

COURT OF APPEALS  
DIVISION II

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

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**CATHY THARALDSON,  
Respondent,**

**v.**

**PROVIDENCE HEALTH AND SERVICES OF WASHINGTON,  
Appellant.**

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**BRIEF OF RESPONDENT**

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## **A. Statement of the Case**

### **1. Statement of the Facts**

Cathy Tharaldson was and is still employed at Providence Health & Services of Washington for the past 30 years. Mrs. Tharaldson started in the housekeeping department and later qualified to work as a Certified Nursing Assistant. On November 8, 2006, Mrs. Tharaldson sustained an industrial injury to her neck and right shoulder as she helped move and clean a patient who weighed over 400 pounds. Mrs. Tharaldson, who weighed about 130 pounds, was pushing and pulling this grossly overweight patient when she felt a significant pop and sharp pain in her neck, upper back and right shoulder region. 08/10/09 Tr. At p. 5-7. The patient was incontinent of diarrhea and had to be rolled and held up to clean up the diarrhea underneath, over his leg, back, and bottom. Id At 6.

Cathy Tharaldson had never had any previous injuries to her neck or right shoulder. Id 8, 9.

Cathy Tharaldson's treatment for this injury consisted of physical therapy, medicine therapy, chiropractic, and one cortisone shot in her back by Dr. Lang. The shot worked and the area did not hurt anymore like it had. Id 9.

Mrs. Tharaldson at first went to Group Health for treatment. She saw Dr. Plaeger-Brockway and Dr. Spree who is her primary care physician. Dr. Spree referred her to Dr. Lang, who is a neurosurgeon. She also saw Dr. Roy Evans for chiropractic care. Id at 10. Mrs. Tharaldson saw Dr. Lang a number of times. He examined her, prescribed medications, and gave her the injection in the back which was “wonderful”. Id at 11.

Mrs. Tharaldson testified that as of the date of the closing order, October 2008, she still had significant symptoms. The treatment Cathy Tharaldson was seeking as of October 2008 were cortisone injections from Dr. Lang because of the excellent results she had received from the back shot Dr. Lang had given her and because of her previous experience with a hand injury Dr. Hussein treated successfully with cortisone shots. Id at 8-10.

Dr. Lang testified that Mrs. Tharaldson was referred to him by her family physician at Group Health Dr. Mark Spree. 08/05/09 Tr. At 7. Dr. Lang believed he saw Mrs. Tharaldson around 15 times from 11-6-07 to 1-21-09. Id at 8. Dr. Lang prescribed Voltaren, an anti-inflammatory, gave Mrs. Tharaldson a hard cervical collar, later gave her other anti-inflammatories, recommended an EMG nerve conduction study and

epidural steroid injections. The injections were never allowed. As of the date of the closing order of October 10, 2008 Dr. Lang recommended a right epidural steroid injection at C6-7 level. Id at 12. That was the level at which a disc protrusion existed. Id at 13. Dr. Lang's opinion on a more probable than not basis was that Mrs. Tharaldson had a C6-7 disc herniation. He based this opinion on the results of a MRI scan of 9-2-07 and clinical findings of weakness of the right triceps muscle, diminished right triceps reflex and atrophy of the right arm. Dr. Lang reviewed the MRI report himself which had a right posterior disc herniation. Id at 13. Mrs. Tharaldson had been sent by the self insured provider to Drs. Leyen & Wong for an IME. Dr. Lang reviewed their report and testified that their findings were consistent with his. Id at 11.

Dr. Lang was aware that the EMG study was positive for carpal tunnel; but, not a herniated disc with radiculopathy. However, he stated it's just one tool and it's not one hundred percent accurate. His impression was based on all of the evidence, his many years experience and that "we" [doctors] have to add all these things together. Id at 22.

Dr. Lang testified that the dominant arm should be at least .5 centimeters larger than the non-dominant. Id at 15. On repeat

measurements the left (non-dominant) arm was consistently larger than the right. This supported his clinical finding of atrophy. Id at 15, 37-38.

Dr. Lang testified the purpose of giving Mrs. Tharaldson up to 3 epidurals in one year is to try to get rid of the inflammation permanently. (Emphasis added) Id at 23.

