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71346-9

NO. 71346-9-I

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

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LEROY DOPPENBERG,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF  
WASHINGTON AND EAGLE HYDRAULICS, A WASHINGTON  
CORPORATION,

Respondents.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## I. INTRODUCTION

This is a workers' compensation appeal. A jury affirmed the Board of Industrial Insurance Appeals' decision that Leroy Doppenberg's workers' compensation claim should not be reopened because the condition caused by his work injury had not objectively worsened. The superior court awarded the Department \$1,016 in costs (a statutory attorney fee, deposition transcription costs, and a jury demand fee).

The trial court properly awarded these costs under RCW 4.84.010, RCW 4.84.030, and RCW 51.52.140. The Supreme Court and Court of Appeals have affirmed the award of costs in cases Doppenberg does not cite to this Court.

The jury correctly decided that Doppenberg did not prove objective worsening, and he does not challenge the verdict on substantial evidence grounds. Rather, he argues that because the Department accepted "right peroneal nerve injury" on his claim, res judicata bars testimony about the nature and extent of that injury. But Doppenberg has not preserved any alleged error as he did not object to most of this testimony. Additionally, the testimony was proper and did not violate res judicata principles. In any case, any error is harmless.

This Court should affirm.

## II. ISSUES

1. Did the trial court properly award the Department costs where RCW 4.84.010, RCW 4.84.030, RCW 51.52.140, and well-established case law permit the trial court to award costs?
2. Did the trial court commit a prejudicial error of law by allowing testimony regarding the nature and extent of the peroneal nerve injury when res judicata does not bar testimony about the nature and extent of an accepted condition and when the record contains many passages about the nature and extent of the injury to which Doppenberg did not timely object?
3. Did the trial court abuse its discretion in declining to give a proposed instruction that was not supported by the evidence?

## III. STATEMENT OF THE CASE

### A. **In March 2007, a Steel Plate Fell on Doppenberg's Right Foot at Work, Bruising His Foot and Injuring the Superficial Peroneal Nerve on Top of His Foot**

In March 2007, Doppenberg was placing a steel plate that weighed between 200 and 400 pounds over a hydraulic cylinder at work. RP 25, 84, 163, 174.<sup>1</sup> The plate fell, striking his right calf and shin and landing on his right foot. RP 25, 62, 84, 163, 172-73. He filed a workers' compensation claim, which the Department of Labor and Industries allowed.

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<sup>1</sup> The testimony was read to the jury on September 11, 2013; this brief cites this testimony as "RP," followed by the page number. Proceedings on September 10, 2013 are cited as RP (9/10/13).

Doppenberg's objections at the Board hearing appear in the certified appeal board record, not the report of proceedings. Thus, where relevant to issues of preservation, this brief cites the certified appeal board record as "BR" followed by the witness name and page number.

*See* RP 27. The Department accepted “right peroneal nerve injury” as a condition under the claim. Ex. 1.<sup>2</sup>

The peroneal nerve divides into multiple branches. RP 105-06, 111-12; *see also* Ex. 2. The common peroneal nerve branches off from the sciatic nerve, which runs down the back of the thigh. RP 105, 140. After branching off from the sciatic nerve, the common peroneal nerve runs around the outside of the knee. RP 140. The common peroneal nerve further divides below the knee into the superficial peroneal nerve and the deep peroneal nerve. RP 140.

On April 9, 2007, Doppenberg saw Dr. Andrew Soo, a podiatrist, for foot and ankle pain. RP 26, 80, 84. Dr. Soo treated Doppenberg for over one year. *See* RP 88-100. Without objection, Dr. Soo testified that the work injury caused a bruised right foot and an injury to the superficial peroneal nerve “running on top of the foot.” RP 85; BR Soo 10. Dr. Soo explained, without objection, that there are two peroneal nerves relevant to this case—the common and superficial peroneal nerves—and that Doppenberg injured the superficial peroneal nerve. RP 85; BR Soo 10.

The superficial peroneal nerve is a sensory nerve that does not control any muscles. RP 98. As Dr. Soo explained, without objection, an in-

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<sup>2</sup> Doppenberg now argues that the acceptance of “right peroneal nerve injury” bars the Department from presenting testimony about the nature and extent of this injury in the form of distinguishing between a superficial peroneal nerve and the common peroneal nerve. *See* App. Br. 25.

jury to the superficial peroneal nerve therefore cannot cause “drop foot,” which is ankle weakness that makes it difficult to clear the foot from the ground when walking. *See* RP 89, 98; BR Soo 25. Rather, injury to the superficial peroneal nerve causes a “disturbance of sensation,” such as a numbing or tingling sensation on the top of the foot. RP 98.

**B. Dr. Andrew Soo Concluded, Based on Objective Tests, That Doppenberg’s Right Foot Weakness Was Not Caused by the Work Injury but by an Unrelated Low Back Condition and Peripheral Neuropathy**

On April 9, Dr. Soo administered a cortisone injection to Doppenberg’s superficial peroneal nerve to “calm down the nerve” and determine whether it was the source of his pain. RP 86-87. The cortisone injection did not help, which led Dr. Soo to believe that the superficial peroneal nerve might not be the source of pain. RP 86-87.

In two subsequent visits to Dr. Soo in April 2007, Doppenberg reported a tingling sensation in his right foot. RP 86-87. Dr. Soo ordered a nerve study to investigate. RP 87.

The nerve study revealed possible stenosis in the low back. RP 88. Stenosis is a narrowing of the spinal canal that can cause nerve damage. *See* RP 88, 90. The nerves emerging from the lower spine control the foot and ankle muscles. *See* RP 90. An injury to the low back can cause foot and ankle weakness. *See* RP 90. Dr. Soo noted that Doppenberg did not

injure his low back in the March 2007 work injury. RP 88-89. Therefore, the work injury did not cause any stenosis in the low back. RP 89.

In June 2007, Dr. Soo observed that Doppenberg had ankle weakness causing “drop foot.” RP 89. Without objection, Dr. Soo testified that an injury to the superficial peroneal nerve could not cause foot drop. *See* RP 98; RP 106; BR Soo 25, 34. Dr. Soo ordered an MRI of the low back to determine the cause of the drop foot. RP 89-90.

Like the nerve study, the MRI showed that Doppenberg had stenosis in his low back. RP 88, 90. Dr. Soo concluded, based on the nerve study and the MRI, that stenosis in the low back caused the weakness to Doppenberg’s right foot and ankle and the related drop foot. RP 90. He referred Doppenberg to a back specialist for evaluation but was unsure whether Doppenberg ever followed up. RP 91.

In November 2007, Dr. Soo believed that Doppenberg had reached maximum medical improvement with regard to his work injury. RP 92.<sup>3</sup> He noted that eight months had passed since the contusion and that Doppenberg did not report any pain on the top of the foot. RP 92. Although Doppenberg continued to express concern about a weak right

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<sup>3</sup> The Department stops payment for health care services once a worker reaches “maximum medical improvement,” i.e. “when no fundamental or marked change in an accepted condition can be expected, with or without treatment.” WAC 296-20-01002. Maximum medical improvement may be reached even though “there may be fluctuations in levels of pain and function” and even though the condition “might be expected to improve or deteriorate with the passage of time.” WAC 296-20-01002.

foot and ankle, Dr. Soo did not think the work injury caused the weakness; rather he opined that peripheral neuropathy, possibly caused by the low back condition or other causes, caused it. RP 92.

Peripheral neuropathy describes a systemic nerve injury that affects every nerve in the lower extremities. RP 100. Neuropathy has many potential causes, including trauma or a systemic condition, like diabetes, alcohol abuse, or genetics. RP 92, 142.

Dr. Soo did not believe that Doppenberg's 2007 work injury caused his peripheral neuropathy; rather, he believed that Doppenberg's low back condition or a systemic issue caused the peripheral neuropathy. RP 92. According to Dr. Soo, the fact that Doppenberg had peripheral neuropathy in both legs, rather than just the right leg, suggested that the low back or a systemic issue caused the neuropathy. RP 93.

