

72816-4

72816-4

FILED

April 22, 2015

Court of Appeals

Division I

State of Washington

No.: 72816-4-I

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

---

CLARK CONSTRUCTION GROUP, INC., AND  
THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE  
STATE OF WASHINGTON,

Appellants,

v.

ROLAND ANDERSON,

Respondent.

---

**APPELLANT CLARK CONSTRUCTION GROUP INC.'S  
REPLY BRIEF**

---

Aaron J. Bass, WSBA No. 39073  
Of Attorneys for Appellant Clark  
Construction Group Inc.

Sather, Byerly & Holloway, LLP  
111 SW Fifth Avenue, Suite 1200  
Portland, OR 97204 - 3613  
Telephone: 503-225-5858

## TABLE OF CONTENTS

	<b>Page</b>
I. ARGUMENT.....	1
A. Reply In Support Of First Assignment of Error.....	1
1. Mr. Anderson argues for an inaccurate standard. ....	3
2. Superior Court failed to apply “necessary and proper” standard including the hindsight rule. ..	5
B. Reply In Support of Second Assignment of Error.....	6
1. Bare statement by Superior Court does not confirm it gave proper weight to Board findings. ....	6
2. Substantial evidence does not satisfy Mr. Anderson’s burden of proof. ....	9
II. CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

CASES

*Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 97 P.3d 17 (2004)..... 4

*Du Pont v. Dep't of Labor & Indus.*, 46 Wn. App. 471, 730 P.2d 1345 (1986)..... 2, 10

*Energy Northwest v. Harje*, 148 Wn. App. 454, 199 P.3d 1043 (2009)..... 2

*Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 395 P.2d 633 (1964)..... 7, 9, 11

*Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988)..... 10

*In re Susan M. Pleas*, BIIA Dec., 96 7931, 10 (1998)..... 3, 4

*Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 573 P.2d 10 (1977)..... 1

*Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 630 P.2d 441 (1981)..... 1

*McLaren v. Dep't of Labor & Indus.*, 6 Wn.2d 164, 107 P.2d 230 (1940)..... 8, 11

*Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 208 P.2d 1181 (1949)..... 7, 8, 11

*Roberts v. Dep't of Labor & Indus.*, 46 Wn.2d 424, 282 P.2d 290 (1955)..... 2, 10

*Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 210 P.3d 355 (2009)..... 2, 4

<i>Roller v. Dep't of Labor &amp; Indus.</i> , 128 Wn. App. 922, 117 P.3d 385 (2005).....	4
<i>State ex Rel. Perry v. City of Seattle</i> , 69 Wn.2d 816, 420 P.2d 704 (1966).....	1
<i>Thorp v. Devin</i> , 26 Wn.2d 333, 173 P.2d 994 (1946).....	1
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	11
 <b>STATUTES</b>	
RCW 51.52.115 .....	6
 <b>RULES</b>	
WAC 296-20-01002 .....	2, 4, 5

## I. ARGUMENT

### A. Reply In Support Of First Assignment Of Error<sup>1</sup>

Through the Industrial Insurance Act (“Act”), the Legislature granted the Department of Labor and Industries (“Department”) original, exclusive jurisdiction over issues of compensability of workers’ compensation claims. While the Act should be liberally construed, the courts must apply a “sensible construction” that adheres to the legislative intent, but avoids unjust or absurd consequences. *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (1981) (citing *State ex rel. Perry v. City of Seattle*, 69 Wn.2d 816, 821 420 P.2d 704 (1996); *Thorp v. Devin*, 26 Wn.2d 333, 173 P.2d 994 (1946)). Despite the liberal construction of the statute, the Superior Court’s decisions and application of law cannot be a mere fiat to support or overturn an administrative decision. *Jepson v. Dep’t of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977). A finding or conclusion made without evidence to support it is arbitrary.

///

///

---

<sup>1</sup> Although respondent did not organize his response in this order, for clarity, employer is maintaining the order of its arguments as initially set out on appeal.

The Superior Court's failure to apply the proper legal standard is reviewed under an error of law standard. *Energy Northwest v. Harje*, 148 Wn. App. 454, 199 P.3d 1043 (2009). For Mr. Anderson to succeed, he has the burden to prove with medical testimony that he was not fixed and stable as of the date of the closing order. *Du Pont v. Dep't of Labor & Indus.*, 46 Wn. App. 471, 477, 730 P.2d 1345 (1986); citing *Roberts v. Dep't of Labor & Indus.*, 46 Wn.2d 424, 425, 282 P.2d 290 (1955)). Mr. Anderson failed to refute Drs. Lee, Toomey, and Brage's testimony, all whom agreed Mr. Anderson was fixed and stable and capable of returning to work as of December 2011. CP 369, 377, 407-409, 445, 449.

