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Washington State Supreme Court

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Ronald R. Carpenter
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h/h

NO. 91963-1

SUPREME COURT

IN THE STATE OF WASHINGTON

CLARK COUNTY,
RESPONDENT/PLAINTIFF

v.

PATRICK J. McMANUS,
PETITIONER/DEFENDANT.

PETITIONER PATRICK McMANUS' ANSWER TO AMICUS

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Issue for Review

No. 1. Where the long-standing and settled rule of law requires finders of fact to give special consideration to opinions of attending physicians and where an attending physician has testified, is the trial court required to advise the jury of this rule of law?

Answer: The Superior Court abused its discretion because Defendant's Proposed Instruction No. 10 is an accurate statement of the law per this Court's decision in *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.3d 569, 761 P.2d 618 (1988). Where substantial evidence supports the instruction, giving it is non-discretionary.

Statement of the Case

Multiple prior briefings filed in this case contain excellent statements of the factual and procedural history of this appeal. Instead of a summary recitation, Petitioner asks the Court to focus on the decision of the Board of Industrial Insurance Appeals in this matter. (See Certified Appeal Board Record pp. 57 – 71; Appendix A¹). The Board considered, *inter alia*, the testimony of Dr. Won, the attending physician, who supported benefits, and the testimony of one-time examiners Drs. Harris and Dietrich, who did not support benefits.

¹ The included copy, from our file, of the Proposed Decision and Order adopted by the Board contains markups that were added during trial preparation and cannot be easily removed. They are not intended to draw any emphasis by this Court.

On page 68², line 16, Industrial Appeals Judge Gil wrote, “The testimony of medical experts is key to this decision.” The IAJ then proceeded to analyze the testimony of the medical experts. The IAJ then wrote, “The evidence in this case is very close, and there were discrepancies on both sides.” (CABR p. 69, ln. 21-22).

The IAJ then finds benefits should be allowed. (CABR p. 69, ln. 22-26). The IAJ based her decision, “On the testimony of Mr. McManus’s [sic] treating physician, Dr. Won. The attending physician’s opinion should be given careful consideration.” (CABR p. 69, ln. 26-27; *citing Hamilton v. Dep’t of Labor & Indus.*, 111 Wash.2d 569 (1988)).

Summary of Answer to Amicus

Petitioner agrees with the position and policy statements made by the Washington State Association for Justice Foundation’s (WSAJF) Amicus Brief. The trial court abused its discretion because where the jury hears testimony of an attending physician, it must be told the law requires it to give that testimony special consideration. The trial court’s failure to give the Petitioner’s proposed instruction meant the jury used a different legal standard than the Board when determining whether Petitioner was entitled to benefits. Finally, the Court should not only affirm *Hamilton*, 111 Wash.2d 569, but also its predecessor cases, including *Groff v. Dep’t of Labor &*

² Petitioner is using the Certified Appeal Board Record’s pagination as reference; this is actually page 12 of the decision.

Indus., 65 Wash.2d 35, 395 P.2d 633 (1964).

Argument

1. The Attending Physician instruction should be given in every case where the jury hears testimony from attending physicians and hired examiners.

Petitioner agrees with WSAJF the trial court abused its discretion when it declined to give Proposed Instruction No. 10. Petitioner agrees with WSAJF this Court should not reject *Hamilton* and overturn over 70 years of settled case law that triers of fact give attending physicians' opinions special consideration. Petitioner agrees with the WSAJF this Court need not reach whether or not it is appropriate to decline this instruction under various counter-factual scenarios and special circumstances.

However, Petitioner asks the Court to affirmatively hold that trial courts must give an attending physician instruction so long as a jury hears testimony from an attending physician and so-called hired examiners. Petitioner admits that a special consideration instruction is not appropriate where no attending physician testified before the Board of Industrial Insurance Appeals. Stated differently, where there is evidence given from an attending physician, it is not within the trial court's discretion to decline to instruct the jury regarding special consideration.

This is entirely consistent with the plain holding in *Hamilton*: “Since this [the proposed jury instruction] is a rule of law, it is appropriate that the jury be informed of this by the instructions of the court. To refuse to do so would convert the rule of law into no more than the opinion of the claimant's attorney.” *Hamilton*, 111 Wash.2d at 571. In the present appeal the jury heard evidence from Dr. Won, plus two hired examiners. It should have been instructed by the Court to give Dr. Won’s testimony special consideration. The trial court’s failure was prejudicial error and on remand, it should be directed to so instruct the jury.

2. The jury should be advised of and use the same law relied upon by the Board of Industrial Insurance Appeals.

Petitioner also agrees with WSAJF that trial courts should advise juries to use the same legal principles used by the Board. (*Amicus* Brief p. 17). Not only does the Board generally apply special consideration to attending physician testimony, it applied special consideration in this very case. (CABR p. 69). The Board’s decision primarily rested on the fact it was giving Dr. Won’s opinion special consideration. *Id.* It was manifestly unjust for the trial court to not advise the jury that it was also required to give Dr. Won’s testimony special consideration.

3. The Court should affirm *Hamilton, Chalmers, Groff, and Spalding* as accurate statements of the Attending Physician rule.

Finally, Petitioner asks the Court to not only affirm *Hamilton*, but to affirm its prior decisions recognizing the role attending physicians play in our unique system of industrial insurance. Each of its prior four cases all highlight different elements or situations regarding the application of this rule.

a. *Spalding v. Department of Labor & Industries.*

This Court's decision in *Spalding v. Dep't of Labor & Indus.*, 29 Wash.2d 115; 186 P.2d 76 (1947) primarily addresses whether the attending physician's testimony was legally sufficient. More specifically, if a physician primarily, but not solely, relies upon the subjective history given by the injured worker, may a jury still rely upon that testimony? In analyzing that question, the Court acknowledged one of the factors is whether the physician examined the patient once versus multiple examinations. *Spalding* at 128-29.

