

NO. 45793-8-II

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

NATHAN COOPER,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**DEPARTMENT OF LABOR AND INDUSTRIES
BRIEF OF RESPONDENT**

ROBERT W. FERGUSON
Attorney General

KAYLYNN WHAT
Assistant Attorney General
WSBA No. 43442
Office Id. No. 91022
P.O. Box 40121
7141 Cleanwater Dr. SW
Olympia, WA 98504-0121
(360) 586-7719

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I. INTRODUCTION

This is a case arising out of the Industrial Insurance Act. A worker is eligible to reopen a workers' compensation claim when there is evidence of objective worsening proximately caused by the industrial injury, as shown by a comparison between the two dates relevant to this question ("terminal" dates). Here, a jury determined that Nathan Cooper did not show that his condition, as related to his industrial injury of 2007, had objectively worsened.

Contrary to Cooper's arguments, the trial court did not commit instructional error. Cooper's requested instruction confused two distinct theories, and neither was supported by substantial evidence. For an instruction under the first theory, about "lighting up" a pre-existing condition, the pre-existing condition must be non-symptomatic. Here, Cooper had a progressive back condition that continued to cause symptoms at the time of his industrial injury. Under the second, a "*Miller*" theory, the injury must increase a pre-existing disability, and there was no evidence of any increase here. Even if Cooper had presented testimony to support his requested instruction, he cannot show any prejudice by the refusal to give it. No comparison between the two terminal dates was made, so the jury would have returned the same verdict even if the rejected instruction had been given.

Following the verdict, the trial court awarded the Department of Labor and Industries (Department) its deposition transcription costs. Under Supreme Court case law, the Department is entitled to costs under RCW 4.84.010 and RCW 4.84.030 as the prevailing party. Under the plain language of RCW 4.84.010, this includes deposition transcription costs, which the trial court properly awarded.

This Court should affirm the trial court as it properly ruled on the jury instruction and appropriately awarded costs to the Department.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in refusing to give a “lighting up” instruction when no evidence established that Cooper’s pre-existing condition was non-symptomatic?
2. Did the trial court abuse its discretion in refusing to give a *Miller* instruction when no evidence established that the industrial injury increased a pre-existing disability?
3. Did the trial court properly award the Department costs when RCW 4.84.010 makes no distinction between depositions transcribed during Board hearings and superior court appeals, but provides the prevailing party with the costs of those depositions used at the time of trial before the superior court?

III. STATEMENT OF THE CASE

A. **Before the 2007 Industrial Injury That Is The Subject of This Case, Cooper Had a Fusion Surgery That Was Still Symptomatic at the Time He Was Injured at Work**

Before Cooper sustained the 2007 industrial injury that is at issue here, he had progressive back problems that resulted in surgery. He had

been experiencing back pain “off and on” for about eight years before his 2006 surgery. BR Cooper 27.¹ It had worsened significantly in the two years just before the spinal surgery. BR Cooper 27. Despite his testimony alleging this related to a workplace injury, there was no claim filed and this was not an industrially-related condition. BR Cooper 8-9, 28.²

In September 2006, Cooper underwent an extensive spinal surgery that included removing unstable portions of Cooper’s vertebrae and then fusing two levels of his spine together. BR Fossier 13. Cooper’s doctor explained that his back pain would never fully go away, even with this surgery. BR Cooper 27.

In late January 2007, about a month before the industrial injury at issue here, Cooper’s doctor noted that Cooper was still taking a muscle relaxant and still had some back spasms. BR Fossier 39. He was also still taking pain medication at this time. BR Cooper 28. While Cooper testified he thought the surgery had healed fairly well, he did not state that he was not feeling any symptoms just before his industrial injury. BR Cooper 10. In fact, when he returned to work following this surgery it

¹ Three witnesses testified in this case: Cooper and two orthopedists. Citations to their testimony, which are found in the certified appeal board record (BR) are provided by “BR” then the witness name followed by the page number.

² Cooper appears to allege that the fusion is related to an industrial injury. Appellant’s Br. at 1 (referencing “second” industrial injury); *see also* Appellant’s Br. at 3, 11. This violates an oral ruling granting the Department’s motion in limine excluding such argument by the trial court. RP 5. This ruling was not assigned error by Cooper. Regardless, Cooper’s argument is precluded by the statute of limitations. RCW 51.28.050.

was with restrictions: no lifting over 15 pounds, no bending, no twisting, and no turning. BR Cooper 12. Medical records documented that Cooper did not feel he had fully recovered from this surgery. BR Gritzka 46.

Both testifying doctors agreed that Cooper's condition, as related to this fusion, would continue to deteriorate. BR Gritzka 32; BR Fossier 6. The condition itself was related to disc degeneration, which will progress just with the passage of time. BR Fossier 6, 44. Dr. Gritzka testified that even with "no untoward event," that there are people who will "develop degenerative disc disease usually above the level of the fusion." BR Gritzka 47. In Dr. Fossier's opinion, any current condition of Cooper is related to the progression of this process. BR Fossier 37.

B. Following His Fusion Surgery, Cooper Slipped and Fell at Work, Which Resulted in an Accepted Claim of Lumbar Sprain, the Subject of This Appeal

Cooper returned to work, with restrictions, sometime in late January 2007. BR Cooper 21. Then, on March 1, 2007, a cutting board fell off a table and caused him to fall. BR Cooper 13-14. He landed on his tailbone and then laid on his back. BR Cooper 14, 25. He filed an industrial insurance claim, which the Department of Labor and Industries allowed. BR 41. This accepted injury is the subject of this appeal. BR 51.