Mr. Anderson relies solely on Dr. Mason and the post closing-order surgery as evidence he was not fixed and stable when the order issued. When pointing to post-closure treatment to negate medical fixity, a worker must establish that treatment was proper and necessary at the time of closure. This means demonstrating, in hindsight, that the treatment was curative or rehabilitative. WAC 296-20-01002; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 185, 210 P.3d 355 (2009). Thus, to prove he was not fixed and stable, Mr. Anderson must demonstrate that, in hindsight, the refusion surgery was objectively curative. *Rogers* at 181. Mr. Anderson failed to make this showing, and

attempts to sway the Court of Appeals by citing outdated administrative decisions that do not support his argument.

**1. Mr. Anderson argues for an inaccurate standard.**

Mr. Anderson contends that the evaluation of necessary and proper treatment *may or may not* be based on hindsight. (Mr. Anderson's Brief p. 18). In support, he cited a Board case, *In re Susan M. Pleas*, BIIA Dec., 96 7931, 10 (1998), for the statement that "determination that surgical treatment was medically proper and necessary *may* be based on 20-20 hindsight provided from findings of the surgery itself." (Mr. Anderson's Brief p. 18). However, consideration of the full opinion in *Susan Pleas* reveals the Board addressed a situation where workers ignored the Department process, not post-closure treatment at issue here. The Board stated,

"As a matter of public policy, entitlement to industrial insurance benefits should not be decided on the basis of the worker's response to a particular form of treatment. To do so will encourage physicians and patients to proceed in hopes of achieving results sufficient for coverage, and opens up virtually all unauthorized treatments for later consideration and litigation. Further, this would undermine the Department's authority and statutory role in supervising treatment for injured workers with the intent that it be in all cases efficient and up to the recognized standard of modern surgery."

*Id.* The case did not address the impact of surgery on fixed and stable status.

The true standard is put forth in *Rogers*, which is instructive for the current appeal. In *Rogers*, the Court of Appeals stated:

“Rogers’ appeal amounts to a contention that the trial court’s finding that her unauthorized spinal fusion surgery did not constitute a ‘proper and necessary’ medical procedure was unsupported by the evidence. In order for the party seeking review to succeed on such a post surgery claim for reimbursement, he or she must demonstrate that, in hindsight, the procedure was objectively curative or rehabilitative. Rogers fails to make this showing.”

*Rogers* at 181. The court did not suggest this evaluation was optional.

This corresponds with the administrative definition of “proper and necessary” medical treatments to include curative or rehabilitative care “of a type to cure the effects of a work-related injury” that “produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition.” WAC 296-20-01002. The courts interpret agency rules as if they were statutes, and give substantial weight to the agency’s interpretation of those rules. *Roller v. Dep’t of Labor & Indus.*, 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005) (citing *Cobra Roofing Serv., Inc. v. Dep’t of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004)).

///

///

///

///

**2. Superior Court failed to apply “necessary and proper” standard including the hindsight rule.**

Here, the Superior Court failed to apply the “necessary and proper” standard outlined in WAC 296-20-01002 and failed to assess the surgery using the required hindsight rule. Mr. Anderson presented no hindsight evidence that the surgery provided any relief or improvement; instead, he testified he was unchanged. CP 305, 309. Even Dr. Mason agreed that a lack of improvement after surgery would verify the surgery was unnecessary, and he would have expected improvement by the time Mr. Anderson testified. CP 476-477. The Superior Court speculated that Mr. Anderson’s lack of improvement stemmed from a screw used in the surgery, but that does not change the fact that no evidence supports improvement with the surgery. CP 69. (Mr. Anderson’s Brief p. 19). The record is such that no rational fact finder could conclude the post-closure surgery resulted in cure or elimination of the effects of injury, based on the hindsight rule or otherwise.