An EMG report from August 1, 2008, stated that Doppenberg had a "[g]eneralized neuropathy pattern . . . that can generally be seen due to metabolic reasons." RP 101-102. Dr. Soo explained that this indicated that Doppenberg might have had underlying causes for the neuropathy, including "heavy alcohol use [and] diabetes." *See* RP 102.<sup>4</sup>

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<sup>4</sup> Doppenburg objected on hearsay grounds to portions of Dr. Soo's testimony about the EMG results. BR Soo 29, 30. The Board and superior court overruled these objections, and he does not re-raise them here. BR 29; RP (9/10/13) 64.

The EMG report confirmed that Doppenberg had right L5 radiculopathy.<sup>5</sup> See RP 102, 151. The L5 nerve root is the fifth lumbar root that emerges from the spine between the fourth and fifth lumbar vertebra. See RP 152. The L5 nerve root joins with the S1 nerve root and ultimately forms the sciatic nerve. See RP 152. L5 radiculopathy means the fifth lumbar root is possibly compromised from a disk, arthritic changes, or a bony spur touching the nerve root. See RP 152.

Compression of the L5 nerve in the lower back can cause foot drop. RP 153. Right L5 radiculopathy is consistent with right foot drop. See RP 102. As Dr. Soo explained, a pinched nerve in the low back can cause weakness to the right foot and ankle. See RP 103.

**C. Doppenberg Reported Heavy Drinking to Independent Medical Examiners in 2008, and Alcohol Is a Cause of Peripheral Neuropathy**

Alcohol is toxic and can damage nerves. RP 93, 146, 154. Alcohol is a major cause of neuropathy due to its toxicity and the associated vitamin deficiency that occurs in drinkers. RP 146.

Doppenberg has consumed excessive alcohol at times in his life. RP 31. In May 2008, Doppenberg reported to an independent medical examiner that he drank “about a fifth of vodka a week.” RP 154. In Decem-

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<sup>5</sup> Radiculopathy is “disease of the nerve roots, such as from inflammation or impingement by a tumor or a bony spur.” *Dorland’s Illustrated Medical Dictionary* 1571 (32d ed. 2012).

ber 2008, he reported to another independent medical examiner that he had “three to five shots of alcohol per day.” RP 154. In June 2012, Doppenberg testified that the quantity of alcohol he had consumed over the years had not changed. RP 31. He also testified that he been sober for a year and had noticed no improvement in his foot. RP 31.

**D. The Department Issued an Order Accepting Responsibility for Right Peroneal Nerve Injury**

On June 26, 2008, the Department issued a notice that accepted responsibility for “right peroneal nerve injury”:

The Department of Labor and Industries is responsible for the condition diagnosed as Right Peroneal Nerve Injury, determined by medical evidence to be related to the accepted condition under this industrial injury for which this claim was filed.

Ex. 1. Dr. Soo received this order and assumed that it referred to the superficial peroneal nerve. RP 107.

**E. In March 2009, After the Department Closed Doppenberg’s Claim, Dr. Soo Evaluated Him and Did Not Believe That Doppenberg’s Claim Should Be Re-Opened Because There Was No Evidence of Objective Worsening**

In February 2009, Dr. Soo saw Doppenberg for the last time while his claim was open. *See* RP 96; BR 47. Dr. Soo continued to believe that Doppenberg had reached maximum medical improvement. *See* RP 96. Doppenberg’s drop foot had improved and he was able to walk a little better. *See* RP 96. He continued to report tingling, numbness, and weak-

ness in the right foot and ankle, but Dr. Soo believed that the work injury did not cause these symptoms. *See* RP 96-97. Rather, these symptoms were caused by either a systemic issue, such as peripheral neuropathy caused by diabetes or alcohol, or by neuropathy caused by his low back. *See* RP 97. Without objection, Dr. Soo also testified that the work injury did not cause drop foot. RP 97; BR Soo 23. Over Doppenberg's objection, he explained that he did not believe that the work injury caused drop foot because Doppenberg injured his superficial peroneal nerve, not his common peroneal nerve. *See* RP 97; BR Soo 24.

On March 13, 2009, the Department closed Doppenberg's claim. *See* BR 47. Ten days later, he returned to Dr. Soo for an evaluation to determine if his condition had worsened since claim closure so that his claim could be reopened. RP 99-100.

Dr. Soo determined that Doppenberg's condition had not objectively worsened. RP 100. He noted that the contusion was stable. *See* RP 101. He believed that Doppenberg's reported symptoms and complaints—difficulty walking, ankle weakness—were not related to his work injury. *See* RP 101. On May 12, 2009, the Department affirmed its decision to close the claim. *See* BR 47; RP 27.

**F. In November 2009, Dr. D.J. Wardle Examined Doppenberg Without Reviewing Doppenberg's Past Medical Records and Applied To Re-Open the Claim**

On November 1, 2010, Dr. D.J. Wardle, a podiatrist, examined Doppenberg. RP 58, 61-62, 71. At the time of his examination, Dr. Wardle had not reviewed any of Doppenberg's past medical records. RP 63, 72. During the exam, Dr. Wardle observed edema around the right ankle and mid-foot that was not present on left. RP 62. He noted diminished sensation on the right foot compared to the left. RP 62.

After the examination, Dr. Wardle applied to re-open Doppenberg's claim. RP 63. The findings that Dr. Wardle listed to support re-opening were "[n]umbness around the ankle and foot, swelling, and positive Tinel's sign." RP 103. A positive Tinel's sign occurs when tapping on the nerves causes a tingling sensation. *See* RP 65.

**G. Dr. Lewis Almaraz, A Board-Certified Neurologist, Testified That Doppenberg's Conditions Did Not Objectively Worsen**

On December 21, 2010, Dr. Lewis Almaraz, a Board-certified neurologist, examined Doppenberg and reviewed his medical records to determine whether his claim should be re-opened. RP 129, 134-36. On physical exam, Dr. Almaraz observed absent reflexes in both lower extremities and wasting muscles in both feet, suggesting a "diffuse" disturbance of the peripheral nervous system. RP 137-39, 167-68, 176.

Dr. Almaraz noted that the August 1, 2008 EMG showed “diffuse problems” in both extremities. RP 149-50. He believed that Doppenberg had peripheral polyneuropathy with a component of L5 radiculopathy. *See* RP 149, 151. The L5 radiculopathy was not related to the work injury because “the nature of the injury was an object falling on the right ankle, which would not result in a polyneuropathy nor a lumbar sacral radiculopathy.” RP 149. The work injury did not cause the polyneuropathy because “hitting the foot . . . on the right side is not going to cause the nerves on the left foot to not work.” *See* RP 175.

Dr. Almaraz concluded that Doppenberg’s condition did not objectively worsen between May 12, 2009, and June 2, 2011. RP 155. He stated that there was no objective evidence that the foot trauma had worsened. RP 155. He testified, without objection, that the foot drop was not related to the work injury because the muscles that cause the foot to dorsiflex are served by a component of the peroneal nerve around the knee. RP 156; BR Almaraz 36.

Dr. Almaraz further testified, without objection, that Doppenberg’s injury to the peroneal nerve did not objectively worsen. RP 179; *see* BR Almaraz 64. And although Doppenberg testified that he scraped his shin in the work injury, this would not injure the common peroneal nerve because the shin is below that nerve. RP 173.

**H. Neither Dr. Soo nor Dr. Almaraz Believed That Dr. Wardle's Findings Provided Objective Evidence of Worsening to Re-Open Doppenberg's Claim**

Dr. Soo did not believe that Dr. Wardle's findings demonstrated objective worsening of the work injury. RP 103-04. He noted that Doppenberg had all three signs that Dr. Wardle listed on the re-opening application—numbness, swelling, and a positive Tinel's sign—when he saw Doppenberg. RP 103-04. Dr. Soo explained that peripheral neuropathy most likely caused the numbness and positive Tinel's sign and that frequent sprains from drop foot caused the swelling. RP 104. None of these findings was related to the work injury. RP 104.

Dr. Almaraz also disagreed with Dr. Wardle's reasons for seeking to re-open the claim. RP 156-57. He explained that Dr. Wardle's findings were subjective. RP 157. He also testified that he did not observe any swelling on examination but that, even if he had, that did not support a conclusion of objective worsening because peripheral neuropathy can cause swelling. RP 156-57.