X-rays taken two weeks after this fall showed a stable fusion. BR Fossier 14. Cooper received treatment and physical therapy over a six-month period for the injury. BR Cooper 14-15. He eventually returned to full duty and resumed his normal recreational activities. BR Cooper 16. This claim was closed on January 22, 2008. BR 21. An independent medical exam conducted by Dr. Timothy Craven established Cooper's condition as of January 2008, the first terminal date. BR Fossier 16. Dr. Craven reviewed x-rays and determined that there was no objective change in the fusion or spondylolisthesis, so he concluded the 2007 injury caused only a temporary aggravation of Cooper's pre-existing condition. BR Fossier 18. Dr. Craven determined Cooper's impairment was best described as a pre-existing category three, with no increase in disability caused by the 2007 injury. BR Fossier.³

C. No Medical Evidence Showed an Objective Worsening of Cooper's Accepted Condition Between January 22, 2008, and July 7, 2011

Cooper applied to have his claim for his 2007 injury reopened. BR 33. The Department first denied this application in March 2011, and

³ "Impairment" means a loss of physical function. WAC 296-20-220(c). Impairment ratings are given to determine and compensate permanent disability. RCW 51.32.080(5) requires an examiner to distinguish between a pre-existing impairment and one caused or increased by an industrial injury. Low back impairments are described by WAC 296-20-280. Category three refers to mild low back impairment with objective clinical findings but without significant x-ray findings or motor loss. WAC 296-20-280(3). The impairment is not disputed.

affirmed this denial on July 7, 2011. BR 33, 34. At the Board of Industrial Insurance Appeals (Board), the Board considered whether Cooper's accepted condition objectively worsened between January 22, 2008, and July 7, 2011, the terminal dates. BR 51. To reopen a claim, a comparison between two terminal dates is necessary to determine whether an industrially-related condition has worsened. CP 42. The first date establishes the worker's condition at "T1," here January 22, 2008, when the Department last closed the claim. The second terminal date, "T2," here July 7, 2011, is the last date the Department acted on the application to reopen the claim. CP 40, 42.

Dr. Clarence Fossier examined Cooper in October 2010.⁴ BR Fossier 37. At that time, Cooper was tender over his lumbar spine, similar to what Dr. Craven had found in 2008. BR Fossier 22. Cooper's range of motion was still apparently limited, being about ten degrees in any direction, as it had been during Dr. Craven's 2008 exam.

⁴ In 2010, approximately two years after Cooper's claim was closed, he alleged another injury at work. BR Cooper 25. He testified that while he was helping the dishwasher, he bent down to grab a rack and felt something like a rubber band snap in his back. BR Cooper 13. He filed a claim for benefits, which is not the subject of this appeal. BR 51; Cooper 26. Dr. Fossier's exam was to determine whether the alleged April 2010 injury was the cause of Cooper's current condition, or whether it was instead the natural progression of the pre-existing condition. BR Fossier 37. Dr. Fossier determined there was no injury that affected his condition as of October 2010, and concluded the current condition was caused by the progression of the pre-existing condition. BR Fossier 37.

BR Fossier 23. Dr. Fossier determined the fusion was fixed and stable.
BR Fossier 25.

Dr. Thomas Gritzka, Cooper's medical witness, examined Cooper in October 2011. BR Gritzka 11. Dr. Gritzka diagnosed the 2007 injury as a lumbosacral sprain superimposed on the fusion, stating Cooper injured the disc level above the fusion when he "fell over backwards onto his back." BR Gritzka 32-33. According to Dr. Gritzka, such an injury may further concentrate the stress on the level above the fusion, but Dr. Gritzka did not distinguish the degeneration expected from a fusion from any caused by this injury. BR Gritzka 32-33. Moreover, Dr. Gritzka did not testify the fusion was non-symptomatic when the 2007 injury occurred. BR Gritzka 21. In fact, Dr. Gritzka stated Cooper was still under treatment when the 2007 injury occurred. BR Gritzka 20. And Dr. Gritzka did not relate the injury to any increase in impairment. BR Gritzka 47.

Dr. Gritzka's testimony was provided without the benefit of a full review of medical records. His medical record review was limited to records before and up to September 25, 2007, with a large break, and then resumed on May 27, 2010, and continued after that date. BR Gritzka 13-20. He mentioned no records and related no understanding of Cooper's condition at "T1," January 22, 2008. BR Gritzka 13-20, 39. Dr. Gritzka

did not include an objective comparison between the two terminal dates; rather, he described some of his exam findings as of 2011 without comparing these to exam findings from 2008. BR Gritzka 39.

To determine whether there was any evidence of worsening in Cooper's industrially-related condition, Dr. Fossier compared the exam findings of Dr. Craven from 2008 with his own 2010 findings and those of Dr. Gritzka in 2011. BR Fossier 29. The range of motion testing that Dr. Gritzka performed elicited somewhat better results than what Dr. Fossier and Dr. Craven had found. BR Fossier 28. Dr. Gritzka found better muscle tone than Dr. Fossier did, more extensive hip flexion, and better straight leg raising. BR Fossier 28. While Dr. Gritzka's exam findings were largely similar to those of Dr. Craven and Dr. Fossier, Cooper was actually able to do more for Dr. Gritzka in 2011 than he had in 2008 or 2010. BR Fossier 29. All three examining doctors rated Cooper's clinical impairment as a category three. BR Gritzka 47; BR Fossier 18, 31.