The Court also stated what remains good law: it is up to the jury to decide whom it believes. *Id* at 122. The Court also cautioned that it is error for the court to single out any particular or class of witnesses and comment as to their weight or credibility. *Id* Yet the Court affirmed special consideration should still be given to the opinions of attending physicians. *Id* at 129. The clear implication is special consideration is not a comment on weight or credibility. In the present appeal, the Court should re-affirm these

rulings in *Spalding* remain accurate statements of the law.

b. *Groff v. Department of Labor & Industries.*

The primary issue in *Groff v. Dep't of Labor & Indus.*, 65 Wash.2d 35; 395 P.2d 633 (1964) was the inadequacy of the trial court's findings of fact affirming the Board's decision to deny the claim. This case was tried to the bench, rather than to a jury. Similar to the present appeal, the competing testimony in *Groff* was between a long-time attending physician versus a hired examiner. *Id.* at 44-45. The attending physician found the injured worker's condition was due to occupational exposure; the hired physician concluded it was due to non-occupational exposure. *Id.*

This Court was critical of the trial court's failure to explain why it "ignored completely the testimony of the claimant's attending physician, which, if believed, completely refutes the opinion of the examining physician." *Id.* at 44. This Court acknowledged, like in *Spalding*, the trier of fact decides whom it will believe, but it should still recognize it is required to give special consideration to the attending physician's opinion. *Id.* at 45. This Court required the trier of fact to explain why it accepts the testimony of an examining physician over the attending physician. *Id.*

The *Groff* Court placed this requirement in the context of the requirement the Board's decision is *prima facie* correct. First, the Court clarified this only means that if the trier of fact cannot decide who is correct,

then the Board's decision must stand. *Id.* at 42-43. This simply means the appealing party bears the burden to convince the trier of fact the Board was incorrect.

Second, the Court added that where "the testimony offered to sustain that burden was definite and positive[,] the conclusion that the burden was not sustained needs some explanation." *Id.* at 46. In other words, where the attending physician's opinion was "definite and positive" the trier of fact must make "some showing that the attending physician should not be believed." *Id.*

The *Groff* Court's analysis and application of the Attending Physician rule should be affirmed. This analysis starts with the basic premise the trier of fact should presumptively believe "definite and positive" attending physician testimony. This builds on the *Spalding* decision, *supra*, that defines what constitutes legally sufficient (e.g. definite and positive) testimony. The trier of fact is still free to "completely disbelieve" the attending physician but it must be able to articulate the reasons for its disbelief. *Id.* at 46.

This is how the Attending Physician rule is and should be applied at all levels of our system of industrial insurance. The Department's decisions should be based upon the opinion of the attending physician, unless it can articulate why it is wrong. The Board, in specially considering the attending

physician's opinion, should also rely upon it unless it is convinced the opinion is flawed.

The same should be true in our superior court trials: the trier of fact should start with the testimony of the attending physician and decide whether it should be disbelieved. This analysis should not differ between trials to a jury or to the bench. The only difference is the jury's decision results in answers to special interrogatories on the verdict form; whereas the judge's decision should be supported by a memorandum, per the *Groff* decision.

Nonetheless, this remains an important distinction. The opacity of the jury deliberation and verdict process renders it difficult to review on appeal; thus the deference given to jury verdicts by appellate courts. Yet this very opacity makes proper jury instructions centrally important to the process. We only know the jury probably engaged in the correct analysis to the extent it was properly advised of the law and how to apply it.

Where the evidence supports it, as in the present appeal, this should always include instruction on the central role of attending physicians and the special consideration their opinions deserve. However, in the present appeal, the jury was not properly advised of the law; therefore, we do not know whether it gave Dr. Won's testimony the special consideration demanded of Washington law. This is why the Court should also affirm *Groff v. Dep't of*

Labor & Indus. as an accurate statement of how this important rule of law should be applied.

c. *Chalmers v. Department of Labor & Industries.*

This Court then applied the *Groff* Attending Physician Rule in *Chalmers v. Dep't of Labor & Indus.*, 72 Wash.2d 595; 434 P.2d 720 (1967). Like *Groff*, the Board found against the injured worker and the case was tried to the bench in Superior Court. Unlike *Groff*, the judge overturned the decision of the Board after giving special consideration to the attending physician over the hired examiner. Yet the *Chalmers* Court reversed finding the superior court's decision lacked substantial evidence. *Id.* at 602.

The analysis by this Court focused entirely on whether the attending physician's testimony was believable or not. It focused on whether that testimony was legally sufficient, echoing the analysis found in the *Spalding* decision, *supra*. This Court did not find the testimony believable or legally sufficient because the attending physician based his opinion on the "fact" the worker was exposed to a specific chemical agent. The Court concluded there was no substantial evidence to support that "fact", eviscerating the sufficiency of the opinion. *Id.* at 601.

Again, in the present appeal, the Court should affirm *Chalmers* as a correct statement and application of the Attending Physician rule. The focus is whether or not the attending physician's opinion is believable. If it is not,

then the trier of fact should be able to point to something in the record that undercuts that credibility. Yet the starting point remains: the trier of fact must give the attending physician's opinion special consideration and careful thought. In the present case, we do not know whether the jury engaged in that necessary exercise because the Court did not properly instruct it.

d. *Hamilton v. Department of Labor & Industries.*

Finally, this Court should affirm its decision in *Hamilton v. Dep't of Labor & Indus.*, 111 Wash.2d 569; 761 P.2d 618 (1988). *Hamilton* also affirms the holdings of *Chalmers*, *Groff*, and *Spalding*. *Id.* at 571 (citations omitted). *Hamilton's* holding is simple: instructing a jury with an accurate statement of the law is never an impermissible comment on the evidence. *Id.* at 571 (citations omitted). The instruction does not require juries give attending physicians more credibility, but recognizes their important position in workers' compensation claims.