**I. At the Board Hearing, Doppenberg Did Not Object on Res Judicata Grounds to Extensive Testimony About the Nature and Extent of His Peroneal Nerve Injury**

The Department denied Doppenberg's application to re-open his claim, and he appealed to the Board. *See* BR 37-39. He did not file a mo-

tion in limine at the Board requesting that the medical testimony exclude any discussion of the right peroneal nerve. *See* BR 1-85.

During Dr. Soo's deposition, Doppenberg did not object to Dr. Soo's extensive testimony about the peroneal nerve, including his testimony that "there are two peroneal nerves which are relevant to this case" including the superficial peroneal nerve and the common peroneal nerve (BR Soo 10); that Doppenberg injured the superficial peroneal nerve in his work injury (BR Soo 10); that because the cortisone injection on April 9, 2007 did not work, Dr. Soo thought the superficial peroneal nerve may not have been the source of his pain (BR Soo 11); that an injury to the superficial peroneal nerve cannot cause foot drop because it is a sensory nerve that does not control muscles (BR Soo 25); and that an injury to the common peroneal nerve below the knee can cause foot drop but that Doppenberg did not injure the nerve below the knee (BR Soo 24-25).

Dr. Soo also testified without objection that Doppenberg's foot drop was not related to his work injury. BR Soo 23. When Dr. Soo was asked to explain this opinion, Doppenberg objected on *res judicata* grounds because "right-peroneal-nerve injury, which is known to cause foot-drop, has already been accepted under the claim." BR Soo 23-24. The Board overruled this objection, and Doppenberg renewed it in his motion in limine at superior court. BR 29; *see* CP 154-55. In response,

Dr. Soo explained that Doppenberg injured the superficial peroneal nerve, not the common peroneal nerve. BR Soo 24. An injury to the common peroneal nerve can cause foot drop. BR Soo 24. But because the superficial peroneal nerve does not control any muscles or tendons, it cannot cause any weakness to the right foot or ankle. BR Soo 24.

Likewise, during Dr. Almaraz's deposition, Doppenberg did not object to extensive testimony about the peroneal nerve, including: the common peroneal nerve divides into the superficial peroneal nerve and deep peroneal nerve, each of which supplies different muscles (BR Almaraz 19); a division of the common peroneal nerve supplies the muscle that causes the foot to dorsiflex (BR Almaraz 19); Doppenberg's foot drop was not related to his work injury because the muscles that cause the foot to dorsiflex are served by a part of the common peroneal nerve that is "up around the knee, not at the ankle." (BR Almaraz 36, 59).

On cross-examination, Doppenberg offered a diagram of the peroneal nerve into evidence. BR Almaraz 51-52; *see also* Ex. 2. Dr. Almaraz agreed with Doppenberg that the diagram showed the common peroneal nerve splitting into the deep peroneal nerve and the superficial peroneal nerve. BR Almaraz 52.<sup>6</sup>

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<sup>6</sup> The industrial appeals judge admitted the diagram into evidence over the Department's objection. BR Almaraz 52; BR 29.

On redirect, Doppenberg objected on res judicata grounds to a question about whether he had injured the common peroneal nerve. BR Almaraz 64. He also objected to two other questions involving the peroneal nerve, but not on res judicata grounds. BR Almaraz 63, 65.

After considering the testimony, an industrial appeals judge concluded that Doppenberg's condition did not objectively worsen. BR 35. Doppenberg petitioned for review to the Board. BR 3-15.

In his petition for review, Doppenberg took exception to all adverse evidentiary objections (BR 5) but did not ask the Board to strike any other testimony that he had not objected to on res judicata grounds. *See* BR 3-15. The Board denied his petition and adopted the hearing judge's decision as its final decision and order. BR 2.

**J. In His Motion In Limine at Superior Court, Doppenberg Moved To Strike Several Pages of Medical Testimony for the First Time on Appeal**

Doppenberg appealed to superior court. CP 1-2. He filed a motion in limine to renew evidentiary objections that he raised at the Board. CP 147-56. Many of these objections pertained to hearsay and speculation and are not relevant to this appeal. *See* CP 148-151.

Doppenberg renewed only three specific objections on the basis that the Department's June 26, 2008 order was final and binding where he had also raised the same res judicata objection at the Board: (1) Dr. Soo's

testimony about why he did not protest the order (*see* BR Soo 41; renewed on CP 149-50); (2) one instance in Dr. Soo's testimony about why drop foot was not related to the work injury (*see* BR Soo 23-24, renewed on CP 154-55); and (3) Dr. Almaraz's testimony on redirect that Doppenberg did not injure the common peroneal nerve (*see* BR Almaraz 64, renewed on CP 151-52).<sup>7</sup>

The superior court sustained the objection to Dr. Soo's testimony about protesting the order. RP (9/10/13) 64. It overruled the objection to Dr. Soo's testimony about foot drop and to Dr. Almaraz's testimony on redirect about the common peroneal nerve. *See* RP (9/10/13) 97-98, 178-79.<sup>8</sup> Doppenberg does not cite any of these specific objections in his brief

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<sup>7</sup> Dr. Soo testified without objection at RP 98 about why the work injury did not cause foot drop. *See* BR Soo 24-25. On cross-examination, Dr. Soo testified without objection at RP 105-06 that an injury to the superficial peroneal nerve cannot cause foot drop. *See* BR Soo 33-34. Dr. Almaraz also testified without objection at RP 156 that the work injury did not cause foot drop. *See* BR Almaraz 36.

<sup>8</sup> The September 10, 2013 report of proceedings ends abruptly at 2:40 p.m. while the trial court was ruling on Doppenberg's renewed objections. RP (9/10/13) 69. The clerk's minutes show that the court did not adjourn until 3:59 p.m. CP 160. The superior court's ruling with regard to Dr. Soo's foot drop testimony and Dr. Almaraz's testimony on redirect is not in the record; nevertheless, because this testimony appears in the report of proceedings, it is clear that the court overruled these objections and that this testimony was read to the jury. *See* RP 97-98, 178-79.

of appellant, nor does he assign error to any of the trial court's rulings on these objections. *See* App. Br. 2, 12.<sup>9</sup>

In his motion in limine, Doppenberg also asked the court to strike certain medical testimony that he did not object to at the Board on the basis that the Department's June 26, 2008 order was final and binding. *See* CP 154-55. Thus, he asked the court to strike four pages of Dr. Soo's testimony (where he had only objected to one question) and five pages of Dr. Almaraz's testimony (where he had made no objections). *See* CP 154-55; *see also* BR Soo 23-27; BR Almaraz 20-25. Although some of this testimony involved discussion the peroneal nerve, much of it pertained to the effects of peripheral neuropathy. *See* BR Soo 23-27; BR Almaraz 20-25. The superior court overruled these objections and permitted the jury to hear this testimony. *See* RP 96-100, 141-46.

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<sup>9</sup> The only reference to a specific objection anywhere in Doppenberg's brief of appellant appears on page 12. There, he cites a colloquy that occurred after Department's counsel objected on hearsay grounds to his question to Dr. Almaraz about a non-testifying doctor's diagnosis of right peroneal nerve injury. App. Br. 12 (citing BR Almaraz 46). The Board overruled the Department's objection. BR 29. The superior court also overruled the renewed hearsay objection. CP 64; *see* RP 164.

**K. The Superior Court Declined to Give One of Doppenberg's Proposed Instructions but Instructed the Jury That the Determination That Doppenberg Had a Right Peroneal Nerve Injury Was Final and Binding on All Parties**

The superior court declined to give Doppenberg's proposed instruction that when considering the effects of an industrial injury on a particular worker, the jury must take into account the particular worker:

The Worker's [sic] Compensation Act of this state applies to all persons engaged in employment, regardless of their age or previous condition of their health.

In determining the effect of an industrial accident upon a worker, such effect must always be determined with reference to the particular worker involved, rather than what effect, if any, such an accident would have had, if any, upon some other person.

CP 102, 116; RP 191. The court explained that it did not "see that issue in this case." RP 191. Doppenberg took exception. RP 199-200.