David Tharaldson also testified on behalf of his wife Mrs. Tharaldson. 08/10/09 at 22-29. He testified that he observed Cathy holding her right shoulder when it hurt really bad; that he does more housework and that his wife never had suffered any other injuries to her right shoulder or neck.

Dr. Edward De Vita, neurologist testified on behalf of the employer. Dr. De Vita's testimony is thoroughly covered in the petitioner's statement of facts and except for a few minor points won't be reviewed here.

Dr. De Vita testified that Mrs. Tharaldson had a good work ethic. 08/17/09. He also testified she had peripheral neuropathy. Id at 38. Dr. De Vita had reviewed the reflex findings of Dr. Wong who had performed an earlier IME. Dr. De Vita's reflex findings on his onetime exam were symmetrical. Dr. De Vita eventually agreed Dr. Wong's findings were different (asymmetrical). Id at 43-45.

Dr. De Vita expressed the opinion that Mrs. Tharaldson had pre-existing degeneration in the cervical spine to account for the MRI findings. Id at 30. However, he also testified there was no history in the medical records obtained from Mrs. Tharaldson that any pain problems or injuries had occurred to the neck area prior to this industrial injury. Id at 49. In other words. The neck and shoulder were asymptomatic prior to the industrial injury.

Dr. De Vita agreed that the purpose of an epidural steroid is to reduce inflammation in areas of the body. He also agreed that such treatment can be therapeutic and increase a person's functionality. Id at 49.

Dr. De Vita further testified in a typical week he sees patients 1 day only. He does around 84 IME exams monthly and is paid \$230-260 per exam. Id at 55.

Dr. Bays testimony is reviewed at length in the Petitioner's Statement of Facts and will not be repeated here, with the exception of a couple of points.

Dr. Bays saw Mrs. Tharaldson one time only on 5-29-08. 08/24/09 at 9. Dr. Bays testified that based on his review of the records Dr. Lang consistently found triceps reflex present on the left triceps, Id at 46. Dr. Bays further testified that based on his review of Dr. Lang's records Dr.

Lang found diminished right triceps reflex, atrophy, and right triceps muscle weakness on the right arm. Id at 50. Dr. Bays did not diagnose and did not even mention Dr. De Vita's diagnosis of peripheral neuropathy.

Dr. Bay testified 40% of his practice is IMEs; that he does 50-80 exams per months and 8-12 evaluations per day at \$285 per exam. Id at 51-52.

## **B. Argument**

### **1. Standard of Review**

The standard of review for this court is to determine only whether the evidence most favorable to the prevailing party supports the challenged findings. DuPont v. Department of Labor & Industries, 46 Wn. App. 471, 479, 730 P. 2d 1345 (1986). This court does not reweigh or rebalance the competing testimony and inference, or apply anew the burden of persuasion, for doing that would abridge the right to trial by jury. Harrison Memorial Hospital v. Gagnon, 110 Wn. App. 475, 485, 40 P. 3d 1221 (2002).

Further, the trial courts determination on conflicting evidence is decisive and this court cannot substitute it's judgment for that of the trial court even if of the opinion that the factual dispute should have been resolved the other way. See DuPont 46 Wn App. At 479.

In addition, RCW 51.12.010 States:

This title shall be liberally constructed for the purpose of reducing to a minimum the suffering and economic loss arising from the injuries and/or death occurring in the course of employment. (Emphasis added)

This statutory directive has been reaffirmed on many occasions. In Dennis v. Dep't of Labor & Indust., 209 Wn. 2d 460, 470, 745 P. 2d 1298 (1987) the court held:

RCW 51.04.010 embodies these principles, and declares, among other things, that sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided (by the Act) regardless of questions of fault and to the exclusion of every other remedy. To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. (Emphasis added, citations omitted)

## **2. Is there substantial evidence to support the jury verdict?**

This case is simply one where the attending physician's opinion differed from that of the two (2) IME doctors, hired by the employer. The jury was properly instructed and accepted the attending physician's opinion over the opinions of the non-treating one time examining doctors. This is clearly a case of disputed evidence with substantial evidence on both sides. The attending physician's opinion is

entitled to special consideration Hamilton v. Department of Labor & Industries, 111 Wn. 2d 569, 761, P.2d 618 (1988)

The Petitioner's primary challenge is that there is not substantial evidence that Dr. Lang's treatment recommendations will be curative or rehabilitative. WAC 296-20-01002 under the definition of proper and necessary states:

(2)(b) Curative or rehabilitative. Care must be of a type to cure the effects of a work-related injury or illness, or it must be rehabilitative. Curative treatment produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition. Rehabilitative treatment allows an injured or ill worker to regain functional activity in the presence of an interfering accepted condition. Curative and rehabilitative care produce long-term changes.

