

**FILED**

JUL 11 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 31444-8-III

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

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NORMA J. ADAMS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This is a workers' compensation case governed by Washington's Industrial Insurance Act, Title 51 RCW. Appellant Norma J. Adams seeks to establish that the Department of Labor & Industries (Department) is responsible for her conditions diagnosed as lumbosacral degenerative disc disease, cervical degenerative disc disease, left shoulder degenerative disease, left hip degenerative disease, complex regional pain syndrome, and bilateral carpal tunnel syndrome, claiming they are related to her 1986 industrial injury. Adams appeals from a superior court judgment affirming a Board of Industrial Insurance Appeals' (Board) order. The Board order affirmed a Department order denying responsibility for these conditions because they were not proximately caused by her 1986 industrial injury.

At the Board and superior court, it was Adams' burden to prove that the Department's and the Board's orders, respectively, were incorrect and that the Department was responsible for the conditions. Both the Board and superior court found that the 1986 industrial injury and its sequelae did not cause or aggravate any of the conditions.

Adams essentially asks this Court to reweigh the evidence regarding the conditions. However, she failed to assign errors to specific findings of fact. These findings are verities. In any case, substantial

evidence supports the superior court's findings. Three doctors testified that none of her conditions were caused by the industrial injury. None of the Department's medical witnesses testified that the industrial injury and its sequelae lit up a pre-existing condition. To the extent she had a condition; they testified it was wholly caused by age or other non-work related cause.

Adams also asks this Court to consider a document submitted after the close of evidence based on the doctrine of judicial notice that addresses her assertion that she has complex regional pain syndrome. Both the Board and superior court appropriately rejected the late addition of this document through judicial notice.

This Court should affirm the superior court.

## II. ISSUES

- A. **Does substantial evidence support the superior court findings that lumbosacral degenerative disc disease, cervical degenerative disc disease, left shoulder degenerative disease, left hip degenerative disease, complex regional pain syndrome, and bilateral carpal tunnel syndrome were not proximately caused or aggravated by Adams' 1986 industrial injury?**
- B. **When the superior court declined to take judicial notice of the document regarding complex regional pain syndrome, did the superior court abuse its discretion?**

### III. STATEMENT OF THE CASE

#### A. Adams Sustained An Injury To Her Leg in 1986 And Had Two Falls During Two Separate Retraining Programs

On July 23, 1986, Adams sustained an injury to her left knee and a muscle tear in her left calf while working as a flagger for Pacemaker Industries. BR Adams 11, 34<sup>1</sup>. At the time of her injury, Adams was moving a metal sign across Interstate 5 when she felt excruciating pain in her left calf. BR Adams 11. Pacemaker applied for workers' compensation benefits on Adams' behalf. BR Adams 12. Adams was 45 years old at the time of her 1986 industrial injury. BR Adams 26. The Department allowed the claim and provided treatment. BR Adams 12, 25. The Department closed the claim in May 1987. BR 59. Her accepted leg condition later worsened and the Department reopened her claim in September 1991 for further treatment. BR 60. The claim has remained open since that time. BR Adams 36-37.

Between 1986 and 1991, Adams continued to work as a flagger and/or foreman. BR Adams 11. Adams was then retrained to be a cashier at Goodwill. BR Adams 16. While working at the store, Adams fell off a bar stool and hurt her back, hip, neck and shoulder. BR Adams 17. In 2000, Adams suffered another fall while undergoing vocational testing.

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<sup>1</sup> The certified board record is cited as "BR" followed by the witness name and page number.

BR Adams 20. During that time, Adams was also enrolled in college taking business management courses, which included keyboarding. BR Adams 19.

Adams contends the two falls she took during vocational retraining lit up a latent condition in her lumbar and cervical spine and lit up a latent condition in her left shoulder and left hip. App. Br. 7, 9. Furthermore, Adams contends keyboarding performed during vocational retraining caused her bilateral carpal tunnel syndrome. App. Br. 9-10. Lastly, Adams claims the tear to her left calf muscle caused the claimed condition of complex regional pain syndrome (CRPS). App. Br. 7, 11.

**B. Dr. Janes Testified On Behalf of Adams That She Had Multiple Conditions Caused By Her 1986 Industrial Injury**

Dr. Merle Janes is a physician who practices physical medicine and rehabilitation. BR Janes 48. He has also been Adams' treating physician since 2000. BR Janes 55. Dr. Janes attributed Adams' various physical complaints to her 1986 industrial injury. BR Janes 62-64, 95-99.

Dr. Janes testified that he would attribute the degenerative disease in Adams' lumbar spine, cervical spine, left shoulder, and left hip to the 1986 injury because they became symptomatic after Adams fell in 1994 and 2000. BR Janes 66-68, 71-75.

Dr. Janes provided a broad description of lumbar degenerative disc disease and testified generally that focal changes involving one or two discs in a person's spine are indicative of trauma while changes involving multiple discs are age related. BR Janes 69-71. Dr. Janes confirmed Adams has lumbar degenerative disc disease. BR Janes 71-72. Dr. Janes did not provide objective medical findings regarding Adams' lumbar spine. BR Janes 48-120. Dr. Janes testified it would be probable that Adams' fall in 1994 and 2000 could cause a previously undiagnosed or unproblematic back to become painful. BR Janes 72. Dr. Janes agreed that the chart notes he generated over the ten years he treated Adams do not indicate he ever physically examined Adams' back. *See* BR Janes 97.

While Dr. Janes attributed a cervical condition to the 1986 industrial injury, Dr. Janes' testimony regarding Adams' neck is limited to the diagnosis of "pain" probably caused by a ligamentous and muscular injury after Adams' "two falls." BR Janes 72-73. He also never performed a physical examination of Adams' cervical spine nor did he address any objective medical findings regarding her cervical spine. BR Janes 97, 48-120.

Likewise, Dr. Janes did not testify to any objective medical findings regarding Adams' left shoulder, though he attributed "left shoulder degenerative joint disease" to the industrial injury. BR Janes 75,

48-120. Dr. Janes testified that it is probable that a fall could initiate a degenerative series in the shoulder itself from the fall. BR Janes 74. The chart notes he generated in the ten years before his testimony did not include any diagnoses regarding Adams' left shoulder or any indication he had performed a clinical examination on the left shoulder. BR Janes 96-99, 110-111.

