SUPREME COURT NO. 1044844

COURT OF APPEALS NO. 87002-5-1

SUPREME COURT
OF THE STATE OF WASHINGTON

OLABAMIJI M. IDOWU JR. (Dec'd),

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Marta Idowu, mother of the deceased, Olabamiji M. Idowu, Jr., as beneficiary of the Estate of Olabamiji M. Idowu, Jr., respectfully petitions this Court for review of the decision of the Court of Appeals.

II. COURT OF APPEALS DECISION

Division I of the Court of Appeals issued an unpublished decision in Cause No. 87002-5-1 ("Unpublished Opinion") on July 21, 2025. A copy of the decision is in the Appendix at pages A-1 through A-7.

III. INTRODUCTION

On November 21, 2021, Olabamiji Idowu, Jr. was killed on a bus in a racially-motivated attack. Her son having been deprived in life by the Department of Labor and Industries of the benefits to which he had been entitled, Marta Idowu began pursuing permanent partial disability ("PPD") benefits on behalf of Olabamiji's Estate in 2023.

On April 2, 2024, the King County Superior Court granted an interlocutory partial summary judgment in favor of the defendant, holding that plaintiff was not entitled to a monetary award for the physical effects of an industrial injury suffered by Mr. Idowu. In affirming the granting of this motion, the superior court improperly weighed expert witness testimony that should have been left for a finder of fact, and failed to consider any inferences whatsoever in favor of the nonmoving party. The Court of Appeals improperly applied an incorrect and burdensome legal standard that, if uncorrected, would pose a near-insurmountable hurdle to the estates of decedent workers seeking posthumous PPD benefits. Effectively, the Court of Appeals ruling eliminates an entire class of industrial benefits established by the Legislature.

In so erring, the Court of Appeals denied Ms. Idowu's mother her right to be heard by a jury on this issue. It is from these errors that the Petitioner now appeals and seeks review by the Washington State Supreme Court.

IV. ISSUES PRESENTED FOR REVIEW

1. Is the Petitioner, under RAP 13.4(b)(1), entitled to review of the Court of Appeals' decision to uphold an impermissible application of the Supreme Court's standards for summary judgment?
2. Is the Petitioner, in the substantial interest of the public under RAP 13.4(b)(4), entitled to review of the Court of Appeals' failure to equitably apply the 51 RCW Liberal Construction Doctrine in this case?

V. LEGAL STANDARDS

In pertinent part, "[a] petition for review will be accepted before the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or . . . (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court."[1]

A party is to be granted summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[2] The moving party

[1] RAP 13.4(b)
[2] CR 56(c)

bears the burden of proving "by uncontroverted facts that there is no genuine issue of material fact." *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). All inferences must be made in favor of the nonmoving party. If this burden is met by the moving party, the burden shifts, and the nonmoving party is given the opportunity to produce "specific facts evidencing a genuine issue of material fact for trial." *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). On appeal, the standard of review of a summary judgment order is *de novo*. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

For industrial injuries, the Washington State Supreme Court has emphasized the importance of "objective clinical findings" in determining if a genuine issue of material facts exists. *Kresoya v. Dep't of Labor & Indus.*, 40 Wn.2d, 40, 240 P.2d 257 (1952). Because a claim cannot survive where there is "no evidence of even one objective symptom," presentation of evidence of an objective finding creates a genuine issue of material fact for the jury. *Cooper v. Dep't of Labor and Indus.*, 20 Wn.2d 429, 433,

147 P.2d 522 (1944). The Board of Industrial and Insurance Appeals, in a Significant Decision, has held that repeated charting of quasi-objective findings made over time by multiple trained medical providers constitutes objective evidence. *In re Peggy Anderson*, BIIA Dec., 09 11986 (2010).

A permanent partial disability is present when an individual has, as a result of an industrial injury or occupational disease, some permanent loss of bodily function. This loss of function can be either mental or physical in nature. Pertinently, in the case of impairments of dorso-lumbar and lumbosacral impairments, the extent of a patient's PPD is determined by a categorization of his impairment from 1 to 8, with 1 being least severe and 8 being most severe. WAC 296-20-280. Most pertinently, a rating of (1) indicates "[n]o objective clinical findings. Subjective complaints and/or sensory losses may be present or absent." *Id.* A rating of (2) indicates "[m]ild low back impairment, with mild intermittent objective clinical findings of such impairment but no significant X-ray findings and no significant objective motor loss."

Similarly, "[s]ubjective complaints and/or sensory losses may be present."

The extent of a PPD is usually assessed when a patient reaches a point of Maximum Medical Improvement ("MMI"). MMI, sometimes qualitatively referred to as 'fixity,' is achieved when a worker's condition is "determined to be stable or nonprogressive at the time the evaluation is made." WAC 96-20-19000. Normally, MMI must be achieved before a claimant is entitled to a PPD award for injuries persisting at MMI.

However, when a worker dies before MMI can be achieved, his or her Estate is oftentimes entitled to the benefits to which the decedent would have been entitled. 51.32.040(2)(a). This prevents the miscarriage of justice that would occur if one's death extinguished a PPD claim that would have otherwise accrued when the decedent achieved fixity.

The decedent's beneficiaries may recover if they can establish that the industrial injury "caused a particular impairment that, even after contemplated proper and necessary treatment, would

have still remained such that it would have, but for his or her death, entitled the injured worker to an award for permanent partial disability." *In re James McShane, Dec'd,* BIIA Dec., 05 16629 (2006). This gives the plaintiff an opportunity to establish the injury's fixity through expert testimony.

VI. STATEMENT OF THE CASE

A. Statement of Facts

On November 18, 2018, teaching assistant Olabamiji Idowu, Jr., known to students as *Mr. Ola*, was assaulted and injured by a coworker while at work. This line of work was Mr. Idowu's calling, as "[h]e loved children and they loved him." App. 8. Mr. Idowu had previously earned a degree from Eastern Washington University to better his career prospects in education. App. 8. Shortly after this sudden injury, Mr. Idowu sought relevant care

with the assistance of the Department of Labor and Industries, and in April 2019 retained Washington Law Center to represent him in relevant matters in April 2019. No evidence was presented by the Department of Labor and Industries indicating that the Department had authorized, or considered authorizing, care for Mr. Idowu's injured back in the year leading up to his death. Instead, the entirety of the record shows that no treatment of any kind, either for physical or mental health conditions, was ever authorized to Mr. Idowu in the approximate one year period of time his claim remained open after orthopedic surgeon and independent medical examiner, Dr. Darin Davidson, examined Mr. Idowu on behalf of the Department (i.e., within the intervening period prior to the posthumous claim closure).

On November 21, 2021, Olabamiji Idowu, Jr., a young Black man, was murdered in a race-motivated attack while using public transit in the city of Seattle. App. 6. So extensive were Mr. Idowu's injuries that his family was forced to hold a closed-casket funeral. App. 6. Mr. Idowu's mother, Marta, recounts that

while her son struggled in the aftermath of the assault at his workplace, he continued to maintain a positive outlook and focus on his spiritual, mental, and physical health in the time leading up to his death. App. 10.

Following Mr. Idowu's death, his Estate pursued posthumous PPD claims for both the mental and physical disability he suffered from his workplace injury. Four separate expert witnesses were brought by the parties: (1) orthopedic surgeon Dr. Thomas Degan for the plaintiff; (2) clinical psychologist Dr. Stephanie Hanson for the plaintiff; (3) orthopedic surgeon Dr. Darin Davidson for the defense; and (4) psychiatrist Dr. Oscar Romero for the defense. Dr. Degan's testimony and its role in the granting of the motion for summary judgment are central to this appeal.

Dr. Degan provided sworn telephonic testimony before the Board of Industrial and Insurance Appeals on December 7, 2022. Pg. App. 13. Dr. Degan is a board-certified orthopedic surgeon with "about 30 years" of practice, in which Workers'

Compensation cases has represented a significant portion of his practice. App. 19. In his career, Dr. Degan has been retained by the state Attorney General's office for instruction regarding workplace injuries. App. 19. In preparation for this testimony, Dr. Degan conducted an extensive forensic review of Mr. Idowu's records, hospital reports, and imaging reports. App. 19. Under sworn oath, Dr. Degan affirmed that he would provide an objective assessment of Mr. Idowu's injuries, even if they were contrary to the desires of the plaintiff, and that he has provided such contrarian opinions in the past. App. 17.

Following this thorough review, Dr. Degan asserted that Mr. Idowu's "symptomatology from the back injury [from the assault] had not fully resolved" in the period between its occurrence and Mr. Idowu's death. App. 23. It was his assessment that Mr. Idowu had "lumbar contusions and soft tissue injury strain to the muscles, which were related, more probably than not, to the injury of record." App. 24. He further opined that, among those who suffer soft tissue injuries, there is

"a definite segment of the population" who, like Mr. Idowu, have ongoing symptoms "for a number of years" after the injury. App. 25.

In the specific context of a Workers' Compensation claim, Dr. Degan asserted that Mr. Idowu would "best fit into Category 2 of lumbosacral impairments." App. 29. Dr. Degan found this category most appropriate as Mr. Idowu had "mild to intermittent *objective* findings" such as "consistent tenderness in the lower lumbar area from examiner to examiner, and from time to time." App. 29. When asked about the potential for Mr. Idowu to recover further with no additional treatment, Dr. Degan opined, with reference to his experience with similar cases, that if "no further treatment is going to be authorized, then . . . what you have is what you have. I can't say more probably than not that it would resolve. So I think the impairment at the time is the impairment at the time, and it would probably be ongoing." App. 40. He then affirmed that he is expressing this opinion on a more probable than not basis. App. 40.

When asked on cross-examination whether further treatment would have resolved Mr. Idowu's pain, Dr. Degan responded that it was "possible," but that "[it] more probably than not [] wouldn't have cured it." App. 35.

B. Procedural History

1. Initial Department of Labor and Industries Claim and Appeal to the Board of Industrial Insurance Appeals

Mr. Idowu submitted a claim for Workers' compensation benefits to the Department of Labor and Industries shortly after his workplace assault. Pg. 553. Mr. Idowu retained Washington Law Center as counsel in April 2019. During this time period, Mr. Idowu was subjected to "multiple exams," including an Independent Medical Exam by the defendant's chief expert witness and two mental health evaluations by deponent mental health experts.

Mr. Idowu's case remained open at the time of his murder, allowing his Estate to assume his position as a claimant in further proceedings pursuant to RCW 51.32.040(2)(a). Just two days after his death, the Department entered an order accepting responsibility for Mr. Idowu's injuries and providing benefits for *temporary disability*. However, on March 24, 2022, the Department closed Mr. Idowu's claim in its entirety, without having made any award to his Estate for permanent disability, erroneously claiming that Mr. Idowu's injuries not being "fixed" at the time of his death precluded his Estate from recovering a PPD award. App. 50.

As the beneficiary of Mr. Idowu's further benefits, mother Marta Idowu filed an appeal of the closure order to the Board of Industrial Insurance Appeals on May 30, 2023. App. 50. At the first contested hearing, Industrial Appeals Judge John Dalton correctly issued a Proposed Decision and Order reversing the Department's closure order. In doing so, Judge Dalton recognized that beneficiaries such as Ms. Idowu may

be entitled to benefits even if their decedent's injury is not absolutely "fixed" by the letter of the law. BIIA Dec., 05 16629 (2006); App. 51. He also issued an order to remand back to the Department, which the plaintiff objected to, understanding that such an order would likely lead to an erroneous outcome similar to the original closure. App. 51.

Ms. Idowu then petitioned the full Board of Industrial Insurance Appeals for review on July 3, 2023. App. 51. The Board assessed both the physical dimension of Mr. Idowu's PPD claim and the mental health dimension of his claim.

However, the Board erred in assessing that the plaintiff did not present a prima facie case that any of Mr. Idowu's industrially-related conditions qualified him for posthumous PPD benefits. App. 51. This prompted an appeal from this Board decision to the King County Superior Court.

2. King County Superior Court

Following this erroneous holding, Mr. Idowu's Estate timely appealed the decision to superior court on October 24, 2023. On February 13, 2024, the Department of Labor Industry filed a Motion for Summary Judgment with the superior court, arguing that there was no genuine issue of material fact concerning either Mr. Idowu's physical or mental PPD at the time of his death. It is here that the case most clearly diverges into two different dimensions: one dimension being the impact of Mr. Idowu's injury on his physical health and physical ability to work, and the other dimension being the impact of his workplace injury on his mental health and mental ability to work.

Here, the issue of Mr. Idowu's mental health was conclusively resolved. The court properly ruled against a motion for summary judgment on this issue, finding that there is a genuine issue of material fact as to the extent and fixity

of Mr. Idowu's mental health condition caused by his injury, and the matter proceeded to a jury trial. App. 60.

There, the jury found that Mr. Idowu had a "Category 4" mental health impairment, rated under WAC 296-20-340 as "severe," rejecting the Department's request for a lower categorization. The Board's finding was reversed, and the matter was remanded to the Department, with the instruction that the Estate of Mr. Idowu was to be paid in a manner consistent with the jury's finding.

The superior court granted the Department's motion for summary judgment with regard to Mr. Idowu's physical injury. Relying on its interpretation of the standard for a motion for summary judgment and the expert testimony provided, the court held that a reasonable jury could not find that Mr. Idowu was suffering from a *physical* PPD at the time of his death. The superior court incorrectly grounded its ruling in the notion that Dr. Degan's testimony only suggested a *possibility* that Mr. Idowu's Category 2 back

impairment, present several years after injury, would persist after treatment. It then observed that Dr. Davidson testified to the contrary (proof it was weighing the evidence, not applying the correct legal standard). App. 57.

3. Court of Appeals

Finding the partial granting of summary judgment by the superior court to have been in error, Ms. Idowu petitioned Division 1 of the Washington State Court of Appeals for review. On July 21, 2025, the Court of Appeals issued a decision broadly affirming the findings of the lower court. No oral argument was permitted.

The Court noted that, in countering a motion for summary judgment in which the moving party has met its burden of production, the nonmoving party may not rely on "speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Id. M.E. v.*

City of Tacoma, 15 Wn. App. 2d 21, 31-32, 471 P.3d 950 (2020) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wn. 2d 1, 13, 721 P.2d 1 (1986)); App. 45. The Court of Appeals concurred that Dr. Degan's testimony was effectively unsupported by objective clinical findings and dismissed it as "mere conjecture" that was "insufficient to establish *objective* clinical findings." App. 45.

In contrast, the Court spent a significant portion of its Opinion weighing Dr. Darin Davidson's testimony that Mr. Idowu's permanent impairment could not have exceeded Category 1 classification under WAC 296-20-280. App. 46-47. This included an analysis of the various points at which Dr. Davidson directly addressed, and purportedly contradicted, Dr. Degan's testimony. App. 46.

VII. ARGUMENT

A. The Court of Appeals erred by incorrectly applying standards for summary judgment and the role of expert testimony in such applications, and thereby violated Supreme Court precedent established in Lamon v. McDonnell Douglas Corp.

The presentation of conflicting, grounded expert testimony as to an ultimate issue automatically precludes the award of summary judgment to the moving party. *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)). When such testimony is present in the plaintiff's case, there is a *prima facie* case of the matter asserted, and the veracity and reliability of the testimony creates a genuine issue of material fact which must be left to the jury. To afford any court the power to pick and choose what expert testimony should be considered by a jury is to afford that court the power to weigh evidence in disregard of the essential role that is supposed to be left to a finder of fact.

Dr. Thomas Degan is an orthopedic surgeon with 30 years of experience in Workers' Compensation cases. So bona fide are his credentials that he has previously been retained by the Department itself for consultation on matters such as this.

Dr. Degan testified that Mr. Idowu's back injury qualified as a Category 2 impairment that would have, more probably than not, been permanent. It was his professional assertion that Mr. Idowu's consistent presentation to multiple healthcare providers over time with pain and decreased range of motion constitutes an objective basis that a PPD exists. This testimony was consistent with the holding of *In re Peggy Anderson*, which the Court of Appeals did not expressly invalidate.

The Court of Appeals failed to consider the standard set out by the Supreme Court in *Lamon* and re-affirmed in *Eriks*. Dr. Degan's expert testimony, contrasted with that of the defendant's expert witness, creates a genuine issue of material fact. On this matter, a reasonable jury could very well conclude that Dr.

Degan's assessment of Mr. Idowu's symptomatology is sufficient to support a finding of a physical PPD.

In dismissing Dr. Degan's opinion, the Court of Appeals denominated his expert testimony to mere "speculation, conjecture, assumptions, [and] possibility," disregarding Dr. Degan's assertion that Mr. Idowu's consistent, persistent symptomology, reported over the course of three years, cumulatively formed objective evidence of PPD. App. 41.

The Court of Appeals went to great lengths in its opinion to characterize Dr. Davidson's testimony as more reliable, despite it also being utterly inconsistent with the law of the case doctrine.[3] Whether the Court of Appeals found Dr. Degan's testimony compelling is, of course, entirely irrelevant-it is a simple fact that the plaintiff met its burden of production by producing an expert witness who testified to his professional opinion based on objective factual findings, and the court

[3] See App. 111-112, in which Dr. Davidson opined that Mr. Idowu's injury, at that point over two years old, would have resolved in "no more than a matter of weeks."

violated Mr. Idowu's right to be heard by a jury on the matter by weighing this evidence and deciding it was unconvincing. This error is even more egregious given that even Dr. Davidson agreed the reduced range of motion found by the multiple treating providers referenced by Dr. Degan's testimony was at least a partially objective finding.[4]

B. The Liberal Construction Doctrine applies to Workers' Compensation cases and mandates that the Supreme Court disallow the Court of Appeals' stringent standards for expert testimony in Workers' Compensation cases.

Title 51 RCW was written to provide swift and certain relief to injured workers. *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); *Cockle v. Dep't of Labor & Industries,* 142 Wn.2d 801, 16 P.3d 583

[4] See App. 88, in which Dr. Davidson refers to range of motion complaints as "not *wholly* objective." (emphasis added)

(2001). The "overarching objective" of the Act is to reduce to a minimum "the suffering and economic loss arising from injuries and/or death occurring in the course of employment. *Cockle,* 142 Wn.2d at 822 (quoting RCW 51.12.010) (emphasis added). Further, the Act is remedial in nature and is therefore to be construed liberally in order to achieve its purpose. RCW 51.12.010; *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); *Street v. Weyerhaeuser*, 189 Wn.2d 187, 195, 399 P.3d 1156 (2017). The Act is "grounded in such humanitarian impulse" (rephrased for grammatical conformity) as to allow findings "included within the reason, although outside the letter, of the statute." *Ross v. Erickson Const. Co.*, 89 Wn. 634, 639-641, 155 P. 153 (1916) (which held that consequences of medical malpractice are covered as consequential injuries under the IIA). When interpreting the Act, all doubts regarding the law are to be resolved in favor of the injured worker. *Dennis*, 109 Wn.2d at 470; *Sacred Heart*, 92 Wn.2d at 635; *Cockle*, 142 Wn.2d at 811.

Given this principle, the court must be mindful that both the legislature and the courts have traditionally expanded, not restricted or prohibited, coverage under the IIA. *Street*, 189 Wn.2d at 195.

In granting the motion, the Court of Appeals failed to properly consider the plaintiff's evidence of the fixity of Mr. Idowu's injury, essentially ruling that evidence of the injury's permanence was too speculative to support a reasonable finding of such. In so ruling, the court also effectively placed an affirmative obligation on the appellant to speculate as to what treatment may have been possible or available to Mr. Idowu in the future (while failing to note that the Department has failed to produce any evidence that any further care was contemplated for Mr. Idowu).

Whether a posthumous PPD claimant's injuries were truly 'permanent' will always include a measure of uncertainty. As such, it is necessary for experts to make credible, educated prognoses of decedent's injuries. Naturally, testimony that is

purely speculative is disallowed. *Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 278 P.2d 666 (1955); *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 421 P.2d 362 (1966).

Dr. Degan did not speculate to reach his conclusion regarding the permanence Mr. Idowu's injury. He grounded his testimony in a thorough assessment of Mr. Idowu's medical history, analyzed through the lens of 30 years of practice. Mr. Idowu died three years after suffering his workplace injury, and consistently presented to medical professionals with pain and reduced range of motion throughout this time period. No medical report prior to his death showed resolution of his physical injury. Dr. Degan provided his opinion that, after a thorough review of Mr. Idowu's medical record, this injury more probably than not "was what it was," and was unlikely to improve. This medical expert testimony supports the triable inference that Mr. Idowu's industrial low-back injury was fixed and stable.

