

No. 45305-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CLIFFORD S. DANIELS, Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES and DHL CORPORATE,

Respondents.

BRIEF OF APPELLANT

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Table of Contents

	<u>Page</u>
I. Assignments of Error.....	1
II. Statement of Issues	
No. 1.....	1
No. 2.....	1
III. Statement of the Case.....	1
1. Procedural History.....	1
2. Statement of Facts.....	3
a. The Appellant, Mr. Clifford S. Daniels's Injuries Injuries.....	3
b. Medical Testimony.....	8
H. Richard Johnson, M.D.....	8
Jeffrey B. Friedrich, M.D.....	17
Carter Maurer, M.D.....	20
Patrick Bays, D.O.....	25
Allen Jackson, M.D.....	28
IV. Standard of Review.....	31
V. Legal Authority and Argument.....	33
1. THE TRIAL COURT ERRED IN AFFIRMING THE BOARD'S DECISION BECAUSE THE APPELLANT MEET HIS BURDEN, AND THE JUDGE MISAPPLIED THE CASE LAW TO THE.....	33
2. MR. DANIEL'S ATTORNEYS SHOULD BE ENTITLED TO AN AWARD OF FEES FOR WORK DONE AT SUPERIOR COURTAS WELL AS WORK DONE AT THE COURT OF APPEALS.....	46
VI. Conclusion.....	27

Table of Authorities

Page(s)

A. Table of Cases

Washington Cases

<i>Bennett v. Department of Labor & Indus.</i> , 95 Wn.2d 531, 627 P.2d 104 (1981).....	38, 40-42
<i>Bering v. Share.</i> , 106 Wn.2d 212, 220, 721 P.2d 918 (1986) Cert dismissed, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987).....	32
<i>Boeing Co. v. Hansen.</i> , 97 Wn. App. 553, 985, P.2d 421 (1999).....	44-46
<i>Cowlitz Stud Co v. Clevenger</i> , 157 Wn.2d 569, 572-573, 141 P.3d 1 (2006).....	34
<i>Cockle v. Depart. of Labor and Industries</i> , 142 Wn.2d 801, 822, 16 P.3d 583 (2001).....	34, 35
<i>Dennis v. Department of Labor and Indus.</i> , 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).....	34, 37
<i>Department of Labor and Industries v. Moser.</i> , 35 Wn. App. 204, 208, 665 P.2d (1983).....	32
<i>Du Pont v. Department of Labor and Industries</i> , 46 Wn. App. 471, 476, 730 P.2d 1345 (1986).....	32
<i>Gilbertson v. Department of Labor and Industries.</i> , 22 Wn. App. 813, 592 P.2d 665 (1979).....	33
<i>Hill v. Department of Labor and Industries</i> , 161 Wn. App. 286, 253 P.3d 430 (2011) review denied, 172 Wn.2d 1008(Table),(2011).....	31
<i>Hurwitz v. Department of Labor and Indus.</i> , 38 Wn.2d 332, 229 P.2d 505 (1951).....	43

<i>Johnson v. Weyerhaeuser Co.,</i> 134 Wn.2d 795, 953 P.2d 800 (1998).....	35
<i>Littlejohn Construction Company v. Department of Labor and Industries.,</i> 74 Wn. App. 420, 423, 873 P.2d 583 (1994).....	32-33
<i>Longview Fiber v. Weimer.,</i> 95 Wn.2d 583, 628 P.2d 456 (1981).....	35
<i>Metcalf v. Department of Labor and Indus.,</i> 168 Wash. 305, 309 (1932).....	37
<i>Miller v. Department of Labor & Indus.,</i> 200 Wash. 674, 94 P.2d 764 (1939).....	36, 38
<i>Wendt v. Depar't of Labor& Indus.,</i> 18 Wn. App. 674, 571, P.2d 229 (1977).....	43, 44
<i>Weyerhaeuser Co. v. Tri.,</i> 117 Wn.2d 128, 138, 814 P.2d 629 (1991).....	35
<i>Zipp v. Seattle School District No., I,</i> 36 Wn. App. 598, 676 P.2d 538 (1984) review denied, 101 Wn.2d 1023 (1984).....	33

Other Court Cases

<i>In re Soledad Pineda,</i> - BIIA Dckt. No. 08 19297 (2010).....	37
---	----

B. Statutes

RCW 51.....	1, 34
RCW 51.08.100.....	35
RCW 51.12.010.....	34
RCW 51.32.080(5).....	39, fn. 1
RCW 51.52.060.....	31
RCW 51.52.110.....	32
RCW 51.52.130.....	46, 47

C. Rules

RAP 18.1.....46, 47

I. Assignment of Errors

1. The trial court erred in affirming the Board of Industrial Insurances Decision and Order of December 3, 2012, based upon a misapplication of published case law when it found that Clifford S. Daniels's bilateral knee conditions were not proximately caused or aggravated by the December 21, 2010 industrial injury and that the self-insured employer was not responsible for any aggravation or injury to both knees. CP 396-397.

II. Statement of Issues

1. Whether the appellant, Clifford S. Daniels, sustained an injury to both of his knees as a result of the industrial accident on December 21, 2010 under the Industrial Insurance Act (RCW 51) and when applying the Industrial Insurance Act and applicable case law. (Assignment of Error 1).

2. Whether the appellant, Clifford S. Daniels's pre-existing knee injuries were proximately caused or aggravated by the December 21, 2010 industrial injury under the Industrial Insurance Act (RCW 51) and when applying the case law. (Assignment of Error 2).

III. Statement of the Case

1. Procedural History

Mr. Clifford S. Daniels made an Application for Benefits on January 20, 2011 for an injury he sustained on the job on December 21, 2010 while working for DHL Express USA Inc. CP 71. The claim was

allowed by a Department Order issued on February 4, 2011 that entitled Mr. Daniels to receive medical treatment and other benefits as appropriate under the law. CP 71. Mr. Daniels filed an appeal with the Board of Industrial Insurance Appeals on December 20, 2011, from an order of the Department of Labor and Industries dated December 15, 2011. CP 41. An order granting appeal was issued on January 13, 2012. CP 62. In the December 15, 2011 order, the Department affirmed an order issued on August 10, 2011 that indicated the self-insured employer denies responsibility for any aggravation or injury to both knees. CP 41. The Department Order was affirmed by the Proposed Decision and Order issued by the Industrial Appeals Judge Greg J. Duras of the Board of Industrial Insurance Appeals on December 3, 2012. CP 47.

On June 19, 2013, after oral arguments by the parties, the court gave its ruling, affirming the ruling from below. CP 394-395; RP 38. An Order in the Superior Court of the State of Washington in and for the County of Pierce was filed in open court on August 12, 2013 signed by the Honorable Linda CJ Lee, which included findings of fact and conclusions of law and the court incorporated by reference all findings and conclusions made on the record in this matter on June 19, 2013. CP 394-397.

Mr. Clifford S. Daniels gave notice of appeal to the Court of Appeals, Division II, on August 29, 2013 to seek review by the designated

appellate court of the Judgment by and through the Order in favor of the Respondent herein DPWN Holdings, Inc. (DHL Express Corporate) that was entered on August 12, 2013. CP 398-404. A Designation of Clerk's Papers was to this Court on September 30, 2013. CP 405-406.

2. Statement of Facts

a. The Appellant, Mr. Clifford S. Daniels's Injuries

This matter arises out of an industrial accident and injuries on December 21, 2010, in which the appellant, Mr. Clifford S. Daniels (hereinafter Mr. Daniels), was injured while in the course of his employment.

