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

No. 336212

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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JOEL CONZALEZ-PRUNEDA, *Respondent*.

v.

VALLEY FRUIT COMPANY, LLC, *Appellant*,

---

APPEAL FROM THE SUPERIOR COURT FOR COUNTY OF YAKIMA  
HONORABLE BLAINE G. GIBSON

---

**OPENING BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

This is an industrial insurance case. It concerns the issue whether or not Joel Gonzalez, respondent, sustained an industrial injury to his left shoulder. That issue in turn depends on an issue of medical causation. That issue of medical causation is whether or not the purported industrial event proximately caused a left shoulder injury. That issue of causation in turn depends on Mr. Gonzalez's credibility as to whether or not he truthfully related the physical effects of an industrial event in order to support the opinion of his medical expert, Dr. Vickers, on the issue of medical causation.

The Superior Court, by mere review of the Certified Appellate Board Record, found Mr. Gonzalez credible. That finding is not supported by sufficient or substantial evidence, viewing the record in the light most favorable to Mr. Gonzalez.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in reversing the decision of the Board of Industrial Insurance Appeals.

## **III. ISSUES PRESENTED FOR REVIEW**

The trial court erred in finding that Mr. Gonzalez's left shoulder injury occurred during the course of his employment with Valley Fruit

Co., LLC., as that finding is not supported by sufficient or substantial evidence, viewing the record in the light most favorable to Mr. Gonzalez.

#### **IV. STATEMENT OF THE CASE**

On July 12, 2010, some two years before the alleged industrial event alleged to have occurred on September 5, 2012, Mr. Gonzalez was treated by his family physician, Joseph Vickers, M.D., for a symptomatic left shoulder. [CP--CABR—Vickers 8/15-25; 20/17-21]. On examination, Dr. Vickers found Mr. Gonzalez to have significant discomfort on range of motion of the left shoulder. To treat the left shoulder, he prescribed steroids to reduce the inflammation there. [CP--CABR—Vickers 8/15-25].

On October 6, 2010, Dr. Vickers informed the Department of Labor and Industries that he was treating Mr. Gonzalez for bilateral shoulder pain and assessed bilateral frozen shoulders. [CP--CABR—Vickers 28/6-18].

On October 13, 2010, Dr. Vickers again examined Mr. Gonzalez. He found Mr. Gonzalez had some pain behavior while moving through ranges of motion, but was able to get his hands behind his back and his head. [CP--CABR—Vickers 9/19-21].

On November 10, 2010, Dr. Vickers again examined Mr. Gonzalez. He found decreased range of motion in the left shoulder. [CP--CABR—Vickers 29/12-25; 30/1-2]. He assessed bilateral shoulder tendinosis and frozen shoulder. [CP--CABR—Vickers 28/19-24]. For treatment to both

shoulders, he prescribed Percocet. [CP--CABR—Vickers 30/3-10]. “Tendinosis” is a generic description defined as pathology of the tendon or a condition affecting the tendon to include rotator cuff tendonitis (inflammation of the tendon) or tears of the rotator cuff tendons. [CP--CABR—Bays 22/15-25; 23/1-7]. A “frozen shoulder” is a lay person’s name for “adhesive capsulitis.” Adhesive capsulitis is a pathological condition in a shoulder from scar tissue in the tendons and muscles surrounding the shoulder limiting its range of motion. [CP--CABR—Bays 24/11-22].

On December 1, 2010, Dr. Vickers again examined Mr. Gonzalez. He again found decreased range of motion in the left shoulder. [CP--CABR—Vickers 31/12-15]. He again assessed bilateral shoulder tendinosis and frozen shoulder. [CP--CABR—Vickers 30/22-24]. Again, for treatment to both shoulders, he prescribed Percocet. [CP--CABR—Vickers 31/16-19].

The same pattern of left shoulder pain, left shoulder limited range of motion, left shoulder assessment and left shoulder treatment continued into 2011.

On February 1, 2011, Dr. Vickers again examined Mr. Gonzalez. He found *significant* pain with range of motion in both shoulders. [CP--CABR—Vickers 32/6-7]. He assessed that shoulder range of motion was 90% of normal. [CP--CABR—Vickers 10/22-23]. Mr. Gonzalez had

diminished left shoulder strength--4/5 strength in his shoulders bilaterally. [CP--CABR—Vickers 32/8-12]. Again, for treatment to both shoulders, Dr. Vickers prescribed Percocet. [CP--CABR—Vickers 33/11-13].

On September 28, 2011, Dr. Vickers again examined Mr. Gonzalez. Dr. Vickers once more assessed chronic bilateral shoulder pain. [CP--CABR—Vickers 11/11-13; 33/18-23]. Again, for treatment to both shoulders, he prescribed Percocet. [CP--CABR—Vickers 33/24-25; 34/1].

On November 2, 2011, Dr. Vickers again examined Mr. Gonzalez. He found bilateral shoulder pain with range of motion testing. [CP--CABR—Vickers 35/1-18]. He diagnosed chronic bilateral rotator cuff tendinosis. [CP--CABR—Vickers 35/16-18]. Again, for treatment to both shoulders, he prescribed Percocet. [CP--CABR—Vickers 36/1-2].

The same pattern of left shoulder pain, left shoulder limited range of motion, left shoulder assessment and left shoulder treatment continued into 2012.