During his direct testimony, Dr. Janes did not address her "left hip degenerative disease." BR Janes 48-120. Accordingly, Dr. Janes did not provide objective medical findings regarding Adams' left hip degenerative disease either. *Id.* Dr. Janes testified Adams' two falls could have caused a soft tissue injury to the hip. BR Janes 66-67. Dr. Janes testified the sudden onset of left hip problems is due to problems associated with the industrial injury on a more probable than not basis. BR Janes 67-68. In cross-examination, Dr. Janes agreed that the chart notes he generated over the ten years he treated Adams do not include objective medical findings and/or diagnoses regarding Adams' left hip or any indication he performed a clinical exam. BR Janes 96-98.

Dr. Janes was asked to address possible carpal tunnel syndrome. BR Janes 76. Dr. Janes testified that when he examined Adams she had complaints of numbness in her left hand, not her right, but later developed symptoms bilaterally. *Id.* Dr. Janes diagnosed bilateral carpal tunnel

syndrome that he testified was later confirmed by electrodiagnostic studies. BR Janes 82. Dr. Janes associated that condition on a more probable than not basis to the retraining program provided by the Department. BR Janes 76, 87. Although he attributed the left hand numbness to carpal tunnel, he also attributed it to thoracic outlet syndrome. BR Janes 63.

Finally, Dr. Janes diagnosed Adams with CRPS. BR Janes 106. Dr. Janes expressed the opinion that Adams, “has symptoms in her left foot and leg that certainly do fit the definition” of CRPS. *Id.* However, Dr. Janes did not elaborate on what those symptoms were. BR Janes 48-120. He opined that the CRPS was caused by the 1986 industrial injury that he believed caused a blood vessel injury and scarring that pinched a nerve in Adams’ leg. BR Janes 107, 108.

**C. Subsequent To The Opening Of Her Claim In 1986, Adams Developed Age Related Lumbar Degenerative Disc Disease**

Adams testified that before her July 1986 industrial injury she had never been diagnosed with lumbar degenerative disc disease. BR Adams 25. Adams confirmed the onset of that condition occurred over the last twenty five years. *Id.* Dr. Clarence Fossier, an orthopedic surgeon, and Dr. Ming Hong, a neurologist, performed an independent medical examination. BR Fossier 4, 14-15. Dr. Jennifer James, a physical medicine

and spine physician, examined her as well. BR James 4. Dr. Fossier performed a physical examination, which included straight leg raising, a test used to validate complaints of back pain. BR Fossier 37, 43-44. Dr. Fossier testified his orthopedic exam showed a negative straight leg test on the right and inconclusive findings on the left due to complaints of pain unrelated to her back. BR Fossier 43-44. Dr. Hong's neurological exam did not produce any abnormal lumbosacral findings at all. BR Hong 40-47. Dr. James' clinical exam also had a negative straight leg test. BR James 35. Drs. Fossier, Hong, and James reviewed a host of diagnostic imaging tests, including an April 1, 1997 lumbar MRI, a November 16, 1999 lumbar CAT scan and x-rays, and a July 26, 2000 lumbar MRI. BR Fossier 30-33; BR Hong 27, 31, 34; BR James 24-25, 27-28. According to all three physicians, the images showed the progression of age-related multilevel lumbar degenerative disc disease over time rather than findings they would attribute to her acute injuries. BR Fossier 30-33, 45-46, 49; BR Hong 26-28, 29, 31, 34, 48, 51-52; BR James 23-25, 27-28, 39, 41, 42. There was nothing in their testimony that the industrial injury lit up the degenerative disc disease. *See* BR Fossier 3-108; BR Hong 3-75; BR James 3-83. They solely attributed the degenerative disc disease to age. *See* BR Fossier 45-46; BR Hong 26-28, 29, 31, 34, 48; BR James 41.

**D. Diagnostic Findings Also Show Adams Has Age-Related Multilevel Cervical Degenerative Disc Disease**

Drs. Fossier, Hong, and James also diagnosed Adams with age related multi-level cervical degenerative disc disease, which was seen on various imaging studies. BR Fossier 31, 33, 45-46; BR Hong 32, 35, 48; BR James 25-26, 39. During his orthopedic exam, Dr. Fossier did not find any abnormality in her neck. BR Fossier 40. Likewise, Dr. Hong's neurological exam did not show any abnormal cervical findings. BR Hong 40-47. Indeed, Dr. James found that Adams had full range of motion in her neck. BR James 34-35. There was nothing in their testimony that the industrial injury lit up the degenerative disc disease. *See* BR Fossier 3-108; BR Hong 3-75; BR James 3-83. The Department's medical witnesses solely attributed the degenerative disc disease to age. *See* BR Fossier 45-46; BR Hong 32, 35, 48; BR James 39-41.

**E. Medical Testimony Supports The Diagnosis Of Age Related Degeneration In Adams' Left Shoulder**

Drs. Fossier, Hong, and James opined the July 24, 2000, MRI of Adams' left shoulder revealed age related degeneration of the acromioclavicular joint. BR Fossier 34, 45-46; BR Hong 35-36; BR James 28, 40. Dr. Fossier testified Adams had full range of motion in her shoulders. BR Fossier 40. Dr. Hong's neurological exam did not produce any abnormal left shoulder findings. BR Hong 40-47. Dr. James' clinical

examination resulted in a finding of acromioclavicular degenerative changes in Adams' left shoulder. BR James 40. There was nothing in their testimony that the industrial injury lit up the degenerative disease. *See* BR Fossier 3-108; BR Hong 3-75; BR James 3-83. The Department's medical witnesses solely attributed the shoulder condition to age. *See* BR Fossier 45-46; BR Hong 35-36, 48; BR James 28, 40.