Mr. Daniels was born on June 10, 1959 and at the time of hearing had been married for 25 years with three children ages 24, 22, and 20.. CP 113-114. Mr. Daniels is right hand dominant and is five foot ten and weighing 345 pounds. CP 114. He completed 12th grade and has not had any education thereafter. CP 114. As an adult, Mr. Daniels worked for two years as a lube tech, and then worked at Sea-Tac loading and unloading airplanes approximately in 2004-2005. CP 114. Mr. Daniels started work for Airborne Express on May 14, 1991 on a full time basis delivering packages. CP 114-115. On average Mr. Daniels worked 52 hours a week, but depending on the time of year, i.e. Christmastime, he worked anywhere from 12 to 14 hours a day six days a week. CP 115. His work

consisted of delivering packages and picking up packages to and from businesses and residential areas and lifting anywhere from 1 pound to 300 plus pounds, with the aid of help. CP 115. In a given day, he averaged probably 50 to 60 stops with multiple packages going to individual stops. CP 115.

Mr. Daniels testified that he had a previous injury in high school while playing football where he had tore his right meniscus. CP 116. He had it repaired and after rehab it did not bother him. CP 116. Prior to the industrial injury on December 21, 2010 he sought treatment for his knees when he got hurt on the job in 2006 or 2007 when he stepped off the back of his delivery truck. CP 116. It was cold and icy outside when he stepped out the back of his truck and the back bumper which had ice on it cause him to slip and fall and hurt his right knee. CP 116. He went to the doctor, had some x-rays done, took some pain medications, stayed off it for a couple of days, went back to the doctor who looked at it, the swelling went down and then he went back to work. He was released to go back to work without restrictions and he did not have any problems working thereafter. CP 116-117.

On December 21, 2010, Mr. Daniels was working at the north end of the Sea-Tac airport at the Boeing location. CP 117. He would go there every day to pick up packages to go on a plane to go outbound to be

delivered all over the world. CP 117. Sometime between 5:30 pm and 6:30 pm he got to the location, walked in the door like he normally does, and right off the bat he noticed a new employee on the forklift driving around. CP 117. Mr. Daniels had never seen the employee there before that day. CP 117. Mr. Daniels testified that the employee looked like he was somebody new because Mr. Daniels had been going there for the last eight months and had never seen him there. CP 117. Mr. Daniels went to the area where he normally is scheduled to work and proceeded to process his packages for pick up to go outbound. CP 118. He was close to the end of finishing processing the packages, when he stood up from one of the parts casts that Boeing puts all their parts on top to bring from a staging area to where it is to be processed. CP 118. Mr. Daniels stood up and grabbed ahold of the last package to put in the back of his truck, and out of the corner of his eye he saw something just come out of nowhere. CP 118. Mr. Daniels got hit from behind of his legs and crushed his left leg up against a little desk that he was working at and put a pretty big gash in his left leg to where it was probably 7 to 8 inches long and maybe 2 inches deep. CP 118. He was struck from behind in both legs. CP 137. Mr. Daniels described the incident similar to a domino effect, where all he heard and saw was the forklift, where it hit him in the back of his legs, and how it just took his legs out from under him. CP 125-126. Mr. Daniels was

knocked down, and fell over the carts, because the carts came from behind him, and fell backwards on the parts cart. CP 127.

Mr. Daniels was wearing shorts and the gash was on his left leg below the knee at an angle. CP 126. He stood up and was in shock because it happened so fast. CP 118. One of the dock supervisors came over, and then another dock supervisor, Mr. Jimmie Kamacho, whom Mr. Daniels knew because he signed his paperwork, came over. CP 118. Mr. Kamacho assisted Mr. Daniels by helping him with his injury by trying to apply some type of pressure to stop the bleeding and inquired about Mr. Daniels injury. CP 118-119.

An ambulance arrived and took Mr. Daniels to Harborview. CP 126. He was taken into the emergency room where his leg was looked at and was given a few shots for the pain. CP 127. His wounds were also cleaned with some kind of water solution and wood debris was taken out of the injury. CP 127. Mr. Daniels stayed at Harborview from December 21, 2010 until he was discharged on January 3, 2011. CP 127. Mr. Daniels testified that he had surgery where they took one of the muscles and did a “flop” to try to bring the incision or the gash back together, and then a skin graft off his left leg to put on the injury of where the surgery happened. CP 127. He had follow ups on his surgery that was performed on his left leg. CP 127.

Mr. Daniels did not return to work after the December 21, 2010 industrial injury, nor has he been back to work since the aforementioned injury. CP 128. He has used crutches ever since he got out of the hospital. CP 128. He uses a wheelchair for long distances, because he can't really walk or go very far on the crutches because it hurts his arms, and he cannot stand for very long. CP 128. Mr. Daniels testified that he does not sit for long periods of time because if he sits for too long his knees tend to lock up. CP 129. He can stand, without the aid of assistive devices, maybe 15 minutes. CP 129. Mr. Daniels did not have any problems walking before December 21, 2010. CP 129. Additionally, Mr. Daniels has trouble sleeping from his injuries as he experiences pain from the waist down, his hips and knees, because he cannot lay on the bed and straighten his legs out. CP 129. Sleeping on his side also hurts. CP 129. He tries to put a pillow under his knees, but testified that it doesn't really help. CP 130. Prior to his industrial injury, Mr. Daniels used to coach football and play volleyball, as well as camping and fishing, but is not able to do that anymore. CP 130. Because of his injuries, he can't climb into a tent and lay on the ground because it is hard for him to get up. CP 130. Mr. Daniels has not had any additional injuries of any kind since December 21, 2010. CP 131. While Mr. Daniels testified that he had pain in both of his knees prior to the December 21, 2010 industrial injury, he did not have problems

with his knees locking up, walking, sitting, sleeping, lifting or carrying weights, housework or standing. CP 133. Mr. Daniels could not recall missing any days at work due to his knees prior to the December 21, 2010 injury, nor was he placed in a different position or a light duty position due to any knee problem prior to December 21, 2010. CP 136.

b. Medical Testimony

H. RICHARD JOHNSON, M.D.

H. Richard Johnson, M.D., is a Board certified, duly licensed and practicing physician in the specialty of orthopedic surgery in the State of Washington. Dr. Johnson examined Mr. Daniels on January 12, 2012. CP 141. Mr. Daniels's chief complaints at that time were bilateral knee pain, left lower extremity weakness, and depression. Dr. Johnson noted that the history the patient gives him is important for it allows him to determine not only the mechanism of injury, but also that of the forces involved in such an injury. CP 142. Dr. Johnson testified that Mr. Daniels described an incident in which a heavy wooden cart or portable wooden cart that had supplies of aircraft parts on it was struck by a forklift and that cart was then careened into Mr. Daniels as he was standing at a podium that was affixed by a pole. CP 142. He was trapped between the two structures, the moving cart and the fixed podium. CP 142. Mr. Daniels sustained a crush injury to the anterior aspect of both knees and legs resulting in injuries not

only to the anterior aspect, but to the posterior aspect. CP 142. Dr. Johnson noted that the more significant wound was that of a large open wound exposing bone in the left mid leg and a puncture wound to bone in the distal one half of the right leg and he was Medivac'd from the area of injury to Harborview Medical Center. CP 142.

Dr. Johnson also noted that Mr. Daniels had previous problems with both knees, one from a sports injury in high school where he was treated surgically, underwent rehab, and was able to return to playing varsity sports, including football and even participated in boot camp and three years of Army without knee dysfunction. CP 143. Mr. Daniels also had an injury in April of 2007 in which he filed a claim, and in October of 2007 when he slipped in the snow at work. CP 143. The October 2007 injury resulted in severe pain in his knee and calf, and X-rays at the time revealed evidence of severe degeneration joint disease with cartilage loss resulting in narrow of the lateral joint space. CP 143. Dr. Johnson explained that the knee is divided up in to three compartments. CP 143. The lateral compartment that is made of between the outside of the top of the leg bone and the end of the thigh bone. CP 144. The medial compartment is made up of the inner side of the top of the leg bone and the end of the thigh bone. CP 144. Then the joint that is made up between the back of the kneecap and the end of the thigh bone. CP 144. Dr.

