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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
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No. 46017-3-II

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

COMCAST CABLE CORPORATION

Appellant

v.

CORTNEY R. BLACK

Respondent

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. ARGUMENT.....	1
A. Substantial Evidence Supported The Board Of Industrial Insurance Appeal’s Finding That Respondent Did Not Suffer An Occupational Disease	
1. No objective physical medical evidence was ever presented supporting Respondent having a right shoulder labral tear condition.....	1
2. Even if the Court concludes Respondent has an objective right shoulder labral tear condition, there is no evidence in the record supporting it arising naturally and proximately from his industrial exposure.....	9
III. CONCLUSION.....	13

TABLE OF AUTHORITIES

A. Table of Cases

Dennis v. Department of Labor & Indus.,
44 Wn. App. 423, 722 P.2d 1317 (1986).....2

Favor v. Department of Labor & Indus.,
53 Wn.2d 698, 336 P.2d 382 (1959).....6

Lenk v. Department of Labor & Indus.,
3 Wn. App. 977, 478 P.2d 761 (1970).....2

McCelland v. Rayonier, Inc.,
65 Wn. App. 386, 828 P.2d 1138 (1992).....10

Parr v. Department of Labor & Indus.,
46 Wn.2d 144, 278 P.2d 666 (1955).....12

Romeo v. Department of Labor & Indus.,
19 Wn.2d 289, 142 P.2d 392 (1943).....10

B. Statutes

RCW 51.08.140.....1

I. INTRODUCTION

The Board of Industrial Insurance Appeals (Board) affirmed the Department of Labor and Industries two previous orders that determined Respondent does not have an occupational disease as defined in RCW 51.08.140. The Board came to that conclusion following a live hearing and presentation of all the evidence. In doing so, it correctly decided that the Department established all the facts necessary to determine that Respondent did not sustain an occupational disease. As a result, the Superior Court erred in concluding otherwise.

II. ARGUMENT

A. **Substantial Evidence Supported The Board's Finding That Respondent Did Not Suffer An Occupational Disease.**

1. **No objective physical medical evidence was ever presented supporting Respondent having a right shoulder labral tear condition.**

Respondent's medical case and the Superior Court's decision hinges on Respondent having a condition and that condition being naturally and proximately caused by his work activities. Here, the

claimed condition is a right shoulder labral tear, which is not objectively supported in any of the medical evidence. Under the Industrial Act, it is not enough to prove that a disabling condition occurred after an occupational exposure. There must be proof of a disease or infection causally connected to the employment. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977, 478 P.2d 761 (1970). Claimant bears the burden of proof. *Dennis v. Department of Labor & Indus.*, 44 Wn. App. 423, 722 P.2d 1317 (1986).

Respondent's medical case and the Superior Court's decision rely solely on the testimony of John Hung, MD, an orthopedist of two years, who examined Respondent on two occasions. CP 207, 224. Respondent argues Dr. Hung's administration of a few subjective standard orthopedic tests and his own interpretation of the otherwise "normal" MRI scan arthrogram confirms the presence of a significant labral tear. Resp. Br. Pages 5-7. However, Respondent's arguments fail because of the reasons stated in Industrial Appeal's Judge Craig Stewart's well-reasoned September 19, 2012 Proposed Decision and Order (CP 42-46) and Appellant's Briefs.

Employer's expert, long-time orthopedic surgeon Dr. Colm O'Riordin, who examined Respondent on August 4, 2010, administered the very same standard provocative orthopedic tests as Dr. Hung did. CP 186-190. However, unlike Dr. Hung, Dr. O'Riordin testified they were all negative, i.e., completely normal. CP 189-190.

When Dr. O'Riordin was asked what abnormal objective right shoulder findings he found on his examination, he testified "[t]here were really no objective findings in my examination. He had an objectively normal examination." CP 172. Drs. O'Riordin and Hung both acknowledged reading a report from another orthopedist, Dr. Stewart Kerr, who also examined Respondent and found no objective findings supporting Respondent having a labral tear or any other abnormality of the right shoulder. CP 169, 229-231.

When Dr. O'Riordin was asked under direct examination if there were any objective findings supporting the existence of a labral tear contained in either of Dr. Hung's two chart notes, he replied "no." *Id.* Later, when asked what objective findings he would expect

to see if Respondent indeed had a labral tear, Dr. O’Riordin explained at pages 10-11 of his deposition (CP 172-173)

Well, I would expect to see atrophy of the muscles about the shoulder girdle. I would expect to see a reduced range of motion. I would expect to see difficulty in performing external and internal rotation and abduction of the shoulder, and none of these findings were present in this case.

Under cross-examination, Dr. O’Riordin was asked what symptoms he would expect to see if Respondent had a labral tear, which he stated (CP 184-185)

Usually a labral tear causes catching and a clicking sensation. And, of course, it’s a weakness. Of course there’s atrophy of the muscles above the shoulder girdle because of reduced use.”

