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EMP

No. 62692-2-1

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

GILBERTO GUTIERREZ,

Respondent,

v.

NORTHWEST HARDWOODS, INC.,
BY WEYERHAEUSER COMPANY
AND SUBSIDIARIES and the
DEPARTMENT OF LABOR AND INDUSTRIES,

Appellants.

REPLY BRIEF OF APPELLANT

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Weyerhaeuser submits the following in reply to claimant's Brief of Respondent.

A. REVIEW STANDARDS

Claimant asserts that because this matter was presented to a jury, the court's review is more limited than if it had been a bench trial. (BR 4). Both a jury and a judge exercise the superior court's authority to conduct appellate review of Board decisions. *Shufeldt v. Department of Labor and Industries*, 57 Wn.2d 758, 359 P.2d 495 (1961). The standard for reviewing an appellate challenge to the sufficiency of the evidence is the same for both: the appealing party admits the truth of the other party's evidence and all reasonable inferences therefrom, and the evidence is interpreted in a light most favorable to the respondent. *Moses v. Department of Labor and Industries*, 44 Wn.2d 511, 514, 268 P.2d 665 (1954) (bench trial); *Zipp v. Seattle School District No. 1*, 36 Wn.App. 598, 600-01, 676 P.2d 538 (1984) (jury trial). Claimant wrongly argues that, in addition, a jury verdict is presumed correct in all instances – and here. That presumption is derivative of the statutory presumption of correctness applied to Board decisions and therefore applies only when the jury has affirmed the Board. RCW 51.52.115; see *Simpson Timber Co. v. Wentworth*, 96 Wn.App. 731, 981 P.2d 878 (1999) and

cases cited therein. No independent authority supports application of such a presumption to a jury verdict that reverses the Board.

B. SUFFICIENCY OF EVIDENCE

1. Weyerhaeuser Did Not Waive Its Right to Challenge the Sufficiency of Claimant's Evidence.

Claimant erroneously argues that Weyerhaeuser waived its right to challenge the sufficiency of the evidence regarding his alleged aggravation. (BR 16-17). Weyerhaeuser has argued throughout this proceeding that the evidence does not support the conclusion claimant sustained an aggravation of his injury-related low back condition. (CABR 11-15; RP1 159-66; RP2 43-64). This is not a new issue. Weyerhaeuser was not required to make a dispositive motion at trial to challenge the sufficiency of claimant's evidence in this court. RAP 2.5(a), on which claimant relies – but quotes only in part, states the court “may” refuse to review a claim of error first raised on appeal, and is thus discretionary, not mandatory.

Roberson v. Perez, 156 Wn.2d 33, 39-41, 123 P.3d 844 (2005).

Further, the rule expressly authorizes consideration of a claimed “[f]ailure to establish facts upon which relief can be granted,” which is equivalent to a challenge to the sufficiency of the evidence. *Id.* The Supreme Court has held such a challenge may be pursued in the

appellate court even if formally raised for the first time on appeal. *Id.*

2. No Substantial Evidence Supports the Finding That Claimant's Low Back Condition Objectively Worsened Between June 24, 1999 and January 30, 2006.

Claimant erroneously argues that the court should apply the liberal construction doctrine in determining whether he presented evidence sufficient to establish a compensable aggravation. (BR 6). The liberal construction doctrine applies only to matters of statutory construction; it does not apply to issues of fact. *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1, 13, 163 Wn.2d 142 (1945). On factual issues, claimants must be held to strict proof of their right to receive benefits. *Id.*; *Olympia Brewing Co. v. Department of Labor and Industries*, 34 Wn.2d 498, 208 P.2d 1181 (1949). The liberal construction doctrine may not be applied to determine whether claimant presented evidence sufficient to sustain his burden of proving a compensable aggravation. *Hastings, supra*.

Claimant does not dispute the fact that his burden of proof included proving the September 11, 1995 injury proximately caused an objectively substantiated worsening of his low back condition between June 24, 1999 and January 30, 2006. RCW 51.32.160; *Phillips v. Department of Labor and Industries*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). Claimant's objective proof of a worsening

rested solely on the L4-5 annular tear.¹ (Haller 22, 25; Brief of Appellant 16-17). Claimant's medical expert, Dr. Haller, testified that such tears are very typical of the natural progression of degenerative disc disease, and that he could not determine on a more probable than not basis whether claimant's L4-5 tear, first shown by the September 2005 CT scan, resulted from the September 1995 injury or the natural progression of claimant's preexisting disc disease. (Haller 31, 38; *also* pp. 18, 21, 35-36).