**F. The Doctors Testifying On Behalf of the Department Did Not Identify Findings Indicative Of An Ongoing Problem With Adams' Left Hip**

Drs. Fossier, Hong, and James found scant evidence of a hip condition at the time of their examinations. BR Fossier 44, 50-51; BR Hong 48; BR James 40. Dr. Fossier concluded that to the extent Adams has degeneration in her left hip, it is age related. BR Fossier 45-46. There was nothing in their testimony that the 1994 fall lit up a pre-existing hip condition. *See* BR Fossier 3-108; BR Hong 3-75; BR James 3-83. Dr. Fossier testified the hip diagnosis that resulted from the 1994 fall was a "contusion" and that in and of itself would not cause a hip pathology. BR Fossier 50. Dr. Fossier opined it would have been a soft tissue injury that disappeared within a short time period. BR Fossier 50-51. The findings of Dr. Hong's neurological exam involving Adams' hips were invalid. BR Hong 42-43. Dr. James' clinical exam also did not have any positive findings indicating degeneration in Adams' left hip. BR James 40.

**G. None of the Department's Expert Witnesses Diagnosed Complex Regional Pain Syndrome**

Drs. Fossier, Hong and James used the AMA Guide to the Evaluation of Permanent Impairment (5<sup>th</sup> Edition) to determine whether Adams had CRPS. BR Fossier 56; BR Hong 56; BR James 45. Drs. Fossier, Hong and James testified the criteria under the AMA Guide to make a diagnosis of CRPS require both clinical and radiographic signs. BR Fossier 57; BR Hong 59; BR James 46-47. According to the AMA Guide, the local signs should include vasomotor changes, pseudomotor changes and trophic changes. BR Hong 59; BR James 48-49. Radiographic signs should include trophic bone changes—a finding on bone scan that has atypical appearance. BR Hong 59; BR James 49. According to Dr. Hong, only when the clinical signs and radiographic signs correlate are the criterion for a diagnosis of CRPS met. BR Hong 59-60.

To make a diagnosis of CRPS, Adams must have eight concurrent findings. BR Hong 60; BR James 49. Both Dr. Hong and Dr. James concluded that Adams did not present with eight concurrent findings at any time nor did she present with such findings during their respective clinical exams. BR Hong 60-61; BR James 49-50. Dr. Fossier testified that at the time of his examination, Adams did not present with changes

consistent with CRPS. BR Fossier 40-41. Adams' March 1994 normal bone scan also does not support a diagnosis of CRPS. BR Fossier 57-58; BR Hong 62. Drs. Fossier, Hong, and James agree Adams does not suffer from the condition known as CRPS. BR Fossier 58; BR Hong 62; BR James 50.

**H. Medical Testimony Supports A Diagnosis Of Bilateral Carpal Tunnel Syndrome But Differs In Opinion Regarding Causation**

Drs. Fossier and Hong diagnosed bilateral carpal tunnel syndrome based on the positive Tinel's and Phalen's testing performed during their examination. BR Fossier 38, 46; BR Hong 45-46, 53. Dr. James' testing for bilateral carpal tunnel syndrome resulted in negative Tinel's and Phalen's. BR James 34. Drs. Fossier and Hong testified that to the extent Adams has bilateral carpal tunnel syndrome, it is not related to her 1986 industrial injury or the keyboarding she performed during vocational retraining. BR Fossier 46; BR Hong 48. Keyboarding is not a recognized cause for developing carpal tunnel syndrome. BR Fossier 46; BR Hong 53-55; BR James 43-44. Scientifically, the only occupation that is causally related to carpal tunnel is the use of vibratory tools. BR Fossier 46. Adams testified she continues to have numbness in her hands ten years after she ended her keyboarding classes. BR Adams 29. The doctors confirmed Adams has diabetes which is a recognized cause of

carpal tunnel syndrome. BR Fossier 18, 99-100; BR Hong 38, 53, 68-69; BR James 19, 43-44.

**I. The Department, The Board, And The Superior Court Rejected Adams' Claims That The Conditions Were Related To the Industrial Injury**

The Department denied responsibility for the conditions diagnosed as lumbosacral degenerative disc disease, cervical degenerative disc disease, left shoulder degenerative disease, left hip degenerative disease, complex regional pain syndrome, and bilateral carpal tunnel syndrome, determined by medical evidence, finding it unrelated to the industrial injury. BR 38, 39. Adams appealed to the Board. BR 40-45.

At the Board, after calling her witnesses, Adams rested on September 26, 2011. BR Janes 120. After calling its witnesses, the Department rested with the publication of the deposition transcripts, the last of which was filed with the Board on November 15, 2011. BR 99; BR James 1. On November 28, 2011, Adams asked the industrial insurance appeals judge to take judicial notice of a document titled "Work Related Complex Regional Pain Syndrome (CRPS): Diagnosis and Treatment." BR 100.

After considering the testimony presented by Adams and the Department, the industrial insurance appeals judge found in a proposed decision that the six contended conditions were not proximately caused or

aggravated by Adams 1986 industrial injury or its sequelae and affirmed the Department order. BR 25. In her analysis, the industrial insurance appeals judge cited the lack of evidence of any acute injuries in the studies performed of Adams' lumbar and cervical spine, which supports the conclusions of Dr. Fossier, Dr. Hong, and Dr. James. BR 33. The degenerative changes in Adams' left shoulder are consistent with age not injury. *Id.* Due to a lack of objective medical findings, the industrial insurance appeals judge found Adams does not suffer from left hip degenerative disease or CRPS. BR 34. Lastly, the industrial insurance appeals judge concluded Adams' symptoms of bilateral carpal tunnel are the result of diabetic peripheral neuropathy not keyboarding. BR 35. The industrial insurance appeals judge determined Dr. Janes' opinions to be conclusory and not supported by objective medical evidence. BR 33, 34.

In the proposed decision, the industrial insurance appeals judge rejected Adams' attempt to supplement the record after the close of evidence because the document did not comport with the requirements for judicial notice. BR 26. Adams petitioned for a review to the full Board. BR 3. The Board denied Adams' petition for review and adopted the proposed decision as the decision of the Board. BR 2. Adams appealed to

superior court, which denied Adams' motion for judicial notice and affirmed the Board. CP 1-3, 29-32.<sup>2</sup>

The superior court found that the conditions of lumbosacral degenerative disc disease, cervical degenerative disc disease, left shoulder degenerative disease, left hip degenerative disease, complex regional pain syndrome, and bilateral carpal tunnel syndrome, were not caused or aggravated by the industrial injury or its sequelae. CP 30, 32. Adams appeals to this Court.