On January 30, 2012, Dr. Vickers again examined Mr. Gonzalez. He noted *increased* pain in both shoulders. [CP--CABR—Vickers 36/19-23]. He found *significantly* decreased range of motion in the left shoulder. [CP--CABR—Vickers 36/24-25; 37/1-11]. Mr. Gonzalez could barely get his hands up to his head. [CP--CABR—Vickers 37/5-7]. Dr. Vickers continued to diagnose chronic bilateral rotator cuff tendinosis. [CP--CABR—Vickers

37/12-16]. Again, for treatment to both shoulders, he prescribed Percocet. [CP--CABR—Vickers 38/2-4].

On April 4, 2012, Dr. Vickers again examined Mr. Gonzalez. Mr. Gonzalez reported *significant* pain in his left shoulder that prevented him from functioning in the evening. [CP--CABR—Vickers 38/15-18]. Dr. Vickers continued to diagnose chronic bilateral rotator cuff tendinosis. [CP--CABR—Vickers 38/23-25; 39/1-3]. Again, for treatment to both shoulders, he prescribed Percocet. [CP--CABR—Vickers 39/7-9].

On August 27, 2012, Dr. Vickers again examined Mr. Gonzalez. He noted that Mr. Gonzalez continued to have *significant* left shoulder pain. [CP--CABR—Vickers 39/13-15; 40/2-5]. He saw no significant improvement in Mr. Gonzalez's left shoulder pathology. [CP--CABR—Vickers 39/22-25]. Again, for treatment to both shoulders, he prescribed Percocet. [CP--CABR—Vickers 39/16-18].

On September 5, 2012, Bryce Cupp, the HR and Safety manager for the self insured employer observed Mr. Gonzalez. Mr. Cupp explained that Mr. Gonzalez, that day, had been moved from the quality control area where he had been driving a forklift, to a new location, the presize area, where he was still driving a forklift, lifting bins of fruit and placing them in stacks against a wall based on the size of the fruit. [CP--CABR—Cupp 71/1-2 & 20-25]. Mr. Cupp inquired of Mr. Gonzalez about how he was doing in that

new area. [CP--CABR—Cupp 72/12-15]. Mr. Gonzalez replied that he did not like the work he was doing there, and he did not want to work in that new area. [CP--CABR—Cupp 72/18-19]. Mr. Cupp reported that at this time or at any time that day, Mr. Gonzalez did not complain of any injury to his left shoulder. [CP--CABR—Cupp 72/22-25]. Nor did Mr. Gonzalez report an injury to his left shoulder that day. [CP--CABR—Cupp 73/3-6]. Nor did he appear to have any pain in his left shoulder or elsewhere. [CP--CABR—Cupp 72/26; 73/1-2].

Mr. Gonzalez said that he spoke with Mr. Cupp about his injury after 3:30 p.m. in Mr. Cupp's office. [CP--CABR—J. Gonzalez 100/8; 103/15-21]. According to Mr. Gonzalez, Mr. Cupp told him they would talk about it later, but he never did. [CP--CABR—J. Gonzalez 100/11-22]. Mr. Cupp said he first learned of Mr. Gonzalez's industrial insurance claim the following week. [CP--CABR--Cupp 79/2-7].

On September 6, 2012, Mr. Gonzalez continued to work, and Mr. Cupp again spoke with him about how he was doing in his job in the new location. [CP--CABR—Cupp 73/7-13]. Mr. Gonzalez repeated his dissatisfaction with the new location and that he did not want to return to work there. [CP--CABR—Cupp 73/9-19]. He wanted to work in his previous location and so he was moved there. *Id.* That day, Mr. Gonzalez reported no

injury to his left shoulder, either to Mr. Cupp or to any of Mr. Gonzalez's supervisors. [CP--CABR—Cupp 73/20-25; J. Gonzalez 106/5-8].

On September 7, 2012, between 3:30 p.m. and 4:30 p.m., Mr. Cupp met with Mr. Gonzalez to inform him that because his job position in the quality control area was being eliminated, he was being laid off. [CP--CABR—Cupp 74/3-15; 75/10-19; 76/5-14 & 20-26; 77/1-12]. At this time, Mr. Gonzalez did not complain of any injury to his left shoulder. [CP--CABR—Cupp 77/18-20 & 26; 78/1-15]. Nor did he appear to have any pain in his left shoulder or elsewhere. [CP--CABR—Cupp 77/21-25; 78/16-18]. Mr. Gonzalez admitted that on September 7, 2012, he told no one at work that he had injured his left shoulder. [CP--CABR—J. Gonzalez 106/14; 108/3-5].

About an hour later, around 5:00 p.m., Mr. Gonzalez appeared in the emergency room of Yakima Valley Memorial Hospital, complaining of left shoulder symptoms. [CP--CABR—Daily 10/6-9 & 20-21; 13/20-21]. Initially, Mr. Gonzalez saw a triage nurse. [CP--CABR—Daily 40/1-8 & 13-15]. According to the triage nurse's notes, Mr. Gonzalez reported that he had an onset of pain at work on Wednesday (*viz.*, September 5, 2012). [CP--CABR—Daily 41/5-18]. But also, according to those notes, Mr. Gonzalez reported inconsistently that he had the onset of pain in his left shoulder that day at work (*viz.*, September 7, 2012). [CP--CABR—Daily 47/26; 48/1].

The triage notes indicate that Mr. Gonzalez said that he had injured his left shoulder while turning the wheel of his forklift hard. [CP--CABR—Daily 41/5-18].

In the emergency room, that day, Mr. Gonzalez was eventually evaluated by Laura Daily, ARNP. [CP--CABR—Daily 10/9]. To her, Mr. Gonzalez complained of pain in the anterior shoulder, in the anterior chest and in the proximal humerus. [CP--CABR—Daily 14/20-23]. He could not provide a time for the onset of these complaints. [CP--CABR—Daily 15/12 & 10-11]. He could not provide a mechanism of injury. [CP--CABR—Daily 15/7-15]. He merely said that his complaints had worsened in the last few days. [CP--CABR—Daily 15/12].

