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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 31333-6

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

**DIANA LELAND,
Appellant**

v.

**JR SIMPLOT, CO.,
Respondent/Cross-Appellant**

AND

**DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.**

APPELLANT'S BRIEF

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COMES NOW, the Appellant, Diana Leland, by and through her attorneys of record, Calbom & Schwab, P.S.C., per Randy Fair, and files this brief.

I. ASSIGNMENTS OF ERROR

The Appellant, Diana Leland, seeks review of the Judgment entered November 13, 2012, and the Findings of Fact, Conclusions of Law also entered November 13, 2012 by the Grant County Superior Court. The trial court erred in three respects. It erred when: (1) such court refused to find that the Appellant's Pain Disorder was caused, at least in part, by the claimant's industrial injury; (2) the trial court refused to find that the Appellant was a totally and permanently disabled worker as of August 12, 2008; and, (3) when the trial court, despite finding the claimant was totally disabled, and unable to work, remanded the matter back to the Department of Labor and Industries because the allegedly unrelated, and uncovered condition of Pain Disorder 'may' respond to further treatment – therefore, further treatment was ordered.

The Grant County Superior Court should have ruled that the *Pain Disorder was caused, at least in part, by the industrial injury.*

But even if such Pain Disorder was not caused by the industrial injury, the Grant County Superior Court should also have ruled that such Pain Disorder, in combination with the Appellant's back injury, totally and permanently disabled her. At that point, the Appellant should have been granted pension benefits for being permanently disabled. The matter should not have been remanded back to the Department of Labor and Industries for treatment of an allegedly unrelated condition if all conditions caused by the industrial injury were at maximum medical improvement (which means, at a fixed and stable condition), and the Appellant was disabled at that time.

Instead, the Grant County Superior Court, in its November 13, 2012 judgment, did find a period of total disability up to the time the claim closed, and remanded the matter back to the Department of Labor and Industries for treatment of Pain Disorder because such condition 'may' respond to treatment.

II. STATEMENT OF THE CASE

The Appellant, Diana Leland, by way of an appeal to the Grant County Superior Court, sought review of a Proposed Decision and Order issued by the Board of Industrial Insurance

Appeals dated October 30, 2009. [Appellant had tried to have that decision reviewed by the 3 judge Board of Industrial Insurance panel, but that Petition was denied by order on January 22, 2010].

The Appellant, by way of his appeal to the Board of Industrial Insurance Appeals, sought review of an August 12, 2008 order from the Department of Labor and Industries that closed Appellant's case, and granted her no permanent disability benefits, either partial disability or total disability, and stopped her time loss benefits as of March 26, 2008.

At Grant County Superior Court, the judge acknowledged that the Appellant had a pre-existing condition of "Pain Disorder" that was asymptomatic at the time that she suffered her industrial injury. The Superior Court went on to rule that such Pain Disorder was not aggravated or worsened by the industrial injury. The Superior Court also ruled that the Pain Disorder, in combination with the Appellant's industrial injury to her back, was disabling, and the claimant was therefore entitled to time loss from March 26, 2008 until the closing order of August 12, 2008. ['Time loss' benefits are monetary benefits meant to replace wages lost due to the injury].

The Grant County Superior Court further ruled that the physical injury suffered by the Appellant was at maximum medical improvement, and fixed and stable as of August 12, 2008. However, the court also ruled that the pain and disability to the claimant, as of August 12, 2008, continue to be experienced by claimant. Instead of making a finding that the claimant was permanently and totally disabled (as her back injury had stabilized), the Grant County Superior Court found that the matter should be remanded back to the Department of Labor and Industries as the claimant 'may' respond to further psychological treatment. The court found that the claimant was therefore entitled to further medical treatment under RCW 51.36.010, even though the Pain Disorder condition was not found to be related to the industrial injury.

III. SUMMARY OF ARGUMENT

The Appellant's argument is clear at this point, and can be summed up in a few parts:

First of all, the evidence is clear that physically the appellant was disabled. The attending providers, Dr. Bunch and John Betz, state she was physically disabled and not able to work because of

her physical injuries, this was supported by the longtime physical therapist Randy Bruce, who treated appellant with therapy and performed a Physical Capacities Evaluation that showed she could not return to full time gainful employment.

Secondly, Pain Disorder suffered by the claimant was very much worsened, aggravated, or 'lit up', or at least partially caused by the industrial injury. It should be deemed part of the Labor and Industries claim, and included as part of the claim, entitling the claimant to coverage.

