairment and hemiparesis. (*Id.*)

As reflected in the Board's Decision and Order, the Department subsequently determined that the ruptured aneurysm of May 24, 2005 and its medical sequelae were entirely unrelated to the April 9, 2005 work injury.<sup>1</sup> (CABR 2) Claimant initially appealed that determination, but later withdrew the appeal, thereby allowing the Department's determination to become final. (CABR 2-3) While this causation issue remained in doubt, however, employer voluntarily continued to pay Mr. Tschabold temporary disability benefits through November 19, 2006. (CABR 62)

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<sup>1</sup> Dr. Sekhar himself testified, “The aneurysm and the hemorrhage were completely unrelated.” (Sekhar Depo., p. 14).

Ultimately, on March 16, 2007, the Department issued a decision closing the claim with time loss compensation as paid through November 19, 2006 but awarding no permanent disability benefit. (CABR 62) This was based on a determination, subsequently affirmed by the Industrial Appeals Judge and the Board, that claimant's conditions resulting from the original work incident of April 9, 2005 had reached maximum medical improvement; that the record failed to establish claimant's original work injury remained the proximate cause of temporary disability between November 19, 2006 and the March 16, 2007 order closing the claim; and that the record lacked sufficient evidence to establish permanent disability attributable to the April 9, 2005 work injury (as opposed to the subsequent aneurysm rupture). (CABR 3-4, 50-53, 62) Claimant timely challenged the Department determination (CABR 65), and these proceedings ensued.

As postured for review before this Court, therefore, the undisputed findings and the law of the case establish that claimant experienced a compensable brain hemorrhage in one part of his brain on April 9, 2005 for which he underwent treatment and rehabilitative therapy, followed by a second, non-work-related aneurysm and rupture in a separate part of his brain on May 24, 2005.

## B. Contested Issues

In the proceedings below, claimant contended (and employer disputed) that the compensable work injury remained the proximate cause of ongoing temporary and permanent disability notwithstanding the subsequent, supervening rupture of the non-compensable communicating artery aneurysm and associated damage due to bleeding and hematomas. The Industrial Appeals Judge and the Board found claimant failed to adduce persuasive medical evidence establishing such ongoing causal contribution by the work injury, if any, relative to the supervening effects of the non-work-related rupture. (CABR 3-4, 50-53) The Superior Court reversed, finding the record established such causation and the requisite level of disability. (CP 45-48)

The sole medical opinion to provide even arguable support for the Superior Court's Judge's causation findings (and the sole opinion he cited in his oral ruling) was that expressed by Dr. Sekhar in his November 28, 2007 deposition. During that testimony, Dr. Sekhar was asked to describe the nature and level of claimant's disability at the time of his May 18, 2005 evaluation (before the second surgery and ensuing aneurysm rupture) and also about the restrictions he observed by the time of his final, post-surgical follow-up examination in August 2006. (Sekhar Depo., pp. 15-16, 20-22, 31-36). He described claimant's "baseline" condition on May

18, 2005 to include “some problems with thinking,” left-sided arm, leg and facial hemiparesis (“weakness”) and hyporeflexia, and problems with walking that required some kind of “assistance device.” (Sekhar Depo., pp. 15-16). With regard to claimant’s condition in August 2006, after the aneurysm rupture during surgery and subsequent hospitalization, Dr. Sekhar testified that claimant improved to the point that he “basically had the same problems that he had originally going into the surgery, which consisted of cognitive difficulties and mild, left-sided paralysis.” (Sekhar Depo., pp. 19-20). He deemed these problems to be permanent and severe enough that they were likely to prevent claimant from returning to any regular employment. (Sekhar Depo., p. 22).

With regard to causation, Dr. Sekhar attributed claimant’s ongoing disability to the “original [intercerebral] hemorrhage into the brain.” (Sekhar Depo., pp. 19-20). He maintained that his own surgery, the ensuing aneurysm rupture, and the associated complications “left absolutely no permanent increase in Mr. Tschabold’s physical functioning deficits or cognitive deficits.” (Sekhar Depo., p. 41). On cross-examination, however, the following testimony occurred:

Q. [By employer’s trial counsel] Doctor, there were a series of questions that Mr. Tschabold’s lawyer put to you about what your opinion would have been of Mr. Tschabold’s functional ability before you took him to surgery for the aneurysm condition in May

of '05. As part of that, I'm directing you to this letter that's a part of your chart, which bears your signature of November 30, 2005.