Dr. Fossier concluded that there was no objective evidence of any worsening of Cooper's industrially-related condition. BR Fossier 5, 29. Dr. Fossier did not believe Cooper needed any treatment in relation to this condition. BR Fossier 30.

Both doctors testified about invalidity in Cooper's testing during their physical exams. Dr. Gritzka explained that Cooper did not pass the validity test for lumbar flexion under the American Medical Association guidelines. BR Gritzka 35. Dr. Gritzka also noted pain behavior and embellishments of Cooper's physical status. BR Gritzka 37.

Dr. Fossier found similar validity problems during his exam. In remarking on Cooper's tenderness to light pressure on his spine, Dr. Fossier commented that the pressure applied was not sufficient to cause any pain since he was not pushing on a deep structure for this test. BR Fossier 26. Dr. Fossier also elicited results in other tests where Cooper exhibited pain for testing that would not cause pain. BR Fossier 23-25. Most striking of all examination findings, Dr. Fossier commented that the range of motion results found by all three doctors "is almost incompatible with getting up, getting dressed, getting in and out of a car, doing your activities of daily living." BR Fossier 44.

D. The Board and the Jury Determined the Department Was Correct in Finding No Evidence of Objective Worsening of Cooper's Industrially-Related Condition

The Board found that there was no objective worsening between the relevant dates. BR 2, 31. The Board pointed out in its decision that Cooper did not establish a prima facie case to support reopening. BR 27.

This is because he did not provide objective evidence of worsening between the two terminal dates. BR 28.

After the Board affirmed the Department's orders in this case, Cooper appealed to superior court. BR 2; CP 1. Cooper requested a "lighting up" instruction, referred to here as 8a:

If an industrial injury lights up, or makes disabling, a latent or preexisting infirmity, or weakened condition, then the resulting disability is to be attributed to the industrial injury. If the industrial injury is a proximate cause of the condition from which the worker suffers, then the previous physical condition of the worker is immaterial, and the industrial injury is considered to be the legal cause of the full disability, regardless of any preexisting or congenital weakness or infirmity.

CP 25.⁵ The Department objected to the inclusion of this instruction because it was not supported by the evidence. RP 20. The trial court rejected this instruction because it requires "an asymptomatic condition that is made symptomatic as a result of some incident," and noted that this was not discussed by the testifying doctors. RP 22. The court agreed it was not supported by the evidence: "[H]e did have the fusion surgery and I think he probably had some symptomology even if it was low grade." RP 23.

⁵ Cooper compares his instruction to the "esoteric" instruction from *Wendt v. Department of Labor & Industries*, 18 Wn. App. 674, 571 P.2d 229 (1977), so it is generally referred to as a "lighting up" instruction. Appellant's Br. at 12. As will be explained later, this instruction actually confuses two distinct theories and the other will be referred to as a *Miller* theory, based on *Miller v. Department of Labor & Industries*, 200 Wash. 657, 682-83, 94 P.2d 764 (1939).

The court then instructed the jury with standard instructions, including WPI 155.09, WPI 155.12, WPI 155.12.01, that explained what must be shown to grant a reopening. CP 18-21, 40-42. The court instructed the jury on proximate cause, including multiple proximate causes, using the pattern instruction, WPI 155.06:

There may be one or more proximate causes of a medical condition. For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must be a proximate cause of the alleged medical condition for which benefits are sought. The law does not require that the industrial injury be the sole proximate cause of such medical condition.

CP 39. During closing arguments, both attorneys argued using the multiple proximate cause theory. *See* RP 38-39, 42-43, 45, 48.

E. The Jury Affirmed the Board's Decision and the Trial Court Awarded the Department Statutory Fees and Costs as the Prevailing Party

The jury returned a verdict affirming the Board's decision. CP 61. The Department requested statutory attorney fees and costs under RCW 4.84.010 and 4.84.030. CP 49-54. The costs related to the \$303 court reporter charge to transcribe Dr. Fossier's deposition. CP 47. This request did not include other expenses to the Department for trying the case, such as expert witness fees, travel time and expense, or actual attorney time. CP 47-54. Cooper did not object to the \$200 statutory attorney fee, but resisted the deposition transcription fee. CP 56-59. The

court awarded the Department its requested fee and costs, \$503. CP 60. Cooper appealed.

IV. STANDARD OF REVIEW

When Cooper appealed the Department's decision to the Board, he had the burden of showing, by a preponderance of the evidence, that the Department's order was incorrect. RCW 51.52.050(2)(a) (appellant's burden to present prima facie case for relief); *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942) (proof of every element must be by a preponderance). It is well-settled law that a claimant must provide strict proof of each element of his or her claim for benefits under the Act. *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510-11, 413 P.2d 814 (1966); *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996).

On appeal to superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 483, 40 P. 3d 1221 (2002). The superior court reviews the Board decision de novo on the evidence in the certified appeal board record. RCW 51.52.115. The superior court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the

Board's findings and decision are incorrect. *Harrison*, 110 Wn. App. at 483.

The ordinary standard of civil review applies to this Court's review of the trial court's decision. RCW 51.52.140 (appeal shall lie from the judgment of the superior court as in other civil cases); *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Court reviews the decision of the superior court, not the Board. *Rogers*, 151 Wn. App. at 179-81. This Court limits its review to "examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). Substantial evidence supports a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

A refusal to give a requested jury instruction is reviewed for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). A trial court abuses its discretion if its decision was manifestly unreasonable or exercised on untenable grounds or for untenable reasons.

Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). The trial court is only required to give an instruction on a theory where there is substantial evidence to support it. *Stiley*, 130 Wn.2d at 498. Reversal is only required if the error is prejudicial, meaning it affects the outcome of trial. *Id.*; *Boeing Co.*, 93 Wn. App. at 186.