Johnson testified that Mr. Daniels had evidence of degenerative changes in the lateral joint space with narrowing, indicating there had been previous problems with the right knee prior to the injury in terms of development of arthritic changes, but Mr. Daniels clearly had been working and did end up returning to work less than two weeks following that particular injury, which eventually the right knee claim closed with no permanent partial disability. CP 144. Dr. Johnson testified that when talking about impairment, and impairment of function means that there has been a change from normal in terms of normal function, and the means of rating that impairment is based on guidelines that have been established by the American Medical Association and produced in a book called the AMA guides to the Evaluation of Permanent Impairment. CP 144. Dr. Johnson testified that an evaluation in January of 2009 of Mr. Daniels, two years prior to his injury, did show evidence of degenerative changes in both knees and had some flexion contractors of less than three degrees on the left and about ten degrees on the right. CP. 145. Dr. Johnson explained that his records revealed that Mr. Daniels had degenerative changes in both knees with episodic treatment of such, but in spite of that, he continued to work on a regular basis as a deliverer for DHL, the work he was doing at the time of the injury on December 21, 2010. CP 145.

As to the December 21, 2010 industrial injury, Dr. Johnson felt it was significant that Mr. Daniels had a 12 centimeters long laceration, over four inches near five inches long, with exposed bone. CP 146. The tibia, the main leg bone, and muscle were exposed. CP 146. The laceration was sufficient to where it required fairly extensive surgery to gain coverage and eventual closure. CP 146. The coverage was created by moving a muscle over the are of the exposed bone, and then skin grafting applied to the area in order to gain coverage. CP 146. Dr. Johnson testified that when a wound of this complexity and the need for a significant amount of surgery occurs, it is necessary to the patient (Mr. Daniels) to significantly limit their activity level because of the risk of failure of the wound healing as well as displacement of not only the skin graft, but the muscle graft as well. CP 146. There was an eventual 90 percent skin graft take. CP 146. Dr. Johnson noted that Mr. Daniels used crutches to walk to protect primarily the left lower extremity, although he did have pain in the right lower extremity in the knee area. CP 147. The X-rays as part of Mr. Daniels follow-up taken March 18, 2011 did reveal evidence of significant degenerative changes particularly join space narrowing in the medial compartment, and because of Mr. Daniels limited activities, he was spending a great deal of time sitting and this resulted in the development of flexion contractors. CP 147. Those flexion contractors increased to a

fairly significant level throughout his follow-up and did impact his ability to ultimately improve his overall functional status. CP 147. Knee flexion contractors is when the structures in the posterior aspect of the knee tighten up to where the patient is now unable to bring their knee into full extension. CP 154. The contractors can occur simply as a result of protective muscle guarding of a disease process within the knee joint themselves, but that process generally peaks itself out somewhere around 7 to 10 degrees. CP 154. However, Dr. Johnson went on to state that trauma to the lower extremities in the region of the knee can result in the development of more significant contractors, especially where there is a crush injury involved. CP 154-155. When the soft tissue structures above the posterior aspect of the knee is crushed by a significant impact injury, then the crushed tissues go through a process of attempting to heal, but crushing results in tissue necrosis, in other words, death of some soft tissue. CP 155. Dr. Johnson continued that as the body attempts to heal in that scenario, it develops scar tissue, and that can heal with certain levels of flexibility or lack of flexibility, depending on the degree of trauma that's been sustained. CP 155. With the greater the degree of trauma, the less flexibility regained in those soft tissues. CP 155.

Dr. Johnson testified that in this case (that of Mr. Daniels), the damage to his knees and proximal legs resulted in significant soft tissue

damage in that healing process, with the result of the development of contractures, and the need for protecting the left lower extremity for an extended period of time involved in the healing process of his large graft also contributed to the development of flexion contractures. CP 155. The bilateral knee examination did reveal evidence of a 33 degree flexion contracture on the right and 88 degrees on the left. CP 155. Mr. Daniels further had flexion on the right 204 degrees and further flexion on the left to 93 degrees. CP 155. The left leg did show deformity in the mid portion secondary to grafts versus normal appearing right leg. CP 156. There was also chronic swelling in the distal portion of the leg distal to the graft of 2+ intensity, in other words, there was edema, chronic fluid collection in the soft tissue which were evidence of the residuals of his injury and the need for surgery. CP 157.

Mr. Daniels chief complaints during Dr. Johnson's exam were bilateral hip, groin, thigh, and bilateral knee pain. CP 147. The pain was increased or brought on by weight bearing. CP 147. The more significant pain was to both knees, in the center of his knees as well as over the anterior medial and anterior joint line of both knees. CP 148. Mr. Daniels would develop numbness on the bottom of his heel and into the mid foot on the left side. CP 148. Additionally, the knees with motion would pop,

snap, and grind, particularly with weight bearing. CP 148. He also complained of depression. CP 149.

Dr. Johnson also took a social history of Mr. Daniels and found that from a habit standpoint, he did not demonstrate any habits that may contribute to affecting healing, and that his avocational activities of fishing, camping, and coaching football, were given up because of the residuals of the injury of December 21, 2010. CP 150. Dr. Johnson also noted that Mr. Daniels was limited in his ability to stand and walk because of the knee flexion contractors and this affect his ability to stand and do the cooking that he had done before his injury. CP 150. In Dr. Johnson's review of systems he noted that Mr. Daniels complained of sleep problems secondary to being awakened frequently by knee pain. CP 150. Per Dr. Johnson's exam, Mr. Daniels was a well-developed, well-nourished, somewhat overweight Pacific Island male in no acute distress while sitting, and that he weighed 348 pounds and had gained 30 pounds since the industrial injury. CP 151. Mr. Daniels hips were flexed to about 20 degrees and his knees flexed to about 30 degrees or more when he was observed walking, and because the gait analysis was complicated by the need of crutches and the pronounced knee flexion contractors, it was difficult to determine if there was a limp involved in terms of favoring. CP 152. Dr. Johnson used a goniometer to measure the ranges of motion of

both knees. CP 153. Mr. Daniels was not able to perform the heel-to-toe maneuver, heel walking, or toe walking because the pain limited mobility and the knee flexion contractors. CP 152. When asked to remove his shoes, Mr. Daniels needed assistance to do such. CP 153. Muscle mass measurements revealed atrophy of the left thigh of 3.2 centimeters consistent with his pain and a protective guarding of the left lower extremity. CP 154.

Dr. Johnson reviewed both the films and the reports of the X-rays, prior to his industrial accident and thereafter. CP 157-158. Dr. Johnson noted evidence that there had been some progression of significant degenerative changes. CP 158. On the December 21, 2010 imaging study, an X-ray to the right tibia, there was a reference to a puncture wound. CP 180. In that X-ray, it also mentioned a knee effusion, which is a collection of extra fluid in the joint. CP 181. Dr. Johnson also stated finding suggestion of lipohemarthrosis, which means that there is evidence of fat and blood within a joint, which is generally caused by trauma to the knee joint itself. CP 181. When Dr. Johnson was asked if Mr. Daniels was struck on his leg somewhere -- below the knee, would that cause what was shown on the imaging study; It was Dr. Johnson's opinion in answering Counsel's question, that "Not if it was just solely to the leg. This would be the result of trauma to the knee." CP 181.

Dr. Johnson reviewed the panel examination of Patrick Bays, D.O. that was conducted on June 24, 2011. CP 158. Dr. Bays determined that Mr. Daniels had no impairment of either lower extremity due to the residuals of the industrial injury of December 21, 2010. CP 158. Dr. Johnson disagreed with Dr. Bays findings. CP 158. It was Dr. Johnson's opinion from the review of the Mr. Daniels records that there is evidence that he developed residual impairments in both lower extremities, that there had been some progression in terms of degenerative changes, but the more significant impact with regards to functional status is that of the development of the flexion contractors, which in Dr. Johnson's opinion were related directly to the residuals of the industrial injury of December 21, 2010 and speak to the crush component of this injury. CP 158.