At Doppenberg's request, the superior court instructed the jury that the Department was responsible for right peroneal nerve injury:

The Department of Labor and Industries is responsible for the condition diagnosed as Right Peroneal Nerve Injury, determined by medical evidence to be related to the accepted condition under this industrial injury for which this claim was filed. This determination is final and binding on all parties.

CP 175; *see also* CP 107.

**L. A Jury Found That Doppenberg's Condition Did Not Objectively Worsen, and the Superior Court Awarded Costs to the Department**

The jury's verdict affirmed the Board's decision. CP 168. The Department requested costs under RCW 4.84.010 and 4.84.030. *See* CP 195-97. Specifically, it requested \$200 in statutory attorney fees, \$125 for the jury demand fee, and \$691 for the court reporter costs to transcribe Dr. Soo's and Dr. Almaraz's depositions. CP 195-99. The court awarded the Department its requested costs, which totaled \$1,016. CP 192-94.

**M. The Trial Court Denied Doppenberg's Motion for Reconsideration and New Trial**

Doppenberg moved for reconsideration and a new trial. CP 200-13. He moved for a new trial on the basis that the superior court committed an "error of law" when it permitted the jury to hear "evidence designed to call this res judicata acceptance of right peroneal nerve injury into question." CP 201, 209. He moved for reconsideration on the award of costs. CP 201. The superior court denied both motions. CP 253-54.

Doppenberg appeals. CP 255-66.

**IV. STANDARD OF REVIEW**

In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). Doppenberg erroneously cites to the standard of review for a

Board decision in a worker safety and health case under RCW 49.17.150. App. Br. 14 (citing *Mt. Baker Roofing, Inc. v. Dep't of Labor & Indus.*, 146 Wn. App. 429, 431, 191 P.3d 65 (2008)). That standard of review does not apply here.

This Court reviews the decision of the trial court rather than the Board's decision. See *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. This Court limits its review to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). An abuse of discretion occurs when a trial court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

When an error of law is cited as grounds for a new trial under CR 59(a)(8), this Court reviews the alleged error of law de novo. *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 848, 282 P.3d 1124 (2012), *review denied*, 176 Wn.2d 1002, 297 P.3d 67 (2013). The error of law complained of must be prejudicial. *Id.*

This Court reviews a trial court's refusal to give a proposed instruction for abuse of discretion. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). An erroneous instruction requires reversal only if it is prejudicial, that is, only if the error affects the trial's outcome. *Id.*

## V. ARGUMENT

### A. **The Trial Court Properly Awarded the Department Its Costs as the Prevailing Party Under RCW 4.84.010, RCW 4.84.030, and RCW 51.52.140**

The Department prevailed at superior court. Therefore, under RCW 4.84.010, RCW 4.84.030, and RCW 51.52.140, the superior court properly awarded the Department its costs, including statutory attorney fees, the jury demand fee, and deposition transcription costs.

The Department is entitled to its costs through the operation of three related statutes, RCW 4.84.010, RCW 4.84.030, and RCW 51.52.140. None contains any ambiguity and Doppenberg does not allege any, thus conceding the issue. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

RCW 51.52.140 states, “Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this

chapter.” Accordingly, absent a contrary statute in RCW 51.52, the ordinary civil practice, including its cost provisions, applies to superior court proceedings. RCW 51.52.140; *Black v. Dep’t of Labor & Indus.*, 131 Wn.2d 547, 557-58, 933 P.2d 1025 (1997); *Ferencak v. Dep’t of Labor & Indus.*, 142 Wn. App. 713, 729-30, 175 P.3d 1109 (2008), *aff’d on other grounds sub nom. Kustura v. Dep’t of Labor & Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422-23, 832 P.2d 489 (1992).

RCW 4.84.030 provides that a prevailing party “[i]n any action” in superior court is entitled to “costs and disbursements”:

In *any action* in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements . . . .

RCW 4.84.030 (emphasis added). RCW 4.84.010 specifies the types of recoverable costs, including statutory attorney fees, the cost of deposition transcripts used at trial, and “costs otherwise authorized by law”:

[T]here shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party’s expenses in the action, which allowances are termed costs, including, *in addition to costs otherwise authorized by law*, the following expenses:

. . . .

- (6) *Statutory attorney and witness fees*; and
- (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the *reasonable expense of the transcription of depositions used at trial* or at the mandatory arbitration hearing: PROVIDED, That the

expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.010 (emphasis added). The statutory attorney fee is \$200.

RCW 4.84.080(1).

**1. The Trial Court Properly Awarded Statutory Attorney Fees to the Department Under Well-Established Case Law**

The superior court properly awarded \$200 in statutory attorney fees to the Department. RCW 4.84.010(6) specifically authorizes an award of statutory attorney fees. Courts have repeatedly held that RCW 51.52.140 allows the superior court to award statutory attorney fees to the Department under RCW 4.84.030. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 730; *Allan*, 66 Wn. App. at 422-23. As our Supreme Court has recognized, this is because the cost provisions of RCW 4.84 apply to superior court proceedings involving appeals from Board decisions. *See Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23.

Doppenberg disregards this well-established case law and argues that the Department is not entitled to attorney fees (presumably he means “statutory attorney fees”) because “the legislature intended for RCW [51.52.130] to be the exclusive statutory provision for attorney fees and costs in a workers’ compensation appeal to superior court.” App. Br. 18,

20.<sup>10</sup> He suggests that RCW 51.52.130, as a more specific statute, controls over the RCW 4.84.030, a more general statute. App. Br. 18. And he suggests that because RCW 51.52.130 “otherwise” provides for attorney fees, it falls within RCW 51.52.140’s exception to civil practice. App. Br. 19. None of these arguments has merit.

This Court has explicitly rejected the argument that RCW 51.52.130 precludes an award of statutory attorney fees to the Department at superior court in workers’ compensation appeals:

The superior court awarded the Department \$200 in statutory attorney fees under RCW 4.84.030. Ferencak argues that this is an improper award of attorney fees under RCW 51.52.130, which states when attorney fees should be awarded in an industrial insurance appeal. But these two provisions do not deal with the same kind of attorney fees. RCW 51.52.130 allows for an award of actual attorney fees incurred by an injured worker or employer on appeal to the superior or appellate court. In contrast, RCW 4.84.030 allows the superior court to award costs to the prevailing party, and under RCW 4.84.080, those costs include a nominal statutory attorney fee award of \$200. RCW 51.52.140 states that the rules of civil procedure apply in all industrial insurance appeals to the superior court, and the Washington Supreme Court has held that this provision allows the court to impose statutory attorney fees under RCW 4.84.030.

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<sup>10</sup> Doppenberg refers to the award of “attorney fees.” App. Br. 20. The trial court did not award “attorney fees”; it awarded statutory attorney fees, a form of costs. See CP 192; RCW 4.84.010(6); *Ferencak*, 142 Wn. App. at 730. By the reference to “attorney fees,” the Department assumes Doppenberg means “statutory attorney fees.”

*Ferencak*, 142 Wn. App. at 729-30 (citing *Black*, 131 Wn.2d at 557-58).

Thus, Doppenberg's arguments are baseless.<sup>11</sup>

Contrary to *Black*, *Ferencak*, and *Allan*, Doppenberg also asserts that the Department is not entitled to statutory attorney fees under RCW 51.52.140 because, in his view, such fees are a substantive right (relying on case law about attorney fees, not costs), not a procedural remedy. App. Br. 19-20. Therefore, he contends that entitlement to statutory attorney fees does not fall within the meaning of "practice" under RCW 51.52.140. App. Br. 19-20. He provides no case law authority for the proposition that "practice" under RCW 51.52.140 is limited to "procedure." See App. 19-20. But in any case, three decisions of the appellate courts hold that RCW 51.52.140 authorizes the award of costs. See *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 730; *Allan*, 66 Wn. App. at 422-23.

Finally, Doppenberg argues that RCW 4.84.130, a statute involving costs when a party appeals a district court judgment, somehow informs the analysis of whether the Department is entitled to statutory attorney fees under RCW 4.84.010, RCW 4.84.030, and RCW 51.52.140. App. Br.