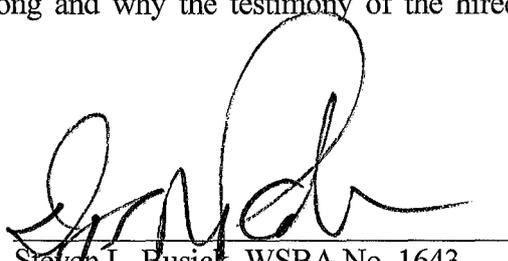
It recognizes the starting point of the inquiry: is the attending physician's opinion wrong and if so, why? This was the essential analysis of *Spalding* in deciding what factual information an attending physician can rely upon. This was the core holding of *Groff* when it asked the trial court to explain why the attending physician was wrong despite his "definite and positive" testimony. This was the reason why the *Chalmers* Court rejected the attending physician's testimony: a failure of substantial evidence

supporting his opinion. These are the reasons why this Court should affirm each of these prior opinions: the attending physician rule remains good Washington law and trial courts should instruct juries of this law.

CONCLUSION

When the trial court refused to give Mr. McManus' Proposed Instruction No. 10, it was prejudicial to this appeal. The jury was not properly instructed to focus its analysis on the opinion of Dr. Won, whom it was still free to disbelieve. It did not know the long-established law of Washington that attending physician's opinions must be given special consideration and careful thought. It did not know it was to apply the same rule of law used by the Board of Industrial Insurance Appeals. Clark County Superior Court should be required, with the new trial, to instruct the jury that Dr. Won's testimony must be given special consideration; to give it careful thought whether and how it is wrong and why the testimony of the hired examiners is preferable.

Dated: February 26, 2016.



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Attorney for Patrick McManus,
Petitioner/Defendant

Appendix A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

1 IN RE: PATRICK J. MCMANUS) DOCKET NO. 12 11103
2 CLAIM NO. SF-11488) PROPOSED DECISION AND ORDER

3
4 INDUSTRIAL APPEALS JUDGE: Anamaria Gil

5 APPEARANCES:

6 Claimant, Patrick J. McManus, by
7 Busick Hamrick, PLLC, per
8 Steven L. Busick

9 Self-Insured Employer, Clark County, by
10 Law Office of Gress & Clark, LLC, per
11 James L. Gress

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Michael J. Throgmorton, Assistant

15 The self-insured employer, Clark County, filed an appeal with the Board of Industrial
16 Insurance Appeals on February 10, 2012, from an order of the Department of Labor and Industries
17 dated December 13, 2011. In this order, the Department affirmed an order dated August 30, 2011,
18 in which it allowed the claim as an occupational disease with a manifestation date of June 25, 2010.
19 The Department order is **AFFIRMED**.

20 PROCEDURAL AND EVIDENTIARY MATTERS

21 On April 10, 2012, the parties agreed to include the Jurisdictional History, as amended, in
22 the Board's record. That history establishes the Board's jurisdiction in this appeal.

23 PRELIMINARY MATTERS

24 The perpetuation deposition of **James Harris, M.D.** taken on October 2, 2012, was filed with
25 the Board on October 12, 2012. This deposition is published in accordance with WAC 263-12-117,
26 with all objections overruled and all motions denied.

27 The perpetuation deposition of **Paul Won, M.D.** taken on October 25, 2012, was filed with
28 the Board on November 7, 2012. This deposition is published in accordance with
29 WAC 263-12-117, with all objections overruled, except the objections on page 20, line 12; page 38,
30 line 19; and page 39, line 3, are sustained. All motions are denied except the motion on page 20,
31 line 12. Dr. Won's testimony at page 20, lines 10-12 is stricken.

1 ISSUE

2 Whether the claimant suffered an occupational disease, which arose
3 naturally and proximately out of the distinctive conditions of his
4 employment.

5 EVIDENCE PRESENTED

6 *Self-Insured Employer's Presentation of Evidence*

7 **THOMAS DIETRICH, M.D., MEDICAL EXPERT**

8 Dr. Dietrich is a physician. He is certified by his peers as an expert in the field of
9 neurosurgery. Dr. Dietrich performed a records review and an IME of Mr. McManus at the request
10 of Clark County's attorneys on July 14, 2011. The medical records reviewed by Dr. Dietrich started
11 on March 2, 1974 and continued through the 2000's.

12 At the examination, Mr. McManus provided a work history of driving a street sweeper for the
13 majority of his working hours. Mr. McManus's chief complaints were chronic low back pain.
14 Sometimes, he would get numbness into his buttock and down the back of his left thigh.
15 Sporadically, he would develop an electric-like sensation down his left leg. Mr. McManus recalled
16 having occasional back pain before 2005. Since approximately 2003, the back pain became more
17 persistent and severe.

18 Dr. Dietrich reviewed MRI imaging studies of the lumbar spine dated February 24, 2006 and
19 June 25, 2010. They showed:

20 He had fairly diffuse, and at least, moderately severe degenerative changes in the
21 entire lumbar spine. It was worse at some levels. It was more severe at the lowest
22 level or L5/S1 level, but there was loss of fluid content in the disks at each level, and
23 at the lower two levels there were, what we call inflammatory end plate changes,
which is a late stage in the degenerative process.

24 10/18/12 Tr. at 17. Comparing the two MRIs, Dr. Dietrich noted a little bit of change at the L2-3,
25 L3-4 and L4-5 levels. There was also a central protrusion at the L2-3 level on the 2010 MRI study
26 which was not present in the 2006 study.

27 Dr. Dietrich explained that over the last several years, research studies have shown that
28 "heredity is a key factor in the rate of degenerative change." 10/18/12 Tr. at 20. Other factors
29 which "play some role" are posture, weight, and smoking. Repetitive jarring of the back is also a
30 factor but not a "major factor." 10/18/12 at 20. Dr. Dietrich noted that Mr. McManus has a history

1 of 15 to 28 pack years of smoking, and at the time of the examination, was 6 feet tall and weighed
2 350 pounds.