Importantly, he informed ARNP Daily that he had had no prior left shoulder injury. [CP--CABR—Daily 16/3]. In his history, Mr. Gonzalez did not mention that he was taking Percocet. [CP--CABR—Daily 20/11-15]. Nor did he mention that he had heard a “popping sensation” in his left shoulder while working for his employer. [CP--CABR—Daily 24/1-5]. On examination, ARNP Daily found no objective evidence of an acute rotator cuff injury. [CP--CABR—Daily 17/22-24]. She found no signs of a left shoulder injury worthy of requiring an x-ray of the left shoulder. [CP--CABR—Daily 22/15-26].

In her Report of Industrial Injury or Occupational Disease, she noted no specific trauma or traumatic injury. [CP--CABR—Daily 33/16-19]. On that form, question number 7 asks, “Was the diagnosed condition caused by this injury or exposure?” She checked box of question number 7 as “yes.” She said she did so because Mr. Gonzalez, when asked, provided no history of any incident outside work. [CP--CABR—Daily 17-24]. She noted that had Mr. Gonzalez reported a prior chronic left shoulder rotator cuff condition and had he reported that he had been treated for that chronic left shoulder condition with Percocet, she would *not* have checked “yes.” [CP--CABR—Daily 13-26; 36/1-9; 57/10-19]. She said the reason she would not have checked yes was that Mr. Gonzalez presented with symptoms consistent with a preexisting condition and so that was inconsistent with an acute injury or re-injury at that time. [CP--CABR—Daily 36/11-14].

Mr. Gonzalez also said his pain was currently 9/10 [*viz.*, exceedingly severe]. [CP--CABR—Daily 41/5-11]. ARNP Daily noted that Mr. Gonzalez’s subjective report of 9/10 pain was not supported by the objective findings. [CP--CABR—Daily 50/10-15]. He was in no acute distress. [CP--CABR—Daily 51/11-17]. He sat calmly through the examination. *Id.*

Thereafter, Dr. Vickers continued to treat Mr. Gonzalez’s left shoulder. Dr. Vickers has testified about the nature of his examination findings and treatment of Mr. Gonzalez’s left shoulder.

On September 18, 2012, Dr. Vickers again examined Mr. Gonzalez, who reported that both shoulders still hurt, left greater than right, and that he could hardly do anything. [CP--CABR—Vickers 13/4-6]. He could barely get his hands behind his head. [CP--CABR—Vickers 13/14-15]. He was barely able to get his left hand to his hip pocket. [CP--CABR—Vickers 13/15-16]. He had 5/5 strength. [CP--CABR—Vickers 13/17]. Dr. Vickers assessed “left greater than right, flare-up of bilateral rotator cuff tendinosis consistent with acute overuse, exacerbating a chronic condition, currently disabled due to decreased range of motion and pain.” [CP--CABR—Vickers 14/14-20; 15/11].

On September 25, 2012, Mr. Gonzalez falsely certified in a document for the Department that he had not received any treatment for his left shoulder pain or problems before September 5, 2012. [CP--CABR—J. Gonzalez 112/4-13; 113/21; Exhibit 1].

On October 2, 2010 [*sic*] [should be 2012], Dr. Vickers found that Mr. Gonzalez had wincing on range of motion of his left shoulder, but was able to get his hand to his wallet pocket and up to his ears. [CP--CABR—Vickers 15/5-7]. Dr. Vickers continued to assess, as he had for years before the alleged industrial event, bilateral rotator cuff tendinosis. [CP--CABR—Vickers 15/9]. Dr. Vickers testified that Mr. Gonzalez’s subjective

complaints about his left shoulder were disproportionate to his objective findings. [CP--CABR—Vickers 54/23-25; 60/4-6].

On October 19, 2012, Mr. Gonzalez had an independent medical examination with Daniel Seltzer, M.D. Dr. Seltzer did not testify in this case, but some of his examination findings are in the record along with some of his opinions, as hearsay, under the auspices of ER 703. [CP--CABR—Bays 100-104]. Dr. Seltzer initially believed that Mr. Gonzalez had sustained an industrial injury to his left shoulder on September 5, 2012, based on Mr. Gonzalez's purported history of not having had any left shoulder complaints or treatment before the industrial injury but then, after he had been finally provided with an accurate history, he repudiated his earlier conclusion and concluded that Mr. Gonzalez had not had an industrial injury to his left shoulder. [CP--CABR—Bays 100/21-25; 102/1-4; 104/11-16].

On November 6, 2012, Mr. Gonzalez had an MRI of his left shoulder. Dr. Bays viewed and interpreted the MRI films. [CABR—Bays 60/9-20; 61/1-3 & 12-25]. Dr. Vickers did not. [CP--CABR—Vickers 15/15-17; 46/20-25; 47/1-7]. Instead, Dr. Vickers read the report of the radiologist's interpretation of the MRI films. *Id.* Dr. Vickers testified that he could not say that the MRI findings indicated a work injury. [CP--CABR—Vickers 49/14-18]. He could not say that what is depicted in the

MRI represents a shoulder condition from an acute event. [CP--CABR—Vickers 49/14-18]. He also testified that the events at work on September 5, 2012, as described by Mr. Gonzalez, were not likely to cause a full thickness rotator cuff tear. [CP--CABR—Vickers 48/12-16]. He said: “I would think it was unlikely that what Mr. Gonzalez described ... caused that [*viz.*, a full thickness rotator cuff tear].” *Id.* Moreover, he said that the findings were inconsistent with an overuse traumatic condition. [CP--CABR—Vickers 46/20-25; 47/1-7].