In addition to hindsight, Drs. Lee, Toomey, and Brage all provided opinions that further surgery was not necessary. The surveillance played a role in these opinions, but was not the only factor. Dr. Lee had prior suspicions about the veracity of claimant’s complaints before viewing the surveillance. CP 365-368. Dr. Toomey also noted discrepancies between

complaints on exam and lack of muscle atrophy. CP 406-407. Medical testimony also showed that, although no solid fusion was seen on imaging, clinically the fusion was stable. CP 380, 412, 423-424, 449. The Superior Court failed to evaluate the evidence that the re-fusion surgery would not produce a cure or eliminate any ill effects of the injury.

The failure of the Superior Court to apply the hindsight rule or truly evaluate the evidence regarding whether the post-closure fusion was “proper and necessary” undermines its conclusions of law and requires reversal. Allowing the Superior Court decision to stand violates the letter and spirit of the law.

**B. Reply In Support of Second Assignment of Error**

Substantial evidence does not support the Superior Court’s finding that Mr. Anderson was not fixed and stable as of December 2011. Here, the Superior Court failed to give proper weight to the Board’s findings and misapplied the treating doctor presumption.

**1. Bare statement by Superior Court does not confirm it gave proper weight to Board findings.**

Mr. Anderson contends the Superior Court did afford the Board’s findings “prima facie” weight because it found Mr. Anderson met the burden of proof notwithstanding the presumption. RCW 51.52.115. However, the Superior Court failed to explain which findings of the Board

it agreed or disagreed with, and failed to explain its disagreement. Its statement about de novo review conveys that it did not afford the Board's findings any particular weight.

*Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 43-44, 395 P.2d 633 (1964) provides insight into the standard the Superior Court must meet to weigh the fair preponderance of the credible evidence. In *Groff*, the Superior Court provided little written analysis of the evidence in a lengthy record of an appeal of a denial of benefits. The Court of Appeals stated, "We are left in doubt, by these ultimate conclusions, as to whether the trial court weighed the evidence and made the same finding as the Board, or whether weighing the testimony of the experts, produced by the claimant and the employer, the court could make no choice between them and so permitted the finding of the Board to stand." *Id.* at 42-43. The Court of Appeals remanded the case because the trial court did not provide sufficient rationale for the judgment. The Court of Appeals further explained, "When the trier of the facts, on a trial *de novo*, finds itself unable to make a determination on the facts because the evidence is evenly balanced it is justified in permitting the prima facie presumption of the correctness of the Board's findings to control the court's determination." *Id.* at 43 (citing *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34

Wn.2d 498, 504, 208 P.2d 1181 (1949); *McLaren v. Dep't of Labor & Indus.*, 6 Wn.2d 164, 107 P.2d 230 (1940)).

Similarly here, the Superior Court failed to provide a rationale for why it rejected the findings of the Board. The Board, adopting the opinion of the hearing judge, clearly found Dr. Lee to be in the best position to evaluate the need for further treatment, referencing his treatment over many years. CP 119, 178. The Board also found Dr. Mason did not see claimant until March 2012, and noted that he thought an orthotic could also have been used instead of a repeat fusion but lacked knowledge if Mr. Anderson had tried an orthotic. CP 119-120. Notably, the Board identified Dr. Lee, not Dr. Mason, as the attending physician – a fact that makes sense because at the operative time (December 28, 2011 to February 23, 2012), Dr. Mason had not even treated Mr. Anderson yet. The Board further noted that the evidence of nonunion did not mean the fusion failed, as evidence showed it was solid. CP 178. Finally, the Board found that Dr. Lee doubted the accuracy of Mr. Anderson's complaints before the surveillance video. CP 178.

The Superior Court did not explain why it afforded Dr. Mason the status of attending physician in contradiction of the Board's finding that Dr. Lee was the attending physician. It also did not explain why it chose to adopt Dr. Mason over Dr. Lee in spite of lesser and later treatment plus

a lack of information about orthotic treatment. The Superior Court did not address the “lack of reliable clinical indicators” for a re-fusion that stemmed not solely from the surveillance but from other suspicions and findings of clinical stability. CP 178.

Like the trial court in *Groff*, the Superior Court failed to explain which of the Board findings it rejected and why. It failed to address the bulk of the record, including the testimony of Drs. Lee, Toomey and Brage. As Mr. Anderson states, “There is nothing to indicate that the Superior Court found the evidence weight as a whole favored the employer, or, as previously discussed, was equally balanced.” (Mr. Anderson’s Brief p. 15). There is similarly nothing to indicate why the judge found the evidence weighed against employer.