Claimant acknowledges that Dr. Haller could not state the 1995 injury *probably* caused the 2005 annular tear. (BR 13-14). He attempts to fill this void in his proof by asserting such proof is not medically possible (BR 10, 13-14), and by referencing evidence that addresses the course of his condition over time. (BR 9-15). Dr. Haller considered this information and still could not conclude the injury probably caused the annular tear. Claimant also suggests that his lay testimony was sufficient to cure the deficiency in Dr. Haller's opinion, citing *Bennett v. Department of Labor and Industries*, 95

¹ Claimant erroneously contends that he sustained a new herniated disc, which supplied the objective evidence necessary to establish a compensable aggravation. (BR 9-15). Neither Dr. Haller nor Dr. Price testified that claimant had a herniated disc. The doctors stated that the CT scan revealed only a tear or fissure in the annulus, or fibrous sac, that surrounds the disc, without the neurologic complications that often accompany a herniated disc. (Price 13, 23-24; Haller 21-22, 25).

Wn.2d 531, 627 P2d 104 (1981). (BR 6-8). *Bennett* holds that in some circumstances lay testimony can help prove the elements of a causation, such as when it directly corroborates a plaintiff's injuries from an accident or shows a chronological connection between an injury and increased disability. 95 Wn.2d 533-34; *citing Bitzan v. Parisi*, 88 Wn.2d 116, 558, P.2d 775 (1977). Lay testimony is not competent to prove the cause of claimant's annular tear. A lay person cannot, through his senses or otherwise, perceive whether the worsened symptoms are the result of a previous injury or the natural progression of a degenerative process because the symptoms resulting from the two causes are indistinguishable to an observer.² Medical testimony is necessary to distinguish between such industrial and non-industrial causes. *Ziegler v. Department of Labor and Industries*, 14 Wn.App. 829, 831-32, 545 P.2d 558 (1976). Here, no medical testimony establishes that claimant's injury more probably caused the annular tear than the degenerative process. For this reason alone, claimant failed to offer evidence sufficient to sustain his burden of proof. *Phillips, supra*.

² Even *assuming* that claimant's testimony of increased back problems after the injury had any bearing on this question, his admission that his back condition stabilized, even improved, for a number of years renders his testimony of early increased problems without any probative value as to the cause of his annular tear. (BR 11).

Dr. Haller also conceded he could not determine when the L4-5 annular tear occurred, even considering the historical information on which claimant relies. (Haller 37-38). His testimony is therefore insufficient to establish an objective worsening between June 24, 1999 and January 30, 2006. *Moses v. Department of Labor and Industries, supra*, 44 Wn.2d at 517-18 (medical testimony showing a worsening outside the aggravation period is not sufficient).

Claimant erroneously relies on Dr. Haller's current status as attending physician to cure the deficiency in the doctor's opinion. This rule applies only where the attending physician has had extensive experience with the claimant that gives him an advantage in addressing the issue in question. *Spalding v. Department of Labor and Industries*, 29 Wn.2d 115, 128-29, 186 P.2d 76 (1947). Dr. Haller's experience with claimant provided him no advantage in addressing the cause of claimant's annular tear or when it developed. He first saw claimant in February 2005, nearly 9.5 years after the September 1995 injury. Like Dr. Price, he needed to rely on the medical records and claimant's history to address the nature of claimant's condition over that 9.5 year period. Nothing in this record suggests that Dr. Haller's more recent ability to observe claimant enhanced his ability to address whether claimant's tear resulted from

a natural progression of the degenerative disc disease or the September 1995 injury. That is an issue solely for expert medical analysis based not on observation, but on the information available to both doctors. Most important, Dr. Haller's status as attending physician does not change the substance of his opinion, which was that he could not determine on a more probable than not basis what caused the annular tear. "Special consideration" is not a talisman that can cure that deficiency.

C. "LIGHTING UP" DOCTRINE

1. The Record Provides No Proper Basis For Concluding That the Department Formally Found the September 1995 Injury "Lit Up" Claimant's Preexisting Disc Disease.

a. Weyerhaeuser Did Not Waive Its Objections To The Admission of Exhibit 1.

