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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No.: 313336

WASHINGTON COURT OF APPEALS, DIVISION III

DIANA K. LELAND,

Petitioner/Appellant,

v.

JR SIMPLOT,

Respondent/Cross-Appellant.

RESPONDENT'S/CROSS-APPELLANT'S BRIEF

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STATUTES

RCW 51.08.14013
RCW 51.52.11513
RCW 51.52.14019

**I. ISSUES PERTAINING TO CROSS
ASSIGNMENT OF ERROR**

Respondent/cross appellant requests reversal of the Grant County Superior Court decision entitling appellant to further medical treatment for a psychological disorder not proximately caused by the industrial injury. The trial court applied an incorrect legal standard in awarding further treatment of the psychological disorder.

II. STATEMENT OF THE CASE

Diana Leland (“appellant”) sustained an industrial injury on January 7, 2005. She was carrying two garbage bags through the door when she slipped on ice, landing on her hip and knee. CP 398. After finishing her shift the next day, she sought treatment at the Moses Lake Walk-In Clinic with complaints of hip, knee, and back pain. Since the injury, appellant has undergone a course of physical therapy and regular office visits for her back pain and has not sought employment. After the claim closed in August 2008, and unrelated to her claim, she underwent a lumbar decompression surgery in January 2009. There has been no request to allow this surgery as part of her claim.

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A. Procedural Posture

Appellant appealed the Department of Labor and Industries order dated August 12, 2008 that closed the claim, awarded no permanent partial disability, and ended time-loss compensation as paid to March 28, 2008. Appellant raised issues of a psychiatric condition, entitlement to time loss, and loss of earning power from March 27, 2008 through August 12, 2008, permanent and totally disabled from the injury, and in the alternative, contended entitlement to further treatment and/or increased permanent partial disability.

Industrial Appeals Judge Steven R. Yeager presided over the hearing. Richard Bunch, MD, John Betz, PA-C, Fred Cutler, VRC, and Randy Bruce, VRC testified on behalf of appellant. June 4, 2009 CP 381-542; May 29, 2009 CP 722-800; May 26, 2009 CP 640-721. Appellant also testified on her own behalf. June 4, 2009 CP 381-542. Respondent rested its case on the testimony of Royce Van Gerpen, MD, John Gilbert, PhD, Robert Crouch, VRC, Michael Barnard, MD, Craig Bock, MA, VRC, Michael Friedman, MD, Herbert Gamber, MD, and Elyse Berkovitch, PT. June 10, 2009 CP 543-604; May 29, 2009 CP 806-867; June 22, 2009 CP 868-912; June 24, 2009 CP 913-994; June 29, 2009 CP 995-1044; July 6, 2009 CP 1045-1090; July 8, 2009 CP 1091-1158; August 5, 2009 CP 1159-1285.

Judge Yeager, in his October 30, 2009 Proposed Decision and Order, affirmed the August 12, 2008 Department Order. The Board held the January 7, 2005 industrial injury did not proximately cause mental health conditions diagnosed or described as depression or pain disorder. CP 88. The Board held appellant was not entitled to temporary disability or loss of earning power benefits from March 27, 2008 to August 12, 2008 due to the industrial injury. CP 89. The Board determined appellant's conditions proximately caused by the industrial injury had reached maximum medical improvement by August 12, 2008. CP 89. Appellant failed to establish a prima facie case that she was permanently partially disabled. The Appellant appealed to Grant County Superior Court. CP 1306-1337.

Judge Evan Sperline of Grant County Superior Court reversed the Board order November 5, 2012. CP 1479-1485. Judge Sperline held appellant was temporarily totally disabled from March 27, 2008 through August 12, 2008. CP 1482. The Court held appellant's physical conditions, proximately caused by the January 7, 2005 industrial injury reached maximum medical improvement as of August 12, 2008; however the pain and disability proximately caused by the injury because of her unrelated psychological disorder had not reached maximum medical improvement and may respond to further treatment. CP 1482.

Judge Sperline held appellant was entitled to further medical treatment. CP 1482. Judge Sperline reversed the Department's August 12, 2008 Order and remanded the matter to the Department for further treatment and proceedings. CP 1483.