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<sup>11</sup> Doppenberg does not cite or discuss *Black*, *Ferencak*, and *Allan* even though these cases are directly on point and the Department discussed them in its response brief to his motion for reconsideration and a new trial. CP 231-33. In his reply brief at superior court, Doppenberg conceded, "[u]nder *Black*, RCW 4.84.030 does apply to workers' compensation appeals to superior court." CP 247. But he argued that *Black* was "wrongly decided." CP 247. In this appeal, he simply ignores *Black*. See App. Br. 15-23. He has waived any argument with respect to the correctness of *Black*. See *Cowiche Canyon Conservancy*, 118 Wn.2d at 809 (party cannot raise new issue in reply).

19. It does not. RCW 4.84.130 allows the superior court, in an appeal from district court, to award “all costs” against a non-prevailing appellant; these include costs incurred in district court. *See Jeffery v. Weintraub*, 32 Wn. App. 536, 547 n.8, 648 P.2d 914 (1982). That the Legislature enacted a statute to discourage meritless appeals of district court decisions by allowing the superior court to award a prevailing party’s costs at both the district court and superior court levels has no application here. RCW 4.84.030 governs superior court actions, and the fact that there is not a separate statute in RCW 4.84 about appeals from Board decisions does not mean that RCW 4.84.010 and RCW 4.84.030 do not apply. RCW 4.84.030 governs *any* superior court action, which under RCW 51.52.140 applies to workers’ compensation cases at superior court. Doppenberg’s arguments disregard the clear holdings of *Black*, *Ferencak*, and *Allan* and should be rejected.

**2. The Trial Court Properly Awarded Deposition Transcript Costs to the Department Because the Depositions Were “Used at Trial” and “Necessary to Achieve the Successful Result”**

The trial court properly awarded the Department its deposition transcription costs. The plain language of RCW 4.84.010(7) allows a prevailing party in a superior court action to recover deposition transcription expenses if the depositions were “used at trial” and “necessary to achieve

the successful result.” These requirements are met here. Dr. Soo’s and Dr. Almaraz’s depositions were read to the jury and, therefore, “used at trial.” *See* RP 80-114, 126-79. The Department’s case depended on these doctors’ medical causation testimony; thus, their testimony was necessary to achieve a successful result. This Court should affirm the award of deposition transcription costs.

In addition to RCW 4.84.010(7)’s plain language, *Black*, *Ferencak*, and *Allan* support the trial court’s award of deposition transcription costs. Although these cases did not address the precise question of deposition transcription costs in a superior court matter involving workers’ compensation appeals, each held that RCW 4.84.030’s cost provisions apply to superior court matters involving workers’ compensation appeals, and each awarded statutory attorney fees to the Department. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23. Statutory attorney fees are a recoverable cost under RCW 4.84.010(6), and RCW 4.84.080 establishes the amount of the fees. There is no compelling reason to distinguish the costs identified in RCW 4.84.010(6) from the costs identified in RCW 4.84.010(7). *Black*, *Ferencak* and *Allan* all support the conclusion that a prevailing party is entitled to its deposition transcription costs under the circumstances present here. *See Black*, 131

Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23.

Doppenberg argues that the plain language of RCW 4.84.010(7) “does not include perpetuation depositions published by the Board.” App. Br. 21. This argument ignores that RCW 4.84.010’s cost provisions apply to *any* superior court action, not just those involving workers’ compensation appeals. RCW 4.84.030. The Legislature elected not to enumerate all the different possible permutations in which depositions might be taken and subsequently used in superior court actions. Instead, it enacted a broad mandate that if depositions are “used at trial” and “necessary to achieve the successful result,” the deposition expenses “shall be allowed to the prevailing party.” RCW 4.84.010. This mandate applies to depositions taken in a workers’ compensation matter.

That the Department took the depositions originally at the Board does not limit recovery for the transcription costs at superior court, contrary to Doppenberg’s claims. App. Br. 20-22. The plain language of RCW 4.84.030 provides for costs to the prevailing party in “*any* action” in the superior court. Acceptance of Doppenberg’s arguments would require this Court to read language such as “taken only for a superior court proceeding,” “taken only for superior court appeal purposes,” or “published only at the superior court” into RCW 4.84.010(7). *See* App. Br. 22. But

courts do not add words to an unambiguous statute when the Legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

RCW 4.84.010(7) says “used at trial.” The statute’s plain language does not focus on the origin of the deposition, as Doppenberg does, but on the *use* of the deposition. RCW 51.52.115 provides for “trial by jury” on the record created at the Board. Under this statute, the depositions are necessarily “used at trial.”

It is a fundamentally incorrect assumption that the depositions here were only “taken for administrative hearing purposes.” *See* App. Br. 22. RCW 51.52.115 provides for the jury or trial court to use the Board record in considering an appeal from a Board decision. When a party takes a perpetuation deposition at the Board level, he or she must anticipate a possible appeal to superior court. Perpetuation depositions are necessarily intended to be offered and used as substantive evidence during both the Board appeal and any subsequent court appeal. *See* RCW 51.52.102, .100, .115. Any costs that a party incurs for depositions are therefore necessary both for the Board proceeding and for any subsequent appeal. Thus, Doppenberg is wrong that “[d]epositions contained in the Certified Appeal Board Record have nothing to do with costs in superior court.” App. Br. 21. To the contrary, in this case, the Department had to incur deposition

costs in order to defend against Doppenberg's superior court appeal, and it would not have prevailed without the deposition testimony.

Doppenberg incorrectly suggests that *Tombari v. Blankenship-Dixon Co.*, 19 Wn. App. 145, 150, 754 P.2d 401 (1978), supports his position that deposition expenses are not recoverable costs unless taken for trial purposes. *See* App. Br. 21. There, the court noted that the depositions were "taken and used for trial purposes" because no other testimony had been taken. *See Tombari*, 19 Wn. App. at 150. Instead, the court's decision was based on a pre-trial order, published depositions, and exhibits. *Id.* *Tombari* does not hold that a party is *not* entitled to its deposition costs unless the depositions were both taken and used for trial purposes. *See id.*

Furthermore, *Tombari* does not alter RCW 4.84.010(7)'s provision of costs for depositions "used at trial" with no qualification because it does not interpret RCW 4.84.010(7). It interprets RCW 4.84.090, which permits an award of "necessary expenses of taking depositions" to the prevailing party in superior court. 19 Wn. App. at 150 (citing RCW 4.84.090). Under the plain language of RCW 4.84.010(7), a party need not show that a deposition was originally taken for trial purposes: the key is whether it was introduced into evidence or used for impeachment pur-

poses at the trial.<sup>12</sup> To the extent that *Tombari* can be interpreted to mean that it is not sufficient for a party to show that a deposition was actually used for impeachment purposes or as substantive evidence, that interpretation has been superseded by the enactment of RCW 4.84.010(7). Compare RCW 4.84.010(7) (enacted in 1983) with *Tombari*, 19 Wn. App. at 150 (decided in 1978); see also Laws of 1983, 1st Ex. Sess., ch. 45 § 7.

Indeed, RCW 4.84.010(7) contemplates that a prevailing party may recover costs for depositions originally taken for one purpose and then used at trial. For example, the court could award costs for a discovery deposition originally taken for discovery purposes and then used at trial under CR 32. The statute allows for transcription costs for those portions of depositions “used for purposes of impeachment.” RCW 4.84.010(7).

Nor does it matter that the Department would not be able to recover deposition transcription costs if Doppenberg had not appealed to superior court. App. Br. 21. If there is no appeal filed, the Department incurs the costs but cannot recover them because they are not “used at trial.” RCW 4.84.010(7). However, the Legislature has provided that if there is an appeal to superior court and the Department prevails, and the

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<sup>12</sup> Nor does the Supreme Court case that *Tombari* cites require that a deposition be taken for trial purposes in order to be a recoverable cost under RCW 4.84.010(7). See 19 Wn. App. at 150 (citing *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wn.2d 28, 381 P.2d 130 (1963)). That case also discussed RCW 4.84.090, not RCW 4.84.010(7). *Most Worshipful Prince Hall Grand Lodge*, 62 Wn.2d at 42-43.

depositions are “necessary to achieve the successful result,” then the Department can recover these expenses under RCW 4.84.010(7).