A. Correct.

Q. And basically, you signed the letter that was sent to you by a Mary McHugh, a medical nurse case manager in Mr. Tschabold's case, which was dated November 29, 2005, in which you were provided with a hospital discharge summary that noted that, "Prior to aneurysm surgery, Mr. Tschabold was staying at home alone during the day and taking a taxi to outpatient occupational physical therapy at St. Joseph Medical Center, and his discharge report from the medical center notes that the patient improved from a supervision level to an independent level and transfers in [sic – from] a minimum assistance level to modified independence level and ambulation stair climbing and that he was walking 300 feet with a single point cane; and in occupational therapy he made gains from a supervision level to an independence level in all areas such as feeding, grooming, bathing and tub transfers."

**And then there's the statement, "In your opinion on a more probable than not basis, had it not been for the aneurysm surgery and subsequent complications, would Mr. Tschabold have been able to return to his work duties with regard to the industrial injury of 4/9/05?" And there's a "yes" place and a "no" place, and you checked the box, "yes," correct?**

**A. Yes. Correct."**

(Sekhar Depo., pp. 40-41; boldface added). Dr. Sekhar provided no explanation or basis to reconcile this statement with his earlier testimony ascribing all of claimant's ongoing disability and associated work restrictions to the industrial injury. Defense counsel asked no further questions about this letter, and claimant's counsel did not raise the issue during his examination on redirect. (Sekhar Depo., pp. 39-43).

As reflected in the findings and conclusions of the IAJ (as affirmed by the Board), no other expert offered testimony purporting to segregate claimant's ongoing impairment and resulting disability or relate it solely to the original industrial injury. (CABR 3-4, 50-53) To streamline this presentation, employer references and adopts the following summary of that other, relevant expert testimony as it appeared in IAJ Hansen's Proposed Decision and Order, which employer has supplemented with bracketed citations to the pertinent parts of the record:

While Dr. Ang agrees that Mr. Tschabold was unable to work as of November 20, 2006, he made clear that he does not feel he is qualified to determine whether the hemorrhage, the aneurism, or the two conditions combined, have been the cause of Mr. Tschabold's problems that he has diagnosed. [Ang Depo., pp. 14-17, 20]<sup>2</sup>

From her review of treatment records between April 9, 2005 and May 18, 2005, Dr. Wray<sup>3</sup> is of the opinion that Mr. Tschabold was improving between those dates. [Wray Depo., pp. 9-10, 15-16, 35-36] Specifically, Dr. Wray noted findings of Dr. Peter Brown, a neurosurgeon, and Dr. David Lundgren, a speech and language

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<sup>2</sup> Dr. Ang is a psychiatrist who provided claimant with ongoing treatment for recurring depression dating to before the work injury and continuing thereafter. (Ang Depo, p. 7-9). Her opinion was based on her interaction with claimant and his family, and also on a review of claimant's medical records. (*Id.*, pp. 9-10).

<sup>3</sup> Dr. Wray is a board certified neurologist with a practice that regularly entails treatment of stroke victims (including victims of basal ganglion hemorrhages) and an associate clinical professor in the University of Washington Department of Neurology. (Wray Depo., pp. 4-7). She conducted an independent examination and a review of claimant's treatment records over the relevant period of time. (*Id.*, pp. 8-11).

pathologist, that she concluded were indicative of improvement. [Id., pp. 16-17] She testified that people often return to full employment after suffering a basal ganglia hemorrhage [Id., p. 35], although she did not offer an opinion as to whether Mr. Tschabold would have been able to work had he only suffered the hemorrhage, and not the aneurism.

Dr. Jung<sup>4</sup> also discussed the improvements that she understood Mr. Tschabold experienced after the hemorrhage and prior to the ruptured aneurism. [Jung Depo., pp. 34-36] She agrees with Dr. Wray that the scalp laceration sustained by Mr. Tschabold would not have precluded him from working during the period in question. [Id., p. 33-34]

Mr. Cohen<sup>5</sup> concluded that Mr. Tschabold was not capable of working during the time period in question, doing so based on the deficits noted in Dr. Wray's report. [Cohen Depo., pp. 46, 53-56] However, as noted above, Dr. Wray testified that Mr. Tschabold made some significant improvement prior to the ruptured aneurism, and as to the deficits noted during her examination, she did not distinguish those resulting from the hemorrhage from those resulting from the aneurism. [Citations provided above].