B. Testimony of Appellant

Appellant testified she has been unable to work since August 12, 2008 due to pain. CP 436. Appellant also reported her mental health has not been good and she opined she has been suffering from depression. CP 436. Appellant testified she does not feel capable of working a full-time job. CP 438. Appellant agreed she was capable of performing her regular job in January 2009. CP 528. Appellant testified she first began to feel depressed in 2005 when her son died in 2005 at the age of 29. CP 532. She has made no efforts since March 26, 2008 to find work. CP 533.

C. Testimony of Richard Bunch, MD and John Betz, PA-C

Dr. Bunch is a general practitioner who first evaluated appellant January 14, 2009 for back complaints. Dr. Bunch previously delegated appellant's injury-related care to his Physician's Assistant, John Betz, who began treating appellant shortly after the injury. CP 518. Assuming appellant's 2009 decompression surgery led to an improved condition, Dr. Bunch felt appellant's condition was not fixed and stable as of

August 12, 2008. CP 506. Conversely, assuming appellant reported initial improvement after the 2009 surgery, but later reported a worsened condition, Dr. Bunch would not endorse the surgery as reasonable and necessary. CP 518. Based on review of Randy Bruce's physical capacities evaluation ("PCE"), Dr. Bunch opined appellant was unable to perform full-time work from March 26, 2008 through August 12, 2008.

On December 12, 2005, Mr. Betz concluded appellant could return to regular work. CP 802-803. Appellant continued to seek treatment, however, and Mr. Betz restricted her from working in early 2006.

On January 10, 2008 and January 19, 2008, Mr. Betz concurred with Drs. Zoltani, Barnard, and Lamb, concluding appellant was fixed and stable and capable of full-time regular employment. CP 816, 827.

Mr. Betz later reviewed the PCE and concurred with the findings.

Mr. Betz last examined appellant in June 2009, conceding "she looked like she did in 2005, 2006." CP 819. Mr. Betz opined appellant's condition was static from 2005 through 2008, waxed and waned, but did not get much better or worse during that period of time. CP 836.

D. Testimony of Royce Van Gerpen, MD

Dr. Van Gerpen provided treatment to appellant from October 2006 through June 2007, on referral from appellant's attending spine surgeon. CP 550, 569. Dr. Van Gerpen was appellant's attending

physician during that period of time. Dr. Van Gerpen evaluated appellant every three to six weeks during this period. He concluded appellant had reached maximum medical improvement as of August 12, 2008. CP 555. He also concluded appellant was capable of full-time work between March 2008 and August 12, 2008. He approved job analyses for a day care worker, cashier, sandwich maker, and a fast food worker.

Dr. Van Gerpen referred appellant for a physical capacities evaluation in May 2007. CP 585. Although Dr. Van Gerpen referred appellant to Mr. Bruce, he did not consider Mr. Bruce's physical capacities evaluation to be valid because of the discrepancy between his own examinations and the findings contained in the PCE. CP 564. The PCE findings did not correlate with Dr. Van Gerpen's objective findings and imaging tests. CP 585. He found Mr. Bruce's ratings significantly below what appellant's anatomy would justify. CP 586. He recommended an additional PCE and noted a PCE is only one portion of the information used to determine the ability to work.

E. Testimony of Michael Barnard, MD

Dr. Barnard evaluated appellant November 14, 2007. CP 920. He observed that appellant presented with non-anatomic responses, incompatible with physiologic abnormalities. He also recorded significant

pain magnification. CP 925-926. Appellant complained of severe pain while being tested with maneuvers that do not elicit pain.

Dr. Barnard concluded the results of the PCE were not consistent with his findings on examination; he did not believe appellant was limited to five hours of work per day. CP 930, 931. According to his evaluation and appellant's medical records, Dr. Barnard concluded appellant had reached medical fixity as of November 14, 2007 and continued to be capable of full time regular employment. CP 922, 925.

F. Testimony of Vincent Gamber, MD

Dr. Gamber evaluated appellant October 26, 2005, alongside Dr. Ronald Vincent. He concluded she had reached maximum medical improvement and was capable of full-time regular employment as of the date of the examination. CP 1103. Dr. Gamber did not believe the 2009 surgery was medically indicated to treat the industrial injury.