Doppenberg’s arguments also fail to account for the fact that the practice of reading deposition transcripts to juries in workers’ compensation appeals has been in place since before deposition costs were made recoverable by RCW 4.84.010(7). *See* RCW 51.52.100. The statute providing for appeals on the Board record, RCW 51.52.115, has existed in its current form since 1951. Laws of 1951, ch. 225, § 15. The taking of deposition testimony to be included in the Board record has been authorized since at least 1927 for the previous Board and since 1949 for the current Board. *See* Laws of 1927, ch. 310, § 8; Laws of 1949, ch. 219, § 6. The Legislature added subsection (7) to RCW 4.84.010 in 1983. Laws of 1983, 1st Ex. Sess., ch. 45, § 7. Thus, the Legislature would have been aware of the practice of using depositions in workers’ compensation trials under RCW 51.52.115 and did not choose to make any exception for this practice in RCW 4.84.010(7). *See ATU Legislative Council v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002) (Legislature is presumed to be aware

of its own enactments). The trial court properly awarded the full cost of transcribing the depositions.<sup>13</sup>

**3. The Trial Court Properly Awarded the Jury Demand Fee to the Department Because It Is a Cost Otherwise Authorized By Law Under RCW 4.44.110**

The trial court properly awarded the Department its jury demand fee. RCW 4.84.010 notes that a prevailing party may obtain “costs otherwise authorized by law” in addition to those enumerated in the statute. Under RCW 4.44.110, “[t]he jury fee paid by the party demanding a trial by jury shall be part of the taxable costs in such action.” Doppenberg is thus incorrect that there is no statutory basis for the award of the jury demand fee. *See* App. Br. 22-23. Therefore, the trial court properly award the jury demand fee to the Department.

Doppenberg suggests that a prevailing party may only recover costs enumerated in RCW 4.84.010. App. Br. 22-23. He is incorrect. Our Supreme Court has rejected this argument based on the Legislature’s inclusion of “costs otherwise authorized by law” in RCW 4.84.010. *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987) (holding

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<sup>13</sup> No basis exists here for a “pro rata” reduction in costs, contrary to Doppenberg’s assertion. App. Br. 22. At the trial court, Doppenberg did not file any pleading that requested pro rata reduction before the trial court entered judgment. He only belatedly requested pro rata reduction in his motion for new trial and reconsideration. CP 207. That belated request did not state by what amount the transcription costs should be reduced. CP 207.

that RCW 4.84.010 does not limit the recoverable costs in a discrimination action where the relevant discrimination statute includes a cost provision).

**B. The Superior Court Did Not Commit an Error Of Law Warranting a New Trial When It Overruled Doppenberg's Objection to Dr. Soo's Testimony About Foot Drop and To Dr. Almaraz's Testimony On Redirect Examination That Doppenberg Did Not Injure His Common Peroneal Nerve**

The trial court did not commit any error regarding the admission of evidence. Doppenberg appears to backdoor two evidentiary objections into his CR 59 claim that the trial court committed an error of law regarding res judicata. He does not assign error to any evidentiary ruling and accordingly this Court may disregard his unpreserved evidentiary claims. App. Br. 2; RAP 10.3(a)(4); *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) (failure to assign error precludes appellate consideration of alleged error).

In any case, if the Court considers Doppenberg's passing references to unspecified objections sufficient to enable appellate review, there was no error. The trial court did not abuse its discretion by overruling the only two res judicata objections that Doppenberg preserved at the Board and renewed at superior court: (A) one instance of Dr. Soo's testimony about why drop foot was not related to the work injury; and (B) Dr. Almaraz's testimony on redirect that Doppenberg did not injure his common peroneal nerve. *See* BR Soo 23-24; BR Almaraz 64; CP 151-52,

154-55.<sup>14</sup> Res judicata did not preclude Dr. Soo or Dr. Almaraz from testifying about the nature and extent of the peroneal injury that Doppenberg suffered in his 2007 work injury. Such testimony was necessary foundation for the doctors' medical opinions as to whether Doppenberg's accepted conditions under the claim had objectively worsened, which is required for a claim to be re-opened.

A worker may reopen a workers' compensation claim for further benefits upon establishing an "aggravation" of the disability. *See* RCW 51.32.160(1)(a). The worker must prove the following elements: (1) medical testimony that establishes the causal relationship between the industrial injury and the subsequent disability; (2) medical testimony, some of it based upon objective symptoms, that an aggravation of the injury resulted in increased disability; (3) medical testimony that the increased aggravation occurred between the first and second terminal dates; (4) medical testimony, some of it based upon objective symptoms which existed on or prior to the closing date, that the worker's disability

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<sup>14</sup> During Dr. Wardle's cross-examination, Doppenburg objected on relevance grounds when the Department asked Dr. Wardle whether he was aware of how much Doppenburg reported drinking to the independent medical examiners. BR Wardle 23. He renewed this objection in his motion in limine in superior court, which the trial court overruled. CP 154; *see* RP (9/10/13) 62; RP 75. To the extent that this objection could be construed as a res judicata objection, the trial court did not abuse its discretion in admitting such testimony as it related to the foundation for Dr. Wardle's causation opinion. Nor was it prejudicial error where the jury heard testimony, without objection, from other witnesses about Doppenburg's reported drinking and the effects of alcohol on the nerves. *See* RP 93, 146, 154.

on the date of the closing order was greater than the supervisor found it to be. *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); *see also Eastwood v. Dep't of Labor and Indus.*, 152 Wn. App. 652, 657-58, 219 P.3d 711 (2009).<sup>15</sup>

Res judicata effect is given to final Department orders that are not protested or appealed within 60 days of communication. *See* RCW 51.52.050(1), .060(1); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994). Once the 60-day appeal period expires, the order becomes final. *See Marley*, 125 Wn.2d at 538.

In this case, it is res judicata that Doppenberg had a right peroneal nerve injury because of his 2007 work injury. The Department issued an order accepting that condition, which became final. Ex. 1. Thus, the parties were precluded from presenting testimony and argument that Doppenberg had no right peroneal nerve injury at all.

Contrary to Doppenberg's suggestions, the Department did not present medical testimony that he did not suffer a right peroneal nerve injury in his 2007 work injury. Rather, it presented medical testimony about the nature and location of his peroneal nerve injury. Both Dr. Soo

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<sup>15</sup> The first terminal date is the date of the last previous closure or denial of an application to reopen a claim for aggravation. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The second terminal date is the date of the most recent closure or denial of an application to reopen a claim. *Id.* at 561. The first terminal date in this case is May 12, 2009, and the second terminal date is June 2, 2011. *See* BR 35.

and Dr. Almaraz testified that he suffered a superficial peroneal nerve injury, not a common peroneal nerve injury. RP 85, 97-98, 156, 173, 178. Medically, the location of the injury is significant because different parts of the peroneal nerve enervate different muscles. *See* RP 140.

Testimony about the nature and location of the nerve injury was appropriate because one of the primary issues was whether Doppenberg's work injury caused his current disability. *Phillips*, 49 Wn.2d at 197. He reported right foot weakness and difficulty walking to Dr. Soo in order to re-open his claim. RP 99. But an injury to the superficial peroneal nerve results in sensory disturbance, not muscle weakness or drop foot. RP 96-98, 106. In contrast, an injury to the common peroneal nerve can cause muscle weakness and drop foot. RP 98, 140-41, 156.

Doppenberg appears to believe that since the Department's June 26, 2008 order did not state that he suffered only a superficial right peroneal nerve injury, the Department is now precluded from presenting medical testimony that only his right superficial peroneal nerve was injured when the steel plate fell on his foot. He cites no authority to support that proposition, and it does not follow from the language of the order. The order states that the Department accepts right peroneal nerve injury, and the Department's medical witnesses testified consistent with the order. Ex. 1. Although it is *res judicata* the Doppenberg has a right

peroneal nerve injury, it is not res judicata that any of his current complaints or findings are related to the right peroneal nerve injury.