#### IV. STANDARD OF REVIEW

The first step in seeking review of the Department's decision to deny benefits is an appeal to the Board. RCW 51.52.060. As the appealing party, Adams bore the burden of proof to prove by a preponderance of the evidence that the Department's order was incorrect. See RCW 51.52.050; *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942). One seeking benefits under the Industrial Insurance Act "must prove his claim by competent evidence." *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966).

Decisions of the Board may be appealed to superior court. RCW 51.52.110. The superior court reviews the Board's decisions de novo, but without any evidence or testimony other than that included in

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<sup>2</sup> The Department has done a supplemental designation of clerk's papers to obtain the order denying the motion for judicial notice.

the Board's record. RCW 51.52.115; *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P.2d 431 (1995). On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992).

The Court of Appeals reviews the superior court's decision in a workers' compensation case under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); see *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). Although Adams asks for review of the Board decision, the Court of Appeals reviews the findings of the superior court, not the Board. See App. Br. 12; *Rogers*, 151 Wn. App. at 179-81.

This Court's review of the superior court decision is limited to examining the record to see if substantial evidence supports the findings made after the trial court's de novo review, and if the 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). Here the findings are unchallenged and are verities on appeal. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

When undertaking substantial evidence review, the appellant court does not reweigh the evidence or re-balance the competing testimony presented to the fact finder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inference from the evidence in the light most favorable to the prevailing party. *Raum v. City of Bellevue*, 171 Wn. App. 124, 151, 286 P.3d 695 (2012), *review denied*, 176 Wn.2d 1024 (2013); *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon*, 110 Wn. App. at 485. "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Korst*, 136 Wn. App. at 206.

Legal questions are reviewed de novo. *See generally Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997). Evidentiary objections are reviewed for abuse of discretion. *See Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 772, 970 P.2d 774 (1999).

## V. SUMMARY OF ARGUMENT

Adams essentially asks this Court to reweigh the evidence to determine whether the superior court was correct in finding that a

proximal relationship does not exist between the six contended conditions and Adams' 1986 industrial injury or its sequelae. Well-established standards for substantial evidence review provide that appellate courts do not reweigh the evidence. Here, ample medical testimony supports the superior court's determination that a proximate relationship between the six conditions and Adams' 1986 industrial injury or sequelae does not exist.

Additionally, Adams argues the superior court erred in its decision not to take judicial notice of a document titled, "Work Related Complex Regional Pain Syndrome (CRPS): Diagnosis and Treatment." The superior court did not abuse its discretion in determining that the document contains information not subject to judicial notice under ER 201(b). The superior court also did not abuse its discretion in rejecting an exhibit that was offered after the close of evidence at the Board.

## VI. ARGUMENT

### A. **The Findings Are Verities And There Are No Disputed Legal Theories On Which Adams Can Prevail**

Despite failing to challenge any specific findings of fact, Adams argues "the facts were overlooked by the superior court, and produced a legally incorrect result." App. Br. 10; *see Allen*, 100 Wn. App. at 530. (Unchallenged findings are verities on appeal).

The trial court made the following pertinent findings of fact based on the evidence presented:

- 1.3 Norma J. Adams' lumbosacral degenerative disc disease was not proximately caused or aggravated by her July 23, 1986 industrial injury or its sequelae.
- 1.4 Norma J. Adams' cervical degenerative disc disease was not proximately caused or aggravated by her July 23, 1986 industrial injury or its sequelae.
- 1.5 Norma J. Adams' left shoulder degenerative joint disease in her acromioclavicular joint was not proximately caused or aggravated by her July 23, 1986 industrial injury or its sequelae.
- 1.6 Norma J. Adams' left hip degenerative joint disease was not proximately caused or aggravated by her July 23, 1986 industrial injury or its sequelae.
- 1.7 Norma J. Adams' complex regional pain syndrome was not proximately caused or aggravated by her July 23, 1986 industrial injury or its sequelae.
- 1.8 Norma J. Adams' bilateral carpal tunnel syndrome was not proximately caused or aggravated by her July 23, 1986 industrial injury or its sequelae.
- 1.9 The Board affirmed the Department's November 12, 2010, determination that the conditions diagnosed as lumbosacral degenerative disc disease, cervical degenerative disc disease, left shoulder degenerative joint disease, left hip degenerative joint disease, complex regional pain syndrome, and bilateral carpal tunnel syndrome were not proximately caused or aggravated by Ms. Adams' July 23, 1986 industrial injury or its sequelae.

CP 30, 32. Adams does not contest these findings, but argues that the superior court "misapplied the law with regard to proximate causal relationship of conditions related to an industrial injury." App. Br. 4.

For a condition or disability to be compensable, the industrial injury must be a proximate cause. *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 684, 571 P.2d 229 (1977). Proximate cause is determined by application of the "but for" test. *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 340, 777 P.2d 568 (1989). A "proximate cause" is one "without which" the condition or disability complained of would not have occurred. *Wendt*, 18 Wn. App. at 684; WPI 155.06.

If a preexisting degenerative condition is asymptomatic, the Department can still be responsible for the treatment of that condition. *McDonagh v. Dep't of Labor & Indus.*, 68 Wn. App. 749, 755, 845 P.2d 1030 (1993). If an injury lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, the resulting disability is also attributable to the injury. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 472, 745 P.2d 1295 (1987). However, the Department is not responsible for degenerative changes which would have appeared and progressed regardless of Adams' 1986 injury. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 7, 977 P.2d 570 (1999); *see also Nagel v. Dep't of Labor & Indus.*, 189 Wash. 631, 636, 66 P.2d 318 (1937); *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 256, 177 P.3d

180 (2008); *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657, 219 P.3d 711 (2009).<sup>3</sup>

Adams fails to cite to anything in the record that shows that the superior court used a flawed legal analysis rather than simply weighing the evidence and rejecting Adams' contention that the conditions were "lit up" by her 1986 industrial injury. Indeed, Adams argued her lighting up theory to the superior court, citing case law on the subject. CP 19-20, 21, 24. The superior court is presumed to have followed the law. *Cf. Raum*, 171 Wn. App. at 148 (jurors presumed to have followed instructions). The superior court rejected her theory. The findings of fact indicate that the superior court found that the industrial injury did not aggravate her conditions. CP 30, 32. Substantial evidence supports these findings. *See Part VI.B infra.*

Again, without citing to the record, Adams also argues that the trial court failed to apply the compensable consequence doctrine to the facts of this case. App. Br. 7-9. Although there is no published decision, the Board's significant decision addresses the compensable injury doctrine. *See In re: Iris Van Dorn*, BIIA Dec., 02 11466, 2003 WL 22273056 (2003).