3 With regard to jarring and vibration, Dr. Dietrich stated:

4 I think, it's been reasonably well established that the **vibration itself** doesn't have an
5 impact. That was sort of conventional wisdom at one point, but there are a number
6 of studies that have indicated that is not a factor. What I am talking about is
7 somebody that's operating heavy equipment, and they are bouncing up and down,
8 and particularly, somebody that is overweight, because you have all, you know, **all**
9 **that weight repetitively putting compressive forces on the disk space.** And I
10 don't have any specific literature to support that, but it **just make sense to me that**
11 **there would be an impact of some type on wear and tear changes in the**
12 **lumbar spine. But it's also clear that the, you know, whatever that impact is, is**
13 **quite minimal when compared to age and heredity.**

14 10/18/12 Tr. at 21-22. (Emphasis added). Dr. Dietrich was less certain whether operating a street
15 sweeper would involve the same forces as operating heavy equipment, like a backhoe. He stated:

16 Well, the people I have seen where I have indicated that, have been people that
17 have operated heavy equipment, like, backhoes, and they were going over rough
18 ground and bouncing up and down and often the seats in these pieces of equipment
19 are not very well sprung. They are not well padded, and so there is a fairly direct
20 impact. **As far as the street sweeper, I am not really quite certain. If it's going at**
21 **very low speed, I wouldn't expect it to have much of an impact, and if it's on a**
22 **street without, you know, bumps in it, I wouldn't expect it to have much of an**
23 **impact.**

24 10/18/12 Tr. at 22. (Emphasis added). Operating a street sweeper involved "just going down a
25 blacktop street." 10/18/12 Tr. at 27. Dr. Dietrich "would not expect it to have any effect." 10/18/12
26 Tr. at 27. Dr. Dietrich explained that people sometimes associate back pain with driving or
27 vibration, but the source of their pain is actually sitting. Dr. Dietrich stated:

28 So, I think, it would be reasonable for Mr. McManus to attribute his back trouble to
29 what he was doing at the time he was having most of the pain, but it's just due to
30 sitting, which he was required to do in the course of his work activities, but not
31 specifically the, you know, bouncing or whatever the specific characteristics were of
32 that particular machine.

33 10/18/12 Tr. at 28.

34 Dr. Dietrich diagnosed "diffuse and fairly severe" degenerative changes; and a congenitally
35 shallow lumbar spinal canal which may have been somewhat of a factor in the central disk
36 protrusion at the L2-3 level. 10/18/12 Tr. at 24. Dr. Dietrich did not believe that the congenitally
37 shallow lumbar spinal canal was narrowed down enough to cause symptoms. Dr. Dietrich believed
38 that the L2-3 protrusion was insignificant and was probably not symptomatic.

1 Dr. Dietrich opined that Mr. McManus's low back condition did not arise naturally and
2 proximately from the distinctive conditions of his employment with Clark County. He stated, "No.
3 As I indicated, I think, that's a factor, but a minor factor. That there were other factors that we
4 mentioned were much more important." 10/18/12 Tr. at 29.

5 On cross-examination, Dr. Dietrich agreed that in his report, he stated,
6 The basic question here is the role of his work activity over the past 20 years and the
7 development of his back pain. This is a somewhat controversial topic. **In my view, it**
8 **likely has played a significant role in the progression of this gentleman's**
9 **degenerative lumbar spine condition.**

9 * * *

10 [I]n my view, however, it is not a predominant role.

11 * * *

12 In my view, Mr. McManus' work activity over the past several years driving a truck
13 with jarring and bouncing, has made a **material, but not a major contribution to**
14 **his lumbar condition.**

14 10/18/12 Tr. at 46. (Emphasis added.)

15 With regard to causation, Dr. Dietrich stated:

16 If you have bouncing up and down over a period of time, I think, that **probably is**
17 **going to accelerate the degenerative changes within the disk**, but as I indicated,
18 **I think, that's a very minor factor compared to other factors**, because people
19 can have degenerative changes in their back that look like Mr. McManus that do
20 office work or very sedentary work all their lives.

20 10/18/12 Tr. at 50.

21 On redirect, Dr. Dietrich agreed that he may have been a "little fuzzy" on the meaning of the
22 term proximate cause. Dr. Dietrich was asked and answered the following question:

23 Q: If you assume "proximate cause" is essentially a but for test, meaning,
24 but for the work activities, would he still have this degenerative disk
25 disease. If you assume that definition, in your opinion, would he still
26 have his lumbar degenerative disk disease even without his work
27 activities driving a sweeper for Clark County?

27 A. Definitely.

28 10/18/12 at 54.

29 On re-cross, Dr. Dietrich agreed that with regard to a number of prior back injuries and
30 problems, going back to 1976, the duration of time loss ranged from one day to three weeks, and
31 there were no symptoms below the leg or knee. And, Mr. McManus's current condition has not
32 responded to conservative measures.

1 ~~SCOTT WILSON, EMPLOYER REPRESENTATIVE~~

2 Scott Wilson is a road operations Superintendent for Clark County Public Works. He has
3 worked for Clark County since September 2, 1986. He has driven 5-yard dump trucks, 1-ton dump
4 trucks, street sweepers, and a vacuum catch basin sewer cleaning truck.

5 Mr. Wilson has known Mr. McManus since the late 1980's or 90's when Mr. McManus first
6 started working for Clark County. Mr. Wilson was Mr. McManus's supervisor from approximately
7 1998 through the date of his testimony.

8 Comparing the ride of a street sweeper with a backhoe, Mr. Wilson stated the backhoe or
9 "off road" is "rougher." 10/18/12 Tr. at 62. Over the years, street sweepers have had design
10 changes to provide a better ride. Street sweepers now use vacuum and regenerative air, mounted
11 on the chassis, along with other suspension components. Comparing the ride of a street sweeper
12 with a passenger vehicle, Mr. Wilson stated:

13 The suspension on these, in a truck chassis is much more robust to take the extra
14 weight and stresses of that weight from compared to a passenger vehicle. So, that
15 would be the only thing I would see different from those, just a lot stouter, bigger
16 built.

17 10/18/12 Tr. at 62-63.