Dr. Degan further testified that Mr. Idowu's injury would *more probably than not* fail to improve even with treatment.

McShane has established that fixity is presumed in posthumous PPD when necessary and ***contemplated*** care would not have furthered a decedent's condition. Because the Department has not offered any evidence that *any* further care was contemplated for Mr. Idowu, it cannot be presumed that the Department would spontaneously offer more in the future.

The court therefore not only incorrectly characterized Dr. Degan's testimony, it also employed a standard which violated the foundational principles of 51 RCW. If an Orthopedic Surgeon with 30 years of practice handling Workers' Compensation injuries testifying that a three year-old, well-documented, industrial injury was "more probably than not" <u>not</u> going to resolve *even with hypothetical treatment* is insufficient to create a genuine issue of material fact in posthumous PPD cases, then a nearly impossible standard has been set for future posthumous PPD claimants. This is in violation of the liberal construction courts must apply to matters concerning industrial injuries. Further, requiring that the plaintiff speculate as to what treatment

may have been available violates this court's prohibition on speculative testimony outlined in both *Parr* and *Sayler*. Because this standard violates the rights of the plaintiff on both of these counts, this court must reverse the ruling of the superior court.

VIII. GOOD CAUSE FOR DELAY

The Petitioner requests that the court find good cause for this petition's delay, none of the blame for which rests on Ms. Idowu. The Petitioner's Attorney, Spencer Parr, has handled an overwhelming docket in previous months, while simultaneously balancing personal matters such as his son's move to college. This caused the initial brief filing deadline to pass, but counsel did submit a timely written notice of intent to appeal with a request for the brief filing deadline to be extended, which is within the discretion of this Supreme Court to grant.

The Department will not be prejudiced by permitting review after this brief delay. However, precluding review will

violate both Mr. Idowu's and Ms. Idowu's right to be heard by a jury on the matter of Mr. Idowu's PPD and thereby precipitate a gross miscarriage of justice. Such preclusion will allow a blatant misapplication of the fundamental standards of summary judgment to stand. It will also prevent timely review of an issue that is likely to be subject to repetition in future posthumous PPD cases. In the interest of justice and fairness, the court should find good cause for the delay.

IX. CONCLUSION

The Supreme Court should grant review because the Court of Appeals both issued a ruling that conflicted with Supreme Court precedent in misapplying settled standards for summary judgment, and because its unreasonably stringent ruling violated RCW 51 in a way that substantially impacts the public interest. In doing so, the Court denied Mr. Idowu's fundamental right to be heard by a jury. As such, the plaintiff respectfully requests

that the Supreme Court grant his petition to have this matter heard.

RESPECTFULLY SUBMITTED this 18th day of September, 2025.

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X. APPENDIX

I N D E X

IN RE: OLABAMIJI M. IDOWU, JR. DEC'D — DOCKET NO. 2214702

CLAIM NO. BE-51971 — VIA ZOOM
JANUARY 13, 2023

T E S T I M O N Y

E X H I B I T S

NONE

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

IN RE: OLABAMIJI M. IDOWU JR DEC'D)	DOCKET NO. 2214702
)	
CLAIM NO. BE-51971)	VIA ZOOM
)	JANUARY 13, 2023

(Scheduled: 9:00 a.m.) (Actual: 9:01 a.m.) (End: 11:16 a.m.)

JOHN T. DALTON, Industrial Appeals Judge
(Via Zoom)

APPEARANCES:

Claimant, Marta Idowu, by
Washington Law Center PLLC, per
Spencer D. Parr
(Via Zoom)

Employer, Learning Land II
(No appearance)

Department of Labor & Industries, by
The Office of the Attorney General, per
Michael E. Duggan, Assistant Attorney General
(Via Zoom)

* * * * *

OPENING STATEMENT

This is an original hearing before the Board of Industrial Insurance Appeals in the matter of Olabamiji M. Idowu Jr. Dec'd, Claim No. BE-51971, Docket No. 2214702. It's being held pursuant to due and proper notice to all interested parties.

The hearing is being held via Zoom technology before Industrial Appeals Judge John Dalton. Today is Friday, January 13th of 2023. We were scheduled to begin at 9:00

A.M., and it is approximately 9:01.

The claimant, Marta Idowu, is present and is represented by Washington Law Center, per Spencer Parr.

The employer, Learning Land II, is not present.

The Department of Labor & Industries is represented by the Office of the Attorney General, per Assistant Attorney General Michael Duggan.

* * * * *

(Witness sworn)

MARTA IDOWU, having been first duly sworn, testified as follows:

THE WITNESS: Yes, I do.

JUDGE DALTON: Thank you.

Counsel, Mr. Parr and Mr. Duggan, I just want to confirm that the issue on appeal is -- let me find the right spot -- I have it as is the claimant entitled to an award for permanent partial disability within the meaning of RCW 51.32.080?

Mr. Parr, do you agree that's the issue on appeal?

MR. PARR: That is the issue, Your Honor. This is a posthumous PPD situation.

JUDGE DALTON: All right. Thank you.

Mr. Duggan, do you agree that's the issue on

appeal?

MR. DUGGAN: I agree. That is my understanding as well.

JUDGE DALTON: Thank you.

All right. Well, Mr. Parr, your witness. Please proceed.

MR. DUGGAN: Yes. We call Marta Idowu.

JUDGE DALTON: All right.

MR. PARR: I'm sorry. Are you going to swear her in, Your Honor?

JUDGE DALTON: I did. Before we went on the record.

MR. PARR: Oh, I'm sorry. My apology.

JUDGE DALTON: No problem.

DIRECT EXAMINATION

BY MR. PARR:

Q. Ms. Idowu, could you tell us what is your son's name?

A. Olabamiji Michael Idowu Junior.

Q. And my understanding is sometimes he went by "Ola" or a nickname of some kind?

A. Yeah. A lot of people called him Ola.

Q. Because his name was a little harder to pronounce for some people in our culture and maybe he gave them a nickname? Is that correct?

A. Yeah.

Q. Okay. Very good.

With respect to your son, unfortunately there's some tragic events that bring us here today in the way we come.

And so could you please just tell us what happened to your son on November 21st of 2021.

A. He was murdered from some type of rage from someone on the head accosted another young black man on the light rail going out from -- you know, coming in to Mt. Baker on the way -- you know, that direction.

And this person, this young black man, had an altercation with this white man and said that the person had -- was in a rage and very angry and he was frightened, so he missed his stop to get off the bus because he was so afraid.

And then as the bus went on, my son was on Rainier coming the direction where -- to where he lived in one of the Paul Allen apartments, but not at the last stop at the light rail. Rainier and McClellan, I believe that was the cross street.

And this person had some kind of illegal knife and pretty much attacked my son. He was -- you know, from what we have found out from the prosecuting attorney, the person had accosted that person and they got away. And he was still in a rage when he got off the bus and my son happened to be the person walking

by. And I didn't watch the tape, but they just told me that it was a vicious attack, multiple stab wounds over his body. And we couldn't -- didn't have, you know, an open funeral because of the multiple stab wounds.

Q. Thank you for your description. I'm sorry. I know this is hard.

Your son was attacked in a hate crime because of his race?

A. That is what they believe, yes, is what, you know, the prosecuting attorney talked to us about, you know. But we don't know -- you know, they don't really tell you everything. They just said that more things would be disclosed around everything during the trial. But it hasn't been assigned yet because they're so far behind around COVID-19. I know cases haven't been brought up. So there's a delay on the docket. So we don't know when it's going to happen.

Q. Is it your understanding that your son had no prior contact with his assailant? Didn't know his assailant? And there was no altercation or interaction between them prior to when he was simply attacked?

A. No. He was walking by as this person approached and, you know, started some kind of altercation with him.

And then he just started slashing away, I guess, you know, attacking him.

Q. Thank you.

Tell us a little bit about your relationship, please, with your son, and the extent to which prior to November 21, 2021 you were able to interact with him.

A. Yeah. We were very close. We talked all the time, did things together. He would always, you know, let me know what he was doing, what was happening with him. And we were -- just days before his murder we were -- you know, he contacted me and said, "Hey, let's get together," and came down and picked him up and we were driving.

He said, "Hey, Mom, your tire lights on. Let's stop at Safeway and let's -- you know, let me fill your tires up for you."

And so we got out, went out over there and did that. And, you know, just did what we were going to do and then went -- took him back home and he went on his way and I went on home. But --

Q. Did he live independently, Ms. Idowu?

A. Yeah. Yeah, he lived independently.

After he graduated from Eastern Washington University, he went to -- you know, I had all -- he

was in private school. I -- he graduated from Garfield parochial school, lower grades. And then high school he went and wanted to be -- go to Garfield, so he went to Garfield High School. After that, he went -- did two years at community college and then transferred to Eastern Washington University.

Q. My understanding is he was working as a teacher's assistant at the time of his industrial injury in this case?

A. Yeah, he was working. He loved children and they loved him. And always all of them always called him "Mr. Ola." And he took pictures, like little pictures that they take, you know, doing funny crazy things, you know, made a funny face. He had all the students behind him. They were all doing those little funny faces and stuff. Yeah. They really liked him. And parents just were so happy that he was looking out for a lot of the children that were struggling a lit bit and --

Q. Just to clarify the time frame. You met with and went to a meal and got your tires, you know, inflated by your son just a few days before his death. Is that right?

A. Yeah.

Q. Could you tell us what your observations were in terms

of, you know, how was he doing? What were his intentions for the future to the extent that you're aware? What were his plans?

Just kind of fill out for us what you understood at the time, you know, just prior to his death what was going on with your son, please.

A. I'd always encouraged him to, you know, always, you know, reach for the sky, you know. "Get all the education you can get 'cause that can't be taken from you. When you have it, you have it."

And so he was -- I kept on saying, "You need to get your master's," do that and stuff, and talking to him about those type of things. And, you know, he'd just, you know, let me know how he was doing.

You know, he was -- he had some injury that happened on his job. Somebody had injured him. And he, you know, told me about that and that he was working through it and it was a hard time and -- you know, he was suffering some injuries and stuff and -- but always kept, you know, a positive attitude about, you know, "Getting myself together, Mom. I've had some struggles with what has happened to me, but I'm going to be okay and I'm going to be positive." And, you know, just always kept on trying to keep me encouraged and stuff about what he was going through.

He had struggles. He told me that, you know, he was having some mental issues and that he was getting help. Told me that he had been talking to a doctor to get help. And he had an attorney and he was talking to the attorney about the -- what he could do to, you know, over just -- you know, just not wanting me to worry and said, "Hey, Mom, I'm feeling a little better today. I'm going to start working out at the gym and trying to get my health a little better." But --

Q. Okay.

A. He was struggling, but he was so positive about everything. He didn't want me to worry. Just that, you know, "Everything's going to be okay, Mom."

And even not too long -- you know, he was letting me know that he had gotten a new job. That he was going to be starting a new job. And he was really happy. And I'm not sure if he had a chance to start it or he was going through preliminaries of onboarding I believe and things like that. 'Cause he said he got the job and that he was going to be, you know, on the road and, you know, being -- you know, that really, really excited him when he got this job. And it was -- he didn't give me any specifics. We just like talked generally and just going through kind of a lot of stuff. And I just regret I didn't ask more

questions about, you know, everything and stuff.

And he was just, you know, telling me about how everything was going and that he was getting himself picked up and back together and always -- you know, we were very spiritual in church, and that's how -- he grew up in the church. And how people in the church and older people were getting in and out of church and stuff. And he would just be there and talking about how happy he was trying to get everything back together. That this was that break that he got that, you know, "Just want to put stuff behind me and move forward."

Q. Okay. With respect to his physical health, it was your understanding he was going to the gym; is that correct?

A. Yeah, he was going to the gym.

Q. Okay. And with respect to school, you mentioned earlier that you'd had a discussion since the time he was little about the fact that, you know, "You get education, people can't take that away from you."

A. Yeah.

Q. Do you have an understanding as to what his educational plans were at the time of his death, if you know?

A. When we had to go to his apartment and take -- get his

stuff and take it out, we found his transcripts from his college, that he was gathering his transcripts together so he could get -- go and get his master's. I didn't know that until after he had passed. He just was getting everything together.

He was that type of person. He didn't want to share anything until he had all the details of stuff. And a friend of mine was helping me pack stuff up and picked up the letters and said, "Marta, your son looks like he was just going to be applying with these transcripts, you know, these envelopes." We opened it up and it was his transcripts. We had to go through and inventory all of his stuff and letters and stuff.

Q. Okay. I think I can speak for everyone assembled here, we're so sorry for your loss.

Ma'am, I have no further questions. Thank you.

JUDGE DALTON: Thank you, Mr. Parr.

Mr. Duggan, any questions?

MR. DUGGAN: I do not have any questions. Thank you.

JUDGE DALTON: All right. And I don't either.

Ms. Idowu, thank you very much for your time and your testimony. We appreciate it. You're excused as a witness. Thank you very much.

MS. IDOWU: Thank you, sir. Have a nice day.

JUDGE DALTON: You too.

BELFAIR, WASHINGTON; DECEMBER 7, 2022

10:03 A.M.

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THOMAS J. DEGAN, witness herein, having been first duly sworn on oath, was examined and testified as follows:

EXAMINATION

BY MR. PARR:

Q. Good morning, Doctor. My name is attorney Spencer Parr. We are assembled today. Today's date is December 7, 2022. It's approximately 10:03 a.m. We are assembled by telephone for your telephonic trial testimony. We are assembled in Board of Industrial Insurance Appeals, Docket No. 22 14702. Again, my name is attorney Spencer Parr. I represent the injured worker, Mr. Idowu, I-D-O-W-U.

Good morning, Doctor. How are you?

A. Good.

Q. Could you, please, state your name for the record?

A. Thomas Jeff Degan. That's D-E-G-A-N.

Q. Okay.

And could you tell us about your education, training and experience as a physician?

A. After attending Pacific Lutheran University as a undergraduate, I attended University of Washington School of Medicine graduating 1976.

Following year, I did a surgical internship at UCLA. Subsequent to that, I did an orthopedic residency at the Mayo Clinic, and finishing in 1981.

I was board certified in orthopedic surgery in 1983 and orthopedic sports medicine with a CAQ in 2018.

(Reporter Clarification.)

THE WITNESS: Yes. CAQ renewed in 2018.

Q. I'm sorry. I don't know that everybody will know what a "CAQ" is. Could you just explain that for the record, please, Doctor?

A. That's a certificate of added qualification. Essentially a certification subspecialty.

Q. Okay.

MR. PARR: And just briefly, Madam Court Reporter, are you on mute?

THE REPORTER: Okay. Can you hear me?

MR. PARR: I can now, yes. But could we get everybody on mute that's not speaking.

THE REPORTER: Yes.

MR. PARR: Because we're getting a lot of feedback here. At least I am.

(Discussion off the record.)

BY MR. PARR:

Q. Okay.

Doctor, just to back up, because we were having telephone difficulties, could you, please, again, state what the added qualification is, please, the CAQ?

A. CAQ is a certificate of added qualification, which essentially denotes a certification of a subspecialty in orthopedics. There are several areas with certifications of added qualifications.

Typically, they are done after additional training and fellowship in an area, sports, spine, hand, children's. But in my case I essentially grandfathered in to that, and then took the examinations to -- and went through the paper qualifications to indicate that I was qualified to have a subspecialty in sports medicine.

Q. I see.

So you're -- correct me if I'm wrong, you're a board certified orthopedic surgeon with a subspecialty in sports medicine; is that correct?

A. That's correct.

Q. Okay.

And you mentioned that you're board certified. What does it take to get board certification, please?

A. Board certification requires completion of a residency with additional oral and written testing and evaluation of case loads and such. It's -- that typically takes a couple years after completion of a residency to get board certification.

Q. And is that a peer-reviewed process?

A. Yes.

Q. Now, with respect to your medical licensure, are you licensed to practice medicine in the State of Washington?

A. I am.

Q. Is your license restricted in any fashion?

A. No.

Q. And as a requirement to maintain licensure, are you required to attend continuing medical education courses?

A. I am.

Q. And are you up to date on all your courses?

A. Yes.

Q. Now, with respect to the issue on appeal, the Department of Labor & Industries issued an order dated March 24, 2022 indicating that this worker had died on November 21, 2021, and that the cause of death was

unrelated to the claim.

The department issued that order and said that there was essentially no permanent partial disability that would be covered under the claim, and that's what brought us into our appeal.

So my question for you is: Were you aware of those background facts?

A. Yes.

Q. And did my office, the office of Washington Law Center, ask for you to conduct a forensic review of this deceased gentleman's, you know, claim file, contents, medical records, those kinds of things?

A. They did.

Q. And with respect to our office asking you to do this kind of review, have you done medical legal testimony in the past?

A. I have, yes.

Q. And with respect to people who request your services as a medical legal expert, does it matter the referral source to the outcome of your opinion? In other words, do you tailor opinions to whoever referred you the analysis?

A. No.

Q. With respect to your work in medical legal matters, if you had an opinion that was contrary to the

implications of being assigned by somebody on one side or the other, claimant side or defense side, would you still state that opinion if you held that opinion?

A. I would and I have.

Q. And from that, do I understand that you've, at times, expressed opinions that you knew that the referring party would not want to hear, but those were your opinions so you expressed them anyway?

A. Yes.

Q. With respect to your practice of orthopedic surgery, are you in active practice in any fashion now or are you not?

A. Currently, I am covering emergency orthopedics at Harbor Regional Health in Aberdeen on a per diem basis.

I retired from my orthopedic practice several years ago and have been actively engaged in per diem, locum tenens practice and am subsequently part time -- current, part-time practice at the Harbor Regional Health.

Q. Thank you.

With respect to your prior orthopedic surgery practice, were there occasions when you would see your own patients who were involved in the Worker's Compensation system, meaning that they had L&I claims

and that's what you were seeing them for?

A. For most of my practice, that comprised approximately 30 percent of my practice.

Q. Okay.

And for approximately how many years are we talking about that that would be about 30 percent of your practice?

A. About 30 years.

Q. Okay.

And so with respect to the Department of Labor & Industries rules, regulations, the Industrial Insurance Act, are you reasonably familiar with the system that we are talking about, the Worker's Compensation system?

A. Yes, I am. And, in fact, instructed early in my career in the state attorney general's office regarding workman's injuries and back injuries.

Q. Okay.

So what information did you receive when doing your forensic review in the matter of Mr. Idowu?

A. I received a bit over 200 pages of records, including the L&I face sheet, the report of his accident, hospital notes, IME notes, treatment notes and imaging -- imaging reports.

Q. And with respect to -- you mentioned a face sheet, and if this matter ever ends up in front of a

jury, the jury may not understand what a "face sheet" is.

But true and accurate to say that that's essentially a shot of what the Department of Labor & Industries has accepted under the claim?

A. Yes. What is allowed and other pertinent information. His is a one-page sheet.

Q. And with respect to the types of materials, the report of accident, the imagery, the medical records, the face sheet, the things that you've just described in your testimony, are those the kinds of things that orthopedic surgeons generally would utilize in forming opinions on diagnoses, causal relation, extent of disability and other related issues within a Worker's Compensation context?

A. They would be, yeah. Typically, one would examine a patient, but unfortunately, this was not possible. So these would be the types of material which would typically be used to form opinions, especially forensic opinions.

Q. Okay.

And is it your practice -- individually, as an orthopedic surgeon that's board certified and sub specialized, is it your practice as well to use these types of materials in forming your opinions?

A. They would be typically used in my practice as part of the patient record and understanding and forming opinions regarding patient's conditions and treatment.

Q. Okay.

And have you used those aforementioned materials in forming your opinions, in today's matter, talking about Mr. Idowu?

A. I have.

Q. So Mr. Idowu was ultimately, unfortunately, killed after riding on public transport and being targeted by a criminal.

But you had his medical records and claim file from the period prior to that; is that correct?

A. That's correct.

Q. Could you tell us what history do you understand of his industrial injury, please, Doctor?

A. He was injured while working as an educator, a para-educator, on November 28 of 2018. He was assaulted at that time by a coworker and struck multiple times in the area of the mid to lower back.

Subsequent to that, he presented to the Cherry Hill Campus Emergency Room for Swedish Hospital. He was tender in the dorsal lumbar area. Imaging was done, which did not show evidence of a injury.

There was a question of a spinous process

fracture both there and previous films at the upper cervical area. Ultimately a SPECT scan was -- did not show any activity, so it -- my assumption would be that the bony fragment that was seen was remote to the injury.

He, however, continued with tenderness, spasm, tightness over a prolonged period of time. Being followed by multiple examiners on multiple occasions. And ultimately underwent a rehabilitative program and had several independent examinations.