Dr. Lang as the attending physician saw this patient around fifteen (15) times as opposed to the one (1) time each of the employer's doctors saw Mrs. Tharaldson. Dr. Lang wanted to "get rid of inflammation around the nerve root and around where the disc protruded". 08/05/09 at 10 Dr. Lang recommended epidural injections up to 3 in one year. He testified that "we're doing this to try to get rid of the inflammation permanently..." (Emphasis added)

Dr. De Vita agreed that epidurals can reduce inflammation and gain improvement in functional activity. Dr. De Vita testified at 49

Q Isn't it true, Doctor, the purpose of an epidural steroid is to reduce inflammation in areas of the body?

A In general, yes.

Q And isn't it true that that treatment can be therapeutic and increase a person's functionality by reducing that inflammation and, in conjunction maybe with exercise or physical therapy, help a person get better use of that areas of their body?

A Of course.

Cathy Tharaldson received cortisone injections in the past with great success. She testified she had trigger thumb surgery and had a hand "thing". Dr. Hussein gave cortisone shots and "that's never come back". 08/10/09 at 9-10

Dr. Lang gave Cathy a cortisone shot in her back to relieve back pain. When asked how it worked, Mrs. Tharaldson answered "Wonderful. That area does not hurt anymore like it did." 08/10/09 at 9-10.

The foregoing medical opinions clearly support the treatment as rehabilitative, and probably curative. The results that Mrs. Tharaldson obtained from her previous cortisone shots to her hand and back were curative. The improvement was dramatic and functionality was restored. There was no medical evidence that a similar result would not be obtained with shots to the neck.

The Petitioner cites Rogers v Department of Labor & Industries 151 Wn. App. 174 (2009) as helpful in resolving the issue before this court. The Petitioner does concede that Rogers, supra, is factually distinguishable. Petitioner's brief at 17. The legal reasoning in Rogers, supra, doesn't change or modify the current case law. Rogers, supra, is a case where a claimant proceeded with an unauthorized surgery which didn't work and then attempted to get the surgery covered. This is not Mrs. Tharaldson's situation. Rogers, supra is inapplicable.

The Petitioner argues that if the epidurals are not successful; that Dr. Lang would pursue the same conservative treatment which Mrs. Tharaldson had already received. That argument is not true because Dr. Lang states that it's possible if she didn't get better surgery could be a consideration for her. 08/05/09 at 24. However, this court need not decide what's the next step is in treatment if the epidurals are unsuccessful. That is not in issue. The only issue is whether there is substantial evidence to support the treatment Dr. Lang prescribed as curative and/or rehabilitative. When the proper standard of review is applied to the evidence cited above; there is no question Mrs. Tharaldson meets the substantial evidence test.

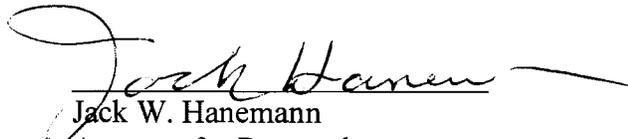
### **C. Attorney Fees**

This worker is entitled to his attorney fees and cost if he prevails on appeal. RCW 51.52.130.

### **D. Conclusion**

It is not for this court to reweigh or rebalance the evidence. A jury heard of all of the evidence; was given accurate statement of law and determined that Mrs. Tharaldson was entitled to further treatment. Substantial evidence supports this determination. Mrs. Tharaldson asks this court to let the jury's verdict stand.

Dated this 9<sup>th</sup> day of February 2011.

  
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IN THE COURT OF APPEALS  
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CATHY THARALDSON,  
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v.

CERTIFICATE OF MAILING

PROVIDENCE HEALTH AND SERVICES OF  
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Appellant.

I certify that on this day I served a true and accurate copy of the foregoing BRIEF OF  
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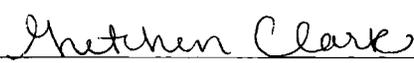
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