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<sup>4</sup> Dr. Jung is also a board certified neurologist and Chief of Neurology at Swedish Medical Center whose practice regularly includes evaluation and treatment of individuals with basal ganglion hemorrhages. (Jung Depo., pp. 3-5). She is also an associate professor of neurology at the University of Washington and serves on several advisory panels for the Food and Drug Administration. (Id., p. 6-7). Her testimony was based on a review of claimant's medical records she conducted to prepare a report analyzing the nature and causes of claimant's disability related his brain diagnoses. (Id., pp 10-13).

<sup>5</sup> Mr. Cohen is a vocational rehabilitation counselor and case manager who conducted a forensic analysis and evaluation of Mr. Tschabold, including an interview and a review of medical assessments describing claimant's restrictions (including Dr. Wray's report), in April 2007. (Cohen Depo., pp. 45-46, 51-53, 55).

Mr. [sic – Ms.] Takei<sup>6</sup> testified that she did not attempt to distinguish residuals related to the hemorrhage from those related to the ruptured aneurism, and that she concluded that, considering only the residuals from the hemorrhage, Mr. Tschabold was able to perform certain jobs available in his labor market. [*Id.*, pp. 21-25]

(CABR 52-53). Based on this evidence and the absence of testimony to explain why Dr. Sekhar's "opinion had changed so drastically" (CABR 52), the IAJ entered findings that claimant failed to establish that residuals of claimant's original thalamic hemorrhage required further treatment or entitled claimant to additional time loss or permanent disability compensation. (CABR 52-53; 55). On review, a majority of the Board Members affirmed Judge Hansen's findings and conclusions. (CABR 2-4).

In an order filed February 24, 2010, Superior Court Judge McCarthy affirmed the ruling that claimant's conditions related to the industrial injury had reached maximum improvement by March 16, 2007, but reversed on the time loss and disability issues. He found that conditions proximately caused by the original work injury continued to qualify claimant for time loss compensation between November 20, 2006

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<sup>6</sup> Ms. Takei is a vocational counselor who conducted a review of claimant's medical records and evaluations to formulate an opinion regarding claimant's residual employability. (Takei Depo., p. 9).

and March 16, 2007, and also that such work-related conditions entitled him to an award for permanent and total disability. (CP 45-48).

Judge McCarthy's order expressed only general findings and conclusions without articulating any evidentiary analysis. (*Id.*). At the bench trial of December 14, 2009, however, the Judge entered an oral ruling into the record in which he commented on the evidence and expressed a preference for Dr. Sekhar's testimony. (Verbatim Transcript, pp. 38-46). For purposes of this appeal, the only reference he made to the conflict between Dr. Sekhar's testimony and his November 30, 2007 letter consisted of this statement:

Dr. Sekhar did, in his testimony, conflict with what he put on the form. *I think that he explained why he did so*, but I know – you know, I compare that testimony of someone who treated him with that of Dr. Jung, for example, ... [the Judge then detoured into a somewhat incongruous discussion of how other experts had doubted whether claimant's original work injury had caused the original hemorrhage].

(Verbatim Transcript, pp. 42-43; *emphasis added*). As noted above, Dr. Sekhar never offered, or asked to offer, an explanation for his endorsement of contradictory opinions.

On March 25, 2010, employer filed a timely Notice of Appeal with this Court. (CP 52).

#### IV. ARGUMENT

Employer brought this appeal based on a specific defect in the Superior Court's analysis that compromised its decision in several ways that compel a reversal, or at least a remand. In a nutshell, the IAJ and Board rejected Dr. Sekhar's statements that claimant's ongoing disability at the relevant times was attributable to his compensable basal ganglion rupture because it represented a "drastically" changed opinion for which no explanation appeared in the record. (CABR 52). The Superior Court entered exactly the opposite finding, explaining only, "I think that he explained why he did so." (Verbatim Transcript, p. 42). That difference in perception operated as the determinative lynchpin for the tribunals' opposing determinations because establishing such a causal connection through medical testimony was essential to determining claimant's entitlement to temporary or permanent disability compensation. *Dobbins v. Com. Aluminum Corp.*, 54 Wash.App. 788, 792 (1989); *Saylor v. DLI*, 61 Wn.2d 439 (1963); *Bonko v. DLI*, 2 Wash.App. 22 (1970). *See also* WAC 296-20-01002 ("All time loss compensation must be certified by the attending doctor based on objective findings"); *Wilber v. DLI*, 61 Wash.2d 439 (1963).