Where a party challenges, on appeal, the trial court's statutory authority to award attorney fees or costs, an appellate court conducts a de novo review of that issue, as it is a question of law. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993).

V. SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in refusing Cooper's proposed instruction. Cooper did not present substantial evidence to support a "lighting up" theory. For such a theory, the pre-existing condition must not be symptomatic at the time of the lighting up. Cooper's lower back following his fusion surgery was still showing symptoms at the time he slipped and fell at work. Similarly, no evidence supported giving a *Miller* instruction because the injury did not increase a pre-existing disability. The trial court's refusal to instruct the jury on these theories was correct since no evidence supported them. Even if this refusal was somehow error, it was not prejudicial because without a

comparison of objective symptoms at the two terminal dates, no worsening was shown, so the result could not have been different.

As the prevailing party, the Department is entitled to its costs under RCW 4.84.010 and RCW 4.84.030. The statute that grants these fees and costs, RCW 4.84.030, states that costs are recoverable in “any action” in the superior court. There is no exception for transcripts from Board proceedings or a distinction based on the type of jurisdiction, original or appellate, exercised by the superior court, contrary to Cooper’s arguments. This action falls under the broad provision of “any action,” so the trial court properly awarded costs.

VI. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion in Rejecting Cooper’s Proposed Instruction Because No Evidence Supported Its Use**

The trial court properly rejected Cooper’s requested instruction because no evidence supported it. This Court reviews the trial court’s decision regarding a particular jury instruction for abuse of discretion, and reversible error only exists if the instruction was (1) supported by substantial evidence and (2) the lack of the instruction affected the outcome of the trial, that is, prejudice is shown. *Stiley*, 130 Wn.2d at 498; *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 740, 981 P.2d 878 (1999). Instructions are sufficient if they permit a party to argue his or her

theory of the case, are not misleading, and when read as a whole, properly inform the jury as to the applicable law. *Boeing Co.*, 93 Wn. App. at 186. A properly worded instruction must be offered to preserve the error or else the right to any such instruction is waived. *McGarvey v. City of Seattle*, 62 Wn.2d 524, 533, 384 P.2d 127 (1963); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 624, 762 P.2d 1156 (1988). Here, the jury was instructed as to the possibility of multiple proximate causes, and this was argued by Cooper. But there was not substantial evidence to support the giving of a “lighting up” or *Miller* instruction, and no other more appropriate instruction was offered.

1. No Evidence Supported Giving a “Lighting Up” Instruction Because the Pre-existing Condition Was Not Latent but Was Symptomatic at the Time of Injury

Cooper’s pre-existing condition, the spinal fusion, was still symptomatic at the time he injured himself at work, so he was not entitled to the instruction he requested. If an industrial injury lights up or makes active a *latent* pre-existing condition, the resulting disability is attributed to the injury, not the pre-existing disability. *Oien v. Dep’t of Labor & Indus.*, 74 Wn. App. 566, 569, 874 P.2d 876 (1994). For the “lighting up” instruction to be appropriate, however, there must be evidence showing the injury lit up or made symptomatic a condition that was asymptomatic before the injury occurred. *Wendt v. Dep’t of Labor & Indus.*, 18 Wn.

App. 674, 678, 571 P.2d 229 (1977). Testimony that the pre-existing condition was latent or inactive is “necessary to trigger the ‘lighting up doctrine’ as a theory of liability.” *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 607, 676 P.2d 538 (1984). To satisfy this, there must be evidence that the condition is “quiescent,” that is, “causing no symptoms,” and “asymptomatic,” meaning “presenting no subjective evidence of disease.” *McDonagh v. Dep’t of Labor & Indus.*, 68 Wn. App. 749, 755, 845 P.2d 1030 (1993). It was Cooper’s burden to present such evidence, and he did not meet this burden. *See Harrison*, 110 Wn. App. at 483. There was no testimony sufficient to trigger the giving of a “lighting up” instruction.

No one testified that Cooper’s fusion surgery was latent, quiescent, or asymptomatic at the time of the 2007 industrial injury. Cooper does not allege the existence of any testimony of this sort. *See Appellant’s Br.* 10-13. Both doctors testified that his pre-existing disc disease would continue to deteriorate, and the fusion would have adverse effects on the spinal segment just above the fusion. *Gritzka* 33, 47; *Fossier* 31. This is an active, ongoing process, the opposite of a latent or quiescent condition.

The evidence further established that Cooper's pre-existing condition was still active and symptomatic at the time of his injury. Cooper testified that he returned to work with restrictions related to the fusion: he was not to bend, twist, turn, or lift over fifteen pounds. BR Cooper 12. Less than two months before the industrial injury, he still had back spasms related to the fusion, and was still taking muscle relaxers and pain killers. BR Fossier 39; BR Cooper 28. Medical records additionally documented that Cooper did not feel he had fully recovered from this surgery. BR Gritzka 46.⁶

The court considered a similar factual scenario in *Austin* and determined the evidence there was insufficient to justify a lighting up instruction. *Austin v. Dep't of Labor & Indus.*, 6 Wn. App. 394, 399, 492 P.2d 1382 (1971). In *Austin*, the worker was diagnosed with ankylosing spondylitis, a form of arthritis, following the industrial injury, but x-rays showed the condition was present on x-rays ten years before the injury. *Id.* at 396. On cross-examination, the worker admitted to occasional stiffness in his back and to missing work occasionally because of it. *Id.* His testifying doctor stated the condition would progress naturally without

⁶ Contrary to Cooper's contention that the 2007 industrial injury occurred a "few years later" after the fusion surgery was performed, Appellant's Br. at 11, it was six months later. The fusion was performed in September 2006, and Cooper returned to work sometime in January 2007. BR Cooper 9, 10, 27. The industrial injury occurred on March 1, 2007. BR 51.

an injury. *Austin*, 6 Wn. App. at 398. Because there was no evidence stating the pre-existing condition was latent or inactive, the lighting up instruction was properly refused. *Id.* at 399.