Dr. Gamber recorded non-anatomical responses to testing and concluded appellant had a disability conviction, considering such responses. CP 1111. He noted that appellant's non-anatomical responses would affect the validity of the PCE, as her medical records contemporaneous with the PCE should have been consistent in order to be reliable. Assuming Dr. Van Gerpen's findings were inconsistent with the PCE, Dr. Gamber concluded the PCE was suspect. CP 1113.

G. Testimony of Randy Bruce, PT

Mr. Bruce performed a physical capacities evaluation in June 2007 at the request of appellant's treating physician at that time, Dr. Van Gerpen. CP 561. Mr. Bruce had provided physical therapy for appellant since 2005. Though he conducted the PCE, he admitted that the test is more reliable when he does not have any preconceived ideas of an individual's level of functioning before administering a PCE. CP 718.

Mr. Bruce used the Isernhagen Work Systems ("IWS") 13-point checklist to determine validity and noted that three "no" responses marks an invalid test. Mr. Bruce did not believe there were any "no" responses. CP 663. Part of his test considers appellant's pain tolerance as it attempts to clarify an individual's function. Mr. Bruce's findings led him to believe appellant was capable of only five-and-a-half hours of work per day. However, he noted appellant was deconditioned, affecting her performance in the evaluation. With conditioning, appellant would likely have been more functional. CP 620.

H. Testimony of Michael Friedman, MD

Dr. Friedman is a board certified psychiatrist who has additional training in psychoanalysis. CP 1050. He evaluated appellant May 2, 2009, and diagnosed major depressive disorder and pain disorder that was multi-factorial in nature, stemming from her history and psychological

stress. CP 1059. Dr. Friedman noted appellant's pain disorder was a focus on pain in excess of objective findings as a coping method.

CP 1062, 1063. He concluded none of appellant's psychiatric conditions were related to the work injury. CP 1065.

Given her history, Dr. Friedman explained that the conditions were "long in the making" as appellant developed such coping mechanisms during childhood. Appellant would have developed such conditions regardless of the 2005 injury, but he noted the injury was coincidental, not causal, factor as it provided a focus for her complaints. CP 1067-1069.

I. Testimony of John Gilbert, Ph.D.

Dr. Gilbert is a clinical psychologist who evaluated appellant for pain management. He diagnosed pain disorder associated with both psychological factors and a general medical condition. CP 832.

Dr. Gilbert explained that a pain disorder is a patient's approach to dealing with the pain and psychological factors that can affect their response to pain symptoms. CP 834. The effect of a pain disorder is to increase the patient's focus on pain and his or her perception of pain as well as his or her general functional level.

Dr. Gilbert noted the pain disorder was partially related to the injury as the pain disorder develops from prior psychiatric conditions and a painful event in one's life. CP 835-837. From a psychiatric standpoint,

Dr. Gilbert concluded there was no reason appellant could not perform regular work. CP 854. He did not endorse further treatment.

J. Testimony of Elyse Berkovitch, PT

Ms. Berkovitch is a physical therapist who also performs physical capacity evaluations and has been licensed since 1976. She reviewed Mr. Bruce's PCE as well as appellant's complete medical file.

She explained the IWS sets forth a minimum 13 point checklist to determine PCE validity. CP 1182. If an examiner finds three or more "no's," the PCE is considered inconsistent or a non-maximum effort.

Ms. Berkovitch observed Mr. Bruce's PCE had at least three "no's" and therefore did not represent a reliable examination. CP 1184.

Ms. Berkovitch also explained two factors further discrediting Dr. Bruce's PCE. First, Mr. Bruce had a long-standing relationship as the treating therapist before performing the PCE. The IWS guidelines require that an examiner not have a prior treating relationship with the patient. CP 1171, 1172. Ms. Berkovitch also noted Mr. Bruce's recommendations regarding floor-to-waist lifting did not correlate with the repetitive squatting recommendations. CP 1184. Likewise, she explained Mr. Bruce's waist- to overhead-lifting findings did not correlate with elevated work recommendations. CP 1187-1189. The front carry and left and right carry also did not correlate. CP 1191-1192. These

inconsistencies demonstrate appellant provided an inconsistent or non-maximum effort. Given the numerous inconsistencies, Ms. Berkovitch testified the PCE was not a reliable indicator of functional capacity. CP 1200.