Claimant argues Weyerhaeuser preserved its objections to the admission of Exhibit 1, the adjudicator's June 24, 1999 letter, only on the basis of hearsay and authenticity, not relevance, prejudice or whether the letter was properly admitted as an admission of a party. (BR 29-30). Claimant did not raise this issue at trial and, therefore, should not be permitted to do so now. (RP1 6-7). RAP 2.5(a); *Allen v. Asbestos Corp., Ltd.*, 138 Wn.App. 564, 578, 157 P.3d 406 (2007).

Further, as claimant concedes, Weyerhaeuser's objection at hearing was based in part on hearsay. (CABR, 12/20/06 Tr. 49-52). Judge Lucas admitted the exhibit on the basis it constituted an admission of a party, *i.e.*, the Department. (RP1 4, 43). The question whether the exhibit constitutes an admission by a party opponent derives from what constitutes hearsay. ER 801(a)(2). It is not an independent basis for objecting. Weyerhaeuser's hearsay objection before the Board therefore encompassed whether the exhibit was an admission of a party. In fact, the Board addressed whether the exhibit was hearsay or an admission of a party (as well as its relevance and authentication). (CABR 4-5). Weyerhaeuser expressly contended the exhibit was not an admission and Judge Lucas had the opportunity to consider that issue and counsel's arguments. (RP1 4). He also had the opportunity to consider Weyerhaeuser's, and the Department's, objections based on relevance and prejudice – to which claimant's counsel raised no preservation issue at trial. (RP1 4-9). All these objections are therefore properly before this court. *In re Lee*, 95 Wn.2d 357, 363, 623 P.2d 687 (1980) (an evidentiary challenge is preserved if the trial court had the opportunity to act on it).

b. The Adjudicator's Letter Did Not Constitute a Formal or Binding Determination That the Injury "Lit Up" Claimant's Degenerative Disc Disease. It Is Irrelevant Hearsay.

The June 24, 1999 Department order did not find that the compensable injury had "lit up" claimant's preexisting degenerative disc disease. (BA, App-A). Only the adjudicator's letter, Ex. 1, addressed that issue. (BA, App-B). The legislature has mandated that, "[w]hensoever" the department has made any order, decision or award, it shall" issue the decision in a specified format with a recitation of appeal rights. RCW 51.52.050 (BA, App-F). The Supreme Court has specifically held a Department adjudicator's letter that does not comply with these statutory requirements does not constitute a determinative Department decision and is not appealable." *Lee v. Jacobs*, 81 Wn.2d 937, 941, 506 P.2d 308 (1973).

In response, claimant simply asserts that the adjudicator's letter here was different and that the clear holding of *Lee*, and presumably the statutory language on which that decision was based, does not apply here. (BR 31-32). Claimant provides no authority to support his position, but merely asserts that the letter was appealable and that "it is common practice" for parties to appeal

Department letters. (BR 32-33). Appeals from letters are neither common nor successful because the Board rightly views Department letters as not appealable or binding on the parties to a claim. *In re Kerry G. Kemery*, BIIA Dec. 62,634 at 5-6 (1983)

The statutory prerequisites for a determinative order derive from the need for orderly administration of the Industrial Insurance Act. The Department administers a very high volume of claims and it issues a correspondingly great number of documents on a daily basis. The legislature wisely concluded that chaos would reign if it did not specifically circumscribe the type of document that could implement a Department decision and operate to bind parties. Because the legislature has done so, parties reasonably can rely only on formal Department orders to assess their rights and obligations, and to determine what action they should or should not take to protect their interests. And because only formal orders are binding, employers should not be expected to challenge an adjudicator's informal statements or risk being bound by those statements. Employers can and do disregard incorrect statements in adjudicator letters because it is the order, not the accompanying letter, that determines the parties' right and obligations.

It is of no consequence that Weyerhaeuser was aware of the adjudicator's reasoning for granting claimant a Category 2 permanent partial disability award. Since the letter was not binding, Weyerhaeuser had no reason to contest the Department order that actually granted claimant the permanent partial disability award unless it felt the award was not sustainable on any ground. Claimant's assertions notwithstanding, the record shows that claimant had the kind of symptoms, clinical findings and radiographic evidence of impairment that could support a Category 2 rating, irrespective of whether the injury had "lit up" the underlying pathology.³ Weyerhaeuser therefore had no reason to appeal the Category 2 award even though it did not agree the injury had "lit up" the degenerative pathology, as the adjudicator opined.