Cooper's evidence mirrors that presented in *Austin*. He had been experiencing back problems for eight years, culminating in a spinal fusion, due to a progressive condition, spondylolisthesis. BR Cooper 27; BR Fossier 14, 25. Both testifying doctors agreed that the pre-existing condition would continue to deteriorate, even without an injury, simply with the passage of time. BR Gritzka 32; BR Fossier 6, 44. Further, when Cooper returned to work following the fusion surgery, he did so with restrictions and was still taking muscle relaxers and pain medication. BR Cooper 12, 28; BR Fossier 39. He did not, nor did anyone else, testify that he was not feeling any symptoms related to the pre-existing condition just before the 2007 injury. The evidence in Cooper's case is nearly identical to that presented in *Austin*, where the lighting up instruction was properly refused. *See Austin*, 6 Wn. App. at 399.

Case law does not support giving an instruction when no evidence exists to support it. Cooper argues that *Wendt* requires the giving of his jury instruction. Appellant's Br. at 11-13. In *Wendt*, the court determined that the trial court should have given the "lighting up" instruction. However, the *Wendt* Court did not determine that the instruction was

mandatory in every case. *Wendt*, 18 Wn. App. at 676. Rather, it determined the trial court should give the instruction where substantial evidence supports it. *Id.* There was an asymptomatic condition in *Wendt*, and medical testimony that explained it had only become symptomatic due to the trauma of the industrial injury. *Id.* at 677. That is not the case here, where the condition was instead symptomatic, and no testimony alleged that it was not symptomatic to support such a theory.

To trigger a “lighting up” instruction, Cooper needed to show an asymptomatic pre-existing condition. *Zipp*, 36 Wn. App. at 607. This legal requirement is encompassed in the first sentence of Cooper’s proposed instruction: “If an industrial injury *lights up*, or makes disabling, *a latent or preexisting infirmity*, or weakened condition, then the resulting disability is to be attributed to the industrial injury.” CP 25 (emphasis added). The trial court properly rejected this instruction as not supported by the evidence because it requires “an asymptomatic condition that is made symptomatic as a result of some incident.” RP 22. The Court noted that this was not discussed by the testifying doctors. RP 22. The Court also said, “[H]e did have the fusion surgery and I think he probably had

some symptomology even if it was low grade.” RP 23. Moreover, the instruction was properly refused because it confused distinct theories.⁷

2. No Evidence Supported Giving a *Miller* Instruction Because There was No Increase In Disability Caused by the Injury

Cooper’s evidence additionally did not support giving the offered instruction under a *Miller* theory. It is well-settled that workers are taken as they are under the Industrial Insurance Act, without regard to any pre-existing conditions or congenital weaknesses. *Miller v. Dep’t of Labor & Indus.*, 200 Wash. 674, 682-83, 94 P.2d 764 (1939). If the injury is a proximate cause of the worker’s disability, the previous condition is immaterial and the worker can recover for the full extent of the disability. *Id.* This theory is encompassed in the remaining portions of Cooper’s offered instruction: “If an industrial injury lights up, or *makes disabling*, a latent or *preexisting infirmity*, or *weakened condition*, then the resulting disability is to be attributed to the industrial injury.” CP 25 (emphasis

⁷ This Court can also affirm rejection of the instruction on any legal ground supported by the record. *See State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997). Cooper’s instruction was confusing and mixed concepts together, with no proof under either theory. Because the instruction was confusing, the trial court did not abuse its discretion in refusing it. *See Boeing Co.*, 93 Wn. App. at 186 (instructions must not be misleading).

Contrary to Cooper’s implication, the court in *Simpson Timber Co.*, 96 Wn. App. at 740-41, discussed only that a similar instruction could be read together with an occupational disease instruction, when the issue before it was allowance of an occupational disease. It did not engage in an analysis of the instruction.

added). While this is an accepted theory under the Act, it is not supported by the evidence here.

There was no evidence that the industrial injury was disabling in any way. When Cooper's claim was originally closed, he was rated a pre-existing category three impairment with no increase from the industrial injury. BR Fossier 18. When Cooper returned to work following the fusion surgery, he did so with restrictions, commensurate with the disability caused by the fusion. There was no testimony that his return to work following the industrial injury required any additional restrictions. BR Cooper 12, 15-16. Cooper testified he resumed full duty, and also returned to his regular recreational activities, following the industrial injury. BR Cooper 15-16. The injury did not, therefore, make disabling or increase the disability caused by a pre-existing condition.⁸ The refusal to give the requested instruction was properly based on the evidence and it was not manifestly unreasonable. Cooper was not entitled to this instruction under either theory.