Thirdly, the law regarding Labor and Industries claims, and this is long held law, takes the claimant as it finds such claimant, with all pre-existing infirmities, illnesses, injuries, etc. Therefore, even if such Pain Disorder pre-existed the injury, and was not caused or 'lit up' or worsened by the industrial injury, it should have been considered in combination with the *industrial injury* in the entire 'disability picture' of the Appellant. The Pain Disorder, if pre-existing per the findings of the Grant County Superior Court, has helped further disable the Appellant when combined with the effects of the industrial injury. The Superior Court ruled that the appellant was disabled from all full-time, gainful employment from March 26,

2008 up to the date of the August 12, 2008 closing order. The Superior Court further found, specifically, that the reason for such total disability was the combination of the industrial injury and the pre-existing Pain Disorder. In fact, the Superior Court went on to find that the pain and disability were continuing as of the date of the closing order, and that the industrial injury was not going to be medically improving (healing) any further.

The Grant County Superior Court went on to award legal fees and costs to the Appellant, pursuant to RCW 51.52.102, RCW 51.52.130, and RCW 51.52.132.

A. FACTS.

This matter involves Appellant's claim for industrial insurance (Labor and Industries) benefits for total and permanent disability. (CP 1479-1485).

The Appellant was born on April 23, 1957. (CP 386) She did not complete the 10th grade. (CP 386) She was 47 years old when injured, 51 years old when her claim closed, 54 years old when the matter was tried at Grant County Superior Court, and is now almost 56 years old. (CP 386, 1479-1485) As a high school dropout, Ms. Leland worked from 1974, age 17, up until the

industrial injury in this matter in 2005. (CP 388) She did take breaks from employment to have children. (CP 388).

She worked two jobs most of her life. (CP 388) She has worked at in-home care, as a waitress, bartender, and also a janitor at J.R. Simplot, hereafter 'Respondent'. (CP 388-391).

While employed by Respondent, she worked 44 hours per week, working four (4) different eight (8) hour shifts, plus one twelve (12) hour shift each week. (CP 392) She also had a second job at that time, providing in-home care. (CP 393) Considering both jobs combined, she was working in excess of sixty (60) hours per week. (CP 736) However, while working for Respondent, Appellant was working as a janitor, responsible for keeping two buildings clean. (CP 395) She swept, mopped, cleaned bathrooms, took out trash, etc. (CP 394-395).

In the ten-to-twenty (10-20) years leading up to the Appellant's industrial injury in this matter, she was in good health. (CP 396).

Appellant was hurt while working on January 7, 2005, the date of her industrial injury. (CP 397, 1481) She was carrying two garbage bags, slipped on snow and ice trying to carry them to a

dumpster, and fell on her buttocks, and again on her right knee and hip when she tried to get up. (CP 1481) She rolled to her stomach to pull herself up. (CP 399).

Appellant had a pre-existing condition of Pain Disorder, which was asymptomatic at that time, and not causing her trouble. (CP 1481).

After the industrial injury, Appellant was in terrible pain, had extreme difficulty getting up the next day, and was unable to work the next day. (CP 400-404).

Appellant did file a claim for Labor and Industries benefits, was paid time loss (wage replacement benefits), and was also provided medical treatment. (CP 1480, 404).

Appellant, about one year after the injury, was offered a light duty position by Respondent, but simply couldn't do the job due to her injury. (CP 412) Appellant was in pain while working light duty and could not continue. (CP 413).

Appellant did try water therapy and physical therapy after her injury in an attempt to rehabilitate herself. (CP 414-415).

Since the injury, Appellant's range of motion has decreased, she has stiffness in the morning and evening, she can't twist or she

has sharp pains, her strength has decreased, and states "Even lifting like a casserole pan, I start shaking." (CP 417).

Appellant testified, less than a year after her claim closed, that she cannot mop a floor, cannot sweep a floor, scrub the floors, or drive for more than five or ten minutes. (CP 419) She estimated she could stand for maybe ten or fifteen minutes. (CP 420).

Appellant has been treated by Dr. Richard Bunch and Physician's Assistant John Betz since 1974. (CP 423) They also treated her for her industrial injury. (CP 422-423).

Mr. Betz and Dr. Bunch, have been working together for forty (40) years. (CP 440) Mr. Betz treated Appellant a few weeks after the industrial injury, in February 2005, for the industrial injury (back injury at that point). (CP 444-445) In May of 2005, Appellant reported to Mr. Betz that she had pain and burning radiating down into both legs and feet. (CP 446).