Finally, Ms. Berkovitch pointed out Mr. Bruce's findings supported the ability to work eight hours a day. She explained that, assuming Mr. Bruce's findings to be true and accurate, it was illogical and inconsistent to find appellant capable of only five-and-a-half hours of work per day. Mr. Bruce's recommendations for each activity add up to approximately eight hours per day. CP 1196.

K. Testimony of Fred Cutler, VRC

Mr. Cutler is a vocational counselor who reviewed the medical and vocational records to provide a vocational opinion at the request of appellant's attorney. He suggested that, considering the opinions of Dr. Bunch and the physical capacities evaluation, appellant was not employable on a full-time basis. CP 736, 766.

L. Testimony of Robert Crouch, VRC

Mr. Crouch was appellant's vocational counselor assigned to this claim. He found appellant employable from March 2008 through August 2008. CP 882. At the time of his vocational determination, Dr. Bunch had approved several job analyses but had not commented on the physical

capacities evaluation. Mr. Crouch testified that even if Dr. Bunch restricted appellant to work for five-and-a-half hours per day, appellant would still be determined employable in view of the preponderance of medical evidence. CP 883.

III. SUMMARY OF ARGUMENT

The cross appeal should be granted as substantial evidence does not support any causal nexus between the industrial injury and the pain disorder. The Superior Court applied the wrong legal standard in awarding further medical treatment. Appellant's arguments that she is permanently and totally disabled and her pain disorder was caused by the industrial injury fail because substantial evidence supports both conclusions to the contrary. The record soundly establishes she is capable of regular and continuous employment, defeating her claim for an award of permanent and total disability. As appellant's brief does not clearly specify Assignments of Error, respondent offers its understanding of appellant's arguments to improve clarity on review.

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**A. Response to Appellant's First Assignment of Error:
Appellant's pain disorder was not caused by the industrial
injury.**

1. Standard of Review

Challenges to the Superior Court's decision are reviewed under the ordinary standard of review for civil cases. RCW 51.52.140. The Court of Appeals reviews whether "substantial evidence supports the trial court's factual findings and then, review, de novo, whether the trial court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d. 1, 5, 977 P.2d 570 (1999). Under RCW 51.52.115 the Board's findings and decisions are prima facie correct and the burden of proof is on the party attacking them. The Court of Appeals should reverse the Grant County Superior Court judgment and reinstate the Board judgment if substantial evidence supports the Board's findings. *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 507, 215 P.3d 1043 (2009).

**2. Substantial evidence supports the findings that the
industrial injury did not cause pain disorder.**

Appellant advances many theories appropriate for a trial court, but none that address substantial evidence review.

Appellant cites *Wendt v. DLI*, for the theory that a workman is to be taken as he is, with all his preexisting frailties and bodily infirmities. *Wendt v. DLI*, 18 Wn. App. 674, 682-683 (1977). This statement is

appropriate for a fact finder, not this appellate court. Additionally, this concept is employed only when assessing the level of disability on an allowed claim. The issue in *Wendt* concerned determining the level of compensation for permanent disability. *Wendt* does not address Appellant's initial burden of proof when determining compensability under the "multiple proximate cause" theory. The case goes on to say, "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." *Id.* The preexisting condition is not the cause of the injury, "but merely a condition upon which the 'proximate cause' operated." *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 341, 777 P.2d 568 (1989).

Defendant agrees the worker is taken as she is when assessing the level of disability, but this appellant has not carried her burden showing a lack of substantial evidence to challenge the court's factual finding that the industrial injury was not a proximate cause of the pain disorder. Further, there is no finding Appellant's unrelated pain disorder was ever disabling.

Whether a disability is the result of an injury or solely of a preexisting infirmity is a question of fact. *Brittain v. DLI*, 178 Wash. 499 (1934). For claimant to recover under the workmen's compensation act,

she must establish a causal connection between the work injury and subsequent physical condition with some degree of probability. *Jacobson v. DLI*, 37 Wn.2d. 444, 451 (1950). Testimony that indicates the injury might have caused the condition is insufficient. *Anton v. Chicago, M. & St. P. R. Co.*, 92 Wash. 305. There must be evidence of probative value that removes the question of causation from speculation. In the instant case, the evidence does not remove the issue of causation from the realm of speculation.