Although Cooper invokes liberal construction to argue for the jury instruction, this canon of statutory construction does not apply to questions of factual sufficiency. Appellant's Br. at 13. While the court liberally construes the Industrial Insurance Act, this liberal construction

⁸ Nor did Cooper's impairment rating change over time: all three doctors that examined him found him to be a category three impairment.

does not apply to questions of fact. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). Those claiming benefits under the Act must prove, by competent evidence, the facts upon which they rely for those benefits. *Id.*; see also *Lightle*, 68 Wn.2d at 510-11; *Cyr*, 47 Wn.2d at 97; *Jenkins*, 85 Wn. App. at 14. Cooper did not prove the necessary facts here, that he had an inactive condition that was lit up by the industrial injury, or that the injury caused or increased his disability, so the refusal to give this instruction was not error.⁹

3. Even if Such an Instruction Should Have Been Given, There Was No Prejudice Shown Because the Jury Would Have Reached the Same Result Even With the Requested Instruction

The trial court did not err in refusing to allow the instruction, but even if it did, reversal is not warranted. Reversal is not proper when, as here, there is no prejudice shown by the refusal to give a requested instruction. See *Boeing Co.*, 93 Wn. App. at 186. An error is only prejudicial if it affects the outcome of trial. *Id.* The reviewing court considers the evidence and whether the instruction would have been likely to change the outcome of the trial. *Id.* at 188-89. Here, even if the

⁹ Cooper's case is like *Nagel* and *McDonald* where the worker's condition was the ordinary progression of a pre-existing condition. *Nagel v. Dep't of Labor & Indus.*, 189 Wash. 631, 636-37, 66 P.2d 318 (1937); *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 626-27, 17 P.3d 1195 (2001).

requested instruction had been given, the jury would have returned the same verdict.

Cooper did not sustain his burden of proof. To prevail on a reopening claim, the claimant must establish each of four elements through medical testimony: 1) objective evidence that the industrially-related condition is worse; 2) that the worsening is proximately caused by the industrial injury; 3) that the worsening arose between the terminal dates, based on a comparison of objective findings; and 4) that the worsening results in either a need for treatment or increased disability beyond that previously awarded. RCW 51.32.160; *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); *Loushin v. ITT Rayonier*, 84 Wn. App. 113, 117-18, 924 P.2d 953 (1996). Cooper's testifying medical witness did not provide two key components: an objective comparison of Cooper's condition between the two terminal dates and a causal link between the injury and the current condition.

The medical testimony must provide a comparison of objective findings from the two terminal dates. *Roellich v. Dep't of Labor & Indus.*, 20 Wn.2d 674, 680, 681, 148 P.2d 957 (1944). This comparison cannot merely rest upon subjective statements. *Cooper v. Dep't of Labor & Indus.*, 20 Wn.2d 429, 433-34, 147 P.2d 522 (1944). The medical witness must have some knowledge of the injury involved and the claimant's

condition at the time of the first closing order. *Larson v. Dep't of Labor & Indus.*, 24 Wn.2d 461, 468, 470, 166 P.2d 159 (1946). A medical witness can base this comparison on medical records establishing objective findings at each of the two dates. *Kresoya v. Dep't of Labor & Indus.*, 40 Wn.2d 40, 45-46, 240 P.2d 257 (1952). But the medical testimony must establish the “baseline” condition as of the first terminal date and provide a comparison based on objective findings. *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 661, 219 P.3d 711 (2009). Here, Cooper’s medical witness had no understanding of Cooper’s “baseline” condition as of the first terminal date, so he could not provide a comparison of two dates.

Dr. Gritzka did not provide any testimony related to the first terminal date, January 22, 2008. He did not examine Cooper close to that time, and he did not review any medical records created at that time. BR Gritzka 14, 17-18. Dr. Gritzka related the current need for treatment to the injury “based . . . on what [he] was told.” BR Gritzka 43. This suggests Dr. Gritzka was relying on Cooper’s subjective statements for his opinions, which is not a sufficient basis for the comparison. *See Cooper*, 20 Wn.2d at 433-34.

Nor did Dr. Gritzka credibly tie any possible worsening to the industrial injury itself; Dr. Gritzka’s testimony repeatedly referred to the

fusion without explaining what effect, if any, the injury had on the fusion.¹⁰ Where there is a pre-existing and progressive process at work, such as here, the medical witness must link the worsening to the injury, and distinguish it from the progression of the pre-existing disease. *Goehring v. Dep't of Labor & Indus.*, 40 Wn.2d 701, 706, 246 P.2d 462 (1952). After he acknowledged the progressive element of Cooper's pre-existing condition, it was incumbent on Dr. Gritzka to distinguish the natural progression of the fusion with any effects on it from the industrial injury. He did not. BR Gritzka 33. Given the lack of evidence to support Cooper's case, it is unlikely the jury would have returned a different verdict.

Reversal is not appropriate because there was no instructional error. Even assuming error, there was no prejudice, and Cooper does not identify any. A new trial with the requested instruction would not provide Cooper with a different result.

¹⁰ Additionally, Dr. Gritzka did not understand how the injury occurred: he seemed to believe Cooper fell on his lumbar spine at the level above the fusion; Cooper testified he landed on his tailbone, he did not testify to any impact at this level of his spine. BR Gritzka 33; BR Cooper 14, 24-25. This is not competent evidence supporting Cooper's claim for benefits. See *Ehman*, 33 Wn.2d at 595. Cooper asserts in his appellant's brief that he fell on his back. See Appellant's Br. at 4. But he testified he fell on his tailbone, then laid on his back. BR Cooper 14, 24-25.