Claimant's contrary argument not only is unsupported by the law but, if accepted, would lead to a proliferation of appeals. If adjudicator letters are held to constitute appealable, binding legal determinations, many parties will appeal every letter that contains

³ Dr. Price concluded the injury had caused a low back strain or mechanical low back pain. (Price 12-13, 36). The medical testimony shows that prior to claim closure, claimant had low back pain and intermittent leg pain, and claimant testified he had leg numbness with a limited ability to walk and the need to lay down frequently. (Price 7-11; Haller 16-17; Claimant 9, 16). This evidence establishes the mild low back impairment described in Category 2, and typically will support a Category 2 PPD award. (BA, App-G). It is unlikely that claimant would contest this if he were now claiming entitlement to a PPD award.

any statement of fact or law with which they disagree. This will cause the chaos that the legislature sought to avoid. Further, if a non-specific finding that an injury has “lit up” a preexisting disease operates as a binding determination of an employer’s liability for any and all aspects of the claimant’s disease, and any subsequent progression of that pathology, then employers will appeal a high percentage of such decisions to protect their interests – even if the disability award is otherwise sustainable.⁴

c. Admission of Exhibit 1 Was Prejudicial to Weyerhaeuser.

Claimant argues that admission of Exhibit 1 was harmless error because it was “just a letter” that was consistent with other evidence available to the jury and did not preclude Weyerhaeuser from contending the 1995 injury was not a cause of claimant’s condition in 2005. (BR 29, 34). Claimant’s counsel argued to the jury that the letter constituted “a binding determination” that the injury had “lit up” claimant’s preexisting condition and aggravated claimant’s spine. (RP1 157-58; RP2 66-67). Counsel further argued

⁴ As discussed, claimant had degenerative disc disease affecting three levels of his lumbar spine by June 1999. (Price 8). The June 1997 radiologist felt the L3-4 level, not the L4-5 level, was the source of claimant’s symptoms. (Ex. 2). Claimant essentially argues the adjudicator’s “lighting up” finding established the compensability of all the then-existing pathology.

that based on the alleged finding of “lighting up,” claimant’s preexisting condition “ceased to exist” as a separate entity. (RP2 32-33). These statements are not consistent with claimant’s current position.

Because the adjudicator’s letter appeared to have been issued under the authority of the Department, it created for the jury the impression that the Department had, in fact, formally found the 1999 injury “lit up” claimant’s preexisting degenerative disc disease. Jury instruction 10, addressing the “lighting up” doctrine, reinforced this perception of a formal Department finding of a “lighting up.” Coupled with the jury’s knowledge of the Category 2 *permanent* partial disability award, the letter and jury instruction effectively informed the jury that the Department had found the injury “lit up” claimant’s disc disease permanently. In short, the letter and instruction essentially endorsed claimant’s theory of the case and precluded Weyerhaeuser from arguing the injury had not aggravated claimant’s disease as of 1999, and made it difficult to argue any such aggravation was not permanent. That, in turn, prejudiced Weyerhaeuser’s ability to argue the injury was not a cause of claimant’s disease, and the L4-5 annular tear, in 2005 and thereafter. Claimant cannot now contend

with any degree of credibility that the exhibit was “just a letter,” only redundant evidence, which had no particular significance.⁵

Claimant also cannot plausibly assert that the “jury already knew what was in the letter” and that it was “not new information.” (BR 29). Dr. Price testified that the 1999 injury had caused only a strain or mechanical pain, and that he could not conclude the incident had affected the degenerative pathology at any time. (Price 12-13, 36). Thus, the expert testimony on this issue was in conflict, so the jury did not “already know,” as claimant asserts, that the injury indisputably had impacted the degenerative pathology. By admitting the letter, the trial court effectively informed the jury that the Department already had formally determined that Dr. Price’s analysis was wrong, which undermined all of his testimony and directly impaired Weyerhaeuser’s ability to argue the injury had not impacted the preexisting pathology at any point or currently. *At a minimum*, admission of the letter placed the weight of the Department’s determinative powers behind claimant’s theory of the case; it also likely created the impression that the Department’s finding was binding on the parties and the jury. Claimant cannot seriously

⁵ As discussed, the improper impact of the letter and instruction was compounded by the trial court’s failure to properly define what a “lighting up” finding does, and does not, accomplish. (BA 31).

contend admission of the letter had no substantial impact – *i.e.*, was not prejudicial – particular given the vigor of his arguments below as to its significance.