It appeared that he did not feel he could return to his job of injury and apparently vocational services had been sought.

He also applied for Social Security Disability prior to his death.

Q. Okay. And he --

A. He had --

Q. Go ahead.

A. He had estimated the physical capacities done but did not have a performance-based physical capacity evaluation, which would have been, I think, more objective in terms of what he -- what his physical capacities had been. Helpful, but apparently was not done.

So that is essentially the -- the summary of

what I saw in the records.

Q. Okay. Very good.

And so he was injured at work on November 28, 2018. He died in the aforementioned violence on November 21, 2021. And so we have essentially a three-year period there, Doctor, where his claim was open.

And so my question for you is: In review of the records, did you find at any point in time where it looked like, based on the facts and data within the records, that all of his symptomology related to the November 28, 2018 injury event had resolved?

A. His symptomatology from the back injury had not completely resolved throughout the period I saw. Also he had psychological sequelae from the injury and had been diagnosed as having a post-traumatic stress disorder, which appeared to affect him as well.

And that appeared to be continuing throughout the period of records.

Q. Okay.

With respect to your own record review, were you able to form an opinion on at least a more probable than not basis as to what diagnostics you would support? In other words, what impressions you would support as diagnoses that should be understood to be related to his

November 28, 2018 industrial injury?

A. I felt he had lumbar -- lumbar contusions and soft tissue injury strain to the muscles, which were related, more probably than not, to the injury of record.

Q. Now, you mentioned that there may have been some spinous process fracture or something of that nature.

Are you relating that on any basis to the industrial injury that you have described, the assault by the coworker?

A. I don't think I can in that there was no evidence of activity on a SPECT scan. On SPECT scans, bone scans will typically stay active for 18 months or more after an injury. That did not appear to be the case, so I don't think, on a more probable than not basis, I can represent that it was related. And I did not have the opportunity to review the specific films.

So I don't think at this point I can relate it, on a more probable than not basis, to the injury of record. I can only relate to the soft tissue injuries.

Q. Okay.

If he had a pre-existing spinous process fracture and he was assaulted by a coworker and struck in the area of the mid and lower back repeatedly as you have indicated in your report, would that be sufficient

to -- as a mechanism of injury, to cause soft tissue injuries that could remain symptomatic for a period of three years like is indicated in his medical records?

A. Again, I don't think I can delineate the spinous process per se. If he was struck and injured in that area you would, I think -- be additional soft tissue injury as described.

Certainly most soft tissue injuries resolve within a couple of months. However, there are a subset of people in which are especially seen in the, say, personal injury, motor vehicle accidents with injuries such as motor vehicle injuries whiplash etc. who do, in fact, have ongoing symptoms. It's a minority of symptoms but it's a definite segment of the population, which does -- which have been correlated in literature for a number of years after the soft tissue injury.

And certainly most of us have had soft tissue injuries which continue and provide discomfort on an ongoing basis. So I think that would be -- more likely be the situation here.

Q. Okay.

And to be clear, in your practice as an orthopedic surgeon for a few decades, you saw people who had soft tissue injuries that left them with residual pain and suffering complaints that just continued over

time and didn't resolve, did you not?
A. Yes.
Q. Okay.
And not all of them had personal injury claims or Worker's Compensation claims. Some of those people were just injured at home or injured incidentally or maybe injured in sports or something of that nature, correct?
A. Yes. Some people over the years, including myself. So, yes, it's something that happens.
Q. Okay.
And so at any point in time, did you see a place where there was any kind of a job offer with restrictions or anything proposed for Mr. Idowu where he could return to his employer of injury?
A. I did not.
Q. Okay.
And so did you have an understanding of whether or not he was -- at the time that he was assaulted and killed on November 21, 2021, did you have an understanding of whether or not he was still receiving time loss benefits under our Worker's Compensation system?
A. I believe he was. I'm not sure from the records. It appears that he was considering trying to

return to work in some manner and considering the vocational alternative at the time. So I don't think his treatment had been completed.

Q. And so when you're looking at these medical records and you formed your diagnoses as stated, related to the industrial injury, were you then asked by my office to also provide an assessment for a posthumous permanent partial disability understanding? Meaning that when an individual dies, they still retain rights under our system, and if they were entitled to some kind of a permanent partial disability they are still paid that permanent partial disability.

Did you review the records for the purpose of determining whether or not there was, more likely than not, some degree of permanent partial disability that Mr. Idowu would have suffered as a result of his industrial injury?

A. I did. I felt he would probably best fit into Category 2 of lumbosacral impairments.

Q. Okay.

And to do that you specifically reviewed Washington Administrative Code Section 296-20-280 as indicated in your report and in reference to this particular industrial injury; is that correct?

A. I did.

Q. Could you just explain to us why you placed Mr. Idowu into a Category 2? Just what's the rationale there, please?

A. He -- let's see -- I thought I had my cheat sheet, but I can't find it. Let me just pull up the WAC here.

Q. Well, so let me just ask it to you this way as you're pulling up the WAC. That WAC indicates the categories of permanent dorsal lumbar and lumbosacral impairments, and Category 1 says: There's no objective clinical findings. You can have subjective complaints or sensory losses that can be present or absent. That's Category 1.

Category 2 indicates that there's at least a mild, low back impairment with mild intermittent objective clinical findings with such impairment. But no significant x-ray findings and no significant objective motor loss. Subjective complaints and/or sensory losses may be present. The system that we have is basically a best-fit system.

Category 3 says: Mild low back impairment with mild continuous or moderate to intermittent objective clinical findings of such impairment. But, again, without significant x-ray findings or significant objective motor loss.

And so the question here, Doctor, is: When you're looking at the categories of impairment, and you're looking just between Categories 1 and Category 3, what did you find to be the best fit description given what you saw in Mr. Idowu's medical records, please?

A. He -- there we go.

He -- I thought he best fit Category 2 in that he had no significant x-ray findings, no significant motor loss. I felt that he had mild to intermittent objective findings in that he had consistent tenderness in the lower lumbar area from examiner to examiner, and from time to time.

Over a period of time, I think -- certainly I felt that the -- a -- it can be characterized as an objective finding.

He certainly had subjective complaints but because he had -- he did not have -- no objective findings. Many observers reported tenderness. And because he did not have the mild, continuous, intermittent or objective findings with reflex or sensory losses that would typically be noted as a Category 3, I felt he best fit Category 2.

Q. In your report, you documented ongoing intermittent muscle tightness in his lumbar paraspinal muscles from examiner to examination -- or examiner to

examiner and examination to examination, on multiple occasions, like you just stated.

But could you, please, explain to us: What are lumbar paraspinal muscles, please?

A. "Para" would be near or adjacent. These are the muscles along the side of the spinous processes. They are essentially the -- they would be the shiny muscles, the muscles that extend the back, and they often are tight and tender with some voluntary or involuntary guarding with chronic tenderness and back pain.

Q. And when people are documenting muscle tightness in the lumbar paraspinal muscles, and it's documented from examiner to examiner, is that something that the examiner is going to be able to tell by palpation and looking at those muscles and having an education in medicine and knowing how muscles are recruited and how muscles fire and react in that area of the body?

A. That would be a summary of it, yes. Typically it's by palpation.

Q. Okay.

Now, with respect to your opinion, is it true and accurate that you stated in your written report that given Mr. Idowu's injury and estimated physical capacities, from reviewing his medical records, and considering his level of education, I do not feel that

he would be totally disabled, but would be employable on a full-time basis in some capacity.

Is that a statement that you wrote in your written report?

A. Yes.

Q. And is that a statement expressed based on the totality of your understanding of Mr. Idowu, including all of the things that you have referenced here today?

A. Those are the things that I understood. I did not factor in the post-traumatic stress issue. From what I read, I don't think it was completely disabling either.

Certainly he's a gentleman with a college education who otherwise had fairly certain described complaints and issues, and, therefore, I thought that he had the educational background to be employed at least in some manner, which is required by the state and some ability, I would think, on a full-time basis at some point that had not been delayed vocationally at the time of his death.

But I feel that he -- his injury was not sufficient to cause complete and total disability.

Q. All right.

And this gentleman was born in 1987 -- on July 1, 1987. Did you see that documented in his medical

records?

A. I believe I did somewhere, yes.

Q. Okay.

And so based on his age as well, is this somebody who you, if you were seeing them in your practice, would say, This man is permanently totally disabled? Or would you be saying, based on his age and his education and what you have seen in his records, He needs to transition back to work and can even though he may have some permanent partial disability?

A. Yes. I think that he should be able to return back to work safely as paraplegics and quadriplegics are employable if they have sufficient education and skills and such that he certainly would be, so...(pause).

Q. Okay.

Have all of your opinions been expressed here on a more probable than not basis, Doctor?

A. They have.

Q. And to be clear, you assign a Category 2 lumbar or low back permanent partial disability based on the way we rate those in the system, correct?

A. Yes. According to the WAC, 2 would be my rating.

MR. PARR: Thank you for your testimony. I will turn you over to opposing counsel. Thank you,

Doctor.

THE WITNESS: Thank you.

E X A M I N A T I O N

BY MR. DUGGAN:

Q. Hello, Doctor. My name is Michael Duggan, and I represent the Department of Labor & Industries.

Can you hear me okay?

A. I can.

Q. Wonderful.

You were asked some questions and were informed that Mr. Idowu passed away in late November of 2021.

Was that your understanding at the time of your records review?

A. Yes.

Q. Do your records review indicate whether or not Mr. Idowu was still receiving treatment for his back condition at that time?

A. He -- November of '21. Let's see, he had -- in the May of '21 he was seen at the Swedish Medical Center, and in November he had an evaluation -- a psychiatric evaluation with regard to the injury.

After April when he had massage therapy and May when he was seen at Swedish, I don't -- other than the psych issue -- the psych records, I don't have the

records, but it did not sound as though his status had been resolved. I'm not sure whether -- where the treatment had been authorized after IMEs either. Apparently his IMEs felt he was able to return to work and no treatment was indicated.

Oftentimes I've had periods of time when the patients are not able to receive treatment because some of the treatment is authorized, and they can't pay for it -- can't afford to pay for it on their own.

So sometimes that's an area of contention, which isn't resolved until things get hashed out in the legal sector.

Q. Understood. Thank you.

And for clarity, I want to make sure that I have it correct that the documented objective findings that led you to a Category 2 impairment rating were both the intermittent muscle tightness in Mr. Idowu's lumbar paraspinal muscles and the continued tenderness and spasm he noted over time with different examiners.

Is that the total of your objective findings that led to your impairment rating?

A. He had intermittent spasm. I don't know that the spasm was continuos. He had, certainly, tenderness to palpation. Yes, the intermittent -- or the ongoing findings over periods of time with different examiners,

physicians, massage therapists, therapists, etc., would to me indicate that there was something that would be felt to be objective.

It was, you know, not something with significant x-ray findings, weakness, loss of motion, motor loss. It was what it was, which was the tenderness.

Q. And in your opinion, on a more probable than not basis, would Mr. Idowu have benefitted from further treatment to resolve any of those documented objective findings?

A. With those findings, he -- it's hard to say as he had had some intermittent treatment in the earlier part of 2021. I think that certainly other treatment options were available for physical therapy, possibly for the massage therapy, certainly electrical stimulation and other pain modalities had not been tried.

So I think there were other things that certainly were on the table that didn't occur that could have been done.

Q. Do you feel that any further treatment could resolve any of the documented symptoms that led you to your Category 2 impairment rating, perhaps resulting in a lower rating if that treatment had been available?

A. It's possible that -- it's possible that it

would have allowed the symptoms of tenderness to resolve. It's difficult to say on a more probable than not basis in that he had the symptoms for two to three years. And oftentimes if that's the case, they persist for a number of years, possibly on an ongoing basis.

So I can't say, you know, more probably than not, one way or the other, more probably than not it would have cured it. More probably than not it wouldn't have cured it.

Certainly it was an option.

Q. I suppose based on that response, would you also not be able to say whether or not he was at maximum medical improvement for his low back by the time of his passing in late November of 2021?

MR. PARR: I'm just going to object to the relevance.

A. I -- in terms of that, I think that if he was still having issues, which could have been resolved -- could have been resolved with further treatment, it would have been probably reasonable to apply those modalities. Therefore, I don't think he would have been at maximum medical improvement. From reading the psychiatric notes, I don't think he was at maximum medical improvement from those issues either.

So I can't say more probably than not that he

was at maximum medical improvement. No, I can't say that.

MR. DUGGAN: And in response to Counsel's objection, I'll note for the record that we were talking about permanent, partial disability and that ongoing treatment may resolve, reduce or eliminate some factors that lead to a diagnosis of permanent, partial disability. As such, whether or not a claimant is at maximum medical improvement is directly relevant to the extent to which further treatment may be capable of resolving any permanent, partial impairment.

MR. PARR: Well, I would just note -- I'd like to clarify that the definition for maximum medical improvement indicates no material change over time, and there's no indication anyone was affording this gentleman any additional treatment.

So I think it's speculative, and I would add speculative to my objection based on those circumstances.

But I understand your position, Counsel. Thank you. I'm sorry, Mr. Duggan, are you still there?

MR. DUGGAN: Yes, sir. I was reading my notes and thinking quietly.

MR. PARR: I thought I might have been kicked out of the room. You know, these telephone

conversations, we never know.

MR. DUGGAN: It happens to the best of us. I have no further questions for you, Doctor. I imagine there may be some redirect questions for you, though.

F U R T H E R E X A M I N A T I O N

BY MR. PARR:

Q. Doctor, just with respect to the notion of what was objective, you're not saying that his pain was resolved at any point in time, are you?

A. I don't think his pain was resolved. I don't think his -- certainly his psychological issues from the injury and his perceived ongoing injury and impairment, which could have been -- I think it elucidated to him with such things as a physical capacities evaluation and directed vocational issues.

I don't think any of those were resolved. I think he had ongoing issues. I think that he had ongoing treatment options, which could have been available if they had been allowed to occur.

Q. Okay.

And to that extent, there's no indication that they were authorized; is that correct?

A. That's my understanding. I certainly don't get all the -- oftentimes in these records, I don't get all

the back and forth communications from his claims manager to physicians' offices and such. I mean, oftentimes you're not included, so I don't see any evidence that further treatment was authorized for the claimant.

Being that the patient's receiving, to me indicates they're able to go back to work and obtain further treatment, it can be quiet problematic. At least it has been in my practice.

Q. Thank you.

And with respect to the way the law reads, Doctor, if somebody declines further treatment, then they are considered at maximum medical improvement. If somebody is not able to obtain additional treatment, the law can consider that. And here we have a gentleman who died on November 21st, 2021, and so wasn't given an opportunity.

And my question for you is: If not given any opportunity at any of those treatment modalities and he's already had this ongoing problem for two plus, three years, is that more likely then fixed and stable based on your understanding of the situation?

A. You mean the impairment and his condition at the time?

Q. In other words, if he's not authorized or he's

not given access and he has no way to obtain additional treatment modalities to treat this thing that's been going on, are you -- are you able to say that he would likely just have his symptoms resolve?

A. Well, typically, what I have stated in the past with similar soft tissue injury cases is, is if he is -- at this point treatment is going to be, you know, cut off, no further treatment is going to be authorized, then I think, you know, what you have is what you have.

I can't say more probably than not that it would resolve. So I think that the impairment at the time is the impairment at the time, and it would probably be ongoing.

Q. Okay.

And is that opinion stated on a more probable than not basis please, Doctor?

A. Yes.

MR. PARR: I have nothing further for you.

MR. DUGGAN: Nothing further from the Department. Thank you.

MR. PARR: Thank you for your time. Can you please show us off the record, Madam Court Reporter?

THE REPORTER: Yes. We are off the record.

(Deposition concluded at 10:48 a.m.)

(Signature waived.)

FILED
7/21/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OLABAMIJI M. IDOWU, JR. (DEC'D), Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	No. 87002-5-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — The estate of Olabamiji M. Idowu Jr. (the Estate) appeals from the trial court's order granting summary judgment in favor of the Department of Labor and Industries (Department) regarding Idowu's claim for industrial insurance benefits under the Industrial Insurance Act (IIA), Title 51 RCW. Finding no error, we affirm.

Because the parties are familiar with the facts, we recite them only as necessary to explain our reasoning below. Idowu's claim arises out of a 2018 incident when a coworker assaulted him by striking his back while he was working at a childcare facility. He sought medical treatment and reported tenderness in the dorsal lumbar area. Medical imaging taken after the incident did not show evidence of an injury. Idowu was seen by multiple examiners and "ultimately

underwent a rehabilitative program and had several independent examinations." The record reflects "he did not feel he could return to his job of injury and apparently vocational services had been sought." Consequently, Idowu filed a claim with the Department for industrial insurance benefits.

In late 2021, while his claim still remained open, Idowu died when he was stabbed on a public bus. Thereafter, Idowu's claim has been litigated by the Estate.[1] A few days after Idowu's death, the Department accepted responsibility for the conditions diagnosed as "lumbar contusion" and provided industrial insurance benefits for *temporary disability*. Several months later, the Department closed Idowu's claim for *permanent disability* without an award noting, "it appears Mr. Idowu was not totally permanently disabled and treatment was not concluded to consider partial permanent impairment disability, therefore [the claim] is closed." The Estate appealed that decision to the Board of Industrial Appeals (Board), which affirmed the Department's decision, and then appealed the Board's decision to King County Superior Court, which affirmed the Board's decision. This timely appeal followed.

"In appeals under the IIA, we review the superior court's decision and apply the ordinary civil standards of review." *Peterson v. Dep't of Labor & Indus.*, 17 Wn.

[1] Addressing payment of an award where, as here, a claimant dies for reasons unrelated to the industrial injury, RCW 51.32.040(2)(a) states: "If any worker suffers (i) a permanent partial injury and dies from some other cause than the accident which produced the injury before he or she receives payment of the award for the permanent partial injury or (ii) any other injury before he or she receives payment of any monthly installment covering any period of time before his or her death, the amount of the permanent partial disability award or the monthly payment, or both, shall be paid to the surviving spouse or the child or children if there is no surviving spouse. If there is no surviving spouse and no child or children, the award or the amount of the monthly payment shall be paid by the department or self-insurer and distributed consistent with the terms of the decedent's will or, if the decedent dies intestate, consistent with the terms of RCW 11.04.015."

App. 2d 208, 217, 485 P.3d 338 (2021); RCW 51.52.140. Here, the trial court granted summary judgment, which is governed by "'a burden-shifting scheme.'" *Welch v. Brand Insulations, Inc.*, 27 Wn. App. 2d 110, 114, 531 P.3d 265 (2023) (internal quotation marks omitted) (quoting *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 326, 387 P.3d 1139 (2016)). "The moving party bears the initial burden 'to prove by uncontroverted facts that there is no genuine issue of material fact.'" *Id.* at 115 (quoting *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977)). If the moving party meets this burden, then the burden shifts to the nonmoving party to produce "'specific facts evidencing a genuine issue of material fact for trial.'" *Id.* (quoting *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995)). "This court reviews a motion for summary judgment de novo, construing all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

For "dorso-lumbar and lumbosacral impairments," at issue here, WAC 296-20-280 describes eight categories of impairment, where category 1 is least severe and category 8 is most severe. Idowu claimed a category 2 impairment, which the IIA defines as follows: "Mild low back impairment, with mild intermittent *objective clinical findings* of such impairment but no significant X-ray findings and no significant objective motor loss. Subjective complaints and/or sensory losses may be present." WAC 296-20-280(2) (emphasis added). As can be seen, a category 2 impairment requires "objective clinical findings." Thus, when rating such impairment, "reliance is primarily placed on objective physical or clinical findings

that are independent of voluntary action by the worker and can be seen, felt or consistently measured by examiners." WAC 296-20-19030.

Our Supreme Court has explained the importance of the "objective clinical findings" requirement in industrial injury cases:

> The rule that an expert medical witness may not base his opinion upon subjective symptoms alone is designed to protect the industrial insurance fund against unfounded claims of aggravation. If such claims could be established by the testimony of a physician who based his opinion entirely upon what the claimant told him, it would open the door to fraudulent claims, as well as those mistakenly made in good faith. A claimant might honestly believe his subsequent condition arose out of his original injury, but this is a medical question and an opinion thereon must be derived from sources other than the claimant's statement.

Kresoya v. Dep't of Labor & Indus., 40 Wn.2d 40, 45, 240 P.2d 257 (1952). Accordingly, where "[t]here is no evidence of even one objective symptom," a claim for industrial insurance benefits is properly dismissed. *Cooper v. Dep't of Lab. & Indus.*, 20 Wn.2d 429, 433, 147 P.2d 522 (1944).