In the months following the injury, Appellant had objective abnormalities showing up on an MRI. (CP 446-447) Mr. Betz attributes such abnormalities, on a more probable than not basis, to the industrial injury. (CP 447).

Mr. Betz reports that the complaints over the next few years, as relayed by the Appellant, were consistent about her pain and suffering to her back. (CP 447) The complaints from Appellant, in the years following the injury, were consistently about back pain. (CP 449) Mr. Betz also palpated, or pushed upon, a certain area in the Appellant's lower back, and the response of the Appellant was consistent when he was doing so. (CP 460) Mr. Betz also stated, "Every time we sent her back to work, the pain got worse". (CP 447) The complaints in the back area appeared to be consistently at the L4-L5 area. (CP 449-450) Per Mr. Betz, The complaints of Ms. Leland were consistent with someone who has problems in the L4-L5 area of their back --- and PAC Mr. Betz has been working with people with back problems for forty (40) years. (CP 450) Mr. Betz stated that the industrial injury caused problems, on a more probable than not basis, upon a nerve root of the Appellant's. (CP 453-454).

On a "more probable than not" basis, Mr. Betz (again, who is a Physician's Assistant) took the Appellant off work on February 7, 2006. (CP 462).

Mr. Betz stated that Appellant could not have worked from March 26, 2008 up to the date the claim closed on August 12, 2008. (CP 475) Mr. Betz also stated that Appellant would be disabled from work on a full time basis as of the time her claim closed on August 12, 2008. (CP 476).

Dr. Richard Bunch, also an Attending Physician, also testified in this matter. (CP 498) Dr. Bunch has been practicing medicine for forty-seven (47) years, and works closely with Mr. Betz. (CP 499-500) He approves of the treatment Mr. Betz provides, and he has supervised him for forty (40) years. (CP 500) Dr. Bunch states Mr. Betz does good work and that he trusts his judgment. (CP 500) Dr. Bunch has discussed Appellant's back injury matter with Mr. Betz on a 'variety of occasions' over the years. (CP 501) Dr. Bunch states that Appellant had 'pretty much run the full gamut of conservative treatment' for her industrial injury. (CP 501-502) Appellant had chiropractic treatment, physical therapy, injections, etc. to treat her industrial injury. (CP 502).

Dr. Bunch, on a 'more probable than not' basis, believes that the problems Appellant was having in her low back were due to the industrial injury, and the problems were due to impingement of a

nerve root in the L4-L5 area. (CP 504) Due to her industrial injury, Dr. Bunch asserted that Appellant was disabled from full time gainful employment from March 26, 2008 up until the claim closed on August 12, 2008. (CP 506-507) Dr. Bunch also asserted that claimant was disabled from full-time work on a permanent basis as of the time the claim closed on August 12, 2008. (CP 506).

Randy Bruce is a Physical Therapist that evaluated Appellant and performed a Physical Capacities Evaluation upon her. His Physical Capacities Evaluation was circulated to Dr. Richard Bunch and Physician's Assistant John Betz. (CP 643-645) He has been a physical therapist for twenty-five (25) years. (CP 645) He has performed 400-500 Physical Capacities Evaluations. (CP 645) Randy Bruce also treated Appellant for over twenty sessions of Physical Therapy. (CP 647) Mr. Bruce treated and saw Ms. Leland off and on in 2005, 2006, and 2007. (CP 645-652) Mr. Bruce was asked to perform a Physical Capacities Evaluation by the Employer's Vocational Consultant (Robert Crouch asked on behalf of Respondent) in June of 2007. (CP 654, 664) Mr. Bruce felt that Appellant was cooperative and gave honest effort with him through the evaluation. (CP 655).

After conducting his Physical Capacities Evaluation upon Appellant, Randy Bruce concluded that she could not work more than five hours per day at less than a 'light' level. (CP 652) In other words, she was not qualified to return to full-time, gainful employment and disabled from full time employment. In Mr. Bruce's opinion, Appellant was in a 'tremendous amount of pain' (CP 662).

Dr. Gilbert is a clinical psychologist, and the only one who treated Appellant for mental health purposes. (CP 810) He does have a Doctorate in Psychology. (CP 814) Over the years, he states he has seen several hundred patients with 'Pain Disorder'. (CP 812) He has worked with a number of patients with chronic pain. (CP 812).