For these reasons, the court should find the trial court erred in admitting Exhibit 1. Because the record does not otherwise establish that the Department found the injury had “lit up” claimant’s preexisting degenerative disc disease, the court should also find the trial court erred in instructing the jury on the “lighting up” doctrine. Claimant did not need the instruction to argue, based on the evidence, that the injury had aggravated his preexisting disease and was thus a cause of his current condition. The jury should have been instructed, as Weyerhaeuser proposed, only as to what constitutes Category 2 permanent impairment because that is the only formal finding the Department made.

2. Even Where Applicable, the “Lighting Up” Doctrine Establishes Only the Compensability of An Injury-Disability, Not the Underlying Preexisting Condition.

Claimant’s argument conflates two similar, but distinct legal issues and cases. The first type of case is where the claimant has sustained a compensable injury or occupational disease, and then seeks benefits for disability resulting from a preexisting, asymptomatic disease on the basis the workplace injury or activities

produced symptoms of the disease and thus caused the disability for which benefits are sought. This constitutes a “lighting up” case and is exemplified by this case and *Miller v. Department of Labor and Industries*, 200 Wash. 674, 94 P.2d 764 (1939). The second type of case is where the claimant seeks to establish either allowance of his claim based on a workplace aggravation of a preexisting disease, or allowance of the preexisting disease as part of an already accepted claim. *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467 (1987) (allowance of claim based on an aggravation of preexisting osteoarthritis); *Romano v. Department of Labor and Industries*, 20 Wn.2d 108, 146 P.2d 186 (1944) (claim for reopening based on preexisting condition that had been aggravated by the injury and accepted). These are “aggravation of preexisting condition” cases, not “lighting up” cases. The “aggravation” and “lighting up” cases are similar and present common issues – such as whether the claimant can recover benefits based on a non-industrial disease.⁶ However, they are distinguishable in other respects, chiefly as to whether the underlying disease or only the work-related disability is compensable. The underlying disease is compensable, and becomes part of the claim, only when the claimant has proved that the work exposure has

⁶ As a result, the distinction between them is sometimes blurred.

aggravated or worsened the underlying pathology. When the work exposure has only provoked symptoms of the underlying disease, without proof of a pathological worsening, only the disability is compensable, not the preexisting disease itself.

Claimant scoffs at the idea of a distinction between pathology and symptoms, but provides *no authority* to support his position that the two concepts are indistinguishable. He asserts Weyerhaeuser has merely “cherry-picked” from the “lighting up” cases, but does not dispute the fact that in the cases cited, and numerous others, the appellate courts consistently have described the “lighting up” doctrine as applying only to the “resulting **disability**.”⁷ Claimant references no true “lighting up” case to support his position that a finding of “lighting up” establishes not only the disability, but the underlying disease as compensable.

Claimant incorrectly relies on *Dennis v. Department of Labor and Industries, supra* to support his theory that a finding of “lighting up” by itself converts a preexisting disease into a compensable condition. (BR 18). Strictly speaking, *Dennis* was an “aggravation of preexisting disease case,” not a “lighting up” case. Mr. Dennis

⁷ Even the Department adjudicator, on whom claimant relies, cited *Miller* for the proposition that a “lighting up” makes the resulting “disability” compensable. (Ex. 1; BA, App-B).

sought allowance of his claim based only on the theory that his work activities had aggravated his preexisting wrist osteoarthritis. 109 Wn.2d 468-69. That is, allowance of his claim was premised solely on allowance of the osteoarthritis as part of the claim. The issue in *Dennis*, therefore, was whether and under what circumstances a preexisting non-industrial disease could be compensable. The Department argued that the occupational disease statute excluded the claimant's osteoarthritis from any coverage because it was not contracted in employment, *i.e.*, that its non-industrial origin disqualified the condition as a source of benefits. 109 Wn.2d at 470-71. In addressing that argument, the court noted that its application of the "lighting up" doctrine in injury cases supported the principle that a preexisting disease need not originate in employment to support a claim for disability benefits. 109 Wn.2d 471-72. The court concluded the same principle must be applied to occupational disease claims. 109 Wn.2d 472-73. The court thus cited the "lighting up" rule as support for its ultimate conclusion, but the court did not apply that rule in finding the claimant entitled to benefits. 109 Wn.2d at 481.