Patrick N. Bays, D.O., a Board certified orthopedic surgeon, reviewed the medical records and depositions of the key witnesses and provided his opinions on causation, concluding that Mr. Gonzalez did not have signs of an acute injury on September 5, 2012. [CP--CABR—Bays 17/6-8]. Dr. Bays also concluded that Mr. Gonzalez did not have signs of a recent flare up or lighting up of his chronic left shoulder pathology. [CP--CABR—Bays 66/24-25; 67/1-2].

Dr. Bays summarized those of Dr. Vickers’ chart notes prepared before September 5, 2012. Those records clearly indicated that Mr. Gonzalez had been complaining about and had been treated for chronic left shoulder pathology for several years. [CP--CABR—Bays 28/21-23; 29/1-6; & 10-25; 30/1-6; 32/4-18; 32/22-25; 33/1-2 & 9-16 & 21-24; 36/10-25; 37/1-4; 38/8-13 & 17-20].

Dr. Bays reviewed the September 7, 2012 emergency room records at Valley Memorial Hospital for indications of an acute injury, and found none. He said that in the emergency room record were reported no swelling; no erythematous or redness in the skin; and no warmth in the left shoulder area—all indicators of no acute condition. [CP--CABR—Bays 42/5-9; 43/16-20]. The emergency room record noted that Mr. Gonzalez had flexion of 90° with active and passive range of motion testing. [CP--CABR—Bays 43/5-8]. He had tenderness to palpation over the AC joint consistent with arthritis of the AC joint. Mr. Gonzalez's range of motion in his left shoulder was consistent with what Dr. Vickers had identified before September 5, 2012. [CP--CABR—Bays 44/5-10]. ARNP Daily did not order further diagnostic studies because the clinical evidence did not warrant such studies. [CP--CABR—Bays 44/22-25; 47/7-13]. Dr. Bays further remarked that no evidence existed in the emergency room record that Mr. Gonzalez reported he heard a popping noise in his left shoulder on or about September 5, 2012. [CP--CABR—Bays 45/14-18].

Dr. Bays reviewed Dr. Vickers' chart notes after September 7, 2012, and concluded that the findings, assessments and recommended treatments were identical to those before September 7, 2012. [CP--CABR—Bays 48/7-25; 49/6-25; 50/1].

Dr. Bays reviewed Dr. Seltzer's independent medical examination of October 29, 2012, about two months after the alleged industrial event. Dr. Bays found that the results of Dr. Seltzer's left shoulder examination markedly differed from those of Dr. Vickers and ARNP Daily. [CP--CABR—Bays 51/24-25; 52/1-25; 53-54/1-4]. It appeared that Mr. Gonzalez was manipulating the examination. [CP--CABR—Bays 69/17-23; 70/6-14]. That conclusion was reinforced upon review of the examination results of subsequent examinations by treating providers Mark Merrell, M.D., and Jonathan Perry, M.D. [CP--CABR—Bays 56/21-25; 57/1-25].

Dr. Bays noted that under the *AMA Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> edition) at page 533, §17.2, if there is an inter-rater disparity in range of motion findings of greater than 10%, all such findings are invalid. [CP--CABR—Bays 58/17-20].

Dr. Bays noted a number of other findings from Dr. Seltzer's IME to support his conclusion that Mr. Gonzalez was manipulating the examination. [CP--CABR—Bays 53-56].

Dr. Bays reviewed the MRI films of the left shoulder. [CP--CABR—Bays 61/1-3]. He said the MRI clearly indicated that Mr. Gonzalez had chronic, not acute, left shoulder pathology. [CP--CABR—Bays 61/12-25; 66/24-25; 67/1-2]. The MRI revealed the following: (1) acromioclavicular (AC) joint arthrosis. [CP--CABR—Bays 61/13-17]; (2) a

humeral head riding high in the socket indicative of a rotator cuff tear. [CABR—Bays 61/20-25; 62/1-4]; (3) a chronic or old full thickness tear in the area of the supraspinatus tendon (a rotator cuff tendon). [CP--CABR—Bays 62/5-19]; (4) old scarring adjacent to the infraspinatus tendon (another rotator cuff tendon). [CP--CABR—Bays 62/20-23]; (5) areas of calcific tendinosis. [CP--CABR—Bays 62/24-25]; (6) 4/5 muscle atrophy, a sign of chronicity. [CP--CABR—Bays 63/14-25; 64/1-8]; (7) prominent tendinosis of the biceps tendon, a sign of chronic rotator cuff pathology. [CP--CABR—Bays 64/25; 65/1-6]; (8) the glenoid labrum showed marked changes indicating degenerative changes relative to high riding humeral head. [CP--CABR—Bays 65/7-25; 66/1-2].

## **V. STANDARD OF REVIEW**

When the Court of Appeals reviews Superior Court decisions as to issues and conclusions of law, the Court does so *de novo*. *E.g., Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001); *Crown, Cork and Seal v. Smith*, 171 Wn.2d 866, 872, 259 P.3d 151 (2011).

When the Court of Appeals reviews Superior Court decisions as to findings of fact, the Court limits its review to determine whether the findings are supported by sufficient or substantial evidence, viewing the record in the light most favorable to the prevailing party in Superior Court.

RCW 51.52.140; RCW 4.44.060; *e.g.*, *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Benedict v Dep't of Labor & Indus.*, 63 Wn.2d 12, 385 P.2d 380, 381-382 (1963); *Layrite Products Co. v. Degenstein*, 74 Wn. App. 881, 887, 880 P.2d 535 (1994) (Division III). "Substantial evidence" is such evidence that would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *E.g.*, *Omeitt v. Dep't of Labor & Indus.*, 21 Wn.2d 684, 686, 152 P.2d 973 (1944); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2006).