Dr. Gilbert treated Appellant, and also performed a psychological evaluation upon her. (CP 816) He was treating her in 2006, which was relatively soon after her injury. (CP 820-822) Dr. Gilbert, in his evaluation, diagnosed Appellant with 'Pain Disorder' associated with psychological factors and a general medical condition. (CP 830-831) The diagnosis of Pain Disorder, for Dr. Gilbert, was not a difficult one to make. (CP 832) The

'medical condition' that was associated with Appellant was the lumbar problem. (CP 833).

Dr. Gilbert explained quite a bit about Pain Disorder that was not covered by any other mental health witnesses. (CP 833) He stated that Pain Disorder "involves the patient's approach to dealing with their pain and psychological factors that can affect their response to pain symptoms." (CP 833) The effect of Pain Disorder, is to increase the patient's focus on pain, the perception on pain. (CP 833-834) According to Dr. Gilbert, Pain Disorder does require a painful event in life, and Appellant's complaints stem from the injury Appellant had at work [the industrial injury]. (CP 834-835).

Dr. Gilbert stated that the Pain Disorder suffered by Appellant is at least partially related to the industrial injury in this matter. (CP 836) Dr. Gilbert did have six treatment sessions with Appellant for Pain Disorder, was a treating provider, and did state Appellant was cooperative with the treatment. (CP 835-837) Dr. Gilbert couldn't state, after the six (6) treatment sessions, if Appellant was at maximum medical improvement from such Pain

Disorder, although he did believe she improved with some treatment. (CP 837).

Dr. Friedman testified by deposition in this matter for the Respondent. (CP 1047-1089). He is a mental health specialist. (CP 1047-1052). He did not examine the claimant while the claim was open, but did examine the claimant after the claim was closed, on May 2, 2009. (CP 1051) He diagnosed the claimant with Major Depressive Disorder, and also diagnosed her with Pain Disorder. (CP 1058) Dr. Friedman also diagnosed her, on the "Axis III" diagnosis as having 'chronic pain'. (CP 1058).

Dr. Friedman expressed that the Appellant's chronic pain (the Axis III diagnosis) may be influencing the Axis I diagnosis – (which were Major Depression and Pain Disorder). (CP 1063) Dr. Friedman didn't feel her mental health diagnosis was related to the industrial injury of 2005 (despite the fact she was treated for Pain Disorder in 2006), but he did feel that her condition 'would happen regardless of whether she slipped on ice in '05 or not.' (CP 1066) Dr. Friedman did acknowledge – metaphorically – that this injury was the final 'flake' on a branch – but he felt the Pain Disorder (which he likened to a continual weakening of a branch) was going

to develop with or without the injury – therefore, he did not believe the injury caused the Pain Disorder because apparently something was going to cause this Pain Disorder – as it would have happened anyway. (CP 1067) He also admitted that the injury she suffered, from a Pain Disorder standpoint, was something for her to ‘focus on’. (CP 1068).

Dr. Friedman felt, from a psychological standpoint, that the Appellant was fixed and stable (needing no more treatment). (CP 1069).

Dr. Friedman stated that Appellant’s Pain Disorder, and Major Depression, have arisen since her industrial injury and not before such injury (greatly contradicting Dr. Gilbert). (CP 1072) He also stated that Appellant had reported a lot of pain since the injury, and that he believed her in her pain. (CP 1072).

Dr. Friedman reversed himself a bit, and was asked that if the injury itself (the fall), and the subsequent pain, were ‘at least a part of the cause for the depressive disorder and the pain disorder?’ and responded “They are a factor. I am not sure how much of a cause they are.” (CP 1073) Dr. Friedman also acknowledged that the fall (and subsequent pain) was a ‘lesser

factor' of the Pain Disorder. (CP 1075) Again, Dr. Friedman was called as a witness by the Respondent.

Dr. Friedman admitted again that the origination of the Pain Disorder was 'multifactorial' – and that the injury here was one of the factors. (CP 1076-1077).

Vocational Specialist Fred Cutler also testified he found, that with the limitations suffered by the Appellant, as stated by Randy Bruce and other experts, that the claimant was totally disabled as she could not return to full-time, gainful employment. (CP 763-767).

B. POST TRIAL COMMUNICATIONS AND LETTER RULINGS FROM JUDGE.

After the trial, judge issued a few letter rulings, or near rulings, and asked for further briefing. (CP 1316-1317) At first, the judge was unsure of the 'eggshell' skull rule, or the doctrines regarding lighting up asymptomatic conditions (specifically, the 'Pain Disorder'). This brought a round of briefs from both counsel.