Dr. Johnson also review the panel examination by Dr. Carter Maurer, which was conducted on October 12, 2011, and disagreed with the conclusion that Dr. Maurer recorded in terms of stating that the bilateral knee flexion contractors were only temporarily associated with the injury of December 21, 2010. CP 158-159. It was Dr. Johnson's opinion that the flexion contractors were clearly permanent, not temporary. CP 159.

Dr. Johnson's ultimate opinion on a more probable than not medical basis that Mr. Daniels clearly had a significant crush injury to the

left leg and that resulted in a sever laceration that was associated with exposure of bone and extensive soft tissue necrosis and this required debridement of the soft tissue, a muscle flap transfer to cover the defect, especially the exposed bone, as well as extensive skin grafting. CP 159. Dr. Johnson also stated on a more probable than not medical basis that Mr. Daniels also sustained direct blows to the posterior aspect of both knees as part of the mechanism of the injury where he was trapped between the wooden cart that struck him and the podium that he was standing at and that he had also developed progression of pre-existing flexion contractors, right greater than left. CP 159-160. There was also evidence of some worsening of pre-existing tricompartmental arthritis of both knees. CP 160. This was based on objective findings. CP 160. Dr. Johnson also noted that in the records he reviewed, there was no evidence that Mr. Daniels missed work prior to his December 21, 2010 injury, outside any short period of time, and that he was working as indicated by the other IME examiners, working without any formal restrictions. CP 160. Dr. Johnson stated in other words, he was performing his job as a DHL driver and doing it on a regular continuous basis, working up to 50 hours per week prior to his injury. CP 160.

JEFFREY B. FRIEDRICH, M.D.

Jeffrey B. Friedrich is a Board certified medical doctor in the specialty of plastic surgery, with a certification in the subspecialty of hand surgery, and is a duly licensed and practicing physician in the State of Washington. CP 199. Dr. Friedrich first met Mr. Daniels as an inpatient in December of 2010, on or about December 26 or 27 of 2010, after Mr. Daniels sustained what was reported to him as an at-work injury to the left lower extremity. CP 202, 203. Dr. Friedrich testified that Mr. Daniels sustained what appeared to be a crush type injury to the left lower extremity, specifically the lower leg on the front or shin portion of the leg. CP 202-203. The soft tissue over the tibia bone or shinbone had been completely disrupted and there was a transverse or horizontal laceration there that was quite long, and there was exposed tibia bone at the bottom of that laceration. CP 203. Dr. Friedrich's plan was to treat Mr. Daniels with a reconstruction that involved both a muscle transfer over the exposed bone and then skin graft to go over that muscle. CP 204. The surgery itself took a couple of hours, and then Dr. Friedrich saw Mr. Daniels for a number of months basically in the first half of 2011 to continue following up about how his wounds were healing. CP 208. The surgery was performed on December 27, 2010. CP 209.

Dr. Friedrich recalled that Mr. Daniels had a laceration, meaning a traumatically induced cut in the skin, but that it being fairly ragged and did

not appear to be a clean cut as one would expect to be made with a knife. CP 206. Dr. Friedrich stated that there certainly did appear to have some sort of crushing component to it. CP 206. He also stated that he thought he could tell specifically from Mr. Daniels wound that it was likely a fairly high energy injury to cause that amount of soft tissue compromise over the tibia. CP 207. Dr. Friedrich saw Mr. Daniels as an outpatient after he had been discharged from the hospital on January 6 and 20, 2011, February 17, 2011, March 17, 2011, May 19, 2011, and on May 10, 2012. CP 209. On the May 20, 2012 visit, Dr. Friedrich noted that the reconstruction actually looked excellent, but his chief limitation was his ability to walk, or the inability to walk and Dr. Friedrich thought Mr. Daniels was able to ambulate or walk small amounts, but it was not what anyone would consider normal ambulation. CP 209-210. He did not believe that it was due to the reconstruction. CP 210.

Dr. Friedrich's ultimate opinions were that the wound on Mr. Daniels shin on his left side was on a more probable than not basis caused by the industrial accident. CP 212. He also stated that he did not believe that his pre-existing degenerative joint disease was caused by the industrial accident, but did feel that the symptoms that he had from the joint degeneration was likely aggravated by the industrial accident that he sustained. CP 212. He based his opinion on the fact that Mr. Daniels

inability to resume walking after the surgery and the persistence well after the majority of the pain and wound healing issues from the shin injury resolved, and that weight bearing on both of his legs and ambulation or walking was problematic for Mr. Daniels. CP 213.

CARTER MAURER, M.D.

Dr. Carter Maurer is a Board certified medical doctor in the specialty of orthopedic surgery and is licensed in the States of Washington and California. CP 223-224. Dr. Maurer does about 20% of forensic work which consists of 10 to 15 hours a week and equates to about 30 IMEs a month. CP 225-226. Dr. Maurer examined Mr. Daniels on October 12, 2011. CP 226. Dr. Maurer reviewed the X-ray reports from December 21, 2010 and partial X-rays that were presented on a disk from January 22, 2009, but not from the date of injury. CP 227. He also reviewed X-ray reports from March of 2011. CP 228. Dr. Maurer reviewed the panel exam from Dr. Patrick Bays performed on June 24, 2011. CP 229. He also reviewed the medical evaluation by Dr. H Richard Johnson from January 12, 2012. CP 230-231. Dr. Maurer testified as to the December 21, 2010 injury date, that Mr. Daniels reported that he was at his place of work at DHL at an off-site work site at Boeing and that he had a forklift that was coming towards him, it ran into a cart, and the cart pinch his legs between that and another cart, and that Mr. Daniels described having pain as well

as a large laceration and was brought to Harborview by ambulance. CP 232. Dr. Maurer testified that per his report Mr. Daniels was admitted and during that time the leg was elevated to allow for swelling, and approximately one week later on December 27, he was brought to the operating room and he underwent a left rotational soleus flap and split thickness skin grafting and a wound vacuum-assisted closure. CP 233. Dr. Maurer then testified that Mr. Daniels was kept in the hospital for about a week and then he was discharged to home, and then he was referred to an orthopedic provider, Dr. Carlson, for evaluation of his ongoing knee arthritis. CP 234.

Per Dr. Maurer's examination, Mr. Daniels reported his chief complaints as aching pain at his bilateral anterior hips, aching pain in his bilateral anterior knees, and he noted that the left calf was the area of laceration from the injury and he reported he did not have pain at that location. CP 234. Upon physical examination, his height was 5'10", and weight was 348 pounds. CP 235. Dr. Maurer noted that at the beginning of the exam Mr. Daniels was in a wheelchair, and he asked Mr. Daniels to stand up from the wheelchair and found that he had bilateral flexion deformed knees as well as his hips that caused him to stand in a crouched position. CP 235-236. Mr. Daniels attempted to walk, however, this was significantly limited by his flexion contractures and he returned to the

wheelchair. CP 236. Dr. Maurer performed range of motion testing of his knees, and his right knee had motion of 40 to 100 degrees (meaning he lacks 40 degrees to reach full extension), and his left knee had 30 to 100 degrees. CP 236, 237. Dr. Maurer measured Mr. Daniels thigh circumferences, however, this proved to be difficult due to his flexion contractures to identify appropriate starting landmarks and found that his measurements were 60 centimeters on the left and 58 on the right. CP 237. Dr. Maurer performed a hip exam and found that he had flexion contracture at both of his hips of 15 degrees and he was able to flex them to 80 degrees with a 30 degree rotational arc being unable to perform any internal rotation on his hips, and these were symmetric deformities meaning on the left and the right. CP 237. Dr. Maurer reached the conclusion that Mr. Daniels had a left leg soft tissue laceration from the industrial injury of October 12, 2011 [sic] which required a soleus flap and split thickness skin graft and bilateral knee osteoarthritis that predated the industrial injury. CP 240. Dr. Maurer also stated that Mr. Daniels had a history of increased bilateral knee flexion contractures following the industrial injury or temporally associated with the industrial injury. CP 240. Dr. Maurer stated that Mr. Daniels has bilateral knee arthritis that predated the industrial injury and that the events on December 21, 2010, as well as the surgical treatment or postoperative care, did not permanently