## **VI. ARGUMENT**

In summary, Valley Fruit Company's argument is as follows:

1. Mr. Gonzalez's only medical witness was Joseph Vickers, M.D.
2. But for Dr. Vickers' testimony about medical causation, Mr. Gonzalez cannot prove the *prima facie* elements of his industrial insurance claim.
3. But for Mr. Gonzalez's testimony about the occurrence of an industrial event, Dr. Vickers' testimony about medical causation is unfounded. [CP—CABR—Vickers 40/13-23; 41/1-6].
4. The evidential value of Mr. Gonzalez's testimony about an industrial event is based on Mr. Gonzalez's credibility.
5. If Mr. Gonzalez is not credible, he has not proved his industrial insurance claim.

6. Based on Mr. Gonzalez's testimony, Mr. Gonzalez is not credible. He lied under oath at the Board hearing about crucial medical history.
7. The trial court found Mr. Gonzalez credible. [CP--Memorandum Opinion dated April 15, 2015].
8. The trial court's finding that Mr. Gonzalez was credible is not based on such evidence that would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed; that is, it not supported by sufficient or substantial evidence, viewing the record in the light most favorable to Mr. Gonzalez.

**Part A—Alleged Work Injury**

This case rests ultimately upon Mr. Gonzalez's credibility. Mr. Gonzalez testified at the Board hearing that on September 5, 2012, while driving a forklift using primarily his left arm in a faster movement and work pace than he typically did, he felt a pop in his left shoulder. No one witnessed this purported event.

Mr. Gonzalez's claim rests entirely upon his word. Although the trial court concluded that Mr. Gonzalez was credible, not by seeing him testify but merely from reading the Board record, the evidence is overwhelming that he was not credible. The evidence that he is credible would not convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.

## **Part B—Interactions with Employer**

On September 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup>, Mr. Gonzalez interacted with the safety manager for Valley Fruit Company, but during those interactions, according to the safety manager, Mr. Gonzalez did not mention an injury nor did he appear to have sustained an injury.

On September 5, 2012, Bryce Cupp, the HR and safety manager for Valley Fruit Company, observed Mr. Gonzalez. Mr. Cupp explained that Mr. Gonzalez, that day, had been moved from the quality control area where he had been driving a forklift, to a new location, the presize area, where he was still driving a forklift, lifting bins of fruit and placing them in stacks against a wall based on the size of the fruit. [CP--CABR—Cupp 71/1-2 & 20-25]. Mr. Cupp asked Mr. Gonzalez how he was doing in that new area. [CP--CABR—Cupp 72/12-15]. Mr. Gonzalez replied that he did not like the work he was doing there and did not want to work there. [CP--CABR—Cupp 72/18-19]. Mr. Cupp reported that at this particular time, or at any other time that day, Mr. Gonzalez did not complain of any injury to his left shoulder. [CP--CABR—Cupp 72/22-25]. Nor did Mr. Gonzalez report an injury to his left shoulder that day. [CP--CABR—Cupp 73/3-6]. Nor did he appear to have any pain in his left shoulder or elsewhere. [CP--CABR—Cupp 72/26; 73/1-2].

Mr. Gonzalez testified that he reported the injury to his supervisor Luis Reyes. [CP--CABR—J. Gonzalez 100/2-6]. He further testified that he spoke with Mr. Cupp about his injury after 3:30 p.m. in Mr. Cupp's office. [CP--CABR—J. Gonzalez 100/8; 103/15-21]. According to Mr. Gonzalez, Mr. Cupp told him they would talk about it later, but he never did. [CP--CABR—J. Gonzalez 100/11-22]. Mr. Cupp denied that Mr. Gonzalez told him he sustained a workplace injury and said he first learned of Mr. Gonzalez's industrial insurance claim the following week. [CP--CABR--Cupp 79/2-7]. Mr. Reyes did not testify at the Board hearing.

On September 6, 2012, Mr. Gonzalez continued to work, and Mr. Cupp again spoke with him about how he was doing in his job in the new location. [CP--CABR—Cupp 73/7-13]. Mr. Gonzalez repeated his dissatisfaction with the new location and that he did not want to return to work there. [CP--CABR—Cupp 73/9-19]. He wanted to work in his previous location, and so he was moved there. *Id.* That day, Mr. Gonzalez did not report an injury to his left shoulder either to Mr. Cupp or to any of Mr. Gonzalez's supervisors. [CP--CABR—Cupp 73/20-25; J. Gonzalez 106/5-8].

On September 7, 2012, between 3:30 p.m. and 4:30 p.m., Mr. Cupp met with Mr. Gonzalez to inform him that because his job position in the quality control area was being eliminated, he was being laid off. [CP--

CABR—Cupp 74/3-15; 75/10-19; 76/5-14 & 20-26; 77/1-12]. At this time, Mr. Gonzalez did not complain of any injury to his left shoulder. [CP--CABR—Cupp 77/18-20 & 26; 78/1-15]. Nor did he appear to have any pain in his left shoulder or elsewhere. [CP--CABR—Cupp 77/21-25; 78/16-18]. Mr. Gonzalez admitted that on September 7, 2012, he told no one at work that he had injured his left shoulder. [CP--CABR—J. Gonzalez 106/14; 108/3-5].