18 On cross-examination, Mr. Wilson stated he operated a street sweeper in approximately
19 1988. He operated a backhoe on and off in the early and mid-1990s. He agreed that the bouncing
20 of a backhoe is more up and down, side to side, with "jerk movement." 10/18/12 Tr. at 67. A street
21 sweeper is on a much flatter surface without the unexpected bounce that could occur. He agreed,
22 however, there is definitely bouncing on a street sweeper. He agreed the suspension on a street
23 sweeper would be much stiffer than the suspension in a passenger car. He agreed a street
24 sweeper would be a "harder ride" than a passenger vehicle. 10/18/12 Tr. at 68.

25 **JAMES HARRIS, M.D., MEDICAL EXPERT**

26 Dr. Harris is a general orthopedic surgeon. He is certified by his peers as an expert in the
27 fields of general orthopedic surgery and orthopedic sports medicine. On June 27, 2012, Dr. Harris
28 conducted a review of Mr. McManus's medical records, dating from 1974 through 2000 and
29 beyond.

30 Dr. Harris was aware that Mr. McManus operated a street sweeper. Dr. Harris has never
31 been in a street sweeper, but he has seen them on the road. He felt it would be reasonable to
32 conclude that a street sweeper produces more vibration or a rougher ride than a passenger vehicle.

21 ~~Based on his records review, Dr. Harris reached three diagnoses. First, Mr. McManus had a~~
2 three and a half decade history of chronic intermittent low back pain, that by medical records,
3 appeared to be progressing in severity with age. This degenerative condition was not caused by
4 any injurious event on June 25, 2010. Second, there was MRI evidence of a new central disc
5 protrusion at the L2-3 level that developed sometime between February 24, 2006, and June 25,
6 2010. Third, Mr. McManus had chronic morbid obesity, which was contributing to Mr. McManus's
7 chronic back pain complaints.

8 With regard to the second diagnosis, Dr. Harris initially "speculated" that the disc protrusion
9 was caused by an industrial injury of June 25, 2010. Harris Dep. at 25. However, he reviewed the
10 records on several occasions and could not identify any injury. Dr. Harris felt that his speculation
11 was "erroneous". Harris Dep. at 25.

12 Dr. Harris also noted that Mr. McManus's treating physicians have advocated that the disc
13 herniation was caused by heavy vibration from Mr. McManus's work operating a street sweeper.
14 Dr. Harris stated:

15 But since that I have actually done quite a bit more research on that and it's very
16 clear from the available medical literature that there is no connection between
17 driving heavy vehicles that vibrate and an increased risk of disc herniation.
18 Harris Dep. at 25. The most recent study was from Journal of Spine Surgery, October 1, 2012.
19 Researchers in this study performed a systematic review of literature to determine if there was any
20 correlation between whole body vibration and abnormal spinal imaging studies found on MRI. The
21 researchers determined there was no objective basis to find a correlation between whole body
22 vibration and abnormal spinal imaging findings on MRI. A second study, comparing identical twins,
23 found that the rate of back pain complaints and abnormalities were identical between those twins
24 that drove heavy equipment and those who did not. Thus, the conclusion was that back pain
25 complaints from operating heavy equipment had more to do with genetics than occupational
26 factors.

27 Dr. Harris explained that most people with degenerative spine conditions would find riding in
28 a street sweeper to cause some pain. Dr. Harris opined that Mr. McManus did not have any
29 condition involving his lumbar spine that arose naturally and proximately from the distinctive
30 conditions of his employment. In addition, Mr. McManus's multilevel degenerative disc disease
31 including the disc herniation at L2-3 is related to his age, his genetic makeup, and morbid obesity.

1 ~~On cross-examination, Dr. Harris agreed that in his report, he stated, "extended sitting and~~
2 driving of a heavy truck can plausibly be considered a distinctive condition of employment that
3 could cause the mild L2-3 disc bulge." Harris Dep. at 38. He agreed that he would consider the
4 disc bulge "mild" but others might consider it "moderate". Harris Dep. at 38. Dr. Harris agreed that
5 the radiologist described "moderate to severe canal stenosis." Harris Dep. at 39.

6 Based on his review of the literature, Dr. Harris would not agree that operating a street
7 sweeper aggravated Mr. McManus's condition. Mr. McManus's condition would have worsened no
8 matter what he was doing.

9 On redirect, Dr. Harris stated that it did not appear to him that the L2-3 disc protrusion was
10 symptomatic. Mr. McManus's symptoms were attributable to his multilevel degenerative disc
11 disease, but not necessarily the protrusion at L2-3.

12 ***Claimant's Presentation of Evidence***

13 **PATRICK J. McMANUS, CLAIMANT**

14 Patrick James McManus was born on June 7, 1954. He lives in Vancouver, Washington. At
15 the time of his testimony, Mr. McManus weighed approximately 330 pounds. He has weighed in
16 the range of 300 pounds since he turned 40. He is 6 feet, 1 inch tall. 10/18/12 Tr. at 84.

17 Mr. McManus started working for Clark County on June 12, 1989. He worked as a
18 maintenance worker until approximately 1998 or 1999, when he started working as a sweeper
19 operator. Between 1998 or 1999 and 2008 or 2009, Mr. McManus drove two street sweeping
20 machines. He described them as follows:

21 They were quite bumpy when you were sweeping. You would hit holes and dips
22 along the curb line, seems to be the most roughest part of the road. As the machines
23 got older, the springs would wear out in them and shocks would wear out, and those
24 were one things that, to my knowledge, the shops did not change or upgrade.

25 10/18/12 Tr. at 81. Mr. McManus worked full time, five 8-hour shifts. For a few years during the
26 spring and summer, he worked four 10-hour shifts and some overtime as well.

27 In approximately 2008 or 2009, Clark County purchased a new street sweeper, an Elgin
28 "regenerative air." 10/18/12 Tr. at 84. According to Mr. McManus, the design of the Elgin was
29 "substantially" different than the previous two street sweepers. Mr. McManus described the seat
30 and the ride as follows:

31 Ergonomically it was very bad working environment. The seat was completely
32 different. It was the cheapest seat you could possibly get or order for that piece of

~~equipment. You couldn't adjust the air. It was some type of negative air ride. As you~~
2 sat on it, the air would lift you up, and then when it hit a bump or anything, instead of
3 floating, like, the other adjustable air-ride seats would, this seat would hold you in
4 place. So, if you went to go down, it would push you back up, and it felt like you were
5 sitting on a block of concrete.