Applying these legal principles here, the Department plainly met its initial burden of production on summary judgment. The Department argued there was an absence of objective evidence supporting a disability award.[2] The Department noted the Estate's only medical expert, Dr. Thomas Degan, characterized the low-back symptoms referenced in Idowu's medical reports as "objective" merely because Idowu told medical providers that he experienced "consistent tenderness in the lower lumbar area" and "muscle tightness" "over a period of time" concluding,

[2] The Department also argued the Estate had not established Idowu's condition was "permanent" because it had not reached "maximum medical improvement" before Idowu's death and could therefore be denied on that basis as well. Because the lack of objective medical findings is sufficient to affirm the trial court's ruling granting summary judgment in favor of the Department, we need not address the Department's permanency argument.

"I think . . . it can be characterized as an objective finding." The Department further noted that when Dr. Degan was cross-examined as to whether he relied on any objective clinical findings of a category 2 impairment, as opposed to Idowu's own statements, he advanced none. This was sufficient to shift the burden of production to the Estate.

Where, as here, the moving party satisfies their initial burden and the burden of production shifts to the nonmoving party, that party "cannot rely on 'speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.'" *M.E. v. City of Tacoma*, 15 Wn. App. 2d 21, 31-32, 471 P.3d 950 (2020) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn. 2d 1, 13, 721 P.2d 1 (1986)). Despite this burden shifting framework, the Estate's brief in opposition to the Department's summary judgment motion is conclusory and unsupported by objective evidence. The Estate attempted to recast the report of Idowu's medical expert as more than mere conjecture lacking a factual basis by pointing to Idowu's complaint that he experienced tenderness and "tightness over a prolonged period." That is insufficient to establish *objective* clinical findings, as required to establish a category 2 impairment under the IIA.

The Estate's opposition brief also asserted the testimony of the Department's medical expert, Dr. Darin Davidson, was "legally fallacious." Contrary to the Estate's aspersion, a careful review of the record indicates Dr. Davidson's medical opinions are supported by the record and consistent with applicable legal authority. Unlike Dr. Degan, who relied solely on medical records,

Dr. Davidson examined Idowu when he was alive and his claim was open with the Department. During the examination, Dr. Davidson noted Idowu exhibited "some nonphysiologic or nonanatomic findings" and "atypical" reports of sensations contrary to "what would be typical . . . if there was radiation and pain." Dr. Davidson explained these "nonanatomic" findings can occur where a patient reports low back pain after, as here, a health care provider performs a leg muscle test or applies "light compression on the top of the head," which "should not elicit any symptoms in the lower back." He added that when there are multiple nonanatomic findings during a patient exam, "as is the case in this instance," other "discrepancies," and other "unusual reports," such circumstances "all put together indicate that . . . these symptoms do not have a specific cause in the low back, and so other potential causes for the report of those symptoms become pertinent." Dr. Davidson thus concluded Idowu's condition was a category 1 impairment, which the IIA defines as, "No objective clinical findings. Subjective complaints and/or sensory losses may be present or absent." WAC 296-20-280(1).

Dr. Davidson's report directly addressed the flaws in Dr. Degan's conclusions, explaining:

> [T]enderness is not an objective finding, and even if a person consistently repeatedly over time reports that same objective finding, it does not make it an objective finding.
>
> Objective finding, as it relates to a lumbar condition, would include . . . findings on imaging studies that are attributable to the claim to the injury that we're evaluating.
>
> [T]he fact that an individual, as may be the case in this situation, consistently and repeatedly reports the same symptoms or there's the same objective finding on examination may very well be true.

> However, that is not objective evidence that would be considered within an impairment rating.

The Estate failed to rebut this testimony with specific facts and admissible evidence establishing *objective clinical findings* of a category 2 impairment.

Lastly, the Estate claims the trial court failed to view the record in the light most favorable to it. That is incorrect. As explained above, the Estate could not avoid summary judgment by asserting that its experts treated Idowu's self-reported tenderness as "objective" in order to show a category 2 impairment. *M.E.*, 15 Wn. App. 2d at 31-32; *Cooper*, 20 Wn.2d at 433. Instead, the Estate was required to produce expert testimony or other admissible evidence supporting Idowu's claim that was not based on speculation, conjecture, assumptions, or mere possibility. *Id.* The Estate failed to produce such evidence, and the trial court correctly concluded that his conclusory assertions about the "objective" nature of his pain are insufficient to avoid summary judgment.[3]

Affirmed.

Feldman, J.

WE CONCUR:

Díaz, J.

[3] The Estate also requests that any "reverse and remand determination" by this court contain a statement regarding recovery of attorney fees in the event it ultimately prevails in the litigation. Because we affirm the trial court's summary judgment ruling in favor of the Department, the Estate is not entitled to the requested relief.

The Honorable Hillary Madsen
Hearing Date: March 22, 2024
Hearing Time: 11:00 am
With oral argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

OLABAMIJI M IDOWU (DEC'D), PLAINTIFF, V. LEARNING LANDS II AND WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, DEFENDANTS.	No. 23-2-19073-4 KNT ORDER GRANTING DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on the Department of Labor and Industries' Motion for Summary Judgment claiming the Department was entitled to summary judgment because Plaintiff Olabamiji M. Idowu, deceased, presented insufficient evidence to prove entitlement to an award for permanent partial disabilities.

The Court heard the oral argument of counsel for the Department, Michael Duggan, and counsel for the Plaintiff, Spencer Parr. The Court considered the pleadings filed in the action, and those portions of the Certified Appeals Board Record cited in the parties' pleadings.

Based on the argument of counsel and the evidence presented, the Court finds:

Background

1. Plaintiff Olabamiji M. Idowu graduated from Eastern Washington University. His chosen career involved working with children. Mr. Idowu was injured in the course of his employment at Learning Land II, a childcare center, when he was assaulted by a co-worker. Mr. Idowu submitted a claim for workers compensation benefits. A few years

later, while Mr. Idowu's claim was still open, Mr. Idowu was murdered. The Department of Labor and Industries closed Mr. Idowu's claim without making a permanent partial disability award. Mr. Idowu's mother and beneficiary, Marta R. Idowu, believed the Department's closure order was wrong. This appeal follows.

Permanent Partial Disability—Categories of Impairment

2. A "permanent partial disability" is a loss of bodily function to a part or parts of the body, proximately caused by a workplace injury. In Washington, the Department has created "categories of impairment" for classifying various disabilities. An evaluator must assess the level of impairment by (1) comparing the condition of the injured worker (2) with the condition described in the categories of impairment, and then (3) selecting the most appropriate rating or level of category of impairment.
3. In this case, Mr. Idowu's disabilities included a back injury and mental health condition.
4. The categories of impairment for back injury and mental health are found in WAC 296-20-220. The ratings descriptions are Category 1 (minimal); Category 2 (mild); Category 3 (moderate); Category 4 (severe); and Category 5 (extreme). *Id.*
5. It is unclear whether the appropriate time to assess Mr. Idowu's loss of bodily function was at the time of his death or the date the Department closed the claim. The timing does not make a difference in this case because Mr. Idowu had multiple exams leading up to his death, including a mental health exam just ten days before his death.

Procedural History

6. On November 28, 2018, Mr. Idowu was injured at work.
7. On November 21, 2021, Mr. Idowu was murdered.

8. On November 23, 2021, the Department of Labor and Industries entered an order accepting responsibility for Mr. Idowu's condition.

9. On March 24, 2022, the Department issued a closure order without making an award for permanent partial or total disabilities. The Department determined it could not make an award because Mr. Idowu's condition was not fixed and stable at the time of his death; further treatment would have been required to determine the appropriate rating. The Department relied upon *In re Bette Pike,* BIIA Dec., 88 3366 (1990).[1]

10. On May 30, 2023, Ms. Idowu, as Mr. Idowu's beneficiary, filed an appeal to the Board of Industrial Insurance Appeals. Industrial Insurance Appeals Judge John Dalton presided over a contested hearing and received all the evidence in this case. Judge Dalton issued a Proposed Decision and Order, which reversed the Department closure order and remanded the case to the Department to consider Mr. Idowu's claim again. Judge Dalton instructed the Department to determine whether Mr. Idowu was permanently partially disabled or permanently totally disabled at the time of his death. Judge Dalton disagreed with the Department's reliance on *Pike*; instead, he determined *In re James McShane, Dec'd*, BIIA Dec., 05 16629 (2006)[2] was the controlling authority. Ms. Idowu agreed with Judge Dalton's decision to reverse, but disagreed the Department should consider the claim again. Ms. Idowu believed the Department should have been instructed by Judge Dalton to make an award based on Mr. Idowu's permanent partial disability: Category 2 back impairment and Category 4 mental health impairment.

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[1] In *Pike,* the injured worker experienced a back injury and psychiatric disorder(s). The Board concluded even if the worker's back impairment *might* be fixed, the worker was still receiving treatment for her mental health impairment, so the Department was precluded from making an award for permanent partial disability. *Pike* stands for the general principle all conditions must be fixed and stable to make an award.

[2] In *McShane,* the Board held a beneficiary may be entitled to benefits under RCW 51.32.050 and RCW 51.32.067 if the worker's beneficiaries can establish the worker's disability *would have been* permanent *even if* the worker had not died from unrelated causes before treatment was complete.

11. On July 3, 2023, the Board granted Ms. Idowu's Petition for Review.

12. On September 14, 2023, the Board of Industrial Insurance Appeals issued its Decision and Order, which affirmed the Department closure order. The Board reviewed the *Pike* and *McShane* decisions and, applying *McShane*, found the Department incorrectly declined to make an award based on fixity. However, the Board reviewed the record and determined the Department closure order was factually correct because Mr. Idowu did not establish that he likely would have had permanent physical or mental health impairments, even after further necessary and proper treatment. The Board expressed skepticism about Mr. Idowu's medical expert's rating of Category 2, but more importantly, the Board found the expert failed to offer a rating after treatment:

> [He] could not say more probably than not that the Category 2 lumbosacral impairments would remain after necessary and proper treatment, and he concluded that Mr. Idowu was capable of working full time in some capacity.

Similarly, the Board found Mr. Idowu's mental health expert (1) offered no evidence about the level of mental health impairment that would have remained if Mr. Idowu had received necessary and proper treatment, and (2) concluded Mr. Idowu would return to work. As the party challenging the Department's closure order, the Board observed Mr. Idowu carried the burden of proof. The Board found insufficient evidence was presented that Mr. Idowu's disability was permanent, so Mr. Idowu was not entitled to benefits.

13. On October 24, 2023, Ms. Idowu filed this appeal to the King County Superior Court.

14. On October 31, 2023, the Certified Appeal Board Record ("CABR") was filed into this case record, including the Board Decision and Order dated September 14, 2023; Order Granting Petition for Review; Claimant's Petition for Review; Proposed Decision and

Order; Mr. Idowu's Response in Opposition to the Department's Oral Motion to Dismiss and the Department's Reply; Jurisdictional History; and Transcript.

15. On February 13, 2024, the Department filed a Motion for Summary Judgement. Mr. Idowu filed a timely Response in Opposition, the Department filed a timely Reply, and this Court heard oral argument on March 22, 2024.

Dispute

16. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). A material fact is one on which the outcome of the controversy depends. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wash.2d 780, 789, 108 P.3d 1220 (2005).

17. The Department moves for summary judgment because it claims there is no factual issue to decide when Mr. Idowu failed to present sufficient evidence of permanent partial disability proximately caused by the industrial injury.

18. The Department and Mr. Idowu agree this Court is presented with a legal question about the sufficiency of the evidence. Under the summary judgment standard in CR 56, if the Court determines Mr. Idowu did not present sufficient evidence, then the Court should dismiss the case. Alternatively, if Mr. Idowu presented sufficient evidence he may be entitled to benefits, then the case should proceed to trial.

19. During the contested hearing, after the conclusion of Dr. Hanson's testimony, the Department made an oral motion to dismiss "on the basis that despite the significant evidence of the nature and extent of a potential rating had the worker not passed, that rating is inappropriate in the context of an open claim where a worker is not yet fixed and

stable or at maximum medical improvement." CABR 183-184 (emphasis added). Mr. Idowu argues this concession defeats the logic of the Department's arguments about the sufficiency of the evidence now.

Legal Analysis

Fixity

20. Generally, a worker's condition must be determined to be at maximum medical improvement, meaning that it is stable or non-progressive at the time an evaluation is made. WAC 296-20-19000. However, a worker may die from a cause unrelated to the workplace injury *before* maximum medical improvement can be achieved. The worker may still be entitled to benefits if the worker's condition would have been permanent.

21. The Department issued the closure order due to lack of medical fixity so most of the testimony and argument in the contested hearing below involved the question of fixity; Mr. Idowu argued his condition was permanent because it was never going to improve while the Department argued his condition was not permanent because it would have improved with treatment. The parties were right to focus on permanency, but the parties seem to have mixed up permanency with improvement and medical fixity.

22. This Court agrees with the Board that *McShane* is directly on point. In *McShane*, the worker suffered a back injury that required surgery. The worker died one month before the surgery. The worker's medical expert testified the surgery, while appropriate, would not have enabled the worker to return to gainful employment; the medical expert selected a rating of Category 4 before surgery and Category 3 after surgery. The Department's medical expert did not offer a rating before or after the surgery, but instead focused on whether the worker could have been returned to gainful employment. The Board made

two important decisions. First, the Board agreed with the Department's medical expert that the worker could have been returned to gainful employment after the surgery. As a result, the worker was not entitled to permanent total disability (pension) benefits. Second, the Board found the uncontroverted evidence was the worker would have had a rating of Category 3 back impairment post-surgery. The Board concluded the worker's beneficiary was entitled to an award for permanent partial disability consistent with the rating of Category 3. The Board in *McShane* rejected the Department's argument the lack of medical fixity at the time of a worker's death precludes the worker's beneficiary from receiving any benefits or award. Rather than fixity, the Board held the appropriate focus is the nature of the worker's disability:

> [W]hen an injured worker whose industrial condition(s) had not reached medical fixity dies due to causes unrelated to the industrial injury, in order to receive a permanent partial disability award under RCW 51.32.040(2)(a), the beneficiary must establish that at the time of death, the industrial injury caused a particular impairment that, even after contemplated proper and necessary treatment, would have still remained such that it would have, but for his or her death, entitled the injured worker to an award for permanent partial disability.

(emphasis added). The only reasonable interpretation of *McShane* is injured workers in Washington do not have to reach medical fixity if they die from unrelated causes before they can reach medical fixity.

23. In keeping with *McShane*, the burden of proof rests with the worker as the party seeking benefits to show the reasonable likelihood of disability after treatment as follows:

    a. If the worker's disability would have been the same before and after treatment, then the Department should make an award.

    b. If the worker's disability would have resolved after treatment, then the Department should not make an award.

c. If the worker's disability would have improved – in other words lessened in severity – after treatment but the worker would still be disabled, then the Department should analyze the categories of impairment to determine what rating would most likely reflect the worker's impairment after treatment.

Improvement

24. Evidence a worker would have "improved" with proper and necessary treatment does not preclude the worker's beneficiary from receiving an award for permanent partial disability. In *McShane*, for example, the worker's medical expert opined the worker would improve (Category 4 to Category 3); the Board allowed the claim because the worker would still be disabled even after treatment. Improvement just means the rating of impairment could have reasonably been expected to change after treatment. The degree of change is what matters.

Return to Work

25. The fact an injured worker can return to gainful employment does not preclude an award for partial permanent disability. In *McShane,* for example, the Board determined the worker would return to gainful employment, so the worker's beneficiaries were not entitled to permanent total disability benefits but rather an award for partial permanent disability. Partial permanent disability assumes the worker will return to work. To the extent return to work is relevant, return to work may help the evaluator to assess the accurate rating or level of category of impairment after treatment.

Rating After Treatment

26. To establish the worker's disability would have been permanent even if the worker had not died from unrelated causes before the proposed treatment could be completed, the

worker must prove the rating or level of category of impairment the worker would have been reasonably certain to experience after treatment.

27. The parties dispute whether it is speculation for a medical expert to opine about a rating after treatment. Just like the medical expert in *McShane*, a medical expert may opine on reasonable expectations for the outcome of any proposed treatment. Medical experts are frequently expected to explain any proposed treatment, the risks and benefits of the proposed treatment, alternative possibilities to the proposed treatment, and the risks and benefits of declining the proposed treatment. Medical experts may not always be able to accurately predict when complications will arise during treatment or the degree of patient compliance with treatment, and it may be harder to accurately predict outcomes for more complex treatment regimens, but our courts do not require absolute certainty.

Evidence about Back Injury and Mental Health

Back Injury

28. Dr. Degan testified Mr. Idowu experienced lumbar contusions and soft tissue injury strain to the muscles. Dr. Degan testified this type of back injury should have resolved within months, but Mr. Idowu experienced ongoing discomfort for over three years. Dr. Degan testified when a patient expresses a complaint that is unchanging over time, especially a long period of time with different providers, then the patient's complaint may constitute the basis for an "objective finding." Dr. Degan also testified about the medical images and scans performed on Mr. Idowu and palpation during medical exams. He testified a rating of Category 2 was appropriate.

29. Dr. Degan suggested different therapies may have relieved Mr. Idowu's discomfort. He testified these therapies may have relieved the discomfort, but he could not say whether

the therapies would have fully resolved the discomfort. Dr. Degan acknowledged most of his treatment recommendations had not been tried, but he was skeptical about treatment because no real progress had been made in over three years. Mr. Idowu's physical limitations when at the time of his death included not sitting and standing for prolonged periods of time, bending or twisting.

30. Dr. Degan testified treatment would probably have *improved*, but not *cured* Mr. Idowu's back impairment. Dr. Degan did not testify with any specificity about how much Mr. Idowu's back impairment would have improved. Dr. Degan did not offer a rating or level of category of impairment after treatment.

31. The inference that Mr. Idowu would like the factfinder to draw from Dr. Degan's testimony is Mr. Idowu would continue to experience a Category 2 back impairment even after treatment. As the old saying goes: the best predictor of the future is the past. It is possible Mr. Idowu could have experienced a Category 2 back impairment before *and* after treatment. The problem is Mr. Idowu had to prove more something than a possibility. Dr. Davidson testified a rating of Category 1 was more accurate. A second, equally reasonable inference could be drawn that Mr. Idowu's back injury would have improved to the point he was no longer entitled to benefits.

Mental Health

32. Dr. Hanson testified Mr. Idowu was experiencing a severe mental health disorder; she testified a rating of Category 4 was appropriate. She testified she did not believe Mr. Idowu's mental health would have improved from the time that she examined him until the time of his death (ten days). Dr. Hanson testified long-term psychotherapy would have helped Mr. Idowu. Dr. Hanson did not testify about what rating of impairment

would have been warranted after long-term psychotherapy. Regarding return to work, during and after treatment, Dr. Hanson testified:

> Well, I for sure think he couldn't have done the preschool job. Because he didn't have the patience at that point, and the ability to accurately assess what was going on, to be able to have that job. But with his education, with his interest in working and doing something, I think that work could have been found for him that would minimize his need to – minimize a need to be with other people and have to interact with them and get along with them. I think that a job would have been able to have found for him.

CABR 180. She testified he would require accommodations.

33. On cross-examination, Dr. Hanson was asked if "ongoing treatment would have been able to return this claimant to his pre-injury status?". CABR 183. She testified "I can't say that with the certainty. There are too many variables in it to know if treatment would have been successful to that extent." *Id.* She again testified Mr. Idowu would likely have required long-term treatment for one year to reach maximum medical improvement:

> I would say at least a year of intensive, consistent work with a follow-up after that. This would be a long-term – a long-term treatment. And in my work, one year was short-term. Because I saw people for many years. But I would say that it is needed – that treatment was necessary for at least one year.

Id. In other words, Dr. Hanson rejected the possibility of full recovery after treatment.

34. The Department called their own expert, Dr. Romero, to testify about Mr. Idowu's mental health. Like Dr. Hanson, Dr. Romero never testified about what rating would have most likely reflected Mr. Idowu's impairment after treatment. Like Dr. Hanson, Dr. Romero was cautious about the possibility of recovery. CABR 275 ("He will have responded to some degree..."), CABR 296 ("When I did a recommendation for psychiatric treatment for him is because I believe that he could improve psychiatrically. Whether they could treat him, I didn't know..."). Dr. Romero seemed even more cautious about the possibility of recovery than Dr. Hanson because Dr. Romero referenced the lack of tools

available to treat Mr. Idowu. *Id.* Dr. Romero testified a rating of Category 3 would have been appropriate. Under cross-examination, Dr. Romero eventually agreed that Mr. Idowu's impairment could have increased in severity from a rating of Category 3 to Category 4 due to the time lag between examinations and lack of treatment.