worsen his underlying preexisting bilateral knee arthritis. CP 241. Dr. Maurer agreed that it is possible that Mr. Daniels sustained impact to the back of the knee, however, in his opinion this mechanism would not lead to a flexion contracture. CP 245. When Dr. Maurer was asked if Mr. Daniels industrial injury prevented him from working in any way, he responded that when he, “examined Mr. Daniels on December 21st, 2010, [sic] I determined that he was still deconditioned from his left soleus flap that was providing work restrictions related to his December 21st, 2010, injury so the answer to your questions is yes. I guess I should clarify you said does he have restrictions in working in any way. He would be capable of some work, but not all work if that’s what you asked.” CP 248. Dr. Maurer’s assessment was that Mr. Daniels would have needed a wheelchair for a period of time due to the injury and necessary surgery, and at the time of his exam on October 12, 2011, he was approximately 10 months from his surgery and he felt that he would still benefit from additional rehabilitation to make him stronger and to fully recover from surgery, but would not need a wheelchair by one year following his injury. CP 249-250. Dr. Maurer also stated that from the injury to the left lower extremity it is possible that the treatment could cause a flexion contracture and that would be the immobilization for the soleus graft to allow for a healing of the wound and that could lead to a flexion contracture. CP 252.

However, he concluded post report based on records provided to him prior to his testimony that the surgical treatment, postoperative care, and period of immobilization did not cause a flexion contracture or worsen a flexion contracture for Mr. Daniels. CP 251-253. Dr. Maurer's understanding was that Mr. Daniels remained fully employed and considered full duty and full-time prior to his injury, and did not have any permanent restrictions. CP 256-257. Dr. Maurer also believed that both of Mr. Daniels legs were struck on December 21, 2010. CP 259. When Dr. Maruer was asked, "So hypothetically then if a man who weighs over 300 pounds is struck from behind forcefully and say below his knees by a couple of inches and then is propelled forward from that point to the point that he flies backwards and falls down with his knees – his lower extremities between the knees caught between two objects to the point that Mr. Daniels suffered this laceration, would that be hyperextending his knee?" CP 262. Dr. Maurer responded, "Depending on how he fell he could. So if you are saying his knees were pinched between two – or his lower legs were pinched between two items securing them to the ground and he fell depending on which way he fell, yes, he could have sustained a twist to the knee, a hyperextension to the knee, a hyperflexion to the knee, and yes, any one of those could have occurred." CP 262-263. However, Dr. Maurer did not think this would cause a hyperextension injury. CP 263.

Dr. Maurer also stated that in general a traumatic event can accelerate osteoarthritis, and that in Mr. Daniels' case he was at end-stage osteoarthritis meaning that the functional articular cartilage was essentially entirely gone. CP 264-265.

PATRICK BAYS, D.O.

Patrick Bays is a Board Certified osteopathic doctor with the specialty of orthopedic surgery and licensed in the States of Washington California, and Arizona. CP 272-273. About 30 to 40 percent of his practice involves consultations, where he is not the attending physician but simply a consultant. CP 276. Of those, about 90 percent are at the request of the Department of Labor and Industries or Self-Insured employers. CP 276. Dr. Bays stated that he does anywhere from 300 to 400 panel exams in some years. CP 306. He typically does 10 examinations on one day. CP 306.

Dr. Bays examined Mr. Daniels on June 24, 2011. CP 276. He was contracted by Sunrise Medical Consultants. CP 302. At the time of testimony Dr. Bays could not recall the exact cover letter because it was not in his file, and stated that, "Sunrise many times changes what I actually dictate to conform with the information that they have available. I was under the assumption I was seeing Mr. Daniels at the request of the claims manager for the Sedwick CMS, which was a third-party

administrator for DHL and Boeing, I believe. Sometimes the legal representative for the claims managers will help prepare the cover letters for the claims managers.” CP 303-304.

Dr. Bays reviewed medical records prior to his evaluation and post evaluation. CP 277-281. He also reviewed the medical evaluation of Dr. H. Richard Johnson, and the testimony of Dr. Friedrich. CP 281. Dr. Bays testified that according to the cover letter that was submitted by the claims manager representing DHL Express, he was asked to evaluate Mr. Daniels with reference to the work-related injury from December 21, 2010. CP 282. He was also asked to review enclosed medical records, perform a physical evaluation, author a report, provide answers to very specific questions posed in the cover letter, and to make a determination as to what injuries were causally related to the work injury of December 21, 2010. CP 282. He was also asked to inquire about the prior work injury claims from 2007, to determine what treatment was reasonable and appropriate and necessary and related to subject work injury, as well as he was asked to segregate all non-work-related conditions. CP 282. He was also asked to determine employability, and whether any preexisting conditions were aggravated or exacerbated. CP 282-283.

Dr. Bays testified that Mr. Daniels indicated that on December 21, 2010 he was gainfully employer by DHL, and that he was actually

working on the Boeing campus to process packages for Boeing. CP 283. At the time of injury he was standing, processing international packages, when he was struck from behind by a forklift tong, and that the force caused him to be impaled between a cart and that the tong pushed him into the cart, and that his knees struck the cart. CP 284. It was also noted that his knees went forward and then he fell backwards with his knees in the flexed position and that he developed immediate calf and knee pain. CP 284. It was Dr. Bays belief that Mr. Daniels was discharged several days after his injury from the hospital. CP 316.

Dr. Bays physical exam noted a 52 year old, right-hand dominant Pacific Islander male who stood 5'10" and weighed 345 pounds, that he was morbidly obese, and that the examination was somewhat difficult to perform because Mr. Daniels was confined to a wheelchair. CP 285. According to the medical records, Dr. Bays noted that the purpose of spending more time in the wheelchair was secondary to pain to his right and left knees. CP 285-286. Dr. Bays examined Mr. Daniels in the seated position. CP 286. Dr. Bays noted that his hip range of motion was 0 degrees extension to 90 degrees of flexion with external rotation to 40 degrees and internal rotation to 15 degrees, which he stated that these motions to the hips were normal. CP 286. His right and left knee ranges of motion were abnormal, with extension with both the right and left knees at

minus 30 degrees. CP 286. The only diagnosis that Dr. Bays made that was related to the December 21, 2010 industrial injury was a left pretibial lower extremity laceration, status post left soleus rotational flap with slip thickness skin grafting. CP 288. Dr. Bays did not find any acute findings in any imaging studies. CP 294. At the time of Dr. Bays 2011 examination, he felt that all of MR. Daniels' conditions had reached maximum medical improvement and had reached medical fixity. CP 295. Dr. Bays answered "no" as to if the industrial injury prevented Mr. Daniels from returning to his job of injury. CP 295. Dr. Bays said he saw nothing anywhere in the records that would indicate that the traumatic injury of December 21, 2010 has any effect at all on these preexisting contractures that were essentially caused by the endstage arthritis. CP 299. Dr. Bays was not sure if at the time of injury on December 21, 2010, if Mr. Daniels was performing a modified duty job or his regular duty job. CP 318.

ALLEN JACKSON, M.D.