To resolve this difference of perception, this Court will need to review Dr. Sekhar's deposition testimony. When it does, it will find that

the IAJ and the Board had the right of it. Dr. Sekhar did admit endorsing the contradictory report. (Sekhar Depo., pp. 40-41). Nowhere in the entire deposition, however, did he utter any statement from which a reasonable person could conclude (as Judge McCarthy did) that he “explained why” or otherwise reconciled the contradiction. (CABR 42) Based on that readily confirmed circumstance, employer urges this Court to make one or more of the following rulings:

1. The Superior Court’s reversal of the Board's key finding of fact was not based on a fair preponderance of credible evidence.

In workers' compensation cases, a Superior Court Judge reviews *de novo*, but the Board's decision is deemed “prima facie correct” under RCW 51.52.115.<sup>7</sup> The party challenging the Board's decision must

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<sup>7</sup> RCW 51.52.115 provides, in pertinent part:

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be *de novo*, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same.

therefore support its challenge by a preponderance of the evidence, and the superior court may substitute its own findings and decision for the Board's only if it finds “ ‘from a fair preponderance of credible evidence’, that the Board's findings and decision are incorrect.” *Ruse v. DLI*, 138 Wash.2d 1, 5-6 (1999); *McClelland v. ITT Rayonier, Inc.*, 65 Wash.App. 386, 390 (1992) (quoting *Weatherspoon v. DLI*, 55 Wash.App. 439, 440 (1989)). *See also Rogers v. DLI*, 151 Wash.2d. 174, 180 (2009).

In this case, the Superior Court Judge necessarily accepted Dr. Sekhar’s opinion as sufficient to constitute preponderant, credible medical evidence establishing the cause and extent of claimant’s ongoing disability because no other expert expressed opinions supporting the necessary causation and disability findings. The judge conveyed that finding in his oral comments indicating Dr. Sekhar had “explained why” he had expressed a contrary opinion in the previous letter. (Verbatim Transcript, p. 42)

The factual record, however, is explicit and unambiguous in establishing that Dr. Sekhar admittedly provided contradictory opinions on the causation and disability issues on which Judge McCarthy deemed his testimony to be persuasive. A witness who provides two, contradictory opinions on an issue without providing a basis to choose between them cannot rationally or validly be deemed credible as to either one without

some further explanation. As a matter of law and logic, testimony indicating two, opposite opinions is inherently incapable of constituting a “fair preponderance” of “credible” evidence establishing *probable* causation because, in and of itself, the most it can establish is a *possibility* of such causation. It follows that the Superior Court Judge committed legal error in determining that Dr. Sekhar’s opinion constituted a “fair preponderance of credible evidence” sufficient to justify a reversal of the contrary findings entered by the IAJ and Board.

2. The record did not contain substantial evidence to support Judge McCarthy’s finding that Dr. Sekhar “explained why” he had provided contradictory opinions on the issue of causation and disability.

An alternative formulation for the same fundamental problem is to say that the record lacked substantial evidence to support Judge McCarthy’s finding that Dr. Sekhar “explained why” he had offered such contradictory opinions. (Verbatim Transcript, p. 42). Such an inquiry falls within this Court’s standard for review, and decisions based upon findings that lack such support are subject to reversal. *Oien v. DLI*, 74 Wash.App. 566 (1994). Substantial evidence exists when the record contains “evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Watson v. DLI*, 133 Wash.App. 903, 909 (2006); *Grimes v. Lakeside Indus.*, 78 Wash.App.

554, 560-61 (1995). In this case, no “rational, fair-minded person” could deem the evidence in this case sufficient to support the Superior Court’s finding that Dr. Sekhar “explained why” he endorsed diametrically opposed opinions on the determinative causation and disability issues in this case. That is because the record contained no evidence to support any such finding.

3. The Superior Court decision failed to make findings that adequately explained why the Board's contrary findings were not supported by substantial evidence.