Dr. Almaraz's testimony on redirect was appropriate and did not violate res judicata principles because it provided foundation for his medical opinion that there was no causal relationship between the work injury and Doppenberg's reported disability. The same is true for Dr. Soo's response about why the work injury did not cause foot drop. Such a causal relationship is required for re-opening a claim. *See Phillips*, 49 Wn.2d at 197. Because the steel plate injured Doppenberg's superficial peroneal nerve, it could not cause the symptoms that Doppenberg reported, such as foot drop. *See RP 96-101, 140, 155-57, 172-73.*

Furthermore, Doppenberg opened the door to Dr. Almaraz's testimony on redirect that he did not injure the peroneal nerve when he offered a diagram of the peroneal nerve into evidence through Dr. Almaraz. BR Almaraz 51-52; Ex. 2; *see State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) ("It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it."). The Department was entitled to ask Dr. Almaraz clarifying questions about the peroneal nerve on redirect and it is not

manifestly unreasonable to allow such testimony. The trial court did not abuse its discretion in allowing this testimony.

Even if the trial court abused its discretion or committed an error of law by admitting Dr. Soo's testimony about foot drop and Dr. Almaraz's testimony on redirect, it did not materially affect the trial's outcome. The jury heard identical evidence at other points during the trial, which Doppenberg did not object at the Board. Thus, Dr. Soo testified that "there are two peroneal nerves" including the superficial and common peroneal nerves. BR Soo 10. He further testified, without any objection, that Doppenberg injured the superficial peroneal nerve but did not injure the peroneal nerve below the knee. BR Soo 10, 24-25. Dr. Soo explained, without any objection, that an injury to the right superficial peroneal nerve cannot cause foot drop. BR Soo 25. Dr. Almaraz testified, without objection, that the foot drop was not related to the work injury because the muscles that cause the foot to dorsiflex are served by a component of the peroneal nerve around the knee. BR Almaraz 36. Thus, even if the jury did not hear the limited testimony that Doppenberg objected to at the Board and preserved, the trial's outcome would not have been affected.

**C. The Superior Court Did Not Commit an Error of Law Warranting a New Trial When It Declined To Strike Several Pages of Medical Testimony That Doppenberg Did Not Object to at the Board**

Doppenberg's general reference to testimony about the peroneal nerve does not preserve any alleged error on this issue. On pages 24 and 25 of his brief, Doppenberg argues that the Department improperly introduced evidence regarding the nerve at the Board. He raised a similar argument at the superior court with respect to some of the testimony (it is unclear what exact testimony he now contests because he does not cite to specific testimony in the record when he makes his argument) he moved to strike in his motion in limine. *See* App. Br. 23-27; *see* CP 154-55. He does not assign error to the trial court's refusal to grant his motion to strike, and accordingly, this Court may decline to review this decision. App. Br. 2; RAP 10.3(a)(4); *Escude*, 117 Wn. App. at 190 n.4.<sup>16</sup>

To the extent he is now attempting to revive his motion to strike as claimed error by his general arguments about the testimony, he establishes no error. The trial court did not abuse its discretion when it declined to

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<sup>16</sup> The statements of Doppenburg's counsel after Dr. Almaraz's deposition also do not preserve any alleged error with regard to testimony that was not objected to at the time it was given. *See* BR Almaraz 65. Objection to testimony must be made when the testimony is offered. *See, e.g., State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967). If the objection is reserved until the question has been answered, the objection is not timely and will not be considered on appeal, unless there was no opportunity to interpose an objection or if it was not apparent from the question that the response would be inadmissible. *Id.* Doppenburg also never filed a post-hearing motion with regard to *res judicata*, as he stated he would. BR Almaraz 65.

strike several pages of Dr. Soo's and Dr. Almaraz's testimony. *See* CP 154-55. Because Doppenberg did not object to this testimony at the Board, he waived any objection to this testimony. The trial court correctly allowed the jury to hear it.

A party who fails to raise an objection to testimony at the time of a perpetuation deposition waives the objection. WAC 263-12-117(4). A party also waives an issue by not raising it in his or her petition for review of the Board's decision. *See* RCW 51.52.104 ("petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein."); *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012), *review denied*, 297 P.3d 706 (2013); *Allan*, 66 Wn. App. at 422.

Objections to evidence cannot be raised for the first time on appeal. *See Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969). They can be "considered only upon the specific grounds made before the Board." *Sepich*, 75 Wn.2d at 316; *see also* ER 103.

Here, Doppenberg asked the superior court to strike four pages of Dr. Soo's testimony even though he objected to only one question during

this testimony.<sup>17</sup> See CP 154-55; BR Soo 23-27. And he asked the trial court to strike five pages of Dr. Almaraz's testimony even though he did object to any of this testimony during the deposition. WAC 263-12-117(4); *Sepich*, 75 Wn.2d at 316; see CP 154-55; BR Almaraz 20-25. Nor did he move to strike any of this testimony in his petition for review. See BR 3-15. Instead, he raised this issue for the first time on appeal in a motion in limine in superior court when the Board was unable to correct any alleged error. CP 154-55. Because he did not preserve these objections, the trial court did not abuse its discretion when it denied his motion to strike this testimony.<sup>18</sup>

Furthermore, the testimony that Doppenberg moved to strike in his motion in limine was not limited to testimony about the peroneal nerve.

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<sup>17</sup> The preceding section explains why the trial court did not commit prejudicial error when it overruled Doppenberg's response to this single question.

<sup>18</sup> Doppenberg states that "[a]t its most extreme point, the Department introduced evidence through Dr. Soo that the right peroneal nerve does not exist." App. Br. 24. This is misleading. It was Doppenberg's counsel who first elicited such testimony during Dr. Soo's cross examination:

Q: And so, my question was: Damage to the peroneal nerve can cause foot drop. Correct?

A: There is no such thing as a peroneal nerve itself. You have to refer to which, whether it's a deep peroneal nerve, superficial peroneal nerve, or the common peroneal nerve.

RP 106. Doppenberg did not move to strike this testimony. BR Soo 34-35. On redirect, Department's counsel asked for clarification:

Q: And just so I understand your testimony, is there anything that's just called a peroneal nerve?

A: No.

RP 112; see also BR Soo 41.

*See* CP 154-155; BR Soo 23-27; BR Almaraz 20-25. Much of it concerned the diagnosis and effects of peripheral neuropathy, which Dr. Soo and Dr. Almaraz cited as a cause of Doppenberg's symptoms, rather than the work injury. *See* BR Soo 23-27; BR Almaraz 20-25. Even if Doppenberg had preserved his objection to this testimony, *res judicata* is not a basis to exclude testimony about peripheral neuropathy.

**D. Even if the Trial Court Abused Its Discretion in Overruling the Evidentiary Objections and Denying the Motion To Strike, Doppenberg Shows No Prejudice Because The Jury Would Have Reached The Same Result**

Even if the trial court abused its discretion when it overruled the two preserved evidentiary objections and the motion to strike nine pages of medical testimony in Doppenberg's motion in limine, there is no prejudicial error warranting a new trial. The jury would have reached the verdict even without hearing this testimony.

The jury heard Dr. Soo, a podiatrist who treated Doppenberg's foot and ankle condition for over a year, testify that Doppenberg's condition had not objectively worsened. RP 100, 104. The contusion was stable, and Doppenberg's complaints of a weak ankle and difficulty walking were not related to his work injury. RP 101. In Dr. Soo's opinion, none of the findings that Dr. Wardle cited for re-opening were related to the work injury. *See* RP 103-04.

Dr. Almaraz, the only neurologist to testify, also provided detailed testimony to support his opinion of no objective worsening. His physical findings on exam, including absent reflexes in both legs and wasting foot muscles in both feet, suggested a diffuse nerve problem. *See* RP 137-39. The August 1, 2008 EMG, provided further confirmation of “diffuse abnormalities.” *See* RP 149. Dr. Almaraz believed the cause of the abnormalities was peripheral polyneuropathy with a component of L5 radiculopathy. RP 149, 151. An object falling on the right ankle would not cause this. RP 149. Dr. Almaraz specifically testified that Doppenberg’s condition proximately caused by the work injury did not objectively worsen. RP 155. And he specifically testified that the injury to the peroneal nerve had not worsened since claim closure. RP 179.