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<sup>3</sup> Although some of these cases involve reopening applications, they still stand for the general proposition that a worker is not entitled to benefits if a condition worsens for entirely non-injury related reasons.

While neither party briefed the compensable consequence doctrine below, the Department at no point argued that Adams' two falls could not be a basis for recovery. CP 8-24.<sup>4</sup> The Department argued at the Board and superior court that Adams' conditions developed independently of the industrial injury. CP 8-15. There is no evidence in the record that the superior court rejected Adams' evidence on the basis that the compensable consequence doctrine precluded her recovery.

**B. Substantial Evidence Supports The Superior Court's Determination That Adams' Current Conditions Were Not Caused Or Aggravated By Her 1986 Industrial Injury**

**1. The Superior Court Properly Rejected Adams's Theory That Evidence Of Degenerative Changes After The Industrial Injury Proved Causation**

While the findings of the trial court are verities, Adams argues that the facts show that the industrial injury and the falls lit up her conditions. App. Br. 6, 7, 9, 10. In a reversal of the substantial evidence standard, Adams argues that substantial evidence supports her position. App. Br. 4. However, that is not the correct standard of review here. The Court reviews the evidence to see if the substantial evidence supports the superior court's decision in favor of the Department, the prevailing party. *Korst*, 136 Wn. App. at 206. "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational

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<sup>4</sup> The Department has done a supplemental designation of clerk's papers for Adams's opening trial brief.

person of the truth of the declared premise.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Here, the declared premise is whether the superior court was correct when it found the six conditions were not proximately caused or aggravated by Adams’ 1986 industrial injury or its sequelae. CP 30, 32.

Adams asserts that “[e]ach doctor states that the first onset of symptoms became symptomatic was after either the industrial injury, or the falls suffered due to the accepted condition and while the worker was actively participating in vocational services.” App. Br. 7 (citing BR Janes 26, 65-68, 71, 74-77, 79, 85-87; BR James 22, 23, 27, 50; BR Fossier 30; BR Hong 65-74). This does not fully reflect the record with respect to the Department’s witnesses.

Dr. Hong took the lead in reviewing Adams’ medical records for the purposes of his joint examination with Dr. Fossier. BR Fossier 15, 23-24. Dr. Fossier relied upon Dr. Hong’s verbal recitation of clinically significant findings. BR Fossier 23-26. Dr. Hong testified they did not have records to indicate one way or the other that Adams’ low back or cervical spine was symptomatic prior to the 1994 fall. BR Hong 65-67. Dr. Hong testified they did not have records for the period 1986 to 1994. BR Hong 67, 74. When asked whether Adams’ left hip or left shoulder was symptomatic prior to the 1994 fall, Dr. Hong confirmed he had, “no

idea” and “no records.” BR Hong 67-68. Dr. Hong provided the same response to questions regarding Adams’ bilateral carpal tunnel syndrome. BR Hong 68. Dr. Hong testified it is just as possible Adams was symptomatic from 1986 to 1994 with regards to her neck, back, left hip, left shoulder and carpal tunnel as she was after 1994. BR Hong 74. Dr. James confirmed she did not have all the records but only summaries. BR James 62.

To the extent Adams has bilateral carpal tunnel syndrome, the doctors testified there is no scientific basis linking keyboarding to carpal tunnel syndrome. BR Fossier 46; BR Hong 53-54; BR James 43-44. The doctors all confirmed Adams has diabetes, which is a known cause of carpal tunnel syndrome. BR Fossier 18, 99-100; BR Hong 38, 53, 68-69; BR James 19, 43-44. None of them thought she had CRPS. BR Fossier 58; BR Hong 62; BR James 50.<sup>5</sup>

Adams asserts that “[a]nother of the Department’s hired examiners provides medical testimony of the evidence, compared both before and after one of these falls, showing an objective worsening of Ms. Adams’ back. Further, testimony of the doctor shows Ms. Adam’s latent cervical neck condition as rendered symptomatic after the 1994 fall.” App. Br. 9 (citing BR Fossier 70-71, 77-78). Dr. Fossier testified the variances

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<sup>5</sup> The testimony regarding each condition is discussed in detail below. See Part VI.B.2-7 *infra*.

identified in Adams' lumbar spine are degenerative in nature and do not involve nerve root compression or displacement of a disc. BR Fossier 69-70. Dr. Fossier attributed the degenerative changes found on Adams' cervical MRI to multi-level spondylosis. BR Fossier 75. He attributed the degenerative conditions in both the back and neck to age. BR Fossier 73-74, 76-77.

Adams points to testimony from Dr. Janes and Pamela Graever to support her theory of lighting up. App. Br. 6-7. However, this testimony cannot be weighed over the testimony of the Department's medical witnesses. The Department's medical witnesses did not believe that the industrial injury (or the falls), caused or aggravated the conditions. *See* BR Fossier 45-46, 50-52, 100-01; BR Hong 27-28, 35-36, 48, 51-54; BR James 24-25, 39-42. Under the substantial evidence standard of review, this Court views this testimony in the light most favorably to the Department. *See Korst*, 136 Wn. App. at 206.

Adams' premise is that if there are no symptoms before the injury and there were symptoms after the injury, this means that the symptoms were related to the injury. *See* App. Br. 7, 9. This theory fails when substantial evidence supports a finding of no causation for those symptoms. *See Zipp v. Seattle School District No. 1*, 36 Wn. App. 598, 606, 676 P.2d 538 (1984). Here taking the Department's witnesses'

testimony as true, the conditions were attributable to age or other causes, and not the industrial injury.