Appellant tries to sidestep substantial evidence review by asserting special consideration should be given to the opinions of Dr. Bunch, Dr. Gilbert, Mr. Betz, and Mr. Bruce, because the court must give special consideration to the opinion of the treating physician. *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d. 569, 571, 761 P.2d 618 (1988). This assertion is inconsistent with the case law and statutes that allow for a singular attending physician. Special consideration is not given to all of appellant's treating providers, only the attending physician. *Id.* The evidence is sufficient to prove causation, if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists. *Douglas v. Freeman*, 117 Wn.2d. 242, 252, 814 P.2d 1160 (1991). However, the opinions of the other

medical providers are more well-reasoned and persuasive despite “special consideration.”

Both Dr. Friedman and Dr. Gilbert assessed a pain disorder associated with both psychological factors and a general medical condition. Both explained that appellant’s psychiatric condition was developmental in nature, stemming from her childhood and prior experiences. While Dr. Gilbert opines the injury is “partially related” to appellant’s pain disorder, Dr. Friedman described it as a “factor.” These description terms are not the equivalent of proximate causation. “Related” implies an unspecified association, not causation. A “factor” is an even more nebulous connection. These are medical experts who carefully explained the pain disorder is idiopathic and not causally tied to the injury. Careful scrutiny of both expert opinions demonstrates the condition is developmental in nature and not proximately caused by the 2005 industrial injury. Substantial evidence supports this trial court conclusion.

Dr. Friedman, after considering appellant’s psychologically significant history, explained that appellant would have developed the pain disorder regardless of the injury. The pain disorder is chronic in development, borne out of her prior chronic stressors with an eventual

shift and preoccupation with pain. Appellant manifests the stress by focusing on such pain after the injurious event.

When asked whether appellant's symptoms would be the same had she never had the industrial injury, Dr. Friedman responded in the affirmative. CP 1066. Dr. Friedman clarified by stating appellant would have developed such conditions in the absence of the injury even though the condition may manifest slightly differently. CP 1066. Such opinion does not support appellant's contention that the injury aggravated or caused her disability attributed to her preexisting psychiatric conditions.

Likewise, Dr. Gilbert's, albeit conclusory, statements mirror Dr. Friedman's conclusions even though he terms the condition "partially related" to the injury. Dr. Gilbert noted that a pain disorder is a patient's approach to dealing with pain, manifesting in the patient's increased focus on, and perception of, the pain. Thus, because there is no causal connection between the injury and the pain, there can be no causation between the injury and the pain disorder.

Moreover, Dr. Gilbert explained appellant's history of sexual abuse and the death of her child played integral roles in the cause of her disorder. Like Dr. Friedman, Dr. Gilbert concluded the condition is chronic in development, beginning prior to the 2005 injury. Without the

significant prior history, the condition would not have developed.

Appellant failed to prove proximate causation.

To the extent appellant argues Dr. Gilbert's opinion supports compensability of a mental health condition, such opinion is conclusory and lacks explanation. He was unaware of appellant's complete history. *See Sayler*, supra (opinions based on incomplete history are unpersuasive). Moreover, Dr. Friedman specifically addressed Dr. Gilbert's conclusions and findings. Dr. Friedman offers a better-explained rationale to support his conclusions. Conversely, Dr. Gilbert provides blanket statements describing a pain disorder but fails to draw the specific causal connections to explain why the condition was caused by the injury. Such perfunctory statements cannot support appellant's burden of proof.

Both Dr. Friedman and Dr. Gilbert assessed a pain disorder associated with both psychological factors and a general medical condition. Both explained that appellant's psychiatric condition was developmental in nature, stemming from her childhood and prior experiences. Dr. Friedman explained appellant's pain disorder was a focus on pain in excess of objective findings as a coping method. CP 1061-62. He concluded appellant's psychiatric conditions were not causally related to the work injury. CP 1064. Given her history, Dr. Friedman explained that the conditions were "long in the making" as

appellant developed coping mechanisms during childhood. CP 1065. After considering appellant's psychologically significant history, Dr. Friedman explained appellant would have developed the pain disorder regardless of the injury. CP 1066-67. Moreover, Dr. Friedman specifically addressed Dr. Gilbert's conclusions and findings. Dr. Friedman offers a better-explained rationale supporting his conclusions.