35. On return to work, Dr. Romero stated: "In my opinion his psychiatric condition was not a maximum medical improvement at the time. And I – I opined that he would benefit from psychiatric treatment on a temporary basis as meant for him to recover and return to work." CABR 275. Dr. Romero did not provide any details about reasonable expectations for return to work and whether accommodations would be required; his testimony started and stopped at the fact Mr. Idowu would return to work one day.

36. In considering the testimony from Dr. Hanson and Dr. Romero, it becomes clear Mr. Idowu was experiencing a serious mental health condition. Dr. Hanson and Dr. Romero hoped Mr. Idowu would experience relief from his symptoms with treatment, but neither expert testified Mr. Idowu would fully recover. The unrefuted testimony from Dr. Hanson was Mr. Idowu's interactions with people would have remained limited and he would have continued to require supervision because of his mental health condition even after treatment. A reasonable inference could be drawn that the weight of the evidence demonstrates Mr. Idowu had a permanent partial disability and his permanent partial disability was most accurately represented by a rating of Category 3 in WAC 296-20-340 ("...exhibits periodic lack of appropriate emotional control...").

Conclusions

37. The Court is persuaded by the Department and agrees with the Board that Mr. Idowu did not present sufficient evidence his back injury would have been permanent even if he had not died before treatment was complete.

38. The Court is not persuaded by the Department and does not agree with the Board that Mr. Idowu did not present sufficient evidence his mental health condition would have been permanent even if he had not died before treatment was complete.

Based on the above findings, IT IS ORDERED:

1. The Department's motion is granted in part.

2. The undisputed factual record establishes Mr. Idowu's beneficiaries did not prove Mr. Idowu was permanently partially disabled from his back injury at the time of his death, so no genuine issue of material fact exists with respect to Mr. Idowu's beneficiaries' entitlement to permanent partial disability benefits. The Department is entitled to judgment as a matter of law that the Board of Industrial Insurance Appeals order of September 14, 2023, that affirmed the Department's March 24, 2022, order, is affirmed regarding Mr. Idowu's back injury.

3. A genuine issue of material fact exists with respect to Mr. Idowu's mental health condition, so the Department is not entitled to judgment as a matter of law regarding Mr. Idowu's mental health condition.

DATED this 2nd day of April, 2024.

Judge Hillary Madsen

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I N D E X

IN RE: OLABAMIJI M. IDOWU, JR. (DEC'D)
CLAIM NO. BE-51971
DOCKET NO. 22 14702
WEDNESDAY, MARCH 1, 2023

T E S T I M O N Y

E X H I B I T S

(None)

BE IT REMEMBERED that on Wednesday, March 1, 2023, at 9:49 a.m., the telephonic deposition of Darin Davidson, M.D., was taken before Stephanie Whitney, Certified Court Reporter. The following proceedings took place:

THE REPORTER: Doctor, if you could raise your right hand, please.

DARIN DAVIDSON, M.D., being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

MR. DUGGAN: Hello, everybody. I will give a brief introduction. This is a perpetuation deposition in regards to Board of Industrial Insurance Appeals Docket No. 22 14702. This is related to Idowu Olab -- I've always butchered the last name. It's regarding claim No. BE-51971, and this is Mr. Olabamiji Idowu. I apologize for butchering that name.

EXAMINATION

BY MR. DUGGAN:

Q Doctor, can you please state and spell your name for the record.

A Yes. My name is Darin Davidson. My first name

is spelled D-a-r-i-n; last name spelled D-a-v-i-d-s-o-n.

Q Can you tell us what your business address is and what you do there?

A Yes. My business address is 218 Main Street, Number 791, Kirkland, Washington 98033. And I'm orthopedic surgeon, and through my business, I provide consulting and concierge services for patients with musculoskeletal conditions.

Q Can you please briefly describe for us your education and experience that qualifies you for orthopedic surgery?

A Yes. So my undergraduate training was at the University of Ottawa in Canada in human kinetics.

I transferred into medical school program, same university, University of Ottawa. I graduated from medical school at the University of Ottawa in 2003 and then began my orthopedic surgery residency at the University of British Columbia in Vancouver, Canada. During that time, I also completed a master's degree in epidemiology.

Following graduation from my residency, I completed two clinical fellowships, one in Boston, which I completed 2010, and then in 2011, I finished my second fellowship from the University of Toronto in Toronto, Canada.

Q Are you licensed as an orthopedic surgeon?

A I am, yes.

Q Where are you licensed?

A I am currently licensed in Washington state.

Q And how long have you been licensed in Washington?

A Since 2011.

Q Thank you. You said that. I apologize for making you repeat yourself.

Are you board certified in orthopedic surgery?

A I am board certified with the American Board of Orthopaedic Surgery as well as the Canadian equivalent.

Q Can you please briefly describe for us your current practice in relation to orthopedic surgery generally. And you mentioned some concierge care for people with musculoskeletal injuries or conditions.

A Yes. So as an orthopedic surgeon, I am trained and specialize in surgical and nonsurgical treatment of the musculoskeletal or orthopedic conditions. At the present time and since 2018, I've had my own practice in which I provide second opinion consultations and concierge care for patients with musculoskeletal conditions.

Q Are you familiar with making causation determinations in accordance with the Washington workers'

compensation law?

A Yes, I am.

Q And has part of your medical practice historically or currently been dedicated to injured workers?

A I have treated injured workers over the course of my practice, yes.

Q And is part of your practice, or has it been, dedicated to independent examination of injured workers for the purpose of workers' compensation benefits?

A Yes; I perform those types of examinations.

Q Doctor, I'm going to ask you about your experience with Mr. Olabamiji. When you give a medical opinion today, will all of your opinions been on a more-probable-than-not basis?

A Yes, they will.

Q In your professional capacity as an orthopedic surgeon, did you have the opportunity to examine Mr. Idowu?

A Yes, I did, for the purposes of an independent medical examination.

Q What was the date of that exam?

A The date of the examination was April 20, 2021.

Q And as part of that examination, did you review Mr. Olabamiji's medical records?

A I reviewed the records that were provided to me for review in advance of that IME, yes.

Q Did all of the records you reviewed contain facts and data of a type normally relied upon by orthopedic surgeons in forming diagnoses and treatment plans for patients?

A Yes.

Q Is this information of a type that you would normally rely upon in forming decisions or treatment plans for your patients?

A Yes.

Q And did you rely upon the information that you reviewed when forming opinions in this particular matter related to Mr. Idowu?

A Yes, I did.

Q I'm going to briefly talk about the types of examination you conducted. You mentioned this was part of an independent medical examination. Could you briefly explain what that is, why it might be called independent?

A Well, my understanding of the intent behind it being independent and my -- and based on my understanding, the way I conduct these is to provide an independent evaluation -- independent meaning someone who has not been involved and is not currently involved in the clinical care or treatment of the claimant -- and to,

as part of that evaluation, review available medical records, obtain additional information from the claimant, perform a physical examination and then respond to questions posed to us by the claims manager to provide opinions within our scope of medical expertise as it pertains to the claim.

Q You mentioned the claims manager and the claim. Are you referring to answering questions that are posed or provided by the Department of Labor and Industries related to people who are injured at work?

A In this instance, it was from the Department of Labor and Industries, yes.

Q Do you also do independent examinations that are requested or required by other entities besides the Department?

A Yes. Some of the IMEs I do are requested by private insurance companies or are also in the realm of personal injury. So there are other requesting organizations, I suppose, for these types of evaluations.

Q Does the organization or entity that requests your evaluation change or alter your opinions or the methods by which you arrive or reach those conclusions when you perform an --

A No.

Q -- independent examination?

A No, it does not.

Q Thank you.

When you perform one of these examination, what is your relationship with the patient, and how might that differ from when you see someone in the clinic?

A The relationship is quite different. I would be meeting the claimant for the first time on the day of the examination, and there is no therapeutic or typical doctor-patient relationship established. I will not be assuming any future care or providing future care for the claimant following completion of the IME. The only circumstance in which I might encounter the claimant again is if an additional IME is requested, as occasionally is the case, and then I perform another IME.

But there's no therapeutic relationship established, which is in contrast to the clinical setting in which a doctor -- a typical doctor-patient relationship is established for the purposes of providing information, opinions, recommendations and treatment.

Q Thank you, doctor.

Can you describe for us how thorough an independent examination -- or independent medical examination is in your experience compared to a typical clinical examination, especially for a patient who you haven't seen except in an independent medical

examination?

A Well, the IME is typically much more thorough in a sense that we would review all of the records provided, even if they aren't pertinent to the claim. That differs significantly from a typical clinical evaluation in which there may be limited and sometimes no past records available for review.

More notably, the physical examination is more thorough in the setting in an IME than it would be in the typical clinical setting where it would be much more focused on the specific condition we're treating. Where in the IME, we would focus on the specific conditions as well as address other musculoskeletal conditions or other aspects of musculoskeletal evaluation that would typically not be performed in a clinical setting. So that would be the main differences.

Q Thank you.

You mentioned that you performed an IME of Mr. Idowu. Was there -- did you generate a report of this examination?

A Yes, I did.

Q And did all of the records that you referenced or listed in your report assist you in reaching your conclusions, at least in part, about Mr. Idowu?

A Yes. All of those records are taken into

consideration when forming those opinions.

Q Since the time of this IME, have you performed an additional addendum to that report in order to consider additional records or information that were provided by the Department of Labor and Industries?

A Yes. There was an addendum dated April 29, 2021, that, at least in part, reviewed additional medical records.

Q And have you also reviewed additional records including reports and testimony from a Dr. Thomas Degan?

A Yes.

Q And just to be thorough, have all of the information that you have reviewed in regards to Mr. Idowu's medical history and treatment assisted you in reaching your conclusions and opinions regarding Mr. Idowu?

A Yes, they have.

Q Thank you.

If there is specific detail from these records or from your report or addendum that you don't recall on your own, will you be referring to these records to refresh your recollection here today?

A Yes. I would refer to them, as the original reports were almost two years ago, and as such, I want to make sure that any reference made to specific details as

accurate as possible, which would require me to refer back either to my IME or to the original records themselves.

Q Thank you, doctor.

And since we are appearing by telephone today and we are in front of a court reporter, I'll just ask you that you please let us know when you are referring to your records so that we know what you're looking at and we can look along and be on the same page with you, literally at times, so that we are all capable of knowing what you're referring to. Is that okay?

A Sure.

Q Thank you.

So based on your IME, what did you learn about Mr. Idowu's injury and what happened?

A Well, based on the IME report -- and I'm referencing page 2 of my full report, so that's the April 20, 2021, report -- he described how the injury occurred, that it occurred on November 28th, 2018, and that he described he was assaulted on the job and punched in his back or spine area -- he was not certain what type of object he was hit with -- and that following this incident, he noted tingling, pain and numbness in his spine as well as pain that he described as shooting up and down his spine as well as pain in both of his legs

and difficulty forward bending. He stated that the pain progressed over the ensuing few days and that his treatment consisted of physical therapy, one appointment of massage therapy, and at the time of the IME, he was not receiving ongoing treatment. Although, further physical therapy and massage therapy had been further recommended to him.

Q What were Mr. Idowu's symptoms at the time of your April 20th, 2021, examination?

A Well, as he reported to me, the symptoms -- and I'm referencing page 2 of my report again. As he described to me, he had pain in his mid and lower back that he rated seven out of 10. He also described pain radiating down both legs into the buttocks and down the legs. He reported no numbness and no tingling in either of his legs. He stated that with prolonged positioning or forward bending he would have an increase in his pain. His pain would also increase if he stood or sat for too long.

He reported no symptoms of bowel or bladder incontinence.

I asked him about his sitting tolerance, which varied day to day.

When asked about his standing tolerance, he stated he avoided standing in one place and that he could

walk to a maximum of between four and six blocks.

He further describes that he had pain that at times would shoot up his back and that he had difficulty doing abdominal crunches, bicycle exercises and weightlifting due to the pain in his back.

Q Thank you.

Did you learn anything significant about his past medical history that affected your review of the injury to his lower back?

A So this is referencing page 3 now of the report. He reported no significant past medical history as far as illnesses and conditions. He had his appendix removed in 2016.

He was not taking any regular medication. And he has no known medication allergies.

Further, he reported that he did not smoke cigarettes and did not drink alcohol.

Q Thank you.

In your review of records, what medical conditions do you understand to immediately result from Mr. Idowu's injury?

A So in answering this question, I'll limit my diagnoses to those within my scope of practice, so musculoskeletal conditions.

And he was diagnosed following an emergency

department evaluation on December 1st, 2018, with a lumbar contusion or bruising in the tissues around the lumbar spine. That was on the basis of the examination that he had as well as x-rays that were obtained. That was the primary diagnosis made in the medical records pertinent to the injury.

He had additional diagnoses that were made in a subsequent evaluation, including a diagnosis on December 18th, 2018, of back pain with sciatica. Sciatica referencing pain extending down the legs. And a subsequent MRI demonstrated degenerative changes in his lumbar spine.

Q In your opinion, what, if any, relationship did the degenerative changes in his lumbar spine have to his injury that he experienced at work?

A Nothing. Based on my review of the records, my physical examination, my opinion is that the degenerative changes are not related to the industrial injury for which I did the IME.

Q Thank you, doctor.

You mentioned a December 1st, 2018, emergency department report. And you mentioned additional records afterwards. Can you summarize your review of records from your IME on April 20th, what records you had reviewed and what they told you after that date and after

the date of December 1st, 2018?

A After that date of December 1st, 2018, there was an additional emergency report on December 18th, 2018, that we referenced before.

There was also a report from the Rehabilitation Institute of Washington regarding evaluation of the lower back and review of an MRI as well as a bone scan of the lumbar spine. At that evaluation, there seemed to be some consideration of whether or not there may have been a fracture in the spinous process. The spinous process is essentially a projection of bone extending backwards from the vertebrae themselves. And so that was evaluated in that July 27, 2020, report.

There were additional reports related to a work-conditioning program that were provided.

There's psychiatric reports included.

As well as an additional report of January 13, 2021, that is also following up on the back pain as well as this consideration of whether there was a spinous process fracture or not.

And that essentially concludes the medical records provided for the IME. There are additional physical therapy and chiropractic records provided as well.

Q Thank you, doctor.

As far as this examination, did you perform a physical examination of Mr. Idowu?

A Yes, I did. I performed the typical physical examination that I would perform for a thoracic or thoracolumbar injury or condition.

Q And rather than make you repeat every detail of this examination, can you summarize for us what you learned from your physical examination of Mr. Idowu in regards to his injury to his back?

A Yes. So from my examination, to summarize, there were some nonphysiologic or nonanatomic findings. Referencing page 5 of my report. This included the presence of Waddell's sign that's described in the second to last page. He exhibited reduced range of motion essentially in all planes of motion of his thoracolumbar spine.

Moving to page 6 of the report, there was a discrepancy in the straight leg raise test between a seated position and a supine position. In addition, with the straight leg test, he described an atypical sensation on that testing of the symptoms extending from his leg up to his back; where as what would be typical would be the reverse direction if there was radiation and pain.

There was a further nonanatomic finding that when a flexion, adduction, internal, rotation test was

performed -- that's essentially bending the hip and rotating it -- that he reported mid and lower back pain on both sides when I'm touching the sides. Typically, that test is for the hip joint. It is not, and typically would not, elicit pain in the back.

There was also some atypical subjective reports from the claimant with regard to the sensory examination, in particular -- this is roughly in the middle of the page on page 6 -- that on vibration sensation testing, which is performed with a tuning fork over the first toe, he reported a sensation of energy from the feet extending upward and as he described it, quoting him, "triggering" where he was hit in his back.

Also, when testing his quadricep strength -- so that's the muscle in the front of the thigh that is tested with resisting extension of the knee -- he reported discomfort in his mid low and lower back, which would not typically be reported.

And that really summarizes the pertinent findings of the examination. The remainder of the examination was essentially normal.

Q Thank you, doctor.

You mentioned a couple of terms that I wanted to get clear about.

You mentioned nonanatomical findings, and you

said there was some things that happened that would not be typical of the type of testing or the type of injury that you were looking at. Can you describe for us what you meant by "nonanatomic" and, perhaps, what impressions you got regarding Mr. Idowu's presentation from these findings?

A Yes.

So these nonanatomic findings, or nonphysiologic findings as they're also referred to, essentially reference findings on an examination that do not have a physical anatomic basis.

So, for example, the Waddell sign that I mentioned would include putting light compression on the top of the head and the examinee reporting discomfort or pain in the lower back. That would be considered a nonanatomic or nonphysiologic findings, because, essentially, irrespective of the condition in the lower back, unless it were an acute, right as you were examining, fracture or something extremely severe such as that, compression over the top of the head should not elicit any symptoms in the lower back.

Now, the reason why an individual may demonstrate nonanatomic findings can include several things. It does not provide a specific diagnosis apart from saying that the symptoms that are being noted or

reported cannot be attributed to a physical abnormality in the lower back. The presence of one of these would not necessarily have any significance.

However, when there are multiple ones, such as the presence of all of the Waddell signs, as is the case in the instance, as well as the discrepancies in seated and supine straight leg raising and the unusual reports on the sensory examination with the vibration testing, all put together indicate that a lot of this -- that these symptoms do not have a specific cause in the lower back, and so other potential causes for the report of those symptoms become pertinent.

Q Thank you, doctor.

Can you explain for us your diagnostic conclusions and opinions regarding Mr. Idowu's physical condition after you reviewed records and performed this physical examination?

A Yes.

So the diagnosis related to the claim is a low-back contusion, which per the cover letter provided to me for the IME, was indicated to already be accepted under the claim.

I also in the discussion -- this is now the top of page 7 -- reference the imaging studies consisting of MRIs of the thoracic and lumbar spine and the bone scan.

Specifically with regard to the question raised in some of the clinical reports of whether or not there was a spinous process fracture or not and based on review of the imaging reports, my conclusion was that there was no objective medical evidence that the -- that the fracture had occurred.

Q Thank you.

Were you asked to answer specific questions as a part of this examination?

A Yes.

I was asked to provide an opinion on newly contended conditions as well as his ability to work. I was provided the job analysis with the treatment recommendations as well as whether or not he was at maximum medical improvement and, if so, to provide an impairment rating.

Q In regard to the question about newly contended conditions, what was your response?

A Well, there were three newly contended conditions listed. One was the fracture of spinous process of thoracic vertebra with nonunion at T12, referencing the 12th thoracic vertebra. Another was mild disk bulge. And the third was PTSD, the acronym for posttraumatic stress disorder.

My responses -- or my opinions regarding these

conditions are on page 8 of my report.

The newly contended condition of PTSD is deferred to a psychiatric IME, because it is outside my scope of practice.

Regarding the possible fracture of the spinous process at T12, my opinion is that there is no objective medical evidence that this fracture existed. The imaging studies did not demonstrate the fracture. There was an ultrasound, which per the clinic report, was said to show a mildly displaced fracture. However, as I outlined in my response to this question, ultrasound is really not the ideal modality for diagnosing a fracture and that MRIs and bone scans are better modalities.

Then with the additional newly contended condition of a mild disk bulge, in my opinion the mechanism of injury would not be consistent with developing a disk bulge. Disk bulges are really not going to occur from a direct impact or direct blow to the back of the spine, as the claimant had described to me was how the injury occurred.

Q Thank you, doctor.

In regards to future treatment, moving forward from the date of April 20th, 2021, did you have any recommendations for treatment for Mr. Idowu?

A Yes.

So this is referenced on page 9 of the IME report. And my opinion as it relates to the accepted conditions provided to me on the cover letter, specifically of the low back contusion, that there was no objective medical basis for recommending further treatment related to the claim.

Q Were you asked about permanent partial disability related to the injury that Mr. Idowu experienced?

A Yes, I was. And my opinion on that is on page 11 of the report, and this references.

Q What was --

A Go ahead.

Q I'm sorry. I cut you off.

I was going to ask you, what was your opinion?

A So my opinion using what is the standard impairment rating system for lumbar conditions, referencing the categories of permanent lumbar impairment outlined in WAC 296-20-280, was that his examination and all of the available information more closely fits what is termed a Category 1 impairment.

Q Thank you.

Were you asked to -- we talked about this before. So I'm sorry if I'm making you repeat yourself. Were you asked to prepare an addendum to this report?

A Yeah. That was prepared on April 29, 2021, to review additional medical records that were not available at the time of the original IME.

Q Can you describe for us in brief the additional records you reviewed and what you learned from those?

A Yes.