**2. Substantial evidence does not satisfy Mr. Anderson’s burden of proof.**

The well-reasoned and persuasive opinions of Drs. Lee, Brage, and Toomey were based on medical science, surveillance, and expert analysis, considering all of Mr. Anderson’s abilities. They relied on an accurate history, personal examinations, and an analytical review of the surveillance to conclude Mr. Anderson was at maximum medical improvement and capable of returning to work as of December 2011. CP 369, 377, 407-409, 445, 449. Dr. Mason, on the other hand, blindly

adopted Mr. Anderson's subjective complaints and failed to compare these complaints with surveillance.<sup>2</sup> CP 477. Dr. Mason lacked the necessary knowledge regarding claimant's condition at the time of closure. Having neither seen the surveillance nor Mr. Anderson on or around December 2011, Dr. Mason was prevented from providing an independent, competent opinion regarding fixity at the time the claim closed. His testimony was simply unreliable and largely irrelevant.

The court decided to consider Dr. Mason's testimony sacrosanct and stopped the analysis at that point. Not only did the Superior Court fail to actually weigh the testimony and give deference to the Board, it relied on the testimony of a provider who treated Mr. Anderson after the date in question. This is particularly egregious as it did so at the expense of ignoring the opinions of the attending physician. *See Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988). The relevant date in determining whether a condition is fixed is the date on which the closure order issued. *Roberts* at 425. The testimony relating to Mr. Anderson's condition after the date of closure is irrelevant. *Du Pont*, 46 Wn. App. 471, 477. Moreover, Dr. Mason's testimony is no more than a

---

<sup>2</sup> Dr. Mason initially said he had not seen the surveillance. He later could not remember or thought he may have seen still pictures from the surveillance.

presumption, as he stated that he expected surgery would help Mr. Anderson's condition. In the alternative, Dr. Mason's testimony is insufficient to establish substantial evidence because he admitted improvement from surgery verifies the need for surgery. Yet, Mr. Anderson testified his pain and functional ability had not improved. CP 305-306, 476-477.

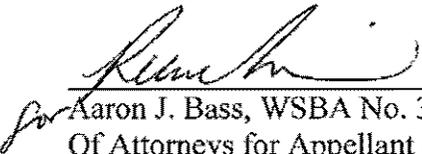
The substantial evidence standard requires "a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000) (internal citations omitted). Dr. Mason's opinion, based entirely on Mr. Anderson's post closure, subjective and inconsistent complaints is not sufficient to establish the need for additional curative treatment. Because the evidence is equal, at best, the finding of the Department on that issue must stand. *Groff*, 65 Wn.2d at 43; *Olympia Brewing Co.*, 34 Wn.2d at 504; *McLaren*, 6 Wn.2d 164. Substantial evidence does not support the Superior Courts conclusion, as no rational fact finder could rely on the evidence to conclude Mr. Anderson had not reached fixity as of December 2011. Therefore, the Court must reverse the lower court's judgment and affirm the Board's Decision and Order.

## II. CONCLUSION

For the reasons provided above and in Appellant's opening brief, the trial court erred in reversing the Board's decision that affirmed claim closure as of December 28, 2011. Appellant respectfully requests the Court of Appeals reverse the judgment and affirm the Board of Industrial Insurance Appeals Decision and Order.

Dated: April 22, 2015

Respectfully submitted,

  
\_\_\_\_\_  
for Aaron J. Bass, WSBA No. 39073  
Of Attorneys for Appellant Clark Construction  
Group, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I filed APPELLANT CLARK CONSTRUCTION GROUP INC.'S REPLY BRIEF via efileing on the following:

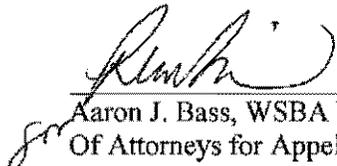
Richard D. Johnson, Court Administrator  
Washington Court of Appeals, Division I  
One Union Square  
600 University St.  
Seattle, WA 98101-1176

I further certify that on this date, I mailed a copy of the foregoing APPELLANT CLARK CONSTRUCTION GROUP INC.'S REPLY BRIEF via first class mail, postage prepaid, with the United States Postal Service to the following:

Josef Reibel  
Law Offices of William H. Taylor, P.S.  
PO Box 898  
Everett, WA 98206

Anastasia Sandstrom  
Assistant Attorney General  
Attorney General's Office of Washington  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104

DATED: April 22, 2015

  
\_\_\_\_\_  
Aaron J. Bass, WSBA No. 39073  
Of Attorneys for Appellant, Clark Construction Group,  
Inc.