B. The Trial Court Properly Awarded the Department Its Deposition Transcription Costs as the Prevailing Party Under RCW 4.84.010 and RCW 4.84.030

The Department prevailed before the superior court, so the superior court properly awarded the Department its deposition transcription costs under RCW 4.84.010, RCW 4.84.030, and RCW 51.52.140. Cooper argues that because the depositions were taken at the Board, the Department cannot recover the transcription costs at the superior court. Appellant's Br. at 14-17. But the plain language of the relevant statute provides for costs to the prevailing party in "any action," so it is irrelevant that this action involved appellate, rather than original, jurisdiction. See RCW 4.84.030, .010. Moreover, RCW 51.52.140 specifies that the practice in civil cases applies to superior court proceedings involving workers' compensation cases. Both the Supreme Court and the Court of Appeals have recognized the statutory cost provisions apply to superior court proceedings involving appeals from the Board under this statute.

1. The Plain Language of the Statute Provides Costs to the Prevailing Party in Any Action in the Superior Court

The Department prevailed at the trial court, and RCW 4.84.030 provides for it to recover its costs. The goal of statutory interpretation is to discern and implement the Legislature's intent. *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 743, 317 P.3d 1037

(2014). In doing so, the court looks first to the plain meaning of the language of the statutes. *Ellensburg*, 179 Wn. 2d at 737. When determining a statute's plain meaning, the court considers all related statutes. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). If the plain language of the statute is unambiguous, as here, the court's inquiry is at an end. *Manary v. Anderson*, 176 Wn.2d 342, 352, 292 P.3d 96 (2013).

The Department is entitled to its costs through the operation of three related statutes, RCW 51.52.140, RCW 4.84.010, and RCW 4.84.030. None of these statutes contains any ambiguity and Cooper does not allege any, thus conceding the issue. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

Absent some other statute, the ordinary civil practice applies to superior court proceedings, which includes costs provisions. RCW 51.52.140; *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557-58, 933 P.2d 1025 (1997); *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 729-30, 175 P.3d 1109 (2008); *Allan v. Dep't of Labor &*

Indus., 66 Wn. App. 415, 422-23, 832 P.2d 489 (1992).¹¹ RCW 51.52.140 provides that “Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter.” Thus, the practice in civil cases regarding costs applies to workers’ compensation proceedings as the chapter does not elsewhere preclude such use.

RCW 4.84.030 provides that a party prevailing in the superior court is generally entitled to its costs. The statute awards costs to prevailing parties in “any action” in the superior court:

In *any action* in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements

RCW 4.84.030 (emphasis added). The related statute at issue, RCW 4.84.010, specifies the types of recoverable costs, including the cost of deposition transcripts:

[T]here shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party’s expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

. . . .

(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the *reasonable expense of the transcription of depositions used at trial* or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

¹¹ These cases are discussed *infra* Part VI.B.2.

RCW 4.84.010 (emphasis added). By their plain language, the statutes require (1) a prevailing party; (2) in a superior court action; and (3) the necessary use of deposition transcripts in achieving the successful result. For a proper award of deposition transcription costs then, the Department must prevail in the superior court, and the depositions used must have been necessary to the successful result. All three of these elements are present here: the Department prevailed in a superior court action through the necessary use of a deposition transcript.

There is no dispute that the Department prevailed before the superior court or that the deposition was necessary to achieve that result. *See* Appellant's Br. at 15. Instead, Cooper argues that the deposition must have been "generated in superior court" for the deposition transcript provision to apply. Appellant's Br. at 15, 17. The origin of the deposition does not limit the use of RCW 4.84.010(7). The statute does not say "generated" at superior court, it says "used at trial." RCW 4.84.010(7). Nowhere in the statute does it preclude the use of depositions that were taken originally as part of an administrative hearing; rather the focus is on the "use[] at trial." Acceptance of Cooper's arguments would require reading words into the statute. But courts do not add words to an

unambiguous statute when the Legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Likewise, the superior court's role as an appellate court does not limit application of RCW 4.84.010(7). *See* RCW 51.52.140. Cooper's contention focuses on whether the jurisdiction invoked here was appellate, rather than the general or original jurisdiction of the superior court, and he supports this distinction by referencing RCW 4.84.010(7)'s use of the word "trial." Appellant's Br. at 15. Cooper cannot distinguish the proceeding that happened before the superior court as anything but a trial: a jury was selected, opening statements were given, evidence was presented (the transcripts), closing arguments were made, and a verdict was returned. RCW 51.52.115 gives the parties the right to "trial by jury." While the jury sits in an appellate capacity, it conducts a de novo review of the Board's decision, and it reaches a decision only after a full trial has been conducted. *See* RCW 51.52.115 (providing superior court reviews Board decision de novo limited to certified appeal record and providing for right for "trial by jury"). And the major feature of this full trial is the provision of deposition transcripts, which are read in their entirety.

The practice of reading deposition transcripts to juries in workers' compensation appeals has been in place since before deposition costs were made recoverable by RCW 4.84.010(7). *See Brown v. Dep't of Labor &*

Indus., 23 Wn.2d 572, 576, 161 P.2d 533 (1945) (discussing testimony before Board may be live or by deposition). The statute providing for appeals on the Board record, RCW 51.52.115, has existed in its current form since 1951. Laws of 1951, ch. 225 § 15. The Legislature added subsection (7) to RCW 4.84.010 in 1983. Laws of 1983, 1st Ex. Sess., ch. 45 § 7. The Legislature would have been aware of the practice of using depositions in workers' compensation trials under RCW 51.52.115 and did not chose to make an exception for this in RCW 4.84.010(7). *See ATU Legislative Coun. State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002) (Legislature is presumed to be aware of its own enactments). Nor has it made any changes while otherwise revising the statute: RCW 4.84.010 has been revisited since 1983, but no changes have been made limiting the recovery of deposition costs. *See* Laws of 1984, ch. 258 § 92 (adding arbitration proceedings); Laws of 2007, ch. 121 § 1 (providing for actual service cost); Laws of 2009, ch. 240 § 1 (removing "by way of indemnity"). More specifically, no changes have been made based on the jurisdiction exercised by the court. *See id.*