So the most pertinent records are the MRI to the lumbar and thoracic spine on April 9, 2019. The thoracic spine report demonstrated no report of any fractures or nonunions. The lumbar spine MRI demonstrated that there was a mild or minimal disk bulge at the L5-S1 level that made contact with the nerve roots running adjacent to that level. It also reported mild/minimal other degenerative changes or narrowing around under the nerve root that are exiting the spinal canal at the L5-S1 as well as the L4-L5 levels on both sides of the spine.

The other reports provided were clinical reports regarding ongoing management of back pain, and those continued through March of 2019.

Q Did the review of additional records you were provided for the April 29th, 2021, addendum change any of your opinions regarding either newly contended conditions or the injury that Mr. Idowu experienced?

A No. As stated on page 3 of the addendum

report, none of the opinions from the time of the original IME report related to the claim were changed or altered in any way as a result of the additional medical records.

Q Thank you.

In preparation for this deposition, did you review a report or testimony from Dr. Thomas Degan?

A Yes, I did.

Q Based on your report of those -- that information, did you understand whether Dr. Degan had seen Mr. Idowu or merely done a records review?

A As stated on his report, his being Dr. Degan's report, he performed a records review alone. And I'm referencing his report of December 2nd, 2022.

Q What is the importance, if any, in your opinion of performing the physical examination in forming opinions about a worker's physical condition following the type of injury that Mr. Idowu experienced?

A Well, I think it's -- in order to provide as comprehensive and thorough an opinion as possible, a physical examination is a very important component of that. Without the physical examination, there's really no direct knowledge that the person preparing the report can include. They're relying entirely on the medical record, and so that, in part, is a limitation to the

opinions they can provide, because they have not had an opportunity to specifically examine the person.

In addition, by the nature of a record review, all of the information is from the past, and they would not have any current information at the time that their report is prepared.

Q I'm going to ask you some questions regarding Dr. Degan's appearance in this matter.

Assuming for the sake of this question that Dr. Degan testified that his report included a rating for Mr. Idowu as Cat 2 -- sorry -- Category 2 of lumbar -- permanent partial disability for both the lumbar and lumbosacral impairment. Would you agree with that rating?

A No, I don't agree with it. The rating I provided was a Category 1 impairment which was on the basis of my own physical examination, and best I can determine, Dr. Degan's opinion of a Category 2 rating is based on review of the medical records, presumably including my IME. Although, I do not know that for certain.

In order for a Category 2 impairment to be provided, there needs to be objective evidence of abnormal findings that are related to the claim, and in my opinion, based on the accepted conditions of the claim

under the claim as well as the nature of the physical examination that I performed and we summarized already, there were insufficient objective abnormal findings that are attributable to the lower-back condition accepted under the claim to warrant anything higher than a Category 1 impairment.

Q Thank you, doctor.

Assume for the sake of this question that Dr. Degan testified that, quote, "I felt that he had mild to intermittent objective findings in that he had consistent tenderness in the lower lumbar area from examiner to examiner and that over a period of time I think -- I certainly felt that it can be characterized as an objective finding", end quote.

Assuming that statement was made, what is your opinion of that rationale?

A I completely disagree with it.

The part I do agree with is the presence of tenderness, which I noted in my report as well and we summarized already. However, tenderness is not an objective finding, and even if a person consistently repeatedly over time reports that same objective finding, it does not make it an objective finding.

Objective finding, as it relates to a lumbar condition, would include things, such as motor weakness

on examination. It would include findings on imaging studies that are attributable to the claim to the injury that we're evaluating. Even range of motion, while we measure it, is not a wholly objective finding, because we really have little to no way of knowing whether a given individual exerts full effort when we ask them to perform the range of motion tests that we then measure.

So in my opinion, the fact that an individual, as may be the case in this situation, consistently and repeatedly reports the same symptoms or there's the same objective finding on examination may very well be true. However, that is not objective evidence that would be considered within an impairment rating.

Q Thanks for that opinion, doctor.

I'm going to ask you one more question about Dr. Degan's testimony.

Assuming that Dr. Degan testified that Mr. Idowu had an intermittent spasm and that he had ongoing findings over periods of time with different examiners of this spasm that would indicate to him that there was something that he would feel would be objective, would you agree with that rationale?

A Again, not -- I would not agree with it for similar reasons. A report of intermittent muscle tightness or muscle spasms is not an objective finding.

That is a subjective symptom reported by, in this instance, a claimant.

I would also note that on my examination I did not note any muscle tightness or muscle spasm when I examined and palpated over the spine.

And so, again, for the exact same rationale as we talked about with regard to the tenderness in the lower back, while it may be the case that there are over time consistent reports of intermittent tightness and muscle spasms in the lower back, the consistency of those reports does not make that subjective complaint an objective finding.

Q Thank you, doctor.

Unfortunately, we have learned that Mr. Idowu passed away in late 2022. In your medical opinion and -- based on your review of records, your examination and your review of additional information and the testimony of Dr. Degan, in your medical opinion, could Mr. Idowu have progressed to a Category 2 permanent partial impairment rating of his lower back between the date of your report and his untimely passing in the end of 2022?

A No, in my opinion, he would not. And the rationale for that is multifold.

Firstly, the impairment rating is to be provided on the basis of the accepted conditions under

the claim, which, as we've talked about, in this situation is a lower back contusion. By definition, that would not progress over time and certainly not following my examination of April 20, 2021, which was already over two years following the date of injury in 2018. And so even if there had been a change in examination and even if that had provided objective abnormal findings, given the timeframe of when that would have been noted and the accepted conditions under the claim, that would not be factored into the impairment rating, because it would not be related to the claim, because it would have occurred over two years following the injury and following the physical examination that was part of my IME that documented no objective abnormal findings.

Q Thank you, doctor. I appreciate you taking the time to answer my questions.

My final question, of course, is, Have all of the opinions you expressed today been made on a more-probable-than-not basis?

A Yes, they have.

MR. DUGGAN: Thank you, doctor. I'm sure Mr. Parr has follow-up questions for you, and I might have some after that, but I appreciate you answering my questions so far.

And, Mr. Parr, the floor is yours.

MR. PARR: Thank you.

CROSS-EXAMINATION

BY MR. PARR:

Q Doctor, are you able to hear me okay?

A Yes, I can.

Q I represent Mr. Idowu and the estate, which consists of his mother.

My question to you is, Are you aware of how Mr. Idowu died?

A No, I'm not.

Q Are you aware of how Mr. Idowu lived after you conducted your April 20th, 2021, IME exam?

A No, I'm not.

Q Are you aware of whether or not Mr. Idowu was ever able to return to work successfully?

A I have no independent knowledge of that, of whether he was able to or not.

Q Were you ever provided any vocational analysis with respect to what skills he did or did not have or what employability he did or did not have based on vocational standards that might be considered in that type of an analysis?

MR. DUGGAN: I'm going to object to --

THE DEPONENT: I was provided a job analysis, if that's what you're referring to.

BY MR. PARR:

Q I'm asking: Did you have any analysis of Mr. Idowu, not his prior job of injury, but of Mr. Idowu and whether or not when displaced from his job by the job of -- displaced from the job of injury by the industrial injury that we're discussing, did he have sufficient transferable skills and capacity and labor market availability to go get a different job?

MR. DUGGAN: Same objection.

MR. PARR: I was not provided with that information, to the best of my knowledge, and it's far outside my area of medical expertise to assess that.

BY MR. PARR:

Q Doctor, with respect to your work as an independent medical examiner, do you take referrals from injured worker attorneys?

A I would take referrals from anybody that was requesting an IME.

Q Okay. And so you split hairs there. And so let me just state, I'm not asking would you; I'm asking do you.

Are you in the practice? Does the market reach out to you and ask you to do independent medical exams for injured workers?

A Well, I do all of my IMEs through a panel

company, and so whoever's requesting an IME would reach out to them; and then it's scheduled. So I can't answer your question. I don't know if injured workers' attorneys reach out requesting IMEs or not.

Q I see.

You're not aware of whether or not the IME panel company for whom you conducted the exam works exclusively for one side or the other, are you?

A I'm not familiar with their business practices, no. I provide examinations that are scheduled for me. I perform examinations that are scheduled through that company.

Q When is the last time an injured worker's attorney asked you to provide deposition testimony on their behalf at the Board of Industrial Insurance Appeals?

A I'm not aware of any --

MR. DUGGAN: Objection.

THE DEPONENT: -- time that that's occurred.

BY MR. PARR:

Q And so, doctor, with respect to independent medical examinations that are conducted by these panel companies, would you agree with me that those are generally performed in order to contrast with information that is being provided by treating physicians and

sources?

A No, I would not agree with that. They are performed -- they being the IMEs -- to perform an independent opinion regarding the, in part, medical treatment of injured workers' conditions.

Q Okay. And so is it your understanding that when an IME company is asked to arrange for an IME examination, such as the one that you performed, that the IME provider should give the most conservative opinion that's plausible?

A I'm not sure what you mean by a conservative opinion. I provide an independent and as objective as possible medical opinion.

Q Okay. And so there it is --

A I don't consider those conservative or not conservative. I don't think that's an appropriate describer.

Q Okay. And so maybe we should substitute the verbiage "beneficial to the injured worker" versus "beneficial to the employer or defense interests" for that.

Is it your understanding that the independent medical examiner process is generally there for the benefit of those defense interests?

A No, that's not my understanding at all.

Q Okay. How long have you been doing IME exams, doctor?

A Almost five years.

Q And in almost five years, you've never been asked to testify on behalf of an injured worker, correct?

A Not that I can recall, no.

Q How many IME exams do you do?

A Typically, on average, 15 to 20 per week.

Q Okay. And so safe to say, if it's 15 to 20 per week, you could have done thousands of exams while not being asked to testify on behalf of an injured worker, correct?

A That's correct.

Q And so doesn't it appear that your own particular exams are likely very differential to employer interests if no injured worker's attorney is ever asking you to stand up in court for the injured worker?

MR. DUGGAN: Objection --

THE DEPONENT: No.

MR. DUGGAN: -- calls for --

THE DEPONENT: I don't see how you would -- that's a --

MR. DUGGAN: -- speculation, more prejudicial than probative.

THE DEPONENT: That's a completely illogical

conclusion to draw. I've had numerous IMEs, as recently as yesterday, in which I have given recommendations that you would view as favorable to the worker in the sense that I'm recommending further treatment or further diagnostics to better evaluate their condition. The fact that I may not have been asked -- as I'm sure is the case for most IME examiners -- to testify on behalf of the worker does not provide any evidence to draw the conclusion that there's a biased opinion being given.

BY MR. PARR:

Q Okay. Do you have hospital admitting privileges, doctor?

A Not presently.

Q Okay. So you're an orthopedic surgeon with no hospital admitting privileges; is that correct?

A Yes.

As I described before, I have my own practice in which I provide consultation, concierge care and further opinions in the management of orthopedic conditions.

Q Okay. So if you don't have hospital admitting privileges, does that mean that you don't do surgery presently?

A That's correct.

Q Okay. How long has it been since you had

hospital privileges, doctor?

A Since 2018.

Q And is it the case that you stopped working as an orthopedic surgeon that does orthopedic surgery because you wanted to concentrate on concierge care, or was there any other additional consideration?

A I wanted to change my scope and focus of practice to what I'm currently doing as far as providing the type of care that I provide to patients.

Q There was no other consideration at all, doctor?

A I don't know what you're referring to.

Q Well, it's a yes-or-no question, doctor.

A And I answered your question. I don't know what you're referring to.

Q Okay. Yes or no, was there any other concern or consideration in your mind for why you, trained as an orthopedic surgeon, moved away from active orthopedic surgical practice?

A I did that --

MR. DUGGAN: Objection; more prejudicial than probative.

THE DEPONENT: I did that so that I could pursue the type of work I am currently doing.

BY MR. PARR:

Q Okay. So let's talk about what percentage of your practice is IME practices for defense interests, all those panel companies and everything else, versus how much you actually provide in terms of services on a concierge basis. Could you break that down by percentage approximately, please?

A Approximately 80 to 85 percent of my time or work is in the realm of medical-legal work. The remainder is in my concierge care/consultation practice.

Q Okay. And so just tell us how much money you make as an average, just a range, to provide medical-legal work in a given year.

MR. DUGGAN: I'm going to --

THE DEPONENT: I don't --

MR. DUGGAN: -- object to relevance. I'm going to object as more prejudicial than probative. And I'll put on the record that the continued efforts to malign the type of practice or scope of practice of Dr. Davidson's work is not relevant to whether or not -- his rating and whether or not Mr. Idowu's lower back rating was either accurate or warranted.

BY MR. PARR:

Q Go ahead, doctor. We have a right to this information.

A I don't have my financial records in front of me to answer your questions.

Q Okay.

A And it has no relevance on my opinions in this case, so.

Q Doctor, it's for a finder of fact to determine what the relevance is. And we find people who are making a significant amount of money to travel around and do IME exams for defense interests, and a jury may care about. So please don't assume what is relevant and what is not relevant. Please just answer the question.

What is an expectation that you have for a yearly financial revenue stream based on the five years you've worked to perform the IME examinations that you perform for medical-legal purposes including testimony fees?

A So I get paid $350 per IME. I don't, for purposes of planning, consider testimony, because I have no idea how to predict that, because it is highly variable.

And so on the basis of IME -- the IMEs themselves, on average, I said about 15 to 20 per week, and, typically, I would perform these approximately 48 or so weeks per year, and that can be multiplied out to the number of exams and multiplied out by $350 for each exam

to give you a rough estimate. I don't have a calculator with me, so I can't make that calculation for you. But that's what it is.

Q So just the examination process is somewhere between a quarter of a million and 336, so 252,000 at 15 per week, times 48 weeks versus 336,000 for 20 times 48 weeks. So somewhere in that range is about what you get just for setting up the exams, doing the examination portions, correct?

A If you've done the calculation --

MR. DUGGAN: Objection; calls for --

THE DEPONENT: -- correctly, then yeah.

MR. DUGGAN: I'll object --

BY MR. PARR:

Q Okay.

MR. DUGGAN: -- calls for speculation; more prejudicial than probative and relevance. Also move to strike the answers to any questions that I've previously objected to the relevance of or previously objected.

Thank you.

BY MR. PARR:

Q Correct me if I'm wrong, doctor. You also get paid when you review additional medical records and you do addendum -- or addenda?

A Yeah -- yes.

Q And you also --

A I get paid for my time, just as you do. I get paid for my time, just as you do.

Q So you're contingent?

A Contingent on what?

Q On the position being correct.

A I'm not following your question. You haven't really asked a question. Contingent on what position and what's being correct?

Q I guess what I'm saying is, I'm a lawyer. It's expected that I will get paid but only if my client's position prevails.

Do you get paid -- you said you got paid just exactly as I do. Are you paid --

A No, I didn't. I said I'm paid for my time, just as you do. You are mischaracterizing what I'm saying.

I get paid for my time, just as you and all professionals get paid for their time. Yes, I get paid to do addenda, I get paid to review records, I get paid to do examinations, just as any professional would be expected to be reimbursed for the time they spend working within their area of specialty.

Q And you get paid for testimony, correct?

A Yes. I don't get paid on the basis of outcome.

I don't get paid on the basis of whether or not the person requesting the IME likes or agrees with my opinion. I get paid for my time.

Q Do you know what the charge is for your time giving testimony, doctor?

A No. That's through the panel company. So I don't know what -- what that currently is.

Q Do you know what your current percentage or dollar amount per hour of testimony is?

A I don't know that offhand, no.

Q Okay. So does it change radically over time, or have you just not paid attention to that aspect in the last five years that you've been doing this?

How do we understand -- you must know what you make.

A Well, I think that testimony fees recently went up as of the beginning of this year. But you asked me if I know what the amount per hour is, and I do not. That is --

Q Okay. What -- what was the --

A That is all done --

Q What went up --

A Can I finish, please?

That is all done through the panel company. And what I am reimbursed for testimony is highly variable

depending upon the amount of time that is spent on that case. So I don't know what the hourly rate is, because all I would see is a final amount, which, as I said before, is dependent upon the amount of time spent, just as any professional would be expected to reasonably receive payment for time spent providing services related to their area of expertise.

Q So let me just ask this: True or false, your medical-legal work brings you somewhere between -- when considering all aspects -- exams, addenda, review of medical records, testimony, everything that may be involved in medical-legal work -- brings you a salary that is somewhere between a half million dollars to $2 million a year; is that correct?

A Not -- not even close.

MR. DUGGAN: Object to relevance. Object to more prejudicial than probative. Move to strike.

THE DEPONENT: I've never made over a half a million dollars a year in my life.

BY MR. PARR:

Q Okay. So the defense isn't asking you to defend your opinions in court very often either. Is that what we understand?

A As I answered before, I cannot recall a time where an injured worker's attorney asked me to testify,

no.

Q No.

What I'm asking is: Do the insurance interests ask you to stand up in court frequently or infrequently to defend all these opinions you give?

A I -- well, if there's a distinction between depositions and testimony in court. I'm not clear on your question, I guess, if there's a distinction.

But I am asked to do depositions. There's been instances in which testimony has been scheduled, but then cases, I guess, settle, because it then gets canceled.

Q Okay. How many depositions per month or year do you do, please?

A It's highly variable. On average, I would say, it wouldn't be more than one to two per month.

Q Tell me this: With respect to the locations where you do your IME exams, is that variable, or do you limit yourself to just something that's next to your house?

A They're all within the Puget Sound area.

Q Okay. So about how many locations do you travel around to obtain this work?

A One...

MR. DUGGAN: Same objection. Same objection.

THE DEPONENT: Five or six, roughly.

BY MR. PARR:

Q Okay. And with respect to your experience in concierge care, that means that the people that you see as a concierge doctor are there simply for noninsurance-reimbursed services, correct?

A It's self-pay, if that's what you mean, yes.

Q Okay. Just to be clear.

Doctor, with respect to the exam you did, you'll agree with me that's pretty -- pretty darn close to two and a half years after the initial injury, correct?

A Yes.

Q Now, counsel was trying to obtain your testimony that you're somehow familiar with the standards that apply to Industrial Insurance Act cases. Is that true or false?

A I am familiar with them, yeah.

Q Okay. So if you're familiar with that, then are you aware of the Court of Appeals' precedential decision saying that if care is provided for a given condition it is therefore accepted under the claim? Are you aware of that rule?

A I've heard of that.

MR. DUGGAN: Objection; calls for legal conclusion.

BY MR. PARR:

Q Okay. And so just looking at the records -- because you were saying that you would only look at what you were told was an accepted condition under the claim -- you recognize that there are conditions that were being treated under this claim for two and a half years that go beyond the notion of, Here's a contusion, correct, doctor?

A Your question, yet again, is very confusing.

I did not say that I do not look at conditions outside of what's accepted under the claim. I said that my opinions have to be confined to that, that that's -- you know, when I'm given an accepted condition that that's what I have to base my opinions on -- treatment recommendations and impairments and things of that sort on. So if he was provided with --

Q So you don't --

A If he was provided with other treatments over the course of, you know, the time following the injury, I'm not providing an opinion on that. I'm not -- that's not my purpose.

Q Right.

And so the purpose here is to describe what limitations result from a contusion if we assume that all of the care that was provided for two and a half years

isn't what we're looking at and instead we're only looking at the, quote/unquote, condition of contusion, correct?

A That's what I'm asked to limit my opinions to, yes.

Q Okay. So when you're asked to limit your opinion to something that's not comprehensive to what the record actually shows and then you do so, would you regard that as an opinion that was fair to the injured worker?

A My opinions --

MR. DUGGAN: Objection --

THE DEPONENT: -- in this matter --

MR. DUGGAN: -- calls for speculation.

THE DEPONENT: My opinions in this matter are as objective as humanly possible. The fact --

BY MR. PARR: --

Q Okay.

A -- that you may not like them --

Hold on.

The fact that you may not like them or you may not agree with them, I understand is your job, but that doesn't change the independence or objectivity with which I have provided my opinion.

If he received treatment for other conditions

over the course of the time since the injuries, I'm not asked to provide an opinion on that. I'm asked to provide opinions as it pertains to the industrial condition, in this case what is provided to me as accepted conditions.

BY MR. PARR:

Q Okay. So you appear to understand my job, which is to advocate for the injured worker. And you're saying that your job is to limit your opinion and perspective to only what you've told may be accepted under the claim, correct?

A No. Again, you have a wonderful way of not listening to what I'm saying. I am to provide as objective an opinion as humanly possible with regard to the claim, the condition and the questions I am asked by the claims manager via the cover letter, and as it relates to things like treatment recommendations, MMI status and impairment, that is with respect to the industrial conditions and those are that accepted under the claim.