The judge then issued a second letter asking for assistance and briefing on June 26, 2012 stating what he felt to be the theory

and decision. (CP 1364-1366) The judge essentially stated, that the claimant had a fall at work, the physical fall resolved, yet she suffered from an unrelated psychological condition, and the combination of that Pain Disorder and the injury disabled her. The reason is that the Pain Disorder caused the claimant to perceive and experience greater pain than a person without such Pain Disorder would suffer. (CP 1364-1365).

Another round of briefs was solicited by the court, and the final 'letter' ruling was issued on July 27, 2012. The judge ruled "Defendant must take the worker as it finds her; in this case, a worker who, by virtue of an existing psychological disorder, could experience disability from a physical injury otherwise unsupportable by the objective findings. (CP 1384) My conclusion is that this is precisely what the evidence establishes. (CP 1384).

C. ENTRY OF FINDINGS OF FACT / CONCLUSIONS OF LAW, AND JUDGMENT.

Findings of Fact and Conclusions of Law were proposed by the Appellant based upon the letter rulings, and they were not adopted by the court. (CP 1422-1449) *The eventual and signed*

Findings of Fact were then entered, and the judge did not in fact follow what he stated 'precisely what the evidence establishes'. As you can see from the Findings of Fact and Conclusions of Law ultimately adopted, the judge inserted a 'provision' that even though Appellant was disabled at time of claim closure, and up to that time, the matter should be remanded for further treatment of an uncovered condition (the Pain Disorder). (CP 1479-1483) Appellant then moved forward with this appeal.

IV. ARGUMENT

RCW 51.04.010, the declaration of police power regarding Labor and Industries, states: "The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker."

According to the court in *Department of Labor and Industries v. Shirley*, 171 Wash.App. 870 (Wash.App. Div. 1, 2012), "The Industrial Insurance Act, chapter 51.32 RCW, is a time-loss compensation scheme for workers who suffer industrial (work-related) injuries. The Act is a compromise between employers and their workers." *Id.* The overarching theme of the Act is that, "in

exchange for limited liability, the employer pays on some claims that have no common law liability." *Id.* As for the worker, "in exchange for a lower rate of recovery than he or she could have received in a civil action, the worker is assured of a remedy without having to fight for it." *Id.*

Additionally, one of the most important things to remember about the Act is that the scheme is no fault: "Workers and their dependents are guaranteed 'sure and certain relief' regardless of questions of fault." *Id.* Thus, the Act "is remedial in nature and is to be liberally interpreted in favor of injured workers, in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with all doubts resolved in favor of the worker." *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, (1987).

1. THE OPINIONS OF DR. RICHARD BUNCH, DR. GILBERT, AND PHYSICIAN'S ASSISTANT JOHN BETZ MUST BE GIVEN SPECIAL CONSIDERATION BECAUSE THEY WERE APPELLANT'S TREATING PROVIDERS.

When there are differing opinions from multiple medical experts in workers compensation cases, “the court must give special consideration to the opinion of the attending physician.” *Hamilton v. Department of Labor & Indus.*, 111 Wash.2d 569, 571 (1988). According to the court in *Poindexter v. Department of Labor and Industries*, 138 Wash.App. 1055, (Wash.App. Div. 2, 2007), special consideration is due an attending physician because “an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case.”

Here, the court must give special consideration to the opinions of Dr. Richard Bunch and Physician's Assistant John Betz because they were Appellant's treating providers, and have been so since the 1970's. Likewise, the court must give special consideration to Dr. Gilbert's diagnosis of Pain Disorder and his opinion that the Pain Disorder was at least somewhat related to the industrial injury that is the subject of this appeal. Likewise, Physical Therapist Randy Bruce treated Diana Leland several times, and performed a Physical Capacities Evaluation and also found her disabled. It should be noted that all four of them give opinions that highly support a disability award on behalf of Appellant.

2. APPELLANT IS TOTALLY DISABLED FROM THE BACK INJURY PER THE ATTENDING PROVIDERS, AND SHOULD BE GRANTED TOTAL DISABILITY STATUS REGARDLESS OF ANY EFFECT OF PAIN DISORDER.