6 10/18/12 Tr. at 87. The seat was repaired at one point, but Mr. McManus felt the repairs were
7 inadequate.

8 When Mr. McManus started driving the Elgin, he immediately noticed differences in his back
9 pain which he attributed to the ergonomics and cab design. The pain radiated across his low back,
10 buttocks, and down his left leg. The pain was a lot different than his previous back pain. The pain
11 was greater, lasted longer and would go down across the top of his foot. He felt like he had
12 "electric shocks" going down his left leg. 10/18/12 Tr. at 92. He had muscle weakness in his left leg
13 which caused him to stumble and almost fall on two occasions. The pain woke him up at night.

14 In April of 2011, Mr. McManus stopped working for Clark County. The pain had progressively
15 worsened to the point where he could not do his job without being overwhelmed with pain. Also, in
16 approximately June of 2010, he started taking narcotic pain medication, and did not feel he could
17 operate a street sweeper while taking narcotics. Reviewing Exhibit Nos. 1 through 9, Mr. McManus
18 identified the Elgin regenerative air machine that he drove for Clark County, and various close-ups
19 of the interior cab.

20 Comparing all three of the street sweepers, Mr. McManus stated the first two machines had
21 adjustable air ride seats and more leg room. All three machines bounced about the same.
22 However, the effects on his body "were more extreme" in the Elgin regenerative air due to the seat,
23 ergonomics and cramped interior. 10/18/12 Tr. at 100.

24 While driving a street sweeper, the bumps were the same at slow speed and high speed. At
25 a higher speed, the machine would shake more and "want to bounce more." 10/18/12 Tr. at 102.

26 Before 2010, Mr. McManus was a lot more physically active. Since 2010, his limitations
27 have been "quite extreme." 10/18/12 Tr. at 104. He walks his dog a shorter distance, he is limited
28 to lifting 20 pounds. He does no overhead lifting, no picking things up off the floor, and no bending
29 or twisting.

30 On cross-examination, Mr. McManus agreed his weight has hovered in the 330 pound range
31 for 30 years. Mr. McManus agreed that he had been taking prescription medication for his low back
32 since 2001 or 2002. Mr. McManus agreed that before operating the third sweeper, he was having
33 symptoms in his low back, both buttocks, and into his left leg. And he was regularly seeking

~~1 treatment for his low back and for symptoms into his legs even before he started driving the third~~
2 sweeper. 10/18/12 Tr. at 114.

3 On re-direct, Mr. McManus explained that he did have problems with his back before he
4 operated the Elgin regenerative air machine, but that machine "just pounded" him. 10/18/12 Tr.
5 at 116. He could not get comfortable with that machine.

6 **KARON McMANUS, CLAIMANT'S WIFE**

7 Karon and Patrick McManus have been married since 2007. They dated briefly in high
8 school and then reconnected in 2006 after approximately 30 years. Mrs. McManus was not aware
9 of any back pain issues other than "everyday getting older stuff." 10/18/12 Tr. at 120. After
10 approximately 2010, Mrs. McManus observed that her husband had more difficulties getting
11 around. She observed his left leg give out while walking. He has difficulty sleeping. He walks
12 shorter distances than he used to. He has been less affectionate due to pain.

13 **PAUL WON, M.D., MEDICAL EXPERT**

14 Dr. Won is a physician. He is certified by his peers as an expert in the field of family practice
15 and preventative medicine. Dr. Won treated Mr. McManus from January 13, 2005 through March 1,
16 2005, and also from April 11, 2011 through December 15, 2011.

17 On January 13, 2005, Mr. McManus's chief complaint was a low back pain from an injury on
18 January 11, 2005, while repositioning heavy rubber equipment on a forklift. Mr. McManus reported
19 pain at a level of 4-5 out of 10, with muscle spasm and no pain radiation into his legs.
20 Mr. McManus reported no prior back injuries. Dr. Won diagnosed lumbosacral sprain.
21 Mr. McManus's symptoms resolved by March 1, 2005, after three visits.

22 Mr. McManus returned approximately six years later on April 11, 2011, reporting a low back
23 injury on January 1, 2010, from driving a vehicle with a "very poor seat cushion." Won Dep. at 19.
24 Mr. McManus reported that he had been working 13 years as a street sweeper, driving 8 to 10
25 hours a day, 4 to 5 days a week. He reported that his back got jarred whenever the road was
26 bumpy or he hit a pothole. His pain was progressively getting worse. On exam, Mr. McManus
27 showed mild distress, with difficulty standing from a sitting position. There was mild tenderness on
28 palpation. There was limited range of motion. He walked slowly and stiffly. Comparing an MRI
29 dated June 25, 2010 to an MRI dated February 4, 2006, Dr. Won noted a "new central disc
30 protrusion at L2-3, resulting in moderate to severe 60 percent narrow stenosis, with crowding of the
nerve root of the carotid artery." Won Dep. at 23. There was also "[m]oderate spondylitic changes

~~1 at other levels without change when compared to the prior [MRI]." Won Dep. at 23. Dr. Won~~

2 diagnosed displacement of the lumbar intervertebral disc at L2-3. He prescribed medication,
3 physical therapy and restricted Mr. McManus to sedentary desk work. Mr. McManus continued with
4 conservative treatment over the following months, but his condition did not significantly improve.