Dr. Allen Jackson is a medical doctor specializing in orthopedic surgery, and licensed in the State of Washington. CP 326-327. Dr. Jackson saw Mr. Daniels on June 5, 2009, and has since reviewed the December 21, 2010 accident report. CP 329. Dr. Jackson also reviewed the Harborview records, Dr. Freidrich's operative report, the X-ray studies,

2011 MRI report, and Dr. H. Richard Johnson's medical report. CP 330. In 2009, Dr. Jackson noted Mr. Daniels complained of right knee pain, lack of motion, and that it hurt after walking for a mile. CP 331. He just did a physical examination. CP 331. At that time Mr. Daniels was 49 years old and he was 5'11" and weighed 325 pounds. CP 332. He was able to walk but had a slight limp. CP332. He could walk on his heels and toes, so he didn't have any appreciable weakness in his legs. CP 332. His range of motion lacked 17 degrees from full extension and further flexion was measured at 112 degrees. CP 332. His calf measurements were essentially equal and his thigh circumference was equal right and left. CP 332. He had no instability of the ligaments of his knees and he had no significant joint effusion, and no effusion of his right knee, but had patellofemoral crepitus on compression of his right knee and 22 degrees lack of full extension and further flexion to 110. CP 332-333. At that time, in 2009, Dr. Jackson concluded that he had osteoarthritis of the knee, both the right and left, and that he also had a sprain of his right knee and his right calf from the 2009 industrial injury. CP 333.

Dr. Jackson's understanding of the December 21, 2010 industrial injury was that there was a forklift accident that ran into Mr. Daniels legs and pushed him into some kind of a pallet or something that was variably described as either truck from the back of his legs or from the front of his

legs. CP 333-334. His review of the records did not indicate that Mr. Daniels had any direct injury to his knee. CP 334. When asked if he had an opinion as to whether Mr. Daniels' bilateral knee condition is worse now based on the records from the 2010 injury than it was when he saw him back in 2009, Dr. Jackson responded, "Well, it would be kind of speculation on my part to say whether his knee condition is worse. Natural history of osteoarthritis of the knee is a progressive worsening over time, so I would expect that his knee condition at this point is probably worse than it was when I saw him." CP 334-335. He stated that he believed that the knee examination and the knee condition looks to be about the same now as it was when he examined him, based upon the post-examination records surrounding the 2010 injury and his examination of 2009. CP 335. Dr. Jackson stated that in his opinion on reviewing the records in that his knee injury – or his knee condition wasn't injured in this accident. CP 336. He concluded that Mr. Daniels condition was a slow worsening of his underlying condition. CP 337. Dr. Jackson also stated in response to record review of Mr. Daniels' flexion contractures was that he was somewhat hesitant to say that range of motion measurements are objective. CP 338. In his opinion, Mr. Daniels may be better or worse, and that he did not know, and he didn't think he could conclude that his flexion contracture is worse. CP 339-440.

Dr. Jackson only saw Mr. Daniels on June 5, 2009, and reviewed some medical records provided to him by counsel. CP 340. It was Dr. Jackson's belief that in at the time Mr. Daniels was injured in December 2010 that he was working full time. CP 343. When asked if he was stating on a more probable than not basis whether he thought that his underlying condition was worse, Dr. Jackson responded, "His underlying condition I suspect is worse." CP 343. Dr. Jackson noted that the radiologist on the X-ray was calling this lipo/hemo fluid level in his left knee, and when asked what usually causes this, he responded, "Usually what causes it is some kind of an internal fracture of the knee joint." CP 344.

IV. Standard of Review

Normally, review by the Court of Appeals in a workers' compensation case is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review of the decision by the Board of Industrial Insurance Appeals, and whether the superior court's conclusions of laws flow from the findings. *Hill v. Department of Labor and Industries*, 161 Wn. App. 286, 253 P.3d 430 (2011), review denied 172 Wn.2d 1008, 259 P.3d 1108 (Table), (2011).

The first step in seeking review of the Department's decision is an appeal to the Board. RCW 51.52.060. Decisions of the Board may be

appealed to superior court. RCW 51.52.110. In an appeal of the Board's decision, the superior court holds a de novo hearing but does not hear any evidence or testimony other than that included in the record filed by the Board. *Du Pont v. Department of Labor and Industries*, 46 Wn. App. 471, 476, 730 P.2d 1345 (1986). The findings and decision of the Board are *prima facie* correct until the superior court, by a preponderance of the evidence, finds them incorrect. *Department of Labor and Industries v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983).

In reviewing the superior court's decision, the role of the court of appeals "is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether the conclusions of law flow therefrom." *Du Pont*, 46 Wn. App. at 476-77. Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), cert dismissed, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). The Court of Appeals reviews interpretation of the Industrial Insurance Act by the Board of Industrial Insurance Appeals de novo under "error of law" standard and may substitute its judgment for that of the Board, although the court must accord substantial weight to the agency's interpretation. *Littlejohn Construction Company v. Department of Labor and Industries*, 74 Wn.

App. 420, 423, 873 P.2d 583 (1994). When reviewing workman's compensation case, appellate court can evaluate written record to test conclusions that have been drawn from the facts, explore for sufficiency of the probative evidence to support findings of fact and analyze findings when the evidence is undisputed, uncontradicted and unimpeached. *Gilbertson v. Department of Labor and Industries*, 22 Wn. App. 813, 592 P.2d 665, (1979).

A claimant in workers' compensation cases need only to establish probability of causal connection between the industrial injury and his disability; it is only when the claimant's medical witness leaves nothing of an objective nature in the record upon which a jury could reasonably rely to find the necessary causation between injury and disability that challenge to sufficiency of evidence should succeed. *Zipp v. Seattle School District No. 1*, 36 Wn. App. 598, 676 P.2d 538 (1984), review denied, 101 Wn.2d 1023 (1984).

V. Legal Authority and Argument

1. THE TRIAL COURT ERRED IN AFFIRMING THE BOARD'S DECISION BECAUSE THE APPELLANT MEET HIS BURDEN, AND THE JUDGE MISAPPLIED THE CASE LAW TO THE FACTS.

This case arises out of a workplace injury, on or about December 21, 2010, and thus the Industrial Insurance Act (Hereinafter "Act") applies

by and through RCW 51. 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. *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987), *See also* RCW 51.12.010.

The Industrial Insurance Act differs substantially from other administrative laws. The Act is the product of a compromise between employers and workers through which employers accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572-573, 141 P.3d 1 (2006). It is important to note that, “the Act was written to provide sure and certain relief to injured workers.” *Dennis v. Dept. of Labor & Industries*, 109 Wn.2d 467, 470, 475 P.2d 1295 (1987). All doubts are to be resolved in favor of the injured worker. *Dennis*, 109 Wn.2d at 470. In *Cockle v. Dept. of Labor and Industries*, the Court observed the “overarching objective” of Title 51 RCW is to reduce to a minimum “the *suffering* and economic loss arising from injuries and/or death occurring in the course of employment.” *Cockle v. Dept. of Labor and Industries*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001) (quoting RCW 51.12.010) (*Emphasis added*). “Also, on a practical level, this Court has recognized that the workers’ compensation

system should continue “serv[ing] the goal of swift and certain relief for injured workers.” *Cockle*, 142 Wn.2d at 822, 16 P.3d 583 (quoting *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

Additionally, “where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation’s fundamental purpose, the benefits of the doubt belongs to the injured worker.” *Id.* at 811. Moreover, and at issue in this case, under the Industrial Insurance Act an “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. As the Industrial Insurance Act is to be interpreted liberally for the benefit of injured workers, the definition of “injury” is given wide latitude in support of coverage. *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 953 P.2d 800 (1998). Additionally, an injured worker need not establish the presence of an “unusual” physical exertion or an awkward angle performed in the workplace in order to qualify as an industrial injury. *Longview Fiber v. Weimer*, 95 Wn.2d 583, 628 P.2d 456 (1981). For instance, normal bodily movements causing injury are compensable, as well as a singular traumatically induced events that affects multiple areas of the body, e.g. injury to hip that affects knee, injury to lower back

that affects lower extremity, injuries to neck that affect shoulders, injuries, etc.