Q Okay. So now you're splitting a hair. You're saying industrial conditions and those that are accepted, but I've heard you no less than three times say that your opinion is limited to the accepted conditions. And that's, in fact, how your report reads, isn't it? Your

analysis is based --

A Well, it is.

Q -- only on what you were told was the accepted condition by the Department of Labor and Industries, i.e., contusion, correct?

A Yes. That's how I am supposed to conduct my job in this capacity.

Q Okay. So let me ask you this: You get a case, you're told somebody has a contusion. The cover letter says, Hey, this is a contusion. I know we're asking you two and a half years later to review all of these interim medical records, but it's a contusion. That's the case you get. That's how the letter comes. You understand your role as an IME physician to be just exactly as you've just described it. What are you thinking in your mind is the meaning of the word "contusion"? How do you define that word, doctor?

A Well, the typical term for a contusion is a medical term and it relates to a bruise, and that could be at the skin level, it could be within the muscle. I'm very clear on what a contusion is given extensive training and medical practice.

Q I appreciate that, doctor.

My point being, if you get a medical record where there's been ongoing treatment for two and a half

years and the Department's claims manager said it's a bruise, how plausible is that in your mind that that's all that's happened in this case?

A Well, it depends on the details.

In this case, I am in complete agreement that the industrial condition is as what is the accepted condition of a contusion.

Now, that's not always the case.

And the fact that there may have been treatment for two and a half years from the time of injury to the time of my IME does not change what I -- based on the available information provide an opinion as to what the conditions are. The fact he had long treatment doesn't change what injuries on a more-probable-than-not basis are likely to have resulted from the mechanism of injury and given all of the information available for review.

Q Okay. So, doctor, answer me this: When's the last bruise that you had that you still had a bruise two and a half years later?

A Well, I haven't. But that's irrelevant to this discussion.

Q Doctor, with all of this --

MR. DUGGAN: Object to relevance and --

I'm sorry. I've got to interject. I'm going to object to relevance and move to strike.

BY MR. PARR:

Q With all of this medical evidence -- or education and training that you've got, doctor, that led you up to involvement in this case, how often would you say in your experience you see a person with no underlying blood or metabolic condition that has a bruise that lasts for two and a half years?

A Well, a bruise wouldn't last for two and a half years. But, again, you're confounding the idea that duration of the treatment reflects the injury that on a more-probable-than-not basis resulted from this injury.

Q Okay. So now that we've established that a bruise doesn't -- can't be expected to last two and a half years, if you're sent a cover letter that says that's what the condition is, when you go into your exam isn't it your automatic bias that there's nothing here to see?

A Not at all.

Q Okay. So let's clarify. How long would you expect a bruise in a young individual this gentleman's age that doesn't have any known underlying conditions that would prolong his experience of a bruise, how long would you expect a bruise to last for a young man like this?

A Well, it depends on the nature of it. But no

more than a matter of weeks to maybe a month or two.

Q Okay. All right. And you agree the claim was still open when you saw him. You're still doing claim analysis two and a half years later, right?

A Yes.

Q Okay. And you said that there's no correlation between the medical services that all the other doctors and providers will provide and what is related to an industrial injury; is that correct?

A No, I don't agree with that. I mean, correlation does not imply causation. You're confusing terms again, so.

Q Okay. I'm confused. We can accept that.

What I want to know is, am I confused -- this man didn't have a preexisting history of extensive back treatments before he got assaulted at work, did he?

A I don't believe --

MR. DUGGAN: Objection; calls for speculation, outside the scope of direct.

THE DEPONENT: I don't believe that he did, and as per page 2 of my report, at the time of the IME he told me he did not have treatment for his back before -- before the date of the injury.

BY MR. PARR:

Q So I understand, there's no evidence anywhere

of which you are aware that he had ever had a back problem prior to being assaulted and struck in the back at work; is that right?

A As far as I'm aware, that's correct.

Q And so because we have no evidence of any other back problem before he was assaulted and struck at work, we understand that there is likely no prior medical records regarding anything having to do with his back, and in any event, you haven't been presented any preexisting evidence or records showing any complaints with his back, right?

A That's correct.

Q Okay. So now he's assaulted at work, and your opinion is that the manner of being assaulted is only consistent with suffering a bruise and no injury beyond that, because you haven't made a diagnosis of that. Am I correct?

A That's correct, including the fact that there's no imaging evidence of any other injury. So there is no evidence -- it's not just my opinion. There's no objective evidence of other injuries that could be attributed to the mechanism of injury. The degenerative changes in the lumbar spine would not be caused by that injury.

Q Okay. And you fully recognize that that's not

actually how our workers' compensation scheme works, right?

You would have taken --

MR. DUGGAN: Objection; calls for speculation, medical conclusion.

BY MR. PARR:

Q You would have taken training in order to qualify as an IME examiner that a preexisting, nonsymptomatic, latent physical infirmity or condition is still allowed and accepted under a claim if it causes a need for additional medical treatment and symptoms or disability that later occur related to the injury, correct?

A I'm aware of the lighting up and aggravation to preexisting conditions laws.

However, I'm not asked to provide an administrative or a legal opinion. I'm asked to provide a medical opinion, and there is not a medical textbook that I can look up the concept of lighting up or aggravation of preexisting condition. And so I provide a medical opinion.

Yes, I am aware of those laws. But those are legal interpretations and administrative interpretations, and I am asked about my medical opinion. So I'm providing --

Q Thank you.

A -- a medical opinion.

Q So it is your testimony here today that you're aware of a schism between what the law allows any injured worker to prove and what your understanding of medical science provides. Is that your testimony?

A No. My testimony is that I am providing a medical opinion. I am aware of the administrative and legal aspects, but I am not an administrative or legal expert. Hence, I cannot provide legal and administrative opinions. I can provide medical opinions. That is my training. That is my area of expertise.

Q Okay. So as a medical expert, you would confirm to me that if somebody has a preexisting -- preexisting, which means it happens before an event -- latent, meaning we don't really know about it -- nonsymptomatic, saying the person isn't complaining about it. If somebody has a preexisting, latent, nonsymptomatic condition, such as degenerative disk disease, and they've never had a problem before, a person can get injured, and the underlying preexisting latent nonsymptomatic condition can suddenly become symptomatic. You would agree with that as a medical expert, wouldn't you?

A Well, again, you're confusing correlation and

causation. So I understand where you're going with this, but you are incorrect. The mere existence of symptoms following an event that may not have been present prior to the event does not mean the event caused those symptoms. And, in fact, as we fully understand from a study, I believe almost 20 years ago, by Jarvik, et al, in the lumbar spine there are many incidental asymptomatic findings, meaning findings of disk bulge and areas of stenosis that are present in MRI that are in asymptomatic individuals.

Q Doctor, I can quote Jarvik. I can quote cadaveric studies. I do this. I don't need to be challenged on where I'm going. I'm asking you only questions that are based in the science.

We can all agree that there can be incidental findings on MRI and incidental, you know, notations or diagnoses that have no relation to a specific thing previous, correct?

A Yes.

Q Okay. Now, the correlation versus causation argument that you just put forward, why don't you tell us -- and at this point, I'm gesturing to the jury that this testimony may come before. Why don't you tell us all what is it that caused the symptoms that drove Mr. Idowu to get all of the physical therapy, the

massage, the treatment by different specialists, the examinations by MRI, et cetera, including ultrasound, bone scan, what is it that caused all of this cascade of medical treatment for two and a half years if not the industrial injury?

A Well, there's many factors that may have caused it. It's very well-known that people can have physical symptoms from mental health conditions. So that's a possibility. Given the nature of his injury and the contended conditions of PTSD, it's entirely possible that his lower back symptoms are a physical manifestation of PTSD. That's possible.

It's possible that he had symptoms before this but never reported them.

It's possible that he was seeking treatment for other reasons.

But based on the available objective medical information taking into account the mechanism of injury, the imaging studies, the physical examination findings, I cannot tell you on a more-probable-than-not basis that all that treatment was the result of this specific injury as it pertains to a physical injury to his lower back.

Q Okay.

A And more-probable-than-not basis is the threshold that I am asked to use.

Q Okay.

A So while anything may be possible, it is not more-probable-than-not. It is not more-probable-than-not that all of that treatment was the result of this injury. There is insufficient objective medical evidence to attribute all of that treatment to this injury to his lower back.

Q Doctor, during your testimony, you keep defining what you think you're supposed to do and what you think the standard is, but the standard that the law provides is that credible medical evidence indicates that something is more probable than not. Credible medical evidence, including facts and circumstances, such as when somebody comes and they have consistent pain complaints, consistent findings on exam or within a reasonable -- a medically reasonable range, that can be sufficient objective indication of an ongoing condition.

Do you disagree with that?

A In my medical opinion, subjective complaints do not equate with objective findings.

Q Okay. So in medicine --

Forgive me. I'm a "noctor", meaning a not doctor, but I've been doing this for a while. In medicine -- maybe you'll confirm for me -- medical professionals, medical experts refer to subjective

complaints as the fifth vital sign; is that not correct?

A Some may.

Q Okay.

A Not everyone does. I think we --

Q And there's --

A Can I finish my answer?

Q Please, doctor.

A We're all trained to listen to -- and I do as well -- the symptoms described by patients, but our job is not simply to listen to that and not interpret that in the context of all the other information. If all we were to do is treat the symptoms that somebody comes forward with, we would not always be providing the best medical care, because sometimes the symptoms are reflective of something else going on rather than what may be apparent based on the symptoms themselves, hence, the whole reason why we have extensive training and all this.

So, yes, symptoms are important. Yes, they are taken seriously. Yes, I listen to them. I consider them, and I have to interpret them within the larger context of all of the other information.

Q Okay. But you said, Look, this guy can't have credible complaints because you thought that anything more than a contusion was beyond the industrial injury mechanism that was sustained. Is that a fair and

accurate assessment of your opinion?

A Completely wrong again. I did not say that it's not credible. I believe that he experiences pain.

I'm saying that it cannot be attributed to the lower back condition, to the lower back injury. As I postulated earlier, it's possible -- I'm not a psychiatrist or a mental health expert, but I do have a sufficient working knowledge to understand that in some instances, which may or may not exist in this specific instance, but for many individuals, mental health, including PTSD and others, can manifest as physical symptoms, including lower back pain.

So I did not ever say that his pain was not credible. I did not ever say it was not repeatedly and consistently reported. I believe that is all the case.

What I'm saying is that those pain complaints cannot be attributed to a physical condition in his lower back.

Q Okay. I appreciate that, doctor.

But you don't deny that when the advanced imagery was provided in the form of an MRI it showed some conditions in both his lumbar and his thoracolumbar spine that may be suspicious for causing pain, in other words, being provocative, correct?

A Incorrect. So the thoracic spine report of

April 9, 2019, didn't demonstrate any significant findings. The lumbar spine MRI report, also of April 9, 2019, did demonstrate what are best summarized as degenerative changes primarily at the L4-5 and L5-S1 levels.

Q Okay.

A They're also best characterized as being mild.

Q Okay. So you had an MRI. And you wrote in your report on page 4 a quotation. You said something in quotation marks on page 4 summarizing what you understood to be indicated by the radiology for the MRI; is that not correct?

A Sorry. Which page 4 are you talking about? The addendum or the original report?

Q The original report when you didn't have any medical imagery to review, you just had what was included in other people's reports.

A Right.

So that quote, I believe what you're referring to, is, quoting, "There may be spinous process fractures at T11, T12 and L1 versus artifacts."

Q Okay.

A That's a quote from the clinician provided in this July 27, 2020, report. It's not the MRI report itself.

Q I see. Okay.

And so let me ask you this with respect to MRIs: MRIs have specificity and sensitivity limitations, do they not?

A All diagnostic studies do, yes.

Q Okay. And I'd like you to turn to our jury that this record may be referred to and explain very clearly what the limitations in specificity and sensitivity refer to in every study. When we're looking at those two concepts what do those mean, please, doctor?

MR. DUGGAN: I'm going to object to relevance, outside the scope of direct, more prejudicial than probative. And move to strike the answer that follows.

THE DEPONENT: The highly sensitive study would essentially be a type of diagnostic study that would pick up a whole bunch of diagnoses even if they were not actually present. A more specific study is the opposite, that it would only show a diagnosis if it was present.

BY MR. PARR:

Q Okay. And an MRI, you will agree with me, while being advanced, may differ in terms of how many teslas, in other words, the power, in terms of the programming of how we ping the water molecules that have been aligned magnetically. There's differences in studies, and different studies have different qualities,

although we might refer to them all as an MRI; is that right?

A Yes.

MR. DUGGAN: Same objections and motion.

BY MR. PARR:

Q And you would agree with me that an orthopedic surgeon will have incidents where, boy, on an MRI, it looks like there's a torn ligament, and you go in and you can visualize it yourself while doing a surgery and there's no torn ligament; the MRI's just a false positive for a torn ligament diagnosis. Correct?

A Well, again --

MR. DUGGAN: Same objections. Also calls for speculation.

THE DEPONENT: I mean, there's so many ligaments, there are -- one, nobody would do a surgery for a torn ligament without a physical examination that you would expect to be consistent with your MRI findings. So your scenario is just very hypothetical and not even really realistic.

BY MR. PARR:

Q Yeah.

Doctor, I work in the area where we have conflicts in medical. Okay?

And I've litigated this for the last 20 years.

So please confirm for me that, in fact, there's plenty of times where you'll see an orthopedic surgeon who thinks there's a rotator cuff tear and ligament tear involvement in that whole process, clinical exam says, Hey, let's go do this, and then they get inside and they say, Hey, this isn't torn like we thought it was based on every indication previously. That happens, doesn't it?

MR. DUGGAN: Same objection and motion.

THE DEPONENT: I imagine it does happen at some times. A good clinician would take into account imaging findings, physical examination, and it would be pretty uncommon that an experienced, skilled clinician would -- would not be able to reach a correct diagnosis in advance of the surgery.

BY MR. PARR:

Q And, similarly, doctor, you can confirm for me that there are times when people look at the imagery, they look at the clinical findings and they go, Gosh, this doesn't all add up. They go do an exploratory surgery or they go do a surgery for, you know, some other specific thing that they think they're attacking, and then they find -- when they actually get inside, despite all the preexisting clinical and imagery, you know, workup, they find things that are actually new that they didn't know that existed before. Doesn't that also

happen?

A That can happen, yes.

Q Okay. And so the reason -- those illustrations of, you know, inability to catch everything and inability to diagnose everything on both sides of the spectrum, positive and negative, the reason those are important is an MRI isn't definitive and doctors don't actually treat MRIs; isn't that correct?

A Yes, it's not completely definitive. And, no, treatment should not be provided solely on the basis of an MRI.

Q Okay. And we can say the same thing about ultrasounds, can't we?

A Well, it depends on the specific circumstances, because ultrasounds might be better than MRIs for certain conditions, and the opposite is true as well. But, in general, no, treatment should not be provided solely on the basis of a single imaging study.

Q Okay. And the same can be true of x-rays, right?

A Yes.

Q And the same can be true of nerve conduction studies and myography -- electromyography studies, correct?

A Yes. With all the diagnostic tests, that's

true.

Q Okay. And the same is true of bones, bone scans. All of it, it's just additional information here, there and wherever it's found with respect to what's going on, correct?

A Well, you're mischaracterizing how this works. It's not a haphazard, random process.

Q And I'm not suggesting it is, doctor.

A Well, your terminology does, actually.

Q Okay. I'm suggesting -- correct me if I'm wrong. I'm suggesting that there's a certain amount of clinical skill that comes into whether or not you've got the right diagnosis, and there is a certain amount of uncertainty even when you've got very significant skill levels on behalf of the clinician.

A Yes. Everything in life is uncertain, including diagnostics for medical purposes.

Q Okay. And here we have not only the potential indication of a spinous process fracture by MRI, as indicated by the record that you quoted to and the provider that you mentioned, but we also have some indications from the ultrasound from April 17 of 2019. And how did you -- how did you characterize the suspicion of that ultrasound in your own written report, doctor?

A Well, I would have said that the ultrasound is

not the best method for assessing this.

Now, you're also, again, mischaracterizing the MRI, because the report itself made by the radiologist of the thoracic and lumbar spine MRIs does not talk about a spinous process fracture. The quote that you had me read was from a clinician, Dr. Heather Kroll, and even in her report, she was not certain if it was spinous process fracture or artifact. So you've mischaracterized things yet again.

The most objective interpretation of the MRI would be from the radiologist, and they do not report spinous process fracture. The ultrasound is far less of a good test for a fracture than is an MRI.

In addition --

Q Doctor.

A In addition, there is a bone scan that did not show any evidence of a fracture, and a bone scan would also be a better marker than an ultrasound.

Q Okay. So there's at least one person who interprets that there may be a spinous process fracture when looking at the imagery. We know they must have looked at the imagery, because you say it's not in the radiologist's report.

And then there's also an ultrasound -- and just correct me if I'm wrong, because you're saying I'm trying

to misconstrue everything. But don't you say in reference to the April 17th, 2019, ultrasound that -- and I'm just going to quote here -- "There was ultrasound of the spine which showed mildly displaced cortical fracture, T12, and ligamentous injury without disruption", even though in the next sentence you say, "But the bone scan didn't show abnormal radiotracer uptake in the spinous process?"

Isn't that -- isn't that a fair and accurate statement of your own summary of what the underlying record shows?

A No. It's not my summary. It is a quote, hence the quotation marks from Dr. Kroll's report. So this is her interpretation of the MRI. Again, you nicely left out that she was considering that it might be artifact meaning it's not a real fracture. But it's not my summary. These are in quotation marks, meaning it is her words, not mine.

Q Okay. You understood that Dr. Heather Kroll was a treating physician, correct?

A Yes.

Q All right. And you understood that she was treating Mr. Idowu under his industrial insurance claim that we're all here talking about today, right?

A I presume so.

Q Okay. And you would understand that, because all of her medical records had his industrial injury claim number and correlated information right there in them, correct?

A Sure.

Q Okay. All right. So you have an opinion that he has a contusion. But there's a lot of other work going on. And there's certainly consistent pain reporting. Is that a fair assessment, doctor?

A Sure.

Q Okay. And so then let's say -- looking at page 5 of your report, January 13, 2021, we have the notation of Alecia Stewart, who's a doctor, correct?

A Yes.

Q And we have Dr. Shannon -- S-h-a-n-n-o-n -- Waterman -- W-a-t-e-r-m-a-n, correct?

A Yes.

Q And the gentleman is making these ongoing pain complaints. He's still having the problems that he's had only just since his industrial injury, correct?

A Yes.

Q Okay. All right. And so when these doctors are looking at the situation, would you agree that they're treating physicians, they're not IME physicians?

A That's correct.

Q Okay. And you -- you drew a distinction between your opinion and their opinion in your medical record report that you wrote and submitted to the company that hired you, correct?

A Well, I'm not technically hired. But, yes, it's in my report.

Q Okay. And you put it into parentheses. What did you put into parentheses?

A What are you referring to?

Q Right there on page 5 under the January 13, 2021, discussion of the report from Dr. Alecia -- A-l-e-c-i-a -- Stewart -- S-t-e-w-a-r-t -- and then the next sentence cosigned by Dr. Shannon Waterman, what are you referring to? What are you saying in parentheses when you're commenting about those other providers?

A That it's unclear what the basis for the diagnosis of the spinous process fracture is given that the SPECT -- S-P-E-C-T -- which is the technical descriptor for a bone scan -- given the findings of the bone scan did not show a fracture.

Q Okay. So let's talk about bone scans. Let's talk about radiotracer uptake, doctor.

When is the bone scan most likely to be most sensitive and specific? Is it when there's still a relatively fresh injury, or is it when the injury has, to

some extent, already healed?

A Well, so they're questioning -- they're diagnosis is --

Q I'm asking a question -- I'm asking a question. Getting to the utility, you said you disagreed with their assessment. Here's two doctors. They're treating doctors. Your report says you're disagreeing with them, and you're pointing to the bone scan as your proof.

So I'm asking you: When is a bone scan -- when does it have the most utility, before or after somebody is mostly healed?

MR. DUGGAN: Objection to mischaracterization of prior testimony.

You may answer.

THE DEPONENT: So the bone scan will be abnormal if it does not heal. Once a fracture has healed --

BY MR. DUGGAN:

Q Okay.

A -- it will not show any abnormality.

What the report here is questioning --

Before you interrupt me, let me finish.

What this report is bringing up a diagnosis of that I am questioning is a spinous process fracture of a thoracic vertebra with delayed healing. In the setting

of delayed healing -- otherwise known as a delayed union or nonunion -- a bone scan would be expected to be abnormal.