### **Part C—Emergency Room Visit**

About an hour later, around 5:00 p.m., Mr. Gonzalez appeared in the emergency room of Yakima Valley Memorial Hospital, complaining of left shoulder symptoms. [CP--CABR—Daily 10/6-9 & 20-21; 13/20-21]. He said that he did not seek medical attention earlier because he could no longer bear the pain. [CP—CABR—J. Gonzalez 101/3-10].

Initially, Mr. Gonzalez saw a triage nurse. [CP--CABR—Daily 40/1-8 & 13-15]. According to the notes of the triage nurse, Mr. Gonzalez reported that he had an onset of pain at work on Wednesday (*viz.*, September 5, 2012). [CP--CABR—Daily 41/5-18]. But also, according to the triage nurse, Mr. Gonzalez reported inconsistently that he had onset of pain in his left shoulder that day at work (*viz.*, September 7, 2012). [CP--CABR—Daily 47/26; 48/1]. The triage nurse indicates that Mr. Gonzalez said he had injured his left

shoulder while turning the wheel of his forklift hard. [CP--CABR—Daily 41/5-18].

At the emergency room, Mr. Gonzalez was eventually evaluated by ARNP Laura Daily. [CP--CABR—Daily 10/9]. To her, Mr. Gonzalez complained of pain in the anterior shoulder, in the anterior chest and in the proximal humerus. [CP--CABR—Daily 14/20-23]. He did not mention that he had a “popping sensation” in his left shoulder while working for his employer. [CP--CABR—Daily 24/1-5]. He could not provide a time for the onset of these complaints. [CP--CABR—Daily 15/12 & 10-11]. He could not provide a mechanism of injury. [CP--CABR—Daily 15/7-15]. He merely said that his complaints had worsened in the last few days. [CP--CABR—Daily 15/12].

On examination, ANRP Daily found no objective evidence of an acute rotator cuff injury. [CP--CABR—Daily 17/22-24]. She found no signs of a left shoulder injury worthy of requiring an x-ray of the left shoulder. [CP--CABR—Daily 22/15-26].

Mr. Gonzalez also said his pain was currently 9/10 [*viz.*, exceedingly severe]. [CP--CABR—Daily 41/5-11]. ARNP Daily noted that Mr. Gonzalez’s subjective report of 9/10 pain was not supported by the objective findings. [CABR—Daily 50/10-15]. He was in no acute distress. [CP--CABR—Daily 51/11-17]. He sat calmly through the examination. *Id.*

Importantly, he informed ANRP Daily that he had had no prior left shoulder injury and had not seen any medical provider for his left shoulder. [CP--CABR—Daily 16/1-5]. Nor did he mention he was taking Percocet for the pain in his left shoulder. [CABR—Daily 20/11-15].

In her Report of Industrial Injury or Occupational Disease, ANRP Daily noted no specific trauma or traumatic injury. [CP--CABR—Daily 33/16-19]. On that form, question number 7 asks, “Was the diagnosed condition caused by this injury or exposure?” She checked the box of question number 7 as “yes.” She said she did so because Mr. Gonzalez, when asked, provided no history of any incident outside work. [CP--CABR—Daily 17-24].

She noted that if Mr. Gonzalez had reported a prior chronic left shoulder rotator cuff condition, and if he had reported that he had been treated for that chronic left shoulder condition with Percocet, she would *not* have checked “yes.” [CP--CABR—Daily 13-26; 36/1-9; 57/10-19]. She said the reason she would not have checked “yes” was that Mr. Gonzalez presented with symptoms consistent with a preexisting condition and so that was inconsistent with an acute injury or re-injury at that time. [CP--CABR—Daily 36/11-14].

Mr. Gonzalez was untruthful when he reported to ANRP Daily that he had experienced no prior left shoulder injury and had not seen any

medical provider for his left shoulder before September 5, 2012. [CP--CABR—Daily 16/1-5]. He was also untruthful in failing to disclose that he was taking Percocet for the pain in his left shoulder. [CP--CABR—Daily 20/11-15].

#### **Part D--Medical History**

For two years before the alleged industrial event, Mr. Gonzalez had chronic pain in his left shoulder, limiting his range of motion. [CP—CABR—Vickers 40/2-5; 57/22-25; 58/1-13].

During this period, Dr. Vickers diagnosed him with chronic rotator cuff tendinosis, a generic description indicating pathology of the tendon (inflammation of the tendon) and/or tears of the rotator cuff. [CP—CABR—Vickers 26/13-18; 38/15-18; 39/13-25; 40/2-5; Bays 22/15-25; 23/1-7].

On January 30, 2012, Dr. Vickers again examined Mr. Gonzalez. He noted *increased* pain in both shoulders. [CP--CABR—Vickers 36/19-23]. He found *significantly* decreased range of motion in the left shoulder. [CABR—Vickers 36/24-25; 37/1-11]. Mr. Gonzalez could barely get his hands up to his head. [CP--CABR—Vickers 37/5-7]. Dr. Vickers continued to diagnose chronic bilateral rotator cuff tendinosis. [CP--CABR—Vickers 37/12-16]. Again, for treatment of both shoulders, he prescribed Percocet. [CP--CABR—Vickers 38/2-4].

On April 4, 2012, Dr. Vickers again examined Mr. Gonzalez. Mr. Gonzalez reported *significant* pain in his left shoulder. [CP--CABR—Vickers 38/15-18]. Dr. Vickers continued to diagnose chronic bilateral rotator cuff tendinosis. [CP--CABR—Vickers 38/23-25; 39/1-3]. Again, for treatment of both shoulders, he prescribed Percocet. [CP--CABR—Vickers 39/7-9].