Drs. Hung and O’Riordin’s testimonies are bare of any mention of those types of symptoms being present during their examinations of Respondent. CP 171-174, 208-236. In fact, on re-direct examination, Dr. O’Riordin confirmed there was no physical objective evidence supporting the existence of any right shoulder atrophy when he examined Respondent in August 2010. CP 197. More importantly, both Drs. O’Riordin and Hung are in complete agreement that Respondent’s right

shoulder strength and ranges of motion were consistently determined to be normal. CP 171, 208, 233.

Dr. O’Riordin testified that in his opinion and based on all the medical evidence to a degree of reasonable medical certainty that Respondent had not sustained any right shoulder condition proximately caused from work. CP 174.

Respondent’s reliance on Dr. Hung’s administration of standard orthopedic tests to support Respondent having a labral tear are misplaced because those tests are not objective, but instead are purely subjective and standing alone do not empirically support the existence of any specific diagnosis. CP 225. When Dr. Hung was asked under cross-examination if he agreed that the standard provocative orthopedic tests that he and Drs. Kerr and O’Riordin performed are subjective, he testified “[c]ertainly.” *Id.* Statements by Respondent as to purely subjective conditions, peculiar to himself, do not provide objective circumstances necessary to establish that disability or condition arose naturally and proximately from

his employment. *Favor v. Department of Labor & Indus.*, 53 Wn.2d 698, 336 P.2d 382 (1959).

Respondent's brief suggests that Drs. O'Riordin and Kerr did not perform the same orthopedic shoulder examination as Dr. Hung and, therefore, their opinions should be discounted. However, that argument is not supported by the record. On cross-examination, Dr. O'Riordin was asked specifically if, after having read Dr. Hung's medical records, whether he performed the same standard provocative orthopedic tests as Dr. Hung, to which he testified "[y]es, I performed a full shoulder examination." CP 186.

Next, we turn to the imaging studies performed in this case. Dr. Hung initially ordered and interpreted several right shoulder x-rays as being "pretty normal. I saw, you know, regular anatomy, no bony abnormalities. Positions were correct." CP 212. Because he observed no abnormalities on the x-rays that would explain Respondent's subjective complaints, Dr. Hung believed that an MRI scan arthrogram would be the best modality to visualize the labral tear he

assumed Respondent had. CP 213. Dr. Hung explained that “an MRI scan arthrogram allows an injection into the shoulder so the contrast can fill the joint, and then when they do the scan, it will be much easier to visualize any tears.” *Id.*

Here, Dr. Hung chose the radiologist (Dr. Jorge Medina) he desired to perform that MRI scan arthrogram because of Dr. Medina’s 11 years of radiology experience. CP 244-247 and 251. Dr. Medina agreed with Dr. Hung that the MRI scan arthrogram was the best modality to view a labral tear. CP 247-249. However, unlike Dr. Hung, Dr. Medina repeatedly interpreted that MRI scan arthrogram as being “normal.” CP 248-250. When Dr. Medina was explicitly asked to define what “normal” indicated in this case, he testified that means “**[n]o tears of the rotator cuff, no labral tears, [and no] abnormality of the muscle. Essentially, [a] normal examination.**” *Id.* (Emphasis added). Dr. Medina testified unequivocally that there was no objective evidence supporting the existence of a labral tear condition on that MRI scan arthrogram. CP 246, 248-250. More importantly, Dr.

Medina maintained that opinion even after reviewing the MRI scan arthrogram for a second time just prior to his deposition and focusing in on the specific slices/frames Dr. Hung previously had identified during his deposition that showed the significant labral tear. CP 248-250, 254-255.

In further support of Dr. Medina's opinion, orthopedic surgeon Dr. Colm O'Riordin testified after personally evaluating the right shoulder MRI scan arthrogram film at pages 11-12 of his deposition (CP 173-174) that

there was no evidence of a labral tear. The dye that was used in the arthrogram was fully contained within the structure of the shoulder. There was no evidence of any changes in either the labrum or to his shoulder itself or the rotator cuff.

Of further significance, when pressed under cross examination whether the slices/frames he identified on the MRI scan arthrogram as showing the significant labral tear truly demonstrated a tear, Dr. Hung equivocated and testified that, "I'm not sure if I can apply whether it's like a tear like of significant magnitude where if you're looking at it you can definitely say there's a tear." CP 232.

Dr. Hung subsequently acknowledged being the only physician out of four who evaluated the right shoulder MRI scan arthrogram and observed a labral tear condition. CP 229-231.

Therefore, the overwhelming preponderance of medical evidence and opinion clearly establishes the fact that the right shoulder MRI scan arthrogram is entirely normal, i.e., that it demonstrated absolutely no labral tear condition or any other abnormal pathology of any sort, which is fatal to Respondent's case and contrary to the Superior Court's decision because there is no disease based condition as required under the Industrial Act. CP 173-174, 229-231, 249-250.