After discussing the "lighting up" rule, the court proceeded to quote Professor Larson's treatise on workers' compensation as also

supporting the principle that the underlying disease need not originate in the workplace. 109 Wn.2d at 475. (See quote BA 21). Contrary to claimant's argument, the court did not cite Larson, an extra-jurisdictional source, as addressing or describing application of Washington's "lighting up" rule. In fact, the court described the Larson extract as "reciting the basic *aggravation* (of preexisting condition) rule." (Emphasis added). 109 Wn.2d 475. Larson's reference to employment having been "aggravated, accelerated, or combined with" a preexisting disease described the essential finding in such an aggravation case, not a "lighting up" case. The court thus cited Larson as another example, in addition to the "lighting up" rule, of the principle that the non-industrial origin of a preexisting disease does not disqualify the claimant from receiving benefits.

The *Dennis* court's analysis also supported the existence of a distinction between the underlying disease pathology and work-related symptoms of that pathology. The Larson quote recognizes that distinction, as does the court's later references to a claimant's ability to establish compensability based on the work activities causing either his "disease or disease-based disability." 109 Wn.2d at 481. As noted previously, other Washington appellate decisions also confirm this distinction exists, and that a finding of "lighting up"

applies only to the disability. (BA 20-22). The courts in other jurisdictions likewise recognize this distinction and hold, as here, that a workplace contribution to disabling symptoms resulting from a preexisting disease supports a claim for disability benefits, but that proof of a worsening of the underlying disease is necessary to establish the disease as compensable. See *Weller v. Union Carbide Corp.*, 288 Or 27, 602 P.2d 259 (1979); *Barrett v. D&H Drywall*, 86 Or App 605, 740 P.2d 203 (1987).

Claimant also finds support for his position in the familiar statement that a finding of “lighting up” makes the preexisting condition “immaterial,” which he interprets as eliminating any further distinction between the compensable injury and the preexisting disease. (BR 19-20, 24). As discussed above and in the Brief of Appellant, the reference to the immateriality of the preexisting disease refers to its non-industrial origin not disqualifying the claimant from receiving benefits if the injury has caused disabling symptoms of the disease. (BA 22, 32). In *Jacobson v. Department of Labor and Industries*, 37 Wn.2d 444, 448, 224 P.2d 338 (1950), the court addressed this issue in the context of a claim based on a work-related aggravation of the claimant’s preexisting schizophrenia:

“If this injury resulted in a recurrence of respondent's schizophrenia, there can be no doubt about his right to recover, and **the fact that he might have been predisposed to this type of mental disorder would not affect that right.** It has been established, in a long line of cases, that, if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury and not to the preexisting physical condition. [Citations omitted.] **Whether the infirmity might possible have resulted in eventual disability or death, even without the injury, is immaterial upon the question of the department's liability** under the Workmen's Compensation Act. [Citations omitted.] Nor does it matter that the injury might not have produced the same effect in the case of a man in normal health. [Citation omitted.] The benefits of workmen's compensation are not limited to those who are in perfect health at the time they receive their injuries. [Citation omitted.] (Emphasis added.)

37 Wn.2d at 447-48. The court's statements demonstrate that the preexisting condition is deemed “immaterial” only in the sense that it does not “affect [the claimant's] right” to recover benefits (*i.e.* disqualify him from receiving benefits) or eliminate the Department's, or employer's, liability for benefits. Nothing in the court's use of the word “immaterial” in *Jacobson*, or any other “lighting up” case, supports claimant's position that the preexisting non-industrial disease is “immaterial” because the disease itself has become part of the claim.