5 On August 31, 2011, Mr. McManus saw a neurosurgeon, who did not recommend surgery.
6 On September 15, 2011, Dr. Won felt that Mr. McManus had reached maximum medical
7 improvement, with no significant change in his condition. Dr. Won put Mr. McManus on permanent
8 modified work. He recommended vocational guidance/training and "closed the exam." Won Dep.
9 at 29. Dr. Won saw Mr. McManus for the last time on December 15, 2011. Again, there was no
10 change in Mr. McManus's condition. Dr. Won reviewed medical evaluation reports by Dr. Thomas
11 Dietrich and Dr. James Harris. He responded to the reports on November 14, 2011, indicating his
12 disagreement with the reports. He felt that "driving trucks with jarring and bouncing has made a
13 major material contribution to [Mr. McManus's] lumbar condition." Won Dep. at 30-31.

14 With regard to causation, Dr. Won was asked whether Mr. McManus's condition "arose
15 naturally and proximately from the distinctive conditions of his employment with the Clark County
16 Public Works department. Dr. Won agreed and stated his opinion as follows:

17 I'm going to read it again. I feel that driving truck with jarring and bouncing has
18 made a major material contribution to his lumbar condition. Patient worked full-time
19 and spent major portion of his activity doing his work.

20 Won Dep. at 31. Dr. Won added:

21 Just the physics of it -- although he may drive slow, the physics force equals
22 mass times acceleration -- his truck is very heavy, he is very heavy.

23 Although he may be accelerating slowly, the force is his mass times acceleration,
24 so there's a great force as he makes those potholes.

25 Won Dep. at 32. The force would be on his low back.

26 On cross-examination, Dr. Won agreed he would be surprised to find out that Mr. McManus
27 had sciatica since he was age 18. He had asked Mr. McManus if he had any prior problems
28 involving his low back, and Mr. McManus said "No." Won Dep. at 35. This was not surprising to
29 Dr. Won, however, because patients sometimes are not truthful or not mindful because they are
30 concentrating on their current condition. Dr. Won agreed he is not board certified in occupational
31 medicine, but his board certification in preventive medicine is under the umbrella of occupational
32 medicine and very similar.

32

~~1 Dr. Won was not aware of a Journal of the Spine article in October of 2012. Dr. Won believed that~~

2 the L2-3 disc herniation was symptomatic. Dr. Won felt that the L2-3 disc herniation was related to
3 Mr. McManus's employment based on history. Dr. Won agreed he could not say one way or the
4 other if Mr. McManus would have developed his low back problems if he had not been driving a
5 street sweeper, Dr. Won agreed that if Mr. McManus's work was contributing to his low back
6 problems, he would expect the pain to worsen throughout the day while he was working. He was
7 not aware that Mr. McManus had previously reported to his treating physician in 2008 that his low
8 back pain tended to be worse in the morning and loosened up throughout the day while driving.
9 Dr. Won questioned whether in 2008, Mr. McManus would have been referring to a different injury.

10 He was asked and answered the following question:

11 Q: So, your opinion is based entirely upon Mr. McManus being an accurate
12 historian?

13 A: Well, I guess you prove me wrong initially.

14 Won Dep. at 42.

15 DISCUSSION

16 In an appeal by an employer, the employer has the burden to present a prima facie case
17 showing that the Department's order is incorrect.¹ Once the employer has presented a *prima facie*
18 case that the Department order is incorrect, the burden shifts to the claimant and Department to
19 prove by a preponderance of the evidence that the Department order on appeal is correct.²

20 At issue in this case is whether Mr. McManus suffered an occupational disease, which arose
21 naturally and proximately out of the distinctive conditions of his work. The specific issue in dispute
22 is whether Mr. McManus developed severe degenerative changes to his low back from vibration
23 and jarring experienced while operating a street sweeping machine for Clark County.

24 An occupational disease is a disease which arises "naturally and proximately out of
25 employment."³ In *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 481 (1987), the
26 Washington Supreme Court set forth the evidence required to prove the existence of an
27 occupational disease. It stated:

28
29
30 ¹ RCW 51.52.050 and WAC 263-12-115(2)(a)(c); *In re Michael Hansen*, BIIA Dec., 95 4568 (1996).
31 ² *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949); *In re Christine Guttromson*, BIIA Dec.,
32 55,804 (1981).
³ RCW 51.08.140.

1 We hold that a worker must establish that his or her occupational disease
2 came about as a matter of course as a natural consequence or incident of
3 distinctive conditions of his or her particular employment. The conditions
4 need not be peculiar to, nor unique to, the worker's particular employment.
5 Moreover, the focus is upon the conditions giving rise to the
6 occupational disease, or the disease-based disability resulting from
7 work-related aggravation of a non-work related disease, and not upon
8 whether the disease itself is common to that particular employment. The
9 worker, in attempting to satisfy the 'naturally' requirement, must show that his
10 or her particular work conditions more probably caused his or her disease or
11 disease-based disability than conditions in everyday life or all employments in
12 general; the disease or disease-based disability must be a natural incident of
13 conditions of that worker's particular employment. Finally, the conditions
14 causing the disease or disease-based disability must be conditions of
15 employment, that is, conditions of the worker's particular occupation as
16 opposed to conditions coincidentally occurring in his or her workplace.
17 (Emphasis added.)

18 With regard to pre-existing conditions, the Court further stated:

19 The worker whose work acts upon a preexisting disease to produce disability where
20 none existed before is just as injured in his or her employment as is the worker who
21 contracts a disease as a result of employment conditions.

22 The testimony of medical experts is key to this decision. In this case, all of the medical
23 experts agreed that Mr. McManus had severe pre-existing degenerative changes in his lumbar
24 spine. The medical experts also agreed that Mr. McManus developed a central disc protrusion at
25 the L2-3 level, sometime between 2006 and 2010 (based on a comparison of MRI's), although they
26 disagreed whether the disc protrusion was symptomatic or caused by Mr. McManus's work. All
27 three medical experts appeared to agree that Mr. McManus's work operating a street sweeper was
28 a factor in the development of his degenerative disc condition, although they differed with regard to
29 how significant a factor it was.

30 Dr. Dietrich opined that Mr. McManus's low back condition did not arise naturally and
31 proximately from the distinctive conditions of his employment. Ultimately, however, Dr. Dietrich had
32 no familiarity with street sweepers or the extent of jarring and vibration caused by them. Also, on
cross-examination, Dr. Dietrich contradicted himself by agreeing that in his written report, he opined
that Mr. McManus's work "likely has played a significant role in the progression of this gentleman's
degenerative lumbar spine condition." 10/18/12 Tr. at 46.