The record has substantial evidence to support the trial court's factual finding the injury is not a proximate cause of the pain disorder or its symptoms. Expert opinions demonstrate the condition is developmental in nature and not proximately caused by the 2005 industrial injury. The trial court's finding should be affirmed.

**B. Response to Appellant's Second Assignment of Error:
Appellant is not totally and permanently disabled from her
injury.**

1. Standard of Review.

Challenges to the Superior Court's decision are reviewed under the ordinary standard of review for civil cases. RCW 51.52.140. The Court of Appeals reviews whether "substantial evidence supports the trial court's factual findings and then, review, de novo, whether the trial court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor &*

Indus., 138 Wn.2d. 1, 5, 977 P.2d 570 (1999). Appellant challenges a factual determination.

2. There is substantial evidence appellant is not permanently and totally disabled.

A worker is totally disabled only if her injury-caused impairments are of such severity that she is unable to perform any reasonably continuous gainful employment within her qualifications that exist in the competitive labor market. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d. 803, 812-15 (1994). Appellant bears the burden of proof. *Id.*

An ability to perform light or sedentary work of a general nature typically precludes a finding of total disability. *Herr v. Dep't of Labor & Indus.*, 74 Wn. App. 632, 636 (1994). Reasonably continuous gainful employment is work which is more than a temporary or short-term employment.

The Superior Court found the industrial injury did not preclude appellant from obtaining or performing reasonably continuous gainful employment. There is substantial evidence to support this finding. Drs. Gamber, Barnard, and Van Gerpen are all familiar with appellant's industrially-related and non-related conditions and all concluded she is capable of full-time employment. CP 1103, 925, 558.

Dr. Gamber evaluated appellant and determined she had reached maximum medical improvement by October 26, 2005. CP 1103.

He noted significant non-anatomical responses to testing and a disability conviction. Such findings are consistent with appellant's entire medical picture. He declared appellant capable of full-time employment.

Likewise, Dr. Barnard, who evaluated appellant November 14, 2007, concluded she had reached medical fixity and was capable of full-time employment without restriction. CP 925. He corroborated Dr. Gamber's findings of non-anatomical responses and inconsistencies on examination. In fact, in the numerous examinations conducted, appellant's inconsistent and non-physiological presentation left a lasting impression on Dr. Barnard. He concluded appellant had no residual permanent restrictions as a result of the injury.

Moreover, Dr. Van Gerpen, who acted as appellant's attending physician from October 2006 through June 2007, concluded appellant was capable of full-time employment in at least a light-duty capacity. CP 558. Dr. Van Gerpen approved several job analyses including positions for a sandwich maker, fast food worker, day care worker, hostess, and cashier. CP 559. Such positions existed in appellant's labor market and were obtainable based on appellant's history. *See Spring v. Dep't of Labor and Indus.*, 96 Wn.2d. 914, 918-20 (1982) (a worker is not totally disabled

when even light or sedentary work, if reasonably continuous, is within the range of appellant's capabilities, training and experience, and available in the competitive labor market). The evidence affirmatively establishes such positions were available. Dr. Van Gerpen determined appellant had reached maximum medical improvement by June 2007 with a Category 1 lumbar impairment. Dr. Van Gerpen reached such conclusions even though, like Drs. Gamber and Barnard, he observed appellant was "reporting far more symptomatology than what her anatomy would support." CP 567.

Drs. Gamber, Barnard, and Van Gerpen collectively examined appellant over more than a two-year period of time. Notably, Dr. Van Gerpen treated appellant for a protracted period of time and was very familiar with appellant's condition and declared her capable of working in a light-duty capacity.

The record contains substantial evidence to affirm the trial court's finding that appellant had reached medical fixity with no impairment and was employable as of August 12, 2008.

3. Appellant's sole argument is premised upon an unreliable PCE.

The June 2007 PCE appellant relies on was not adopted by the Board or trial court as the record establishes it was neither valid nor

reliable. The medical providers relying on the flawed PCE were also rejected. Dr. Bunch and Mr. Betz inexplicably changed their opinions regarding employability based on the flawed PCE. Their opinions are not persuasive.

a. The flawed PCE does not correlate with appellant's objective condition.