Decisions such as *Groff v. DLI*, 65 Wn.2d 35 (1964), provide a third filter through which to view the deficiencies in the Superior Court’s decision. In *Groff*, the Superior Court reversed critical findings by the Board in an order that contained only formal and conclusory “ultimate” findings. Given what it deemed significant, contrary evidence in the record, the *Groff* court chided the Superior Court for failing to articulate a sufficient evidentiary analysis to enable the appellate court to conduct its own review of the Superior Court’s reasons for reversing the Board’s findings. *Id.*, 65 Wash.2d at 42-43. The court explained:

For an adequate appellate review in cases such as the one now before us, this court should have, from the trial court which has tried the case de novo, findings of fact (supplemented, if need be, by a memorandum decision or oral opinion) which show an understanding of the conflicting contentions and evidence, and a resolution of the material issues that penetrates beneath the

generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts.

*Id.* at 40.

As in *Groff*, the Superior Court's "Findings of Fact and Conclusions of Law" consists merely of a recital of the procedural facts followed by conclusory recitals of ultimate facts that contained no references to any of the expert opinions in the case. (CABR 45-48). Again as in *Groff*, such conclusory recitals may suffice to "dispose" of the case, but are "inadequate" to reflect or describe the standards the Judge applied or his evidentiary basis for reversing the Board's findings and conclusions. 65 Wash.2d at 37-38. *See also Bard v. Kleb*, 1 Wash. 370 (1890) (general findings are "entirely insufficient" for an appellate review).

The only other source of information regarding the Superior Court's evidentiary analysis is the commentary Judge McCarthy provided from the bench before rendering his oral ruling. (Verbatim Transcript, pp. 38-46). In that commentary, the ALJ explained that he felt the Board had accorded "insufficient weight to the treating physician's opinions in light of the defense opinions." (Verbatim Transcript, p. 45). As described above, however, that commentary sheds no light on the basis for Judge McCarthy's anomalous finding that Dr. Sekhar "explained why" he had

provided two, contradictory opinions as to the extent and causes of claimant's ongoing disability. That circumstance alone demonstrates and establishes that the Superior Court order failed to articulate an adequate evidentiary basis for its decision to pass muster on judicial review.

Judge McCarthy's commentary did provide other insights, however, which only reinforced an apparent disconnect between the contents of the record and his appreciation of the evidentiary issues it called upon him to decide. Perhaps because he conducted such a speedy review of the evidence,<sup>8</sup> Judge McCarthy's explication reflected that he may have failed to appreciate the discrete nature of two causation issues posed by the record: (1) the dispute over the cause of claimant's initial basal ganglion hemorrhage, and (2) the dispute over the cause of claimant's ongoing disability after the rupture of his connecting artery aneurysm.

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<sup>8</sup> The record reflects that Judge McCarthy set ambitious goals to accomplish an expeditious resolution of this trial. He convened the hearing at 9:20 in the morning on December 14, 2010; entertained opening arguments, and then recessed proceedings to review the record, promising, "I don't know if it will be this morning or this afternoon, but we are gonna finish it today, though." (Verbatim Transcript, pp. 1-10, 18). He then reconvened the trial just four hours later to render an opinion in this complicated case having attempted to digest a record comprising nearly 400 pages of expert testimony in addition to the agency record, the Board's Decision and Order, and the IAJ's Proposed Decision and Order. (Id. at 19).

Such confusion is reflected in the trial judge's repeated statements that he deemed Dr. Sekhar's opinion linking claimant's *ultimate* disability to the initial basal ganglion hemorrhage more persuasive than opinions Drs. Wray and Jung expressed attributing claimant's *original* hemorrhage to the effects of preexisting hypertension rather than to the work episode. For example, the Judge repeatedly commented that he found it "somewhat incredible" that Drs. Jung and Wray suggested claimant's original hemorrhage occurred spontaneously as a result of his preexisting hypertension, thereby causing the fall in which he struck his head, and not *vice versa*. (Verbatim Transcript, p. 40, 42).

By the third time he returned to this topic, there was little doubt he was conflating inapposite causation issues.

So, I compare the testimony of Dr. Jung and Dr. Wray with the treating doctors and those that saw him after the accident and after the hospitalization and during the interim. And, as I say, it's really difficult for me to accept or find them credible in a lot of their opinions when they seem to take the very aggressive stance that he became weak and fell, and that might have been what caused him actually to fall and be lacerated and injured to begin with.