The appellate nature of the superior court proceeding here does not matter under the statute. RCW 4.84.030 provides for costs "in any action in the superior court of Washington." This broad language does not make distinctions between what types of case, be it those invoking original or

appellate jurisdiction, are involved. Moreover, RCW 51.52.140 provides that the civil practice applies and under this, the civil practice regarding costs applies. The Legislature's decision to use the civil practice means that RCW 4.84.010 and .030 apply regardless of whether there is appellate or original jurisdiction. Legislative intent is implemented by giving effect to the plain meaning of the language of a statute. *E.g., Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). As RCW 4.84.010 and RCW 4.84.030 do not contain any language suggesting that the Legislature intended to distinguish between the costs that are awardable when a superior court acts in an appellate capacity rather than under its original jurisdiction, there is no basis to ascribe such an intention to the Legislature. Reviewing courts have not found otherwise, but have instead held that RCW 4.84 applies to superior court appeals from Board decisions.¹²

2. Appellate Courts Have Already Determined That the Statutory Cost Provisions Apply to Superior Court Proceedings Involving Appeals From the Board

The cost provisions contained in RCW 4.84.010 and RCW 4.84.030 apply to superior court proceedings involving appeals from

¹²Cooper quotes WAC 263-12-117, which discusses costs at the Board, as somehow relevant. *See* Appellant's Br. at 16. But WAC 263-12-117(2) only applies to Board proceedings and could not limit a superior court's authority under RCW 4.84.010. Nor is the fact that depositions are regularly used at the Board under WAC 263-12-115 relevant here. What is relevant is whether they were "used at trial." RCW 4.84.010(7).

decisions of the Board. This issue has been reviewed by both the Supreme Court and the Court of Appeals, and neither has determined that the statutory provisions are limited because the superior court sits in an appellate capacity.

In *Black*, the Supreme Court held that RCW 4.84.030 applies to workers' compensation appeals in superior court. *Black*, 131 Wn.2d at 557. It approved of the superior court's award of statutory attorney fees to the Department under RCW 4.84.030 and RCW 4.84.080(1) because RCW 51.52.140 requires that the rules of civil procedure apply in appeals to the superior court under the Industrial Insurance Act. *Id.* There, while other costs were not discussed because the action was dismissed, the logic would remain the same. Since RCW 4.84.030 applies under RCW 51.52.140, the prevailing party may recover all costs specified in RCW 4.84.010.

The same result, providing for an award of costs in an appeal to the superior court from the Board, has been reached by the Court of Appeals. In *Allan*, the court determined that the Department, as the prevailing party, was entitled to statutory costs under RCW 4.84.030, including statutory attorney fees. *Allan*, 66 Wn. App. at 422-23. No limiting language was included: costs were simply allowed. *Id.* at 423. More recently, the *Ferencak* Court awarded fees under RCW 4.84.030 to the Department and

distinguished this award from that provided by RCW 51.52.130. *Ferencak*, 142 Wn. App. at 729-30. RCW 51.52.130 allows for *actual* attorney fees incurred by an injured worker or employer on appeal, whereas RCW 4.84.030 allows the superior court to award statutory costs to the prevailing party. *Id.* at 730. The *Ferencak* Court made no distinction between statutory attorney fees or costs, but instead treated fees as a smaller subset of the larger category of costs. *Id.* (affirming “the award of costs in the form of statutory attorney fees”). In reaching its decision, it relied on RCW 51.42.140, as did the *Black* and *Allan* courts, because that statute makes the civil rules applicable to industrial insurance appeals to the superior court. *Ferencak*, 142 Wn. App. at 729-30; *Black*, 131 Wn.2d at 557; *Allan*, 66 Wn. App. at 422-23. Underpinning *Black*, *Ferencak*, and *Allan* is a recognition that the cost provisions apply when the superior court is sitting in an appellate capacity in a workers’ compensation matter.

Cooper does not contest the statutory attorney fee award here. Appellant’s Br. at 16-17. Just as this fee was properly awarded to the Department as the prevailing party under RCW 4.84.010(6), the cost of the deposition transcript was properly awarded to the Department under RCW 4.84.010(7). It is the same statute, and no reasoned basis exists for distinguishing between the two subsections.

VII. CONCLUSION

The trial court properly rejected Cooper's proposed instruction because it was not supported by the evidence. Moreover, he can show no prejudice as the jury would have reached the same result because he did not present evidence that established his industrially-related condition had objectively worsened between the terminal dates. As the prevailing party, the Department was properly awarded the costs of transcribing one deposition. The Department asks this Court to affirm.

RESPECTFULLY SUBMITTED this 8th day of July, 2014.

ROBERT W. FERGUSON
Attorney General



KAYLYNN WHAT
Assistant Attorney General
WSBA No. 43442
Office Id. No. 91022
P.O. Box 40121
7141 Cleanwater Dr. SW
Olympia, WA 98504-0121
(360) 586-7719

No. 45793-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON *cr*

NATHAN COOPER,

Appellant,

v.

DEPARTMENT OF LABOR
AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Mailing to the parties on record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Steve Busick
Busick Hamrick, PLLC
PO Box 1385
Vancouver, WA 98666-1385

DATED this 8th day of July, 2014.

Debora A. Gross
DEBORA A. GROSS
Legal Assistant 3