On August 27, 2012, some nine days before the purported industrial event, Dr. Vickers again examined Mr. Gonzalez, who continued to have *significant* left shoulder pain. [CP--CABR—Vickers 39/13-15; 40/2-5]. Dr. Vickers saw no significant improvement in Mr. Gonzalez's left shoulder pathology. [CP--CABR—Vickers 39/22-25]. Again, for treatment of both shoulders he prescribed Percocet. [CP--CABR—Vickers 39/16-18].

#### **Part E—Deceitful Medical History Provided**

Mr. Gonzalez provided a deceitful medical history. He told ARNP Daily in the emergency room; he certified to the Department of Labor and Industries [CP--CABR—J. Gonzalez 112/4-13; 113/21; Exhibit 1]; he told his employer; and he testified under oath at the Board hearing that he *never* had treatment for his left shoulder, *never* had difficulty moving his left shoulder, and *never* had taken pain medication for his left shoulder before September 5, 2012. This was all untrue.

At the Board hearing, Mr. Gonzalez testified under oath that before September 5, 2012, he never had any left shoulder symptoms. [CP--CABR—J. Gonzalez 101/17-21]. He further testified that he had no recollection of seeing a doctor specifically for his left shoulder. [CP--CABR—J. Gonzalez 101/22-25]. He had no recollection of seeking treatment, either medication or exercise, for his left shoulder before September 5, 2012. [CP--CABR—J. Gonzalez 101/26; 102/1-3; 109/12; 110/16]. He denied taking Percocet for his left shoulder before September 5, 2012. [CP--CABR—J. Gonzalez 109/1-4]. He denied that Dr. Vickers treated the left shoulder before September 5, 2012. [CP--CABR—J. Gonzalez 110/2-4]. He denied that Dr. Vickers examined his left shoulder before September 5, 2012. [CP--CABR—J. Gonzalez 110/7].

What is especially disturbing is that Mr. Gonzalez asserted these untruths at the Board hearing under oath, even though by then Dr. Vickers had had his discovery deposition in which he revealed Mr. Gonzalez's past medical records, indicating that Mr. Gonzalez had had a symptomatic left shoulder for which he had been treated with narcotic medication and exercise continuously for a couple of years before September 5, 2012, with the most recent treatment being shortly before September 5, 2012. Despite that, Mr. Gonzalez was allowed to misrepresent his medical history under oath at the hearing.

Dr. Vickers testified that Mr. Gonzalez's statement asserting that he did not have left shoulder symptoms before September 5, 2012 was inconsistent with Dr. Vickers' records. [CP--CABR—Vickers 41/14-22]. Dr. Vickers also said that Mr. Gonzalez's statement that he never saw a doctor for his left shoulder before September 5, 2012 was inconsistent with Dr. Vickers' records. [CP--CABR—Vickers 41/23-25; 42/1-2; 45/1-7]. Dr. Vickers testified that Mr. Gonzalez's statement that he never had treatment or took Percocet for his left shoulder symptoms before September 5, 2012 was inconsistent with Dr. Vickers' records. [CP--CABR—Vickers 42/9-13; 42/22-25; 43/1-14; 44/19-24]. Dr. Vickers testified that Mr. Gonzalez's statement that he never had pain in his left shoulder one week before September 5, 2012, was inconsistent with Dr. Vickers' records. [CP--CABR—Vickers 42/16-21]. Dr. Vickers testified that Mr. Gonzalez's statement that he never had difficulty moving his left shoulder before September 5, 2012, was inconsistent with Dr. Vickers' records. [CP--CABR—Vickers 44/12-17].

Dr. Vickers describes complaints, examinations, and treatment, including home exercises and pain medication for the left shoulder, as well as the right shoulder, beginning July 2010 through August 2012. [CP—CABR—Vickers 8/15-25; 20/17-21; 9/19-21; 28/19-24; 29/12-25; 30/1-10; 31/12-19 & 22-24; 32/6-12; 33/11-13; 11/11-13; 33/18-25; 34/1;

35/1-18; 36/1-2 & 19-25; 37/1-16; 38/2-4 & 15-18 & 23-25; 39/1-9 & 13-18 & 22-25; 40/2-5].

**Part F--Dr. Vickers' Opinion**

Dr. Vickers' medical opinion on causation does not rest on any physical or imaging findings. Rather, it rests entirely upon Mr. Gonzalez's word, on his credibility.

**1. Dr. Vickers' Diagnosis**

Dr. Vickers opined that, based on the MRI findings of November 6, 2012, the injury that occurred on September 5, 2012, was a rotator cuff tear. Dr. Vickers did not view the actual MRI films. [CP—CABR—Vickers 31/4-7]. He merely relied upon the radiologist's interpretation of the films. As Dr. Vickers testified:

Q. And in terms of a diagnosis for conditions that would be related to that September 5, 2012 injury, how would you describe those, that diagnosis or diagnoses?

A. Based on the MRI that was done, I would suggest the diagnosis that occurred would be a rotator cuff tear.

[CP—CABR—Vickers 19/9-13].

**2. The MRI Findings**

But Dr. Vickers testified that the MRI findings of November 6, 2012, as interpreted by the radiologist, were inconsistent with a specific

traumatic episode or an overuse condition. In other words, the rotator cuff tear was found to be chronic or longstanding in origin and not from a recent traumatic event. [CP—CABR—Vickers 46/20-25; 47/1-19]. So the foundation of Dr. Vickers' diagnosis—*viz.*, the MRI findings--did not support his opinion on causation of a recent injury. [CP--CABR—Vickers 46/20-25; 47/1-8; 48/12-16; 49/14-18]. As Dr. Vickers' testified:

Q. Doctor, having not seen the MRI scan itself you're not able to say on a more probable than not basis whether any of the pathology noted on that study was acute in nature, can you?