In this case, much of the testimony focuses on the pre-existing conditions the Appellant, Mr. Daniels, had prior to the industrial injury. Under the Industrial Insurance Act, the industrial injury need only be “a” proximate cause not the proximate cause, of the condition complained of.

In *Miller v. Department of Labor & Industries*, the Court stated:

We have held in an unbroken line of decisions that, in an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity *or weakened physical condition occasioned by disease*, then the resulting disability is to be attributed to the industrial injury, and not to the preexisting condition...If this be true with respect to a weakened physical condition resulting from disease, it must likewise be true with respect to a similar infirmity resulting from some structural weakness of the body...It is a fundamental principal which most, if not all, courts accept, that, if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the *previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness*; the theory upon which that principal is founded is that the workman’s prior physical condition is not deemed the cause of the injury, but *merely a condition upon which the real cause operated*. (Citations omitted).

Miller v. Department of Labor & Industries, 200 Wash. 674, 682-3, 94 P.2d 764 (1939). (*Emphasis added*). Benefits are not limited to those workers in good health. “The worker whose work acts upon a preexisting disease to produce disability where none existed before is just as injured in

his or her employment as is the worker who contracts a disease as a result of employment conditions.” *Dennis*, 109 Wn.2d at 471. “The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities.” *Id.* Thus, *Dennis* holds that compensation may be due where disability results from work-related aggravation of a preexisting non work-related disease. *Dennis*, 109 Wn.2d at 474. Mr. Daniels was working full time without any work restrictions prior to the industrial accident of December 21, 2010, and since that accident he has not been able to return to work because of the residuals of his injuries, mainly that to his knees. CP 128.

The Board of Industrial Insurance Appeals has stated, in a previous significant decision based upon case law, that the Industrial Insurance Act does not provide an exception to coverage for workers who may have prior physical frailties, because employers must take workers as they find them. *In re Soledad Pineda*, BIIA Dckt. No. 08 19297 (2010), quoting *Metcalf v. Department of Labor & Indus.*, 168 Wash. 305, 309 (1932), which held “it was not the legislature’s purpose to limit the provisions of the workmen’s compensation act to only such persons as approximate physical perfection.”

Not all workers are perfect physical specimens. Many individuals bring pre-existing conditions with them to the workforce. This fact is not a

bar to recovery for an industrial injury, as employers must take workers as they find them. Any treatment, disability, or impairment resulting from the “lighting up” of a pre-existing, but *latent or asymptomatic* condition, is covered under the industrial injury claim. *Miller v. Department of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939); *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 627 P.2d 104 (1981). The focus in such cases is whether immediately prior to the industrial injury the injured worker’s pre-existing condition was disabling. Mr. Daniels was working without any restrictions prior to his industrial injury and his pre-existing conditions were not disabling nor were causing him any loss of function. In such cases, as aforementioned, the parties must explore the medical records carefully to determine whether the injured worker was undergoing any form of medical attention or was experiencing symptoms for the pre-existing condition immediately before the industrial injury. If not, and if the worker was capable of engaging in the work functions without limitation caused by the pre-existing condition up to the industrial injury, then the lighting up theory of coverage can apply, as is the case here.

For instance, the evidence showed and as contained in the clerk’s papers and record on file, that Mr. Daniels had a preexisting arthritic knee condition and is not disputed. There is also no dispute that Mr. Daniels was performing a full-time, labor-intensive job at the time of the

December 21, 2010 injury *despite* the presence of the bilateral knee conditions, and *despite* the fact that previous medical providers recommended that he have total knee replacements. Mr. Daniels elected not to have the total knee replacements at his relatively young age and to his credit elected to return to a full-time job. There is no evidence in the record indicating Mr. Daniels was ever placed on any permanent work restrictions as a result of his bilateral knee conditions. There is also no evidence in the record he was ever awarded any permanent partial disability awards for his knee conditions *despite* prior knee claims in evidence, or that the Department of Labor and Industries ever issued any order segregating any preexisting arthritic or degenerative conditions.¹

What all this adds up to is the following: from a strictly legal perspective, using the evidence in the record, Mr. Daniels had *no* permanent impairment to his bilateral knees before December 21, 2010. There is a legal distinction between a preexisting condition and a preexisting disability, or impairment. According to Dr. Johnson's testimony, impairment of function means "there has been a change from normal in terms of normal function. The means of rating that impairment is based on guidelines that have been established by the American Medical

¹ RCW 51.32.080(5) requires segregation of a prior preexisting disability, from whatever cause, and limits the award for any disability resulting from a later injury. *Bennett v. Department of Labor and Industries*, 95 Wn.2d 531, 532-33, 627 P.2d 104 (1981). (NOTE: *Bennett* refers to RCW 51.32.080(3), but the statute has since changed).

Association and are succinctly captured in a book called the AMA Guides [to] The Evaluation of Permanent Impairment of which the fifth edition is used by the Department of Labor and Industries at this time.” CP 144. Mr. Daniels was not awarded any prior permanent impairment award by the Department of Labor and Industries for his knees. Testimony and medical records reveal no evidence of Mr. Daniels having a prior *disabling* knee condition, since he was able to perform all the labor intensive work activities his job required without noticeable difficulty. *See Bennett v. Dept. of Labor & Indus.*, 95 Wn.2d 531, 534, 627 P.2d 104 (1981).

The facts in *Bennett* are instructive for this case. Jack Bennett sustained an industrial injury to his low back during the course of his employment in Oregon in 1959, which ultimately resulted in three surgeries. Nine months after the last surgery, he returned to work as a carpenter for various employers in various locations until he suffered an additional low back injury in Washington State in 1973. Following the 1973 injury, he was no longer able to return to his previous work as a carpenter. His claim was closed with a 20 percent PPD for the low back attributed to the 1973 injury alone. He appealed to the Board, which affirmed the award. Mr. Bennett then appealed to Superior Court, the case was tried before a jury, and the jury awarded him a 60 percent PPD, based upon the testimony of his treating physician, the only medical witness,

who testified that the previous injuries had produced a residual weakness in his back, putting him more at risk for an injury than someone who had never experienced an injury. He was unable to say whether the claimant had any pain or symptoms prior to the 1973 injury, and was forced to rely on the claimant's history. The claimant informed him that he had some weakness in one leg, but he had been able to perform all the heavy duties of his carpenter job without noticeable difficulty.

Mr. Bennett's doctor rated his low back at 60 percent, due to the 1973 injury and his preexisting condition, and when pressed, indicated he would allocate 40 percent to the prior injuries and 20 percent to the 1973 injury. The Court of Appeals reversed the Superior Court's holding based upon this testimony. Upon review, the Supreme Court determined this was in error, because while the doctor attributed the larger percentage to the preexisting condition, he never testified the claimant's weakness had been disabling prior to the 1973 injury. *Bennett* at 534. Likewise, in Mr. Daniels's case, while every medical witness acknowledged that Mr. Daniels had preexisting arthritis, even end-stage arthritis, in both knees before the December 21, 2010 industrial injury, no medical witness testified this condition was *disabling*, because every medical witness testified that Mr. Daniels was able to perform his very active job without restrictions and without apparent difficulty, and every medical witness

testified there were no previous, permanent medical restrictions imposed on Mr. Daniels by any medical provider regarding his job, in relation to his bilateral knee condition, before December 21, 2010.