Q Okay. Doctor, where did they say that there's a nonunion?

A They said delayed healing, which, as I just said, would be a delayed union or nonunion. They don't testify --

Q Okay.

A Could you please stop interrupting me?

The authors of this report are not orthopedic surgeons. They are not highly specialized, such as orthopedic surgeons are, in the diagnosis and management of fractures, including delayed healing and delayed union and nonunion.

Q I see.

So you just anticipated my question.

A I just asked you to -- I just asked you to stop interrupting, and you go and do it again.

Q Doctor --

A I --

Q -- respectfully -- respectfully, my client has a right to cross-examine you, and I would ask that you contain your answer to the question we're asking, because we have a right to present this. This is his civil

right. He's dead now, but his estate still wears his civil rights.

So I would ask you -- rather than trying to badger me off my line of questioning, I would ask you to simply ask the question -- or answer the question as it's asked. If then you --

MR. DUGGAN: For the record --

BY MR. PARR:

Q -- want to say more, you can tell the record that you want to say more, and the Department's counsel will understand that you would like to say more, and he can ask you in redirect.

Okay. So, doctor, in anticipating my question, you agree with me that you're using language in a different way when other nonorthopedic surgeons may not necessarily be using it in the same exact way, right?

Delayed healing can simply mean he's got ongoing complaints, he's got ongoing limitations, we're seeing that we think there was a thoracic vertebral fracture of some extent, and we don't think that whatever is going on with him has healed. That's the only implication from that language, not that there's a nonunion that still persists and we can measure it, right?

A No, absolutely wrong. Absolutely wrong.

One, I don't know what their implications are. I can't read their minds. But what I can say is their diagnosis was a closed fracture of a spinous process fracture with delayed healing. If you want to know whether they're referring to delayed healing of the spinous process fracture or something else, you would have to ask them. I can't tell you.

What I can tell you is that, based on the available imaging studies, I am questioning -- in particular, from the bone scan, but also the MRI I reviewed in the addendum, because it was not available at the time of the IME -- what the basis for the diagnosis of a spinous process fracture is given there is no imaging evidence on x-ray, on MRI or on bone scan of a fracture. That is what is being questioned.

Q Okay. So Dr. Shannon Waterman and Dr. Alecia Stewart have cosigned something that is in line with Dr. Health Kroll, all three treating physicians.

And then in January, Drs. Stewart and Waterman are requesting repeat MRI. And you put that fact in your report on page 5, correct?

A Yes.

Q And so you know that they're still trying to do investigation, too, don't you?

A They are, yes.

Q And, yet, when you're asked should any additional diagnostic or medical care be provided under the claim, your answer is no, correct?

A There's no medical indication for it in my opinion. Yes.

MR. DUGGAN: Okay. All right. Very good. So let's take a break, because the court reporter needs a break. That's responsible for us to do. Her hands are working very hard.

(WHEREUPON, a recess was taken.)

BY MR. PARR:

Q Doctor, we're back on the record after a brief intermission. You are still under oath. You understand?

A Yes, I do.

Q Thank you.

Okay. Doctor, just with respect to disk bulges and nerve roots being, you know, partially affected and the other thing that --

THE REPORTER: I'm sorry. You're breaking up, and I couldn't hear you.

MR. DUGGAN: Yeah. I was going to say the same thing. You were much clearer before the break.

(WHEREUPON, an off-the-record discussion took place.)

BY MR. PARR:

Q So, doctor, with respect to the MRI finding, you know, disk material touching or traversing a nerve root, you know, potentially some bulging, those kinds of things, you would agree that those findings in the MRIs that we have -- or the MRI that we have here, you would agree that those are objective, correct?

A Yes. I consider the MRI finding to be objective.

Q Okay. And, despite that, there's other limitations beyond sensitivity and specificity concepts that we've already discussed more generally, such as the fact that when you put somebody in an MRI machine you're not really taking a dynamic study. You don't get to see their spinous processes, their vertebra, the nerve materials. You don't get to see all that stuff as it is interacting inside of this man's body while he's actually trying to move, stand upright, walk, do activities of daily living, correct?

A Yeah, that's right. The MRI you could consider like a photograph as opposed to, like, a video of what might happen during motion or an activity.

Q Right.

And so what that means is, when we've got him laying on his back as still as he can possibly be to

limit the amount of artifact and he's having this MRI while he's, you know, laying there inside this tube, you would agree that there's limitations on the way that type of study is performed, that it can't really show us the full scale of what may be happening when he's in different positions or in motion, correct?

A Yes. That's what I just said.

Q Okay. But also you would agree, in this record very early after the accident, literally within days, he's going to an emergency room and he's talking about pain radiating into his lower extremity, correct?

A Yes. That's what is documented in those reports.

Q And if you look over the period of the two and a half years leading up your examination, he's still making complaints of radiating pain into the lower extremity, correct?

A Yes.

Q And whether you believe his particular clinic findings on the day of your exam or you think they're too variable or not, regardless, there is some indication here in this medical record when we're looking at it that he may have had kind of radiating pain that may emanate from his lumbar spine, correct?

A Yes. He was describing radiating pain.

Q And it's interesting because you're talking about a vibratory sense and it's kind of a weird use of language that he posits. It's atypical to the way other people speak. He's talking about energy and radiating and going back to the lumbar spine. You would expect somebody else to use quite different language, potentially, and that was something remarkable. And so you brought up in your testimony, correct?

A Incorrect. You are mischaracterizing my testimony.

So I said it was atypical, not the language he's using, but the concept of, for example, on vibration testing that placing a vibrating instrument, a tuning fork, on his first toe would cause a sensation of upward traversing, whatever descriptor he used, triggering the area where he got hit. That's what's atypical. The language he used is not what I'm describing as atypical. It's his description, which is an atypical description of that examination.

Q Okay. Doctor, we can agree that different people use language in different ways, correct?

A Yes. But it's not the language. It's the description of it radiating proximately. That's not -- going up into his back. That's not typical. That is not a typical finding for vibration sensory testing. What

I'm --

Q Doctor --

A What I'm describing as atypical is not his language, not at all. I'm quoting his language, but it's the descriptor, the description, of how he's experiencing the sensation of a vibrating instrument on his first toe.

Q Okay. And thank you for leading us directly to where my point always was, which is, the first toe is which toe, doctor, in vernacular language?

A The big toe.

Q It's the big toe.

And where is the innervation that would go down into the big toe? Where does that come out of our lumbar spine?

A So that's the L5-S1 level.

Q Okay. And tell me again, was there problems noted on MRI at the L5-S1 level?

A Yes. But they do not manifest in a vibrating instrument causing a proximal radiation of a sensation up to the back. That is not how it works.

If -- if the L5-S1 nerve root were impacted, it would be a decreased or absent vibratory sensation.

Q So there's some change in vibratory sensation that would come from the L5-S1 spinal level being affected and the nerve -- the exiting nerve root there

being touched or irritated, correct?

A The description, again, is one that is nonphysiological. If the nerve roots are impacted by something, anything, then they're going to have a loss of function, not have an abnormal, nonphysiological function.

The pathophysiology of nerve root impingement would be that they would lose function leading to, for instance, a loss of sensation or an absence of sensation not an altered sensation that is nonphysiological. Other manifestations might include loss of motor strength, which was not noted; loss of reflexes, which was not noted.

So you're mischaracterizing what I am saying for the purposes of trying to make a point that medically does not make sense.

Q I appreciate you helping me make my point here, doctor, which is that, there's a spectrum of change that may be perceived by the individual patient depending on the nature of the nerve root irritation, the severity of the nerve root irritation and the longevity of the nerve root irritation consistently of that nerve root being involved. You would agree with that. There's different ways patients can perceive those circumstances?

A There are. And they do not -- I emphasize

not -- include a sensation of proximal radiation of vibration from first toe, or the big toe, up to the back. It would be a loss of or absence of that sensation.

Q And so on that spectrum of sensations that the patient feels, it may -- when the nerve root of a particular dermatome is being affected, depending on whether it's sensory fibers or motor fibers and depending on how the patient uses language to describe their circumstances, physicians may receive reports involving reports of pain or numbness or burning or different sensations even when there's not even frank motor loss; is that correct?

A Yes.

Q Okay. And so if this gentleman also had some concomitant mental health condition related to his industrial injury and his perceptions have atypical qualities to them, then the mere fact that he's reporting something in a way that is, quote/unquote, nonphysiological, meaning it doesn't follow a textbook pattern that was taught to the physician, that doesn't mean he's not still experiencing that injury; is that correct?

A As I clearly said before, I have not made any claim that he's not experiencing the symptoms he's describing. I'm just saying that they cannot be

explained on the basis of the objective information about his lower back injury and the imaging findings related to it.

Q And by that, you mean they cannot be entirely explained, because there may be processes of which you have not yet identified, especially in the absence of updated imagery and further investigation, correct?

A It's possible. But more probably than not, my explanation is the more accurate one.

Q Okay. Thank you, doctor.

And you said that you didn't accept anything beyond a Category 1 in this gentleman's case. Is that a fair statement?

A That's correct.

Q Okay. But you agree that a Category 2 finding can be made where there's, quote/unquote, a mild low back, correct?

A Yes. And there should be supporting objective abnormal findings supporting that.

Q Okay. So if we credited the objective findings on MRI of nerve root involvement and disk material and things that are going on and looked at the way the man was behaving with respect to his big toe that correlates to that level, if we look at the other consistent presentations he's had with all of these other doctors,

there's some objective evidence, is there not?

A No, there is not. As I described before many times over, there is not in my opinion.

Q Okay. So it's your opinion. And you don't disagree that another doctor, like Dr. Degan, could have his own opinion. You're just only advocating for your opinion; that's it. That's as far as you're going --

A Correct.

Q -- is that right?

A Well, how can I speak to somebody else's opinion?

Dr. Degan and others --

Q Well, let's --

A Excuse me. Again, you're interrupting me.

Dr. Degan and others are entitled to their own opinion. I respect their opinion. I have a different opinion, and I'm providing a rationale for my opinion as well as the rationale for why I do not agree with those other opinions.

Q Okay. And you would agree that if we're just looking at WAC 296-20-280 Category 2 says you don't even need significant x-ray findings, correct?

MR. DUGGAN: Objection; calls for medical conclusion -- legal conclusion.

THE DEPONENT: No. It doesn't require

significant imaging findings, no.

BY MR. PARR:

Q Okay. And, in fact, it doesn't require objective motor loss, correct?

A No. But it requires some objective abnormal finding.

Q Okay. And it doesn't require that subjective complaints or sensory loss is even present. It says objective complaints and/or sensory loss may be present, correct?

A Yes.

Q Okay. And so you have the opinion that there's no Category 2 permanent partial disability, only a Category 1 permanent partial disability, because you don't categorize all of the intermittent medical records as showing you enough clear and convincing --

(Phone connection lost.)

(WHEREUPON, an off-the-record discussion was held.)

BY MR. PARR:

Q Doctor, you didn't provide for a Category 2 permanent partial disability. You provided for a Category 1, because you interpreted the intervening medical records in that two and a half years as not showing mild, intermittent, objective clinical findings,

correct?

A Incorrect.

Q Okay. So did you -- so you did think there were mild, intermittent, objective clinical findings; is that correct?

A No, that's not correct.

My impairment rating is based on my examination, not on other people's examinations. I can't base an impairment rating on what other people have reported in their documentation of their examination. I need to base my impairment rating on my examination.

Q I see.

So in your examination, how much time did you spend with the gentleman?

A Can't recall. It's been almost two years ago. But, typically, for a lower back condition, such as this, it would be 20 to 30 minutes.

Q Is that 20 to 30 minutes per contusion?

A 20 to 30 minutes for this nature of case in which it's a lower back condition without multiple injured anatomic sites.

Q I see.

And so you don't have any objective clinical findings that you're going to ascribe from your exam day, right?

A There's no objective abnormal findings. There's reduced range of motion, which, as I discussed before, is only partially objective and partially subjective, because there's no way to determine the extent of effort put forth by a claimant.

That said, there was no obvious lack of effort, but the range of motion in and of itself is not sufficient, particularly in the setting of numerous nonanatomic, nonphysiologic findings.

Q And so you recognize, though, that when we're categorizing PPD and we're using the word "intermittent" in reference to clinical findings, you do recognize that clinical findings with respect to a low-back condition affecting exiting nerve root, et cetera, et cetera, those can be present or absent on any given day, right?

A Sure. But as I just finished saying, I have to base my impairment rating on my examination, and I only had the examination of that day. So that's what it's based upon.

Q Okay. Just going back to the notion of the industrial injury itself, you don't know after he struck himself how many -- or after somebody struck him from behind, you don't know how many steps he may have stumbled forward, if he fell, if he turned to the right, turned to the left. You don't know what his degree of

pain was immediately. You don't know any of these things, because you didn't ask, correct?

A No. I asked him to describe the injury to me. He described it. I have documented what he describes -- or what he described, and that's the information that I have.

Q Okay. So if the gentleman comes and he's got these medical regards for two and a half years and he's got these other doctors and he's saying they looked at an MRI saying that I've had kind of radiating symptoms documented throughout his records, and you agree all of that characterization is correct, right?

A Yes.

Q Okay. I'm going to ask you: Did you only -- were you satisfied with that workup, or did you think maybe there could be more workup provided?

A No. I think he's had a very complete workup. He had MRIs of his thoracic and lumbar spine. He had a bone scan done. There's no other workup related to the claim that I could provide a medical basis for, which is why I did not recommend any additional workup for the orthopedic condition.

Q Certainly, based on his presentation, you wouldn't be offering him surgery necessarily as an orthopedic surgeon. So there's no reason to do things

like electrodiagnostic studies; is that right?

A Partially. I would not offer him surgery, that's correct. I wouldn't recommend nerve conduction studies, because there were no objective abnormal findings on examination --

Q Okay.

A -- related to his -- related to his neurologic examination. So based on my examination, there would not be an indication for a nerve conduction study.

Q Okay. But the Department was asking you at the time -- they were telling you that there was a contention for additional conditions beyond the contusion. And then you did your examination. Do you agree that's the time sequence?

A Yes. What you omitted was the record review. But, yes, that's, in general, correct.

Q Okay. And so you understand that within our system when a treating doctor is making contentions, something doesn't have to be allowed yet, and a treating doctor can simply say, Look, I think this thing is related and there's more to see here. And then maybe it goes off to an IME provider for them to weigh in. And, only thereafter, does an adjudication happen as to whether or not there's something related. And sometimes it never happens.

You would agree with that characterization, right?

A Yes. That's my understanding of it.

Q Okay. So --

MR. DUGGAN: Objection. Move to strike. Calls for speculation, legal conclusion.

BY MR. PARR:

Q But based on your understanding of how these cases go, some contentions are resolved, some contentions just remain outstanding, and then we are wherever we are at the time when a person, such as Mr. Idowu, gets violently murdered. And that's what happened in this particular case, correct?

A Well, in general, that's the process. The unfortunate situation with Mr. Idowu, obviously, is not typical.

Q And, doctor, if the gentleman has all these pain complaints and they've lasted for two and a half years, does that indicate a condition that you would say is chronic?

A Two and a half years of reporting of symptoms would be chronic, yes.

Q And without further treatment, you would agree that -- if a condition was in existence and it's chronic and no more treatment is being offered, you would agree

that it would probably be more likely than not just a permanent arrangement, right?

A That is just such you a -- that question asks for so much speculation. I really can't answer it.

Q Okay. Doctor, you mentioned that after you became a medical doctor you went and studied epidemiology. Is that because you intended to become a research scientist? Or why did you go into epidemiology?

A Well, that was during my residency, and it was because at the time I was doing a lot of research that was further benefited by the additional training.

Q Okay. And in terms of your original report and then your addendum, you would agree that when you came back in your addendum you gave all the exact same opinions as what you just expressed in your original report, correct?

A Yes.

Q And so you would agree that the reason there was an addendum on April 29, 2021, is because objections were raised, and you were even provided a letter from the claimant. There was unhappiness with the IME process, including the fact that there were things that were not considered during your IME, correct?

A I don't have the letter in front of me, so I don't know what was covered in it. But I'm sure there

may have been disagreement.

Q You know that --

MR. DUGGAN: I'm going to object to --

Sorry. I have to object to calls for speculation and relevance, prejudicial.

BY MR. PARR:

Q You know that there was a letter from the claimant complaining about the product of the IME exam, correct?

A I don't -- as I just said, I don't have the letter in front of me, and I don't know what specifically was contained within it.

Q I see.

But you documented in your addendum that the letter had been sent to you at that time, correct?

A Yes. There was a letter provided by the claimant, yeah.

Q And if you go back to your report, there's this notion that when you did a records review in your original report, when making your original conclusions, the medical record review skipped from December 18, 2018, until July 27 of 2020. Did it not?

A Yes, it did.

Q Okay. And so you knew from collateral reports from Dr. Heather Kroll and from the other providers that

there was other interim medical records. You just knew that it hadn't be sent to you, correct?

A Yes.

Q And at the time, you didn't have the ultrasound, you didn't have the MRI, you didn't have the bone scan. You had none of that, correct?

A That's correct.

Q And, yet, you still put on page 5 that given the findings of the SPECT scan you disagreed with the treating physicians, correct?

A I said that it was unclear what the basis for their diagnosis related to the spinous process fracture was, yes.

Q Okay. And you said that there was no objective evidence, and there was a Cat 1. There were no restrictions. There was essentially no treatment that could be provided, including, in theory, not even pain management, correct?

A I recommend -- my opinion was that there was no medical indication for further treatment related to the claim, specifically the accepted condition of a low-back contusion, yes.

Q Let's just discuss very briefly how we know this conversation would have gone between Mr. Idowu and his medical providers. He's getting sent off to get

various studies. There's suspicion of a spinous process fracture indicated in your medical record review. There's different things that are being requested, including an updated MRI. All of this would have been necessarily communicated to Mr. Idowu if his treating providers are meeting their duty relative to the informed consent, correct?

A I would presume, in addition to good clinical care, they would be discussing this with him.

MR. DUGGAN: I'll object. Calls for speculation, relevance, more prejudicial than probative.

BY MR. PARR:

Q That's how medicine is supposed to work, though, isn't it, doctor?

A What do you mean specifically?

Q In other words --

MR. DUGGAN: Move to strike that answer as well.

BY MR. PARR:

Q In other words, the patient has autonomy, and all of these diagnostic or care recommendations by treating physicians in this or any other setting are supposed to be done with the patient's informed consent, correct?

A Yes, they are.

MR. PARR: All right. No further questions, doctor.

REDIRECT EXAMINATION

BY MR. DUGGAN:

Q Doctor, I only have one follow-up question. After that thorough cross-examination, were any of the questions that were asked of you or any of the responses that you gave of the type that were adequate to alter or change any of the opinions that you have testified to regarding your conclusions, diagnosis and opinions about Mr. Idowu?

A No, not at all.

Q And all of those opinions that you have made both to myself and to Mr. Parr as the opposing counsel have been made on a more-probable-than-not basis, correct?

A Yes, they have.

MR. DUGGAN: You have the opportunity to sign any transcript or waive signature and put your punctuation in the capable hands of our court reporter. Do you want to waive, or do you want to sign?

THE DEPONENT: I will waive signature.

MR. DUGGAN: Actually, I presumed there would be no follow-up questions based on my follow-up question.

Mr. Parr, do you have any follow-up of

redirect?

MR. PARR: No, we did not. You were correct.

MR. DUGGAN: Okay. I believe that closes the record.

(WHEREUPON, the deposition of Darin Davidson, M.D., was concluded at 12:14 p.m.)

(Signature waived.)

NO. 1044844

SUPREME COURT
STATE OF WASHINGTON

In re: OLABAMIJI M. IDOWU, JR. (DEC'D), Appellant, vs. THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents	)	**CERTIFICATE OF SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Proposed Petition for Review and this Certificate of Service in the below described manner:

E-filed via Washington State Appellate Courts Filing Portal:

Washington State Supreme Court

E-service via E-file portal:

Michael Duggan, AAG
Office of the Attorney General
800 5th Ave Suite 2000
Seattle, WA 98104

DATED this 18th day of September 2025, at Tukwila, Washington by:

Tori LeCause, Paralegal
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651 Strander Blvd.
Bldg B, Suite 215
Tukwila, WA 98188
(206) 596-7888
Tori@washingtonlawcenter.com

WASHINGTON LAW CENTER

September 18, 2025 - 4:37 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	104,484-4
Appellate Court Case Title:	Olabamiji M. Idowu, Jr. (Dec'd) v. Department of L&I of the State of WA

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