So, considering the testimony, I am satisfied that the weight of the evidence does support a finding that his current cognitive and physical conditions are related to the April '09 [sic] accident.

(Verbatim Transcript, p. 45).

Contrary to the Judge's analysis, this record did not pit the opinions addressing the cause of claimant's initial hemorrhage against Dr.

Sekhar's opinion addressing the cause of claimant's ultimate disability.<sup>9</sup> The medical opinions Judge McCarthy deemed "incredible" in the first paragraph above bore no rational relationship to the finding he made based on "the weight of the evidence" in the second paragraph. The cause of claimant's original hemorrhage was an issue entirely distinct and irrelevant to the issue of whether claimant's ongoing disability after the second brain surgery and herniation continued to be caused by that original hemorrhage. All of the physicians, including Drs. Wray and Jung, agreed that the first hemorrhage had occurred, whatever its cause, and all were working from the same records and examination findings describing the nature and extent of his recovery before Dr. Sekhar's surgery took place and claimant's communicating artery aneurysm ruptured.

His reliance on what amounted to a *non sequitur* further blurred any rational relationship between the evidence in the record and Judge McCarthy's conclusion that Dr. Sekhar's opinion constituted a fair preponderance of the credible medical evidence addressing the cause(s) of claimant's ongoing disability. Reliance on such inapt and incongruous comparisons with other expert opinions addressing entirely different issues

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<sup>9</sup> In fact, Dr. Sekhar *himself* expressed ambivalence as to whether the original hemorrhage was caused by claimant's preexisting hypertension, the strain of holding onto the falling lawnmower, or the blow to his head when he fell. (Sekhar Depo., p. 13).

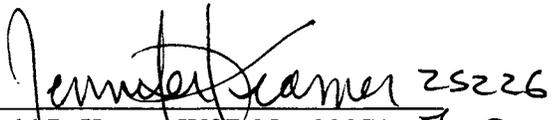
further demonstrates that Judge McCarthy's reasons for crediting Dr. Sekhar's causation were unsupported by substantial reason or substantial evidence.

## V. CONCLUSION

Based on the arguments above, employer seeks an order ruling that neither the record nor the Superior Court's decision reflects any legally sound or valid basis for concluding the Board's decision was not supported by "a fair preponderance of the credible evidence." Based on such a ruling, and the absence of any other medical evidence supporting the Superior Court's decision, employer seeks an order from this Court reversing Judge McCarthy's decision and reinstating the Board's June 16, 2008 Decision and Order. *Oien v. DLI*, 74 Wash.App. at 569.

In the alternative, the Court should find that the Superior Court's decision fails to communicate a rational relationship between the record and its findings under the applicable review standards, necessitating an order vacating the Superior Court's order, and remanding for adequate findings and explication. *Groff v. DLI*, 65 Wash.2d at 40-41.

Respectfully submitted,

  
Jerald P. Keene, WSB No. 22271 For  
of Attorneys for The Home Depot, Inc

FILED  
COURT OF APPEALS

10 AUG -6 PM 2:04

STATE OF WASHINGTON

BY \_\_\_\_\_

### CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing  
**APPELLANT'S BRIEF** and this **CERTIFICATE OF SERVICE** on the  
following individuals on August 6, 2010, by mailing to said individuals  
one true copy thereof, certified by me as such, contained in a sealed  
envelope, with postage prepaid, addressed to said individuals at their last  
known address, to wit:

David C. Snell  
Attorney at Law  
Small, Snell, Weiss & Comfort  
P.O. Box 11303  
Tacoma, WA 98411-0303

Penny L. Allen  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40121  
Olympia, WA 98504-0121

and deposited in the post office at Seattle, Washington on said date.

I further certify that I filed the original of the foregoing with:

David C. Ponzoha, Court Clerk  
The Court of Appeals of the State of Washington  
Division Two  
950 Broadway  
Suite 300, MS TB-06  
Tacoma, WA 98402-4454

by *hand delivery* on the 6<sup>th</sup> day of August, 2010.

**REINISCH MACKENZIE, P.C.**



Shannon M. Duty, Legal Assistant to  
Jerald P. Keene, WSBA #22271  
of Attorneys for Appellant, The Home  
Depot, Inc.