Following the December 21, 2010 injury, where Mr. Daniels was struck from behind and suffered a crush injury to both legs, the preponderance of credible medical testimony states he cannot return to his prior work because of his knees. The Respondent's position is that, in the span of less than a year, without any impact to the knees as a result of the December 21, 2010 injury, Mr. Daniels's preexisting arthritic condition naturally progressed to the point he was no longer able to perform his job, a job he was able to do without apparent difficulty on December 20, 2010. Mr. Daniels's position is, and has always been, that the industrial injury of December 21, 2010 did impact his knees *or* placed additional force upon his knees due to the mechanism of injury that aggravated his preexisting arthritic condition, thereby becoming *a proximate cause* of bilateral knee impairment. The industrial injury did not, in itself, cause the condition of Mr. Daniels's knees, but was instead a factor that aggravates the underlying, preexisting condition which, by the medical testimony presented by the employer, was not *disabling* prior to December 21, 2010, but was *disabling* thereafter.

The only incident that occurred in the time period from December

21, 2010 (the date Mr. Daniels last worked) and the date the employer's medical witnesses examined the plaintiff was the industrial injury. The Respondent, i.e. Self-Insurance Employer posits the theory throughout the case that Mr. Daniels's knee conditions "naturally" progressed and degenerated during this time period. Mr. Daniels asks the Court to overturn the Board's decision because it does not stand up to legal scrutiny, utilizing the case law and facts above.

Similarly and assuming *arguendo*, industrial injuries that aggravate a preexisting *symptomatic* condition are covered under the claim even though the underlying pre-existing condition is not. This issue is really one of causation. An injury need not be the sole cause of a disability. Rather, it need only be "a" proximate cause or a proximate contributing cause, without which the result would not have occurred. *Hurwitz v. Department of Labor & Indus.*, 38 Wn.2d 332, 229 P.2d 505 (1951).

Therefore, if the pre-existing condition is latent or asymptomatic and the industrial injury activates it or makes it disabling, the Department or self-insured employer is responsible for the entire condition. The injury is the cause of the disability, and the asymptomatic condition is merely a condition upon which the cause operates.

In *Wendt v. Department of Labor & Industries*, the Court held that where the medical testimony shows that an industrial injury makes a

preexisting and previously quiescent arthritic condition symptomatic, the claimant is entitled to a “lighting-up” instruction. “Lighting-up” occurs where a sudden injury “lights up” a quiescent infirmity or weakened physical condition, the resulting disability is attributable to the injury and compensation is awardable. *Wendt v. Dep’t of Labor & Indus.*, 18 Wn. App. 674, 571 P.2d 229 (1977). Moreover, “[f]or purposes of coverage of the industrial insurance act, it is sufficient to sustain an injury which aggravates a preexisting infirmity.” *Longview Fibre v. Weimer*, 95 Wn.2d 583, 589, 628 P.2d 456 (1981). A doctor who testifies that a claimant suffers from a preexisting impairment, and who bases that testimony solely on medical history without clinical objective findings to support his testimony, fails to make a case that a preexisting impairment exists. *See Boeing Co. v. Hansen*, 97 Wn. App. 553, 985 P.2d 421 (1999). In the *Hansen* case, the injured worker sustained a low back injury in 1990 while working for Boeing. He underwent surgery and returned to work with daily low back pain. He had previously undergone surgery for his low back in 1986 for another, unrelated injury. A medical witness who testified for the employer stated Mr. Hansen’s current industrial injury warranted a Category 3 low back permanent partial disability (Hereinafter “PPD”) impairment, but his previous injury was also a Category 3 impairment due to the previous surgery, erroneously stating that simply

having the surgery caused him to have an impairment equal to a Category 3. The Department issued an order awarding the injured worker a Category 3 impairment for the 1990 injury, and Boeing appealed. The Board did not find persuasive Boeing's argument that Mr. Hansen's PPD should be reduced based on his previous impairment from the 1986 preexisting, non-work related impairment and surgery. The Board concluded that Boeing's doctor's testimony was insufficient to prove that Mr. Hansen had a prior impairment. Boeing appealed to Superior Court, filing a motion for summary judgment, which the court granted, directing the Department to pay the injured worker a Category 3 PPD with a deduction equal to a Category 3 PPD for the preexisting injury.²

The Court of Appeals reversed the Superior Court, holding that a medical witness must establish the existence of an impairment based on a loss of function. "Without a link between a physical abnormality and an actual loss of function, objective clinical evidence showing the existence of an abnormality is immaterial." *Hansen*, 97 Wn. App. at 557. The Court held a party must present clinical objective findings of the impairment resulting from the preexisting injury in order to reduce a claim for

² PPD awards are based not only on the level of impairment, but also on the date of the injury. Because one impairment in this case was based on a 1986 date, and one on a 1990 date, Mr. Hansen would still have collected a small amount after being awarded a Category 3 PPD for the 1990 injury minus the reduction from the preexisting Category 3 impairment.

disability arising from an industrial injury, and there was nothing in the record that established this. In fact, the record showed that after the surgery for the 1986 injury, Mr. Hansen returned to work and performed his duties without restrictions for four years prior to the 1990 injury. Mr. Daniels was able to perform his laborious job duties up to 52 hours a week without restrictions prior to his industrial injury of December 21, 2010. He is not longer able to do so.

2. MR. DANIELS'S ATTORNEYS SHOULD BE ENTITLED TO AN AWARD OF FEES FOR WORK DONE AT SUPERIOR COURT AS WELL AS WORK DONE AT THE COURT OF APPEALS.

Rule 18.1 of the Rules of Appellate Procedure provides that if “applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court.” RAP18.1

RCW 51.52.130 provides that in worker's compensation cases, if the worker appeals from a decision and order of the Board and the order is reversed or modified and additional relief is granted to the worker, the worker is entitled to attorney's fees for the work done before that court.

Mr. Daniels's attorneys therefore request that this Court overturn the decision of the Superior Court which affirmed the decision of the

Board, and that they be awarded reasonable fees for the work done on this appeal before the Court.

VI. Conclusion

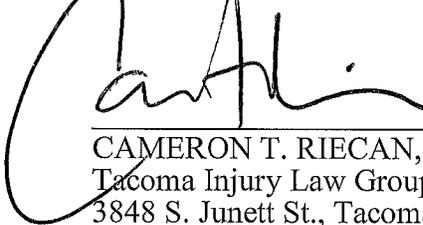
For the reasons stated above, Mr. Daniels respectfully requests that the Court reverse the trial court's June 19, 2013 order reaffirming the Decision and Order of the Board dated December 3, 2012.

Mr. Daniels also respectfully asks this Court to grant him an award for attorney's fees for the work done before this Court under the provisions of RAP 18.1 and RCW 51.52.130.

This matter should be reversed and remanded for the Department of Labor and Industries to take all proper and necessary actions consistent with the Court's findings and conclusions.

Respectfully submitted this 31st day of January, 2014.

TACOMA INJURY LAW GROUP, INC., P.S.



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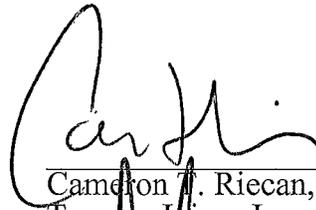
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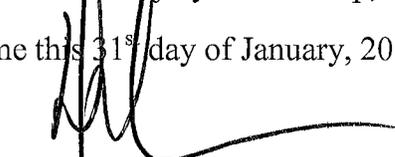
(via Email and U.S. Mail)
anas@atg.wa.gov

12 DATED this 31st day of January, 2014.

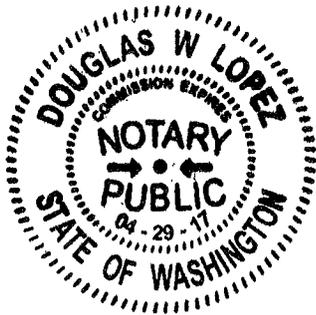


Cameron T. Riecan, WSBA #46330
Tacoma Injury Law Group, Inc., P.S.

13 SUBSCRIBED AND SWORN to before me this 31st day of January, 2014.



14 NOTARY PUBLIC in and for the
15 State of Washington, residing
16 at Thurston. My Commission
17 expires 4-29-17.



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