In contrast, Doppenberg presented only Dr. Wardle’s testimony to support objective worsening. Dr. Wardle applied to re-open without having reviewed any previous medical records. RP 72. As Dr. Soo explained, he had previously observed all the findings that Dr. Wardle listed on the re-opening application. *See* RP 103-04.<sup>19</sup> Dr. Wardle diagnosed an injury to the nerves crossing the ankle joint as the condition

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<sup>19</sup> Doppenberg states that, “[U]pon filing the application to reopen his claim, [he] had begun to experience a foot drop.” App. Br. 7. This characterization neglects previous evidence of foot drop while the claim was open, which Doppenberg acknowledges in the facts section of his brief. App. Br. 9 (citing BR Soo 14). Dr. Soo observed right foot drop when the claim was open. RP 89, 90, 96; *see also* RP 99.

related to the work injury. *See* RP 65, 70. Furthermore, during his testimony, Dr. Wardle could not recall at first whether he had even applied to re-open the claim. *See* RP 62-63. Although he eventually recalled the application, his reasons for objective worsening were unpersuasive. He merely stated that “the injury that we’re talking about and the subsequent pain that he still has that continues down across the ankle and into the foot is related to his industrial accident.” RP 70-71. He established only that a “bruise to the nerve” and “pain across the ankle” was related to the injury. RP 70-71. But he provided no explanation for why he thought the condition had worsened. *See* RP 70-71.

Without citation to the record, Doppenberg asserts that “there is no dispute that his right peroneal nerve condition objectively worsened” based upon Dr. Wardle’s “findings of edema, positive Tinel’s signs, additional paresthesia, and foot drop.” App. Br. 26. This assertion is false. Dr. Almaraz specifically testified, without any objection, that there had been no worsening of the peroneal nerve injury. RP 179; *see also* BR Almaraz 64 (no objection to this testimony at the Board).

Further, despite any alleged error, Doppenberg was able to argue his theory of the case to the jury. The trial court instructed the jury that the Department was responsible for right peroneal nerve injury and that

determination was final and binding. CP 175. Doppenberg was able to rely on this instruction to argue his theory of the case.

Liberal construction provides no basis to reverse the trial court, contrary to Doppenberg's claims. App. Br. 13-14. Under that doctrine, the court liberally construes the terms of the Industrial Insurance Act. RCW 51.12.010; *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). Liberal construction "does not apply to questions of fact but to matters concerning the construction of the statute." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). It applies only to the interpretation of ambiguous statutes. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). This case does not involve an ambiguous statute that requires construction but, rather, whether the trial court abused its discretion in overruling Doppenberg's objections to testimony. *See* App. Br. 13-14.

The trial court did not commit an error of law when it did not strike testimony that Doppenberg did not object to at the Board. Even if the trial court erred, any error was not prejudicial.

**E. The Trial Court Did Not Abuse Its Discretion In Rejecting Doppenberg's Proposed Instruction Because No Evidence Supported Its Use**

The trial court did not abuse its discretion in rejecting Doppenberg's proposed instruction about the effects of the injury on a

particular worker because no evidence supported its use. Jury instructions are sufficient when they allow a party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 809, 872 P.2d 507 (1994). The trial court is only required to give an instruction on a theory where substantial evidence supports it. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

In this case, there was no dispute in the medical testimony, as the proposed instruction contemplates, about whether Doppenberg was more or less susceptible to the effects of a steel plate falling on his foot than another worker. Therefore, no evidence supported the use of the instruction and the trial court properly rejected it. *See Stiley*, 130 Wn.2d at 498. The fact that Doppenberg had other medical conditions did not merit instructing the jury on previous conditions because there was no evidence that the industrial injury interacted with any previous conditions, contrary to Doppenberg's implication. *See App. Br. 27-28.*

The issue for the jury to resolve was whether the conditions proximately caused by Doppenberg's work injury had objectively worsened since claim closure. In the re-opening application, Dr. Wardle cited findings of edema, numbness, and a positive Tinel's sign as evidence of objective worsening. RP 103. Dr. Soo and Dr. Almaraz testified, in con-

trast, that these findings did not prove objective worsening because they were caused by a low back condition and peripheral neuropathy, neither of which was related to the March 2007 work injury. *See* RP 92-93, 103-04, 149, 151, 155-57. Thus, the parties had alternative theories about what caused Doppenberg's disability. Doppenberg did not need his proposed instruction to argue his theory that these findings supported re-opening his claim. The jury instructions allowed both parties to argue their theories of the case and the refusal to give the instruction was not manifestly unreasonable. *See Harker-Lott*, 93 Wn. App. at 183, 186.

Even if such an instruction should have been given, there was no prejudice because, as explained above, the jury would have reached the same result even with the requested instruction. *See Harker-Lott*, 93 Wn. App. at 186. This Court considers the evidence and whether the instruction would have been likely to change the outcome of the trial. *Id.* at 188-89. This instruction would not likely have changed the trial's outcome because it does not address the primary dispute in this case: what caused Doppenberg's disability.

**F. This Court Should Reject Doppenberg's Claim for Reversal of the Board's Decision and for Attorney Fees**

If the Court decides that prejudicial error was committed with respect to the admission of evidence or the rejection of the jury

instruction, the remedy would be remand for a new trial. *See Furfaro v. City of Seattle*, 144 Wn.2d 363, 382, 27 P.3d 1160, 36 P.3d 1005 (2001); *Wash. Irrigation & Dev. Co. v. Sherman*, 106 Wn.2d 685, 694-95, 724 P.2d 997 (1986). Doppenberg inconsistently argues for both a new trial and for his claim to be reopened. *Compare* App. Br. 2 *with* App. Br. 30. Doppenberg presents no argument or authority that would support the Court ordering reopening of his claim.

This Court should also decline Doppenberg's request for attorney fees on appeal. *See* App. Br. 29. Fees are awarded against the Department only if the worker requesting fees prevails in the action and if the accident fund or medical aid fund is affected by the litigation. RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). To support his claim of attorney fees, Doppenberg quotes the first sentence of RCW 51.52.130. App. Br. 29. However, that sentence addresses only the fixing of attorney fees. It is the fourth sentence of RCW 51.52.130 that addresses when attorney fees are payable. The fourth sentence makes clear that an award of fees requires both that the worker prevail in the action and that the accident fund or medical aid fund be affected. RCW 51.52.130; *Pearson*, 164 Wn. App. at 445.

Because Doppenberg should not prevail in this appeal, he is not entitled to attorney fees. Even if he does prevail, remand for a new trial

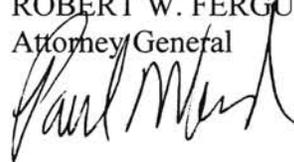
would not support a fee award because such an order would not affect the accident fund or medical aid fund.

## VI. CONCLUSION

The Department asks this Court to affirm the jury verdict. The trial court properly awarded costs to the Department. The trial court did not commit an error of law warranting a new trial when it overruled two objections on res judicata grounds and denied a motion to strike nine pages of testimony that the worker did not object to at the Board. Nor did the trial court err in declining to give Doppenberg's proposed objection. Even if the trial court did err, none of the errors was prejudicial because the Department presented persuasive medical testimony that unrelated medical conditions, rather than the work injury, caused Doppenberg's disability.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of August, 2014

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NO. 71346-9-I

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

LEROY DOPPENBURG,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON AND EAGLE  
HYDRAULICS, INC., A  
WASHINGTON CORPORATION,

Respondents.

CERTIFICATE OF  
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief of Respondent Department of Labor and Industries and this Certificate of Service to counsel for all parties on the record as follows:

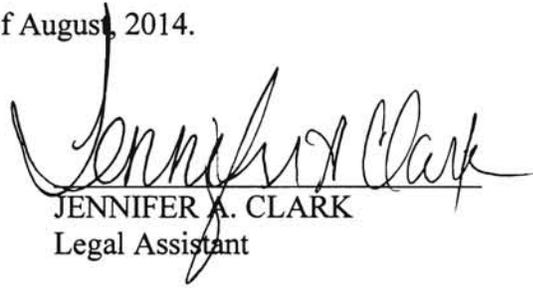
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DATED this 4<sup>th</sup> day of August, 2014.



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