**2. Substantial Evidence Supports the Finding that Adams' Lumbosacral Degenerative Disc Disease Is Not Caused By The Industrial Injury**

Substantial evidence supports the finding that Adams' back condition was not proximately caused or aggravated by the industrial injury. *See* CP 30. Studies performed of Adams' lumbar spine provide substantial evidence to support the finding that Adams' multilevel lumbosacral degenerative disc disease is wholly related to age and not an acute injury. BR Fossier 30-33, 45-46, 49; BR Hong 26-28, 29, 31, 34, 48, 51-52; BR James 23-25, 27-28, 39, 41, 42. Drs. Fossier, Hong, and James testified that the 1986 industrial injury did not cause her degeneration in her lumbar spine. BR Fossier 45-46; BR Hong 48; BR James 39. They testified that Adams' 1994 fall at the Goodwill and 2000 fall during vocational rehabilitation had no impact on the degeneration in her lumbar spine. BR Fossier 50-52; BR Hong 51-52; BR James 42. Specifically, Dr. Hong and James testified that three months after Adams' fall at the Goodwill, a lumbar MRI was performed which revealed a central disc herniation at L4-5, and a moderate disc bulge at L5-S1, which Drs. Hong and James testified on a more probable than not basis are age-related. BR Hong 27-28; James 24-25. Dr. James testified that the findings were degenerative by definition and

none were traumatic. BR James 25. With or without the falls in 1994 and 2000, Adams would have the multi-level degeneration shown on the lumbar MRIs. BR Fossier 100. Moreover, Adams' back pain experienced after the 1994 fall would have resolved within two months. BR James 81. The Department's witnesses did not testify that the industrial injury or the falls lit up a pre-existing back condition. See BR Fossier 3-108; BR Hong 3-75; BR James 3-83. Because substantial evidence supports finding that Adams' low-back condition developed as part of the natural aging process, the Department is not responsible for the condition. See *Nagel*, 189 Wash. at 636-37, 639.

Although *Nagel* is a reopening case rather than a case addressing acceptance of new conditions, it still stands for the general proposition that a worker is not entitled to benefits if a condition worsens for entirely non-injury related reasons. *Nagel*, 189 Wash. at 636-37. In *Nagel*, the claimant injured his right hip and back when he was struck by a board. *Nagel*, 189 Wash. at 632. Nagel received treatment and total temporary total disability and his claim was closed without a permanent disability award. *Id.* Nagel sought to have the claim reopened two years later, but the Department denied the reopening. *Id.* at 635. Nagel appealed to superior court and it remanded to the Department finding that Nagel was totally and permanently disabled. *Id.* at 635. The Department appealed to

the Supreme Court. *Id.* The Court noted that although the evidence clearly indicated that Nagel was totally and permanently disabled, that the sole question was:

Had the claimant's condition, in so far as his injury had affected the same, become aggravated at the time he applied for reopening of his claim? In other words, was his disability caused by the injury which he received, or was the same the result of a pre-existing and progressive disease?

*Nagel*, 189 Wash. at 636.

The Court indicated that Nagel needed to show that his condition was "the result of injury which was the basis of his original claim against the department, and was not due to the ordinary progression of a disease from which he suffered independently of the injury." *Nagel*, 189 Wash. at 636-37. The Court rejected Nagel's arguments finding that the record failed to make a "showing which supports a holding that his condition due to the injury had become aggravated." *Id.* at 639.

Likewise, in *Jenkins*, this Court recognized the longstanding principle that an employer is not responsible for the worsening of a condition unless the worsening itself is proximately caused by the industrial injury. *Jenkins*, 143 Wn. App. at 248, 256 ("Jenkins's disability is not work related, and [the employer] need not compensate him for injuries that are not work related.").

In support of Adams' case, Dr. Janes offers a general description of lumbar degenerative disc disease, the confirmation of the diagnosis in Adams' case, and responds to questions regarding the impact of the two falls. BR Janes 69-72. When asked whether "falling off a chair" or "falling from leg give-way" could cause changes in Adams' lumbar MRI, Dr. Janes stated "[i]t's possible." BR Janes 71-72. The causal connection between a claimant's physical condition and his or her employment must be established by competent medical testimony that shows that the disease is probably, as opposed to possibly, caused by the employment. *Dennis*, 109 Wn.2d at 477. Testimony that an injury "could cause" or "might cause" or "could probably cause" a condition is insufficient. *See Rambeau v. Dep't of Labor & Indus.*, 24 Wn.2d 44, 49, 163 P.2d 133 (1945). Accordingly, a "possible" relationship between a fall and changes in Adams' lumbar MRI is not sufficient to establish causation. Additionally, Dr. Janes' testimony is void of objective medical findings to support the "change" to which he refers. *See* BR Janes 48-120. The only diagnosis offered by Dr. Janes regarding Adams' lumbar spine is "pain." BR Janes 72. Dr. Janes agreed there is no indication he ever physically examined Adams' back. BR Janes 97.

Regarding Adams' leg give-way, Dr. Janes ruled out Adams' degenerative lumbar condition as a cause for that condition. BR Janes 72.

When asked to speculate as to the probability that Adams' 1994 and 2000 leg give-way and subsequent falls caused the "previously undiagnosed or unproblematic back to become painful," Dr. Janes said "yes" and "I can see that happening," and that it would be probable. BR Janes 72. In view of his overall equivocal testimony and the weight of the Department's medical witnesses regarding the back condition, the fact-finder was entitled to disregard this testimony. *See Korst*, 136 Wn. App. 206. The fact-finder could disbelieve Dr. Janes's unsubstantiated testimony and could accept the testimony of the Department's medical witnesses that her back condition was caused by age.