1 ~~Dr. Harris reached the same opinion as Dr. Dietrich. Dr. Harris appeared to base his opinion~~
2 on a study published weeks before his testimony. He cited an article in Journal of Spine Surgery,
3 dated October 1, 2012. He stated:

4 I have actually done quite a bit more research on that and it's very clear from the
5 available medical literature that there is no connection between driving heavy
6 vehicles that vibrate and an increased risk of disc herniation.

7 Harris Dep. at 25. Based on two studies reviewed, Dr. Harris concluded that back pain complaints
8 from operating heavy equipment had more to do with genetics than occupational factors. On
9 cross-examination, Dr. Harris agreed that in his report, he had written, "extended sitting and driving
10 of a heavy truck can plausibly be considered a distinctive condition of employment that could cause
11 the mild L2-3 disc bulge." Harris Dep. at 38. Dr. Harris also had initially "speculated" that the disc
12 protrusion was caused by an industrial injury of June 25, 2010. Harris Dep. at 25. However, after
13 reviewing the records, he concluded his speculation was "erroneous." Harris Dep. at 25.

14 Mr. McManus's attending physician, Dr. Won, opined that "driving trucks with jarring and
15 bouncing has made a major material contribution to [Mr. McManus's] lumbar condition." Won Dep.
16 at 30-31. Dr. Won's opinion was based on the "physics" of driving a heavy vehicle, and also, on the
17 history provided to him by Mr. McManus, which failed to identify the scope of Mr. McManus's prior
18 history of low back pain. I note however, that there is no dispute that despite Mr. McManus's
19 history of back injuries and intermittent, chronic back pain, the duration of time loss from prior back
20 problems ranged from one day to three weeks, and there were no symptoms below the leg or knee.

21 The evidence in this case is very close, and there were discrepancies on both sides. After
22 reviewing the entire record, I am persuaded that Mr. McManus suffered an occupational disease,
23 which arose naturally and proximately out of the distinctive conditions of his work. I am also
24 persuaded that Mr. McManus's work operating a street sweeper aggravated his pre-existing
25 degenerative disc condition, and led to increased loss of function in his ability to work and activities
26 of daily living. This decision is based on the testimony of Mr. McManus's treating physician,
27 Dr. Won. The attending physician's opinion should be given careful consideration.⁴ In addition,
28 Dr. Dietrich and Dr. Harris did not dispute that Mr. McManus's work was a causative factor in the
29 progression of his degenerative spine condition, they merely posit that his work played a lesser role
30 than other factors. A "worker whose work acts upon a preexisting disease to produce disability

32 ⁴ *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569 (1988).

1 ~~where none existed before is just as injured in his or her employment as is the worker who~~
2 contracts a disease as a result of employment conditions."⁵

3 **DECISION**

4 Based on the preponderance of persuasive evidence, I find that the self-insured employer
5 presented a *prima facie* case that the Department order is incorrect, but the claimant proved by a
6 preponderance of the evidence that the Department order on appeal is correct.

7 **FINDINGS OF FACT**

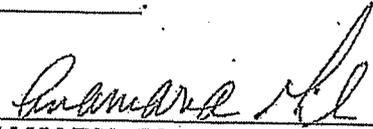
- 8 1. On April 10, 2012, an industrial appeals judge certified that the parties
9 agreed to include the Jurisdictional History, as amended, in the Board
10 record solely for jurisdictional purposes.
- 11 2. Patrick J. McManus worked as a street sweeper operator for Clark
12 County from 1998 or 1999 to April of 2011. As a street sweeper
13 operator, Mr. McManus worked 40 hours per week, and sometimes
14 worked overtime. While operating the street sweeper, Mr. McManus
15 repetitively hit holes and dips along the curb line, which can be the
16 roughest part of the road. Bumpy conditions jarred his back, causing
17 pain. In 2008 or 2009, Clark County purchased a new street sweeper.
18 Mr. McManus experienced more bumping and jarring while operating
19 the new street sweeper. In April of 2011, Mr. McManus ceased working
20 as a street sweeper operator due to pain in his low back.
- 21 3. As early as 1976, prior to his employment with Clark County,
22 Mr. McManus was seen and treated for intermittent, chronic low back
23 pain and degenerative disc changes. An MRI dated February 24, 2006
24 showed moderately severe degenerative changes in the entire lumbar
25 spine. An MRI dated June 25, 2010, showed moderately severe
26 degenerative changes in the entire lumbar spine, and also a new central
27 disc protrusion at the L2-3 level.
- 28 4. Repetitive jarring and bumping constitute distinctive conditions of
29 employment.
- 30 5. Mr. McManus sustained an aggravation of his pre-existing cervical
31 degenerative disc changes arising naturally and proximately out of the
32 distinctive conditions of his employment with Clark County.

⁵ *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569 (1988).

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. Patrick McManus's condition diagnosed as aggravation of degenerative disc changes, arose naturally and proximately out of the distinctive conditions of his employment with Clark County.
3. Patrick McManus's condition is an occupational disease within the meaning of RCW 51.08.140.
4. The Department order dated December 13, 2011, is correct and is affirmed.

DATED: FEB 21 2013



ANAMARIA GIL
Industrial Appeals Judge
Board of Industrial Insurance Appeals

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SUPREME COURT

IN THE STATE OF WASHINGTON

CLARK COUNTY,

Respondent/Plaintiff,

v.

PATRICK McMANUS,

Petitioner/Defendant.

Supreme Court Case No. 91963-1

PROOF OF SERVICE

The undersigned states that on February 26, 2016, I deposited in the United States Mail, with proper postage prepaid, Petitioner Patrick McManus' Answer to Amicus Brief dated February 25, 2016, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

February 26, 2016 Vancouver, WA

Douglas M. Palmer. WSBA No. 35198