Mr. Bruce's judgment and recommendations do not correlate with appellant's objective medical findings. Dr. Van Gerpen, the treating provider at the time and source of the PCE referral, declared the PCE unreliable. CP 564. Dr. Van Gerpen explained the objective findings recorded both before and after the PCE did not correlate with Mr. Bruce's suggestions. Considering the imaging studies, medical history and physical evaluations, Dr. Van Gerpen concluded the PCE was inconsistent with appellant's overall medical picture. CP 585. Dr. Van Gerpen's medical findings did not equate to a five-and-a-half hour per day work restriction. In fact, Dr. Van Gerpen recommended a second PCE due to the unreliability of Mr. Bruce's PCE.

Moreover, appellant's own perception during the PCE reduced its reliability. Appellant asserted her condition was significantly worse due to the PCE, while Dr. Van Gerpen, after conferring with Mr. Bruce, noted such statements to be inaccurate. Dr. Van Gerpen concluded these

misrepresentations raised concerns that appellant was presenting with more symptomatology than was objectively supported. CP 567.

Drs. Barnard and Gamber corroborate such conclusions by stating a PCE's reliability is dependent on an appellant's perception and presentation of symptoms. CP 930, 1113. Based on review of Dr. Van Gerpen's testimony and records, as well as their own examination, the physicians determined the PCE to be unreliable.

A PCE is not a dispositive test of an individual's functional ability or an accurate predictor of future permanent work restrictions. Dr. Van Gerpen explained that a PCE is one piece of information that can be useful in managing a patient's care. Likewise, Drs. Barnard and Gamber concluded an assessment regarding any individual's ability to work should not be determined from one PCE. A PCE, even if accurate, is a snapshot into an individual's function on that particular day.

b. The flawed PCE is internally inconsistent and unreliable.

Ms. Berkovitch carefully evaluated the findings of Mr. Bruce and concluded several internal inconsistencies rendered the PCE unreliable. CP 1166-68. Ms. Berkovitch explained the IWS system provides guidelines for conducting a PCE and determining its reliability. CP 1170. First, the guidelines prohibit a treating therapist from performing the PCE.

Because the PCE is designed to be an objective test of function, it is important for the examiner to provoke the patient to her safe maximum. Ms. Berkovitch explained that it is very difficult to obtain a truly objective maximum as the treating therapist because of the personal and therapeutic nature of the patient's relationship with therapists. CP 1173.

Ms. Berkovitch also explained that each inconsistency within a PCE is identified with a "no" response, meaning a non-maximum effort. A PCE with three "no" responses is considered unreliable and invalid. Ms. Berkovitch identified at least three "no" responses in Mr. Bruce's report. First, she noted the findings of the floor-to-waist test were inconsistent with repetitive squat. CP 1186. She explained that the two tests were designed to elicit the same movement and therefore the results should correlate. Mr. Bruce's results did not correlate. CP 1187. Likewise, Ms. Berkovitch also described how waist-to-overhead lifting did not correlate with the elevated-work findings. CP 1188. Such inconsistencies rendered another "no," or non-maximum effort finding. The third "no" was borne out of the inconsistent results between front carry and left and right carry. CP 1193.

Ms. Berkovitch explained that appellant, with core weakness, should not have the ability to hold her trunk in a neutral position to lift on only one side the same as when lifting from the front.

These inconsistencies established glaring deficiencies in Mr. Bruce's report as Ms. Berkovitch readily identified three separate "no's" to conclude the test was invalid.

Moreover, when asked to assume Mr. Bruce's findings were accurate, Ms. Berkovitch concluded the five-and-a-half-hour-per-day work limitation was inconsistent with the findings he provided in his report. CP 1197-99. Even though Mr. Bruce concluded appellant could rotate 30 minutes sitting at a time up to three hours, stand 30 minutes up to two hours, and walk 15 minutes at a time up to two hours, so the maximum work level should be at least seven hours per day.

Mr. Bruce's five-and-a-half-hour maximum work day is inconsistent with his own findings. Furthermore, Ms. Berkovitch, after considering other findings such as trunk rotation and lifting, determined appellant would be able to work at least an eight-hour day.