The Board's interpretation of the *Miller* rule also refutes claimant's position and holds a finding of "lighting up" makes the employer responsible only for the *disability* resulted from the injury at the time the award is made, not for the underlying disease or its subsequent progression. *In re Arlen Long*, BIIA Dec. 94 2539 (1996). The Board correctly stated that no law, including *Miller* and its progeny, "requires the employer to assume responsibility for the preexisting condition in and of itself" merely because the injury previously had lit up the preexisting condition. *Long* at 7-8. The Board also correctly noted that while an injury can make a preexisting condition symptomatic, the injury "may only have a limited or finite effect on the preexisting condition." (*Id.*). Claimant erroneously contends the Board's interpretation of the law is not entitled to any deference on the asserted basis that the Board "does not enforce the workers' compensation statute." (BR 25). The appellate courts repeated have reached a contrary conclusion and held that they should give "great weight" to the Board's interpretation of the law and defer to that interpretation if it is reasonable. *Weyerhaeuser Co. v. The Board of Industrial Insurance Appeals*, 107 Wn.App. 505, 510, 27 P.3d 1194

(2001); *Department of Labor and Industries v. Avundes*, 95 Wn.App. 265, 270, 976 P.2d 637 (1999), *aff'd* 140 Wn.2d 282, 996 P.2d 593 (2000).

Like the Board, the Supreme Court also has recognized that a prior permanent partial disability award addresses only the claimant's condition at the time of the award and does not conclusively establish that the impact was permanent. *Bennett v. Department of Labor and Industries*, *supra*, 95 Wn.2d 531, 535, n. 1, 627 P.2d 104 (1981); *Rehberger v Department of Labor and Industries*, 154 Wash. 659, 660-61, 283 P. 185 (1929). These decisions show that the "lighting up" of a preexisting disease, or even an aggravation of the underlying pathology, may resolve. Claimant's contrary argument disregards the testimony of his own medical expert, Dr. Haller. (BR 19, 24). Dr. Haller labored over the question whether claimant's current degenerative condition, including the L4-5, was due to the 1995 injury or a natural progression of the degenerative pathology. (Haller 18, 31, 34-36). He stated these two alternative scenarios were equally likely. (Haller 18, 36). Dr. Haller's testimony refutes claimant's suggestion that his degenerative condition could not have "followed its own,

separate, or 'natural' path after this injury." (BR 24). If that were true, Dr. Haller would have had no trouble identifying the cause of claimant's current degenerative pathology. Claimant wrongly assumes that resolution of his "lighting up" necessarily would mean his degenerative disease returned to its asymptomatic state. He disregards the testimony of both physicians that such diseases are naturally progressive and, thus, the possibility that the impact of his injury resolved and that the disease continued to progress naturally. Dr. Haller's inability to determine the cause of claimant's current disease demonstrates he felt the natural progression explanation was as likely as the "lighting up" never having resolved.

For these reasons, *assuming* the court finds a "lighting up" instruction was appropriate, it should remand this matter for a new trial with an instruction that distinguishes between an injury causing symptoms that constitute a disability and aggravating the underlying pathology, and which makes clear that a "lighting up" can resolve.

3. The Segregation Instruction, No. 11, Is Clearly Erroneous.

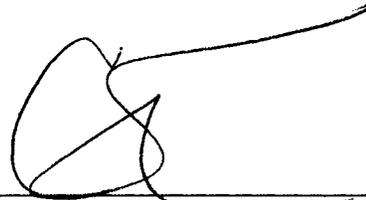
The Supreme Court recently confirmed that RCW

51.32.080(5) applies only when there is a preexisting permanent partial disability. *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 117, 206 P.3d 657 (2009). That statute does not apply to preexisting conditions not constituting a disability or disabilities that arise after an injury. Therefore, the trial court erred by giving the jury instruction 11. (See BA 34-35).

D. CONCLUSION

For the above reasons, the court should reverse the trial court's decision and affirm the Department's denial of aggravation; or, alternatively, remand this matter for a new trial with appropriate instructions. (See BA 35-36).

DATED: August 17, 2009.

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

Craig A. Staples, WSBA # 14708
Attorney for Weyerhaeuser

CERTIFICATE OF MAILING

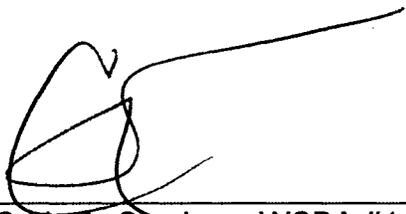
I certify that on August 17, 2009, I served the foregoing REPLY BRIEF OF APPELLANT on the following persons by mailing them each a true copy by first class mail with the U.S. Postal Service at Vancouver, Washington in a sealed envelope, with postage prepaid, and addressed to the following:

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I further certify that I filed the original and one copy of the same document by first class mail on the above date in a sealed envelope, with postage prepaid, and addressed to the following:

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