**3. Substantial Evidence Supports The Finding That The Industrial Injury Did Not Cause Or Aggravate Cervical Degenerative Disc Disease**

Substantial evidence supports the finding that industrial injury did not cause or aggravate the cervical condition. *See CP 30*. The multilevel degeneration found on diagnostic imaging of Adams' cervical spine provides substantial evidence that her cervical degenerative disc disease is the consequence of her age. *See BR Fossier 31, 33, 45-46; BR Hong 32, 35, 48; BR James 25-26, 39*. The Department's expert witnesses provided compelling testimony that Adams' 1986 injury and Adams' 1994 fall at the Goodwill and 2000 fall during vocational rehabilitation had no impact on the degeneration in her cervical spine. BR Fossier 49-52; BR Hong 48, 51-52;

BR James 39, 41, 42. With or without the falls in 1994 and 2000, Adams would have the multilevel degeneration shown on the cervical MRIs. BR Fossier 100. Dr. James would have expected the neck pain Adams experienced after the 1994 fall to have resolved within two months. BR James 80-81. Other diagnostic studies confirmed that her neck condition is wholly related to age and the natural progression of degenerative changes in her cervical spine rather than her falls that occurred during vocational retraining programs. BR Fossier 31, 33, 45-46, 49-52; BR Hong 32, 34-35, 48, 51-52; BR James 25-26, 39, 41, 42. None of the Department's witnesses testified that the industrial injury or the falls lit up a pre-existing cervical condition. *See* BR Fossier 3-108; BR Hong 3-75; BR James 3-83.

On the other hand, Dr. Janes' testimony regarding Adams' neck is limited to a diagnosis of "pain" caused by a ligamentous and muscular injury after Adams' "two falls." BR Janes 72-73. Other than noting its existence, Dr. Janes fails to make any causal connection between Adams' cervical degenerative disc disease and her 1986 industrial injury or the two falls taken, and fails to provide objective medical findings upon which such a determination could even be made. BR Janes 48-120. Indeed, there is no record Dr. Janes ever physically examined Adams' neck. BR Janes 97. The fact-finder could disregard Dr. Janes' unsubstantiated

testimony and accept the Department's medical witnesses' testimony that her neck condition was caused by age.

**4. Substantial Evidence Shows That The Industrial Injury Did Not Cause or Aggravate Adams's Shoulder Condition**

Substantial evidence supports finding that the degeneration found in Adams' left shoulder is related to her age and was unaffected by Adams' two falls. The July 24, 2000 MRI of Adams' left shoulder revealed degeneration of the acromioclavicular joint wholly related to her age. BR Fossier 34, 45-46; BR Hong 35-36; BR James 28, 40. Drs. Fossier, Hong, and James testified that Adams' 1994 fall at the Goodwill and 2000 fall during vocational rehabilitation had no impact on the degeneration in her left shoulder. BR Fossier 50-52; BR Hong 51-52; BR James 42. With or without the falls in 1994 and 2000, Adams would have the degeneration found on the left shoulder MRI. BR Fossier 100-01. Dr. James would have expected the pain in Adams' left shoulder after the 1994 fall to have resolved within two months. BR James 80.

Without providing a single objective medical finding, Dr. Janes opined that Adams' fall in 1994 and 2000 could cause the degenerative condition in her left shoulder. BR Janes 73-74. Dr. Janes then provided the unsubstantiated opinion that Adams left shoulder degenerative joint disease was caused by the industrial injury. BR Janes 74-75. Dr. Janes'

treatment notes do not include objective medical findings and/or diagnoses regarding Adams' left shoulder or evidence of an exam. BR Janes 96-99, 110-11. The fact-finder could disregard Dr. Janes' unsubstantiated opinion, and accept the testimony of the Department's witnesses that the shoulder condition was caused by age.

**5. Substantial Evidence Supports Finding The Industrial Injury Did Not Cause Or Aggravate Any Hip Condition**

To the extent Adams has degeneration in her left hip, substantial evidence supports finding it is wholly related to her age. BR Fossier 45-46. Drs. Fossier, Hong, and James testified that Adams' 1994 fall at the Goodwill and 2000 fall during vocational rehabilitation had no impact on the possible degeneration in her left hip. BR Fossier 50-52; BR Hong 51-52; BR James 42. Dr. Fossier testified the hip diagnosis that resulted from the 1994 fall was a "contusion" and that in and of itself would not cause a hip pathology. BR Fossier 50. A contusion can cause pain. BR Fossier 100. Dr. Fossier opined it should be a soft tissue injury that disappears within a reasonable time. BR Fossier 50-51. Dr. James testified she would have expected the pain in Adams' left hip after the 1994 fall to have resolved within two months. BR James 80.

While Dr. Janes testified to hip "pain" and a possible soft tissue injury to the hip after a fall (BR Janes 66-68), his testimony is entirely

void of any comment, reference or opinion regarding the presence or absence of “left hip degenerative disease” or its relation to Adams’ 1986 industrial injury. BR Janes 48-120. Instead, Dr. Janes makes a general statement on a more probable than not basis that Adams’ left hip problem is due to problems associated with the industrial injury. BR Janes 67-68. Furthermore, Dr. Janes’ testimony is absent any objective medical finding upon which a determination regarding a diagnosis of left hip degenerative disease can be made. BR Janes 48-120. Dr. Janes agreed his chart notes do not include objective medical findings or diagnoses regarding Adams’ left hip or any indication he performed a clinical exam. BR Janes 96-98.

Dr. Janes testified that a fall from a bar stool similar in height to that experienced by Adams in 1994 can cause a “soft tissue injury.” BR Janes 66. When asked about the impact of Adams’ subsequent fall in 2000, Dr. Janes testified it is possible the soft tissue injury became worse and said Adams experienced hip “pain”. BR Janes 67. Testimony about the possibility of a condition is insufficient. *See Dennis*, 109 Wn.2d at 477. The fact-finder was entitled to reject Dr. Janes’ unsupported testimony, and to believe the testimony of the Department’s medical witnesses that any degenerative hip condition was caused by age.

**6. Substantial Evidence Supports Finding That The Industrial Injury Did Not Cause Any Complex Regional Pain Syndrome**

Substantial evidence supports finding that Adams does not suffer from the condition known as CRPS. BR Fossier 58; BR Hong 62; BR James 50. Drs. Fossier, Hong, and James testified that under the AMA Guide to make a diagnosis of CRPS there must be both clinical and radiographic signs. BR Fossier 57, BR Hong 59, BR James 46-47.