Ms. Berkovitch declared appellant capable of working in a full-time capacity, including positions as a cashier and daycare worker. CP 1202. Appellant did not rebut any of Ms. Berkovich's testimony.

c. Mr. Betz and Dr. Bunch's opinions rest entirely on the defective PCE.

Mr. Betz's and Dr. Bunch's opinions are derived solely from the unreliable PCE. Their testimony on this point is not persuasive as both an

unexplained change of opinion and based on inaccurate and unreliable information. Mr. Betz, on three separate occasions, concluded appellant was capable of full-time regular employment. The first release came in December 2005 and two subsequent concurrences with Drs. Zoltani and Barnard in January 2008. While Mr. Betz later sided with Mr. Bruce's findings, he offers no justification or explanation other than the opportunity to review the defective PCE. *See In re Sandra M. McKee*, BIIA Dec., 04 14107 (2007) (conclusory and inconsistent opinions are unpersuasive). Mr. Betz offers no explanation to justify his opinions and therefore is unpersuasive.

Moreover, Mr. Betz fails to consider all relevant medical records in rendering his suggestions. *See Saylor v. Dep't of Labor & Indus.*, 69 Wn.2d. 893 (1966) (expert medical opinion must be based upon all material facts and complete and accurate history to provide sufficient probative value). Mr. Betz admitted that he disregarded all prior information once he had the PCE but even admitted that additional medical information should be considered to determine employability. Dr. Bunch delegated authority to Mr. Betz and adds no independent analysis.

The record establishes the PCE is inconsistent, unreliable, and contrary to objective medical evidence. Thus, Dr. Bunch and Mr. Betz

provided opinions that lack a persuasive foundation and cannot be relied upon to sustain appellant's burden of proof. In conclusion, there is substantial evidence that appellant is not permanently and totally disabled.

C. Cross-Appellant's Assignment of Error: Superior Court erred in awarding treatment for a condition not caused by the industrial injury.

1. Standard of Review

Errors of law are reviewed *de novo* by the appellate court.

2. The conclusion appellant is entitled to further medical treatment for her pain disorder is an error of law.

The Superior Court's Finding of Fact number 3 correctly determined the injury was not a "proximate cause" of appellant's mental health condition diagnosed as a pain disorder. The Superior Court erred in its Conclusion number 4 to allow further treatment for this condition by the following contrary and conflicting statement:

"However, the pain and disability proximately caused by said injury because her psychological disorder had not reached maximum medical/psychological improvement and may respond to further psychological treatment. Therefore, she was entitled to further medical treatment as contemplated by RCW 51.36.010."

This is in direct conflict with the courts finding of fact that the injury did not cause the pain disorder and the physical injury was at maximum medical improvement. CP 1481.

In effect, the court devised a novel and nonsensical standard to tie the injury to an unrelated mental health condition. The Superior Court agreed the injury is stable and is not the proximate cause factually, but inexplicably concludes respondent must provide further benefits for pain and disability attributed to the mental health condition because it is not stable. CP 1482. This is circular reasoning, not proximate cause. The Superior Court applied an incorrect legal standard, and its conclusion is an error of law.

Appellant's argument for remand for mental health treatment suffers from the same legal error. If the injury is stable and did not cause the pain disorder condition or the need for such treatment, the treatment cannot be bootstrapped back to the injury.

IV. CONCLUSION

The Superior Court's Conclusion of Law 4 which states that appellant's pain and disability proximately caused by the injury had not reached maximum medical improvement as of August 12, 2008 is legally incorrect and should be reversed. The Superior Court's Findings of Fact the injury was not a proximate cause of the pain disorder and that appellant was not permanently and totally disabled are supported by substantial evidence and should be affirmed.

Dated: May 15, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'AJ Bass', written over a horizontal line.

Aaron J. Bass, WSBA No. 39073
Of Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the original and one copy of **RESPONDENT'S/CROSS-APPELLANT'S BRIEF** via first class mail, postage prepaid, with the United States Postal Service to the following the following:

Renee S. Townsley
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I further certify that on this date, I mailed a copy of the foregoing **RESPONDENT'S/CROSS-APPELLANT'S BRIEF** via first class mail, postage prepaid, with the United States Postal Service to the following:

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

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