According to the Grant County Superior Court and the Findings of Fact and Conclusions of Law, the Appellant was totally disabled in the time just prior to the closing order being issued, and also at the time it was issued. The ruling also stated that the Appellant's industrial injury, the back injury, had reached a 'fixed and stable' status, and was not going to improve with treatment. There is no finding by the court that the Appellant wasn't disabled from strictly her physical injury. In fact, the evidence is very strong that Appellant – from strictly a physical standpoint, was disabled due to her back injury. This was well-supported by Attending Physician Dr. Bunch, Physician's Assistant John Betz, and a pseudo-attending provider Randy Bruce (Physical Therapist) **[note: we argue pseudo-attending provider as he provided physical therapy services for the claimant]**. Again, Dr. Bunch was asked very pointedly if the Appellant was disabled on a full time basis as

of the date of claim closure and he stated that she was. John Betz was asked the exact same question and he also stated that the Appellant was disabled. Both of them had objective findings to support their decision. Then, after performing a two-day physical evaluation of Appellant at the request of the Respondent's Vocational Counselor, Randy Bruce also stated that Appellant was disabled from full-time employment.

3. APPELLANT'S PAIN DISORDER MUST BE CONSIDERED RELATED TO THE INDUSTRIAL INJURY BECAUSE THE WASHINGTON SUPREME COURT HAS RULED THAT A CONDITION, PREEXISTING A WORK INJURY, IS INCLUDED AND COMPENSIBLE IN THE WORKER'S CLAIM IF THE WORK INJURY WORSENEO OR AGGRAVATED SUCH CONDITION AND CONTRIBUTED TO TOTAL DISABILITY.

The Appellant worked full time (usually more than forty [40] hours per week) during her entire life up to the time of this injury. She had Pain Disorder during this time, accumulated through life, and was able to perform full-time gainful employment. The Appellant, up to the industrial injury, was

therefore clearly not disabled from full time gainful employment due to any pre-existing Pain Disorder. Thus, any injury activating such condition is compensable as shown below.

Appellant, as we have shown by both the testimony of Dr. Gilbert and Dr. Freidman, then had a very painful event (the industrial injury), and that painful event caused, lit up, or worsened her Pain Disorder, and the effects of such Pain Disorder. That in combination with the physical problems caused, have disabled the Appellant.

Under the scenario just mentioned, the law is well settled that the Appellant is disabled and entitled to coverage under the Industrial Insurance Act. The coverage is so broad, and the statute is so geared towards providing coverage, that if, in fact, the Appellant's physical difficulties resolved without residual effects, and the results of such aggravated pain disorder were the only disabling component, then she is still disabled and covered by the Industrial Insurance Act (RCW 51).

So, in effect, if the Pain Disorder was 'lit up' or 'aggravated' or 'worsened' by the industrial injury, then such condition is covered by the Industrial Insurance Act.

This has long been the law, as stated by the Washington Supreme Court in **Miller vs. Department of Labor and Industries**, 200 Wash 674, (1939).

We have held in an unbroken line of decisions that if 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 attributed to the injury, and not to the preexisting condition.

If this is true with respect to a weakened physical condition resulting from disease, it must likewise be true with respect to a similar infirmity resulting from structural weakness of the body. As we have many times stated, the provisions of the workmen's compensation act are not limited in their benefits to such persons only as approximate physical perfection, for few, if any, workmen are completely free from latent infirmities originating either in disease or in some congenital abnormality. It is a fundamental principle 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 principle 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.

Applying this principle to the instant case, we are of the opinion that the accident or injury was the proximate cause of the appellant's ultimate disability and that his prior congenital weakness was but a condition upon which the injury became operative." *Id.*

Here, the self-insured employer has pointed and directed the court – to the definition of 'proximate cause', as if to state that if the industrial injury was not the cause of the Pain Disorder, then the industrial injury should not include any effects of the Pain Disorder. Such a statement is false and strips Appellant of her statutory rights under the Act.

4. THE APPELLANT IS TOTALLY AND PERMANENTLY DISABLED CONSIDERING BOTH HER PHYSICAL INJURY AND HER PAIN DISORDER.

In the judge's opinion, that physical injury, combined with the Pain Disorder, disabled the Appellant.