A. No. I can't.

[CP—CABR—Vickers 49/14-18].

### **3. Dr. Vickers' Examination of Mr. Gonzalez**

Dr. Vickers' physical examination findings, given Mr. Gonzalez's recent preexisting medical history of left shoulder problems, did not support a recent injury. As Dr. Vickers testified:

Q. And then on exam what did you note?

A. Pain with use of his shoulders. Barely able to get his hands behind his head. Able to get his right hand to his lumbar spine, but his left hand barely to his hip pocket. Five out of five strength.

[CP—CABR—Vickers 13/13-17].

The finding as to strength was normal. [CP—CABR—Vickers 58/22-25]. That is an objective finding. The other finding was subjective;

that is, it was subject to Mr. Gonzalez's volition, and so is conditioned on Mr. Gonzalez's credibility. [CP—CABR—Vickers 49/23-25; 50/1-2].

Dr. Vickers noted that Mr. Gonzalez's subjective complaints were disproportionate to his objective findings. [CP—CABR—Vickers 60/4-6]. As Dr. Vickers testified:

Q. Other than Mr. Gonzalez indicating to you that something happened at work, do you have any other independent information that would indicate to you that he has a left shoulder injury that occurred at work on September 5, 2012?

A. The exam after that showed that there was a worsening of a left shoulder condition. That's the best I can say.

Q. But you don't know if that worsening was caused by a specific incident at work or something else, do you?

A. Correct.

[CP—CABR—Vickers 49/19-25; 50/1-2].

#### **4. Causation Assumption**

At the Board hearing, to elicit Dr. Vickers' opinion on causation, Mr. Gonzalez's counsel asked Dr. Vickers to *assume* that Mr. Gonzalez had an injury on September 5, 2012 at work and that, in his opinion, those *assumed* set of facts constituted a workplace injury. As Dr. Vickers testified:

Q. Assume that Mr. Gonzalez will or has testified that on September 5, 2012, while he was working with the employer of injury and he was driving a forklift using primarily, if not entirely, his left arm to drive the forklift; and that he was doing a job that required more vigorous work driving the forklift than had been typical in the past, faster movement and just a faster work pace, basically; and that during the course of that driving with his left arm, he felt a pop in his left shoulder.

Taking into account that assumption as to his description of injury as well as your examinations of him over time, do you have an opinion as to whether or not he suffered a sudden and tangible event on September 5, 2012 that resulted in an injury to his left shoulder?

A. Yes, it would be my opinion that he did suffer from an injury at that time.

[CP—CABR—Vickers 18/17-25; 18/1-8].

During the period Dr. Vickers was treating Mr. Gonzalez, Mr. Gonzalez did not mention to him that he felt a pop in his left shoulder while driving a forklift at work. [CP—CABR—Vickers 50/3-5].

In sum, Dr. Vickers' opinion on causation rests not on findings from the MRI or physical examination, but upon the truth of an assumption, and that assumption in turn depends upon Mr. Gonzalez's credibility. A finding that Mr. Gonzalez is credible, as found by the trial court, is not supported by sufficient or substantial evidence, viewing the record in the light most favorable to the prevailing party in Superior Court.

RCW 51.52.140; RCW 4.44.060; e.g., *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575. 343 P.2d 183 (1959); *Benedict v Dep't of Labor & Indus.*, 63 Wn.2d 12, 385 P.2d 380, 381-382 (1963); *Layrite Products Co. v. Degenstein*, 74 Wn. App. 881, 887, 880 P.2d 535 (1994) (Division III). "Substantial evidence" is such evidence that would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. E.g., *Omeitt v. Dep't of Labor & Indus.*, 21 Wn.2d 684, 686, 152 P.2d 973 (1944); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2006).

Mr. Gonzalez cannot be considered credible when he told ARNP Daily in the emergency room untruthfully; when he certified to the Department of Labor and Industries untruthfully [CP--CABR—J. Gonzalez 112/4-13; 113/21; Exhibit 1]; when he told his employer untruthfully; and when he testified under oath at the Board hearing untruthfully that he *never* had treatment for his left shoulder, *never* had difficulty moving his left shoulder, and *never* had taken pain medication for his left shoulder before September 5, 2012. He cannot be believed.

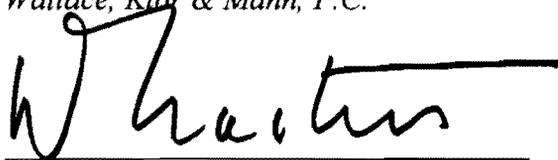
## **VII. CONCLUSION**

For the preceding reasons, Valley Fruit Company, LLC, respectfully requests that this Court reverse the Superior Court's judgment, which had reversed the decision of the Board of Industrial

Insurance, which had reversed the order of the Department of Labor and Industries.

Respectfully submitted this 11<sup>th</sup> day of December 2015.

*Wallace, Klor & Mann, P.C.*

A handwritten signature in black ink, appearing to read "W Masters", with a long horizontal line extending to the right from the end of the signature.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify, under penalty of perjury, that I mailed an original and copies of the  
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6 Court of Appeals No.: 336212

7 Appellant: Valley Fruit Company, LLC

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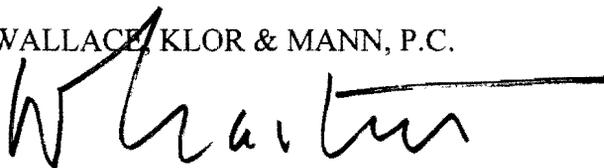
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