2. Even if the Court concludes Respondent has an objective right shoulder labral tear condition, there is no evidence in the record supporting it arising naturally and proximately from his industrial exposure

There may be no recovery for occupational disease in absence of substantial evidence that disease or infection arose naturally out of

employment. *Romeo v. Department of Labor & Indus.*, 19 Wn.2d 289, 142 P.2d 392 (1943). To be compensable, a worker must establish that his or her occupational disease came about as a natural consequence or incident of distinctive conditions of the employment; it is an objective, not a subjective, test. *McCelland v. Rayonier, Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992). Respondent's Brief repeatedly stresses Respondent's overhead work activities as being the cause of his alleged right shoulder labral tear condition. However, Respondent's Brief fails to respond to and, in essence, flat out inaccurately summarizes the testimony of Scott Craig, Respondent's supervisor. Resp. Br. 9, 16-17. Specifically, when Respondent stated Mr. Craig agreed with Respondent's sworn testimony describing his work duties. Resp. Br. 16 and CP 140-141. Respondent claims his job requires overhead lifting and pulling at or above the shoulder level. CP 179. Dr. Hung claimed those activities caused his alleged labral tear. CP 219. Mr. Craig was specifically asked if there was any overhead lifting or pulling involved in Respondent's job to which he stated, "I can't think of any overhead lifting that they would be doing.

There is pulling of cable, but that, you know, it's not – they wouldn't be doing it this (gesturing) – over the head.” CP 141.

Respondent inaccurately claimed that he must lift and carry 70-pound rolls of cable long distances. Resp. Br. 9. Mr. Craig rebutted that when he testified that the “techs normally just take it from the back of their truck, set on the ground, turn it sideways, and then roll it to wherever they got to go, just because of the weight, you know.” CP 141. Mr. Craig also disagreed with Respondent's testimony that he carries “ladders and other equipment at the same time.” CP 140. In addition, Mr. Craig also disagreed with Respondent's testimony concerning the weights of much of his equipment. *Id.* Mr. Craig testified that he has firsthand knowledge of Respondent's work duties because he tries to “get out with the guys at least once a week with all my techs.” CP 144. As a result, Respondent's claim that “Mr. Craig, had verified that Mr. Black's description of his daily activities was accurate” is a glaringly inaccurate statement. Resp. Br. 16.

The significance of Respondent's inaccuracies culminates in Dr. Hung being given an erroneous portrayal of Respondent's true

and relevant work duties. CP 218-220. This is especially problematic for Respondent because Dr. Hung specifically points towards Respondent's overhead work activities as the cause of his alleged right shoulder labral tear condition, which his own supervisor's unrebutted testimony fails to establish he ever performed. *Id.* Causal relationship between disease and occupation must be established before disease can be classified as occupational disease. *Parr v. Department of Labor & Indus.*, 46 Wn.2d 144, 278 P.2d 666 (1955).

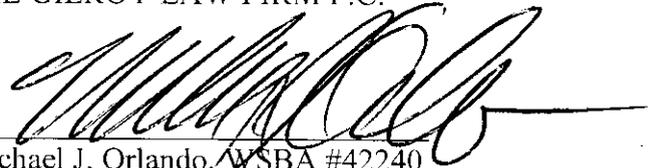
Lastly, Respondent repeatedly claimed that he performed no off the job activities that could have caused or contributed to his right shoulder complaints. CP 115, 180, 219-220. However, under cross-examination, Respondent admitted owning a push mower and using it to mow his half acre lawn until it became too difficult for him. CP 123. Respondent testified that he purchased his new power mower three months after filing this claim, i.e., in September 2010. *Id.* This is a critical fact Respondent chose not to disclose, for whatever reason, to any of the medical providers in this case.

III. CONCLUSION

For the reasons stated within Industrial Appeals Judge Craig Stewart's September 19, 2012 Proposed Decision and Order and Appellant's Briefs, we humbly request this Court reverse Superior Court Judge Vicki Hogan's decision because it is not supported by substantial evidence and that Court's conclusions of law do not flow from the findings.

DATED this 17th day of November, 2014.

THE GILROY LAW FIRM P.C.

A handwritten signature in black ink, appearing to read 'M. Orlando', written over a horizontal line.

Michael J. Orlando, WSBA #42240
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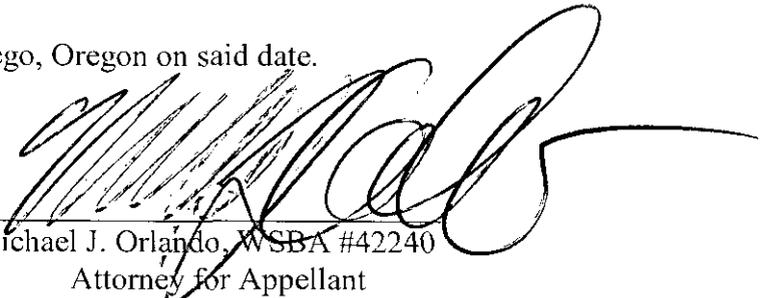
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