In the case of *Wendt vs. DLI*, 18 Wa.App. 674 (1977), the worker had pre-existing conditions, some of which were affected by the industrial injury, and some that were not. Stock Jury Instructions were given to reflect pre-existing injuries that didn't

exactly pertain to worker's rights under RCW 51. The Court, in finding for the worker, stated:

We do think, however, that Wendt was entitled to an appropriate instruction on the theory he may have been attempting to present his proposed instructions . . . that his total permanent disability is compensable as such even though it results from the combined effects of his industrial injury (lighted-up arthritis) and other, completely unrelated disabling conditions. (citations omitted) In actuality, the 'multiple proximate cause' theory is but another way of stating the fundamental principle that, for disability assessment purposes, a workman is to be taken as he is, with all his preexisting frailties and bodily infirmities. (citations omitted) If, in fact, an industrial injury is a proximate cause of disability, it matters not that such an injury would not have disabled another workman in the same degree because the latter previously enjoyed perfect health." (Emphasis added). *Id.*

As is demonstrated by the *Wendt* decision, the courts have explicitly construed the Industrial Insurance Act to guard the rights of disabled workers attempting to work, who are then impacted by the effects of their work-related injury --- even if the effects are considerably different than the effects suffered by an ordinary worker.

Because the judge found the Appellant disabled, and the industrial injury at a 'fixed and stable' status --- the Appellant is a totally and permanently disabled worker, entitled to total disability benefits, regardless of the combination of injuries or how those injuries or pre-existing conditions interact with one another. This is true as long as the fact finder determines that the industrial injury was a proximate cause (and not the sole proximate cause) of the Appellant's current condition.

Under the Act, an industrial injury only has to be a cause, not the only cause, of the claimant's current condition for claimant to be entitled to benefits. *City of Bremerton v. Shreeve*, 777 P.2d 568 (1989). The court in that case held that the trial court did not err in giving an instruction adapted from WPI 155.06 that set forth a "multiple proximate cause theory" in an occupational disease case; the law does not require that the industrial injury be the sole proximate cause of the alleged condition or disability for which benefits are sought. This is a very important concept to understand as a claimant might have several different ailments that contribute to her status as totally disabled, yet only one of those several ailments have to be proximately caused by the industrial injury for

the claimant to be entirely covered under the Industrial Insurance scheme.

Furthermore, under Washington's industrial insurance scheme, not only is the worker's industrial injury considered in determining the level of the worker's disability, but the worker's overall health, combined with the industrial injury, must be considered as well. This concept is what has come to be known as "combined effects" analysis.

The *Wendt* court elaborated on this analysis and stated that "a worker's total permanent disability is compensable as such even though it results from the combined effects of his industrial injury and other, completely unrelated disabling conditions." *Wendt* at 674. The worker in that case had arthritis, which was not caused by the industrial injury, but clearly contributed to the worker's total disability. The court in *Wendt* stated that the real reason combined effects are considered is the overarching policy in Washington that "for disability assessment purposes, a workman is to be taken as he is, with all his preexisting frailties and bodily infirmities." *Id.* The court went on to state the general principle that "if an industrial injury is a proximate cause of a disability, it matters not that such an

injury would not have disabled another workman in the same degree because the latter previously enjoyed perfect health.”

Here, the employer was required to take Appellant, Diana Leland, as it found her, including but not limited to her existing pain disorder, whether latent or not, as this was a “preexisting frailty and bodily infirmity.” Applying *Wendt* to Appellant’s situation, it does not matter that Appellant’s slip and fall “may not have disabled another workman in the same degree because the latter previously enjoyed perfect health.” The employer hired Appellant when she had a latent pain disorder and, under our Industrial Insurance scheme, this “infirmity” must be considered when determining Ms. Leland’s level of disability.

5. THERE IS NO PROOF THAT APPELLANT’S PAIN DISORDER NEEDS FURTHER TREATMENT OR WOULD BENEFIT FROM FURTHER TREATMENT.

The Superior Court judge also found that “the pain and disability proximately caused by said injury because of her psychological disorder had not reached maximum medical/psychological improvement and that Ms. Leland “may

respond to further psychological treatment." Conclusions of Law NO. 4. (emphasis added). Because of this finding, the judge stated that Ms. Leland "was entitled to further medical treatment as contemplated by RCW 51.36.010." *Id.*

While no doubt well-intentioned, the judge has misapplied RCW 51.36.010 in this case. RCW 51.36.010(2)(a) states that:

(2)(a) Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice, if conveniently located, except as provided in (b) of this subsection, and proper and necessary hospital care and services during the period of his or her disability from such injury. (emphasis added).

While chapter 51 RCW does not define "proper and necessary health care services," WAC 296-20-01002 states that proper and necessary health services are those health care services that are:

(a) Reflective of accepted standards of good practice, within the scope of practice of the provider's license or certification;

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

(c) Not delivered primarily for the convenience of the claimant, the claimant's attending doctor, or any other provider; and

(d) Provided at the least cost and in the least intensive setting of care consistent with the other provisions of this definition.