To make a diagnosis of CRPS, eight concurrent findings must be found. BR Hong 60; BR James 49. Adams did not present with the eight concurrent findings at any time during her treatment nor did she present with such findings during any clinical exam. BR Hong 60-61; BR James 49-50. Drs. Fossier and Hong agree that Adams' March 1994 normal bone scan does not support a diagnosis of CRPS. BR Fossier 57-58; BR Hong 62.

Dr. Janes did not present competent medical testimony or any objective evidence to support the diagnosis of CRPS. Dr. Janes' general statement that Adams, "has symptoms in her left foot and leg that certainly do fit the definition" of CRPS is not sufficient to support this diagnosis. BR Janes 106. Dr. Janes' opinion regarding the proximal relationship between his diagnosis of CRPS and Adams' 1986 industrial injury is based upon speculation that she experienced bleeding from a torn muscle

that leaked out and coagulated which caused a scar and pinched nerve. BR Janes 107. The lack of objective medical evidence to that effect leaves this speculation wholly unsubstantiated. BR Janes 107. The fact-finder could disregard this unsubstantiated testimony and believe the testimony of the Department's medical witnesses that she did not have CRPS.

**7. Substantial Evidence Supports The Finding That The Industrial Injury Did Not Cause The Carpal Tunnel Disease**

Substantial evidence supports finding that keyboarding is not a recognized cause for developing carpal tunnel syndrome. BR Fossier 46; BR Hong 53-55; BR James 43-44. Scientifically, the only occupation that is causally related to carpal tunnel is the use of vibratory tools. BR Fossier 46. Drs. Fossier and Hong testified that to the extent Adams has bilateral carpal tunnel syndrome, it is not related to her 1986 industrial injury or the keyboarding she performed during vocational retraining. BR Fossier 46; BR Hong 48, 53-54. Adams testified she still continues to experience numbness in her hands ten years after her keyboarding classes ended. BR Adams 29. If keyboarding was the cause of Adams' bilateral carpal tunnel syndrome, her symptoms likely would have abated over those ten years. BR Fossier 54; BR Hong 54; BR James 44. Instead, Adams was diagnosed with diabetes, which is a recognized cause of carpal tunnel syndrome. BR Fossier 18, 99-100; BR Hong 38, 53, 68-69;

BR James 19, 43-44. Contrary to Adams' suggestion, the doctors did not testify her diabetes predisposed her to acquiring carpal tunnel syndrome from keyboarding. See App. Br. 9; BR Fossier 3-108; BR Hong 3-75; BR James 3-83.

When asked on direct examination whether Adams' carpal tunnel syndrome was caused by keyboarding performed during vocational retraining, Dr. Janes testified, "I think so." BR Janes 76. The basis for Dr. Janes' opinion was, "I think it began right around that time, and it was not present previously, so the conclusion has to be: it was due to that." BR Janes 76. Dr. Janes testified his opinion was on more probable than not basis. BR Janes 87. Dr. Janes failed to offer competent medical testimony to support a causal relationship between Adams' bilateral carpal tunnel syndrome and her vocational retraining. The fact-finder could disregard his testimony, and believe the testimony of the Department's witnesses that the keyboarding did not cause carpal tunnel syndrome.

**C. The Superior Court Did Not Abuse Its Discretion In Refusing To Take Judicial Notice Of The Document About CRPS**

Both the Board and superior court declined to take judicial notice of the document titled "Work Related Complex Regional Pain Syndrome (CRPS): Diagnosis and Treatment". BR 26.<sup>6</sup> On appeal, as in all civil

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<sup>6</sup> As noted above, the Department has filed a supplemental designation of clerk's papers regarding the superior court's order.

proceedings, a trial court's evidentiary rulings are reviewed for abuse of discretion. *Fusato*, 93 Wn. App. at 772. A trial court abuses its discretion if its decision was manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). The superior court's determination that the document contains information not subject to judicial notice is a reasonable conclusion.

ER 201(b) authorizes the superior court to take judicial notice of facts that fall into either of two categories: (1) facts generally known within the territorial jurisdiction of the court; or (2) facts capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. ER 201(b); *Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 772, 970 P.2d 774 (1999). The information contained in the document satisfies neither category. While the document may be found on the Department's website, the information contained therein regarding CRPS is not the type of information that is generally known nor is it the type of information subject to accurate and ready determination by a source whose accuracy cannot be questioned.

Adams' contention that the document provides the standard upon which a determination regarding CRPS must be made is undermined by

Adams' failure to present evidence to that effect during her hearing. The record created before the Board is void of any testimony to that effect and is silent with regard to its applicability to Adams' case. As such, judicial notice of the disputed document is not appropriate. The superior court also would not act on untenable grounds in rejecting an exhibit that had been submitted after the close of evidence. *Cf. In re Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997) (the trial court has the authority to exclude evidence where evidence is not disclosed until just before trial where prejudicial). Here it would have been prejudicial to allow the late submission of evidence because the Department did not have the opportunity to consider it in the presentation of its evidence.

Even if there was error regarding the exhibit, any error was harmless. An error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The disputed document requires objective findings to diagnose CRPS. BR Ex. 2. Dr. Janes did not testify to any objective findings. See BR Janes 48-120. Drs. Hong, Fossier, and James did not testify to any objective findings. See BR Fossier 3-108; BR Hong 3-75; BR James 3-83. Therefore, had the document been admitted as evidence,

the fact-finder would have believed that there was no findings supporting CRPS. The outcome of the trial would not have been materially affected.<sup>7</sup>

## VII. CONCLUSION

For the foregoing reasons, the Department requests that this Court affirm the superior court's judgment.

RESPECTFULLY SUBMITTED this 10 day of July, 2013.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in black ink, appearing to read 'Angela R. Zurlini', is written over a horizontal line. The signature is stylized and cursive.

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<sup>7</sup> If the Court were to find reversible error, the remedy would be to remand to the trial court on that specific issue. *See Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 921, 640 P.2d 1 (1982).

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their  
counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 10<sup>th</sup> day of July, 2013.

  
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CC OLSON