[t]he department or self-insurer stops payment for health care services once a worker reaches a state of maximum medical improvement. Maximum medical improvement occurs when no fundamental or marked change in an accepted condition can be expected, with or without treatment. Maximum medical improvement may be present though there may be fluctuations in levels of pain and function. A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with passage of time. Once a worker's condition has reached maximum medical improvement, treatment that

results only in temporary or transient changes is not proper and necessary. 'Maximum medical improvement' is equivalent to 'fixed and stable.'

The Court in *Miller*, 200 Wash. at 680, held that "a condition is fixed unless it can be improved or rectified through treatment." Thus, taking the *Miller* Court's holding and the statute together, a judge must determine that further treatment is proper and necessary and that the condition can be improved or rectified through treatment.

Here, there was no proof that shows which section of the code provision, if any, the judge was referring to. There are also no facts in this record that show how Appellant's condition could be improved or rectified through treatment. Neither mental health expert provided any such testimony.

The Superior Court's decision is flawed. First, the Pain Disorder is not an "accepted condition" as set out in section (b) of the statute. Because the judge found the Pain Disorder to be a latent, asymptomatic condition not caused by the industrial injury, it would be improper for the judge to remand for further treatment on the unrelated condition. Second, all medical testimony, both from

the claimant and the employer, stated that she was at maximum medical improvement or, in the case of Dr. Gilbert – that he couldn't tell (back in 2006 when he saw Appellant if more treatment was needed). The judge's decision goes against the medical evidence presented as well as every expert medical opinion offered in this case.

Third, and perhaps the most peculiar thing about the judge's finding, is that his decision disregards the entire concept of "proper and necessary" health services under the statute. A claimant has to prove, on a more probable than not basis, that future medical treatment is necessary in order to be entitled to further medical treatment.

Here, the judge merely states that the claimant 'may' respond to further medical treatment. If "may respond to further medical treatment" is not enough to entitle a claimant to medical treatment, it is certainly not enough when the medical experts on both sides do not assert that further treatment will improve or rectify Appellant's condition. Upholding the judge's decision here would set entirely new precedent where a judge, contrary to the opinions of all medical experts and the opinions of both the claimant and

employer, could decide on his or her own that the claimant needs more treatment, based purely on a personal hunch or belief, and prevent the workers compensation process from moving towards fruition. If you then include the Washington Administrative Code's language that "a worker's condition may have reached maximum medical improvement even though it might be expected to improve or deteriorate with passage of time," and the *Miller* Court's holding that a condition is fixed unless it can be improved or rectified through treatment, it is very hard indeed to think of a situation where the judge's decision would be proper and in conformity with the scheme as laid out by RCW 51. There was simply no testimony from the mental health experts that showed that the Pain Disorder would be improved or rectified with treatment.

6. THE APPELLANT SHOULD BE AWARDED LEGAL FEES IN THIS MATTER FOR ALL LEGAL WORK INCURRED ON THIS APPEAL.

The Appellant is entitled to legal fees and costs for asserting her worker's compensation rights pursuant to RCW 51.52.130. A worker is entitled to attorney fees where a court sustains his right to

relief in an employer's appeal. *Young v. Department of Labor and Industries*, 913 P.2d 402 (Wash App Div. 3, 1996). Appellant hereby asserts his rights to such legal fees and costs.

V. CONCLUSION

Appellant requests that the court 1) hold that she is permanently and totally disabled regardless of whether her Pain Disorder is related to her disability; 2) hold that her pain disorder is related to her disability; 3) hold that she is permanently and totally disabled considering both the pain disorder and her industrial injury; 4) hold that the judge erred in concluding that further treatment was necessary when there was no evidence supporting that further treatment would improve or rectify Appellant's Pain Disorder; and 5) hold that she is entitled to legal fees.

RESPECTFULLY SUBMITTED this 26 day of March, 2013.

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By: 

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CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the date entered below, I mailed the Brief of Appellant Diana Leland to counsel for all parties of record. I certify that I caused to be mailed or delivered on the 26th day of March, 2013, the following document(s):

APPELANT'S BRIEF

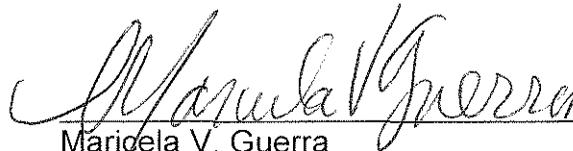
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