

No. 73344-3

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

STERLING O. HAYDEN
Respondent

vs.

THE BOEING COMPANY
Appellant

BRIEF OF RESPONDENT STERLING O. HAYDEN

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INTRODUCTION

This is a substantial evidence case arising from a workers' compensation appeal. The issue decided by the superior court was whether the Board's determination that Boeing was not responsible for Hayden's preexisting left shoulder glenohumeral osteoarthritis was correct. The trial judge found that the record establishes that the preexisting condition left shoulder glenohumeral osteoarthritis was aggravated by his accepted shoulder strain condition and therefore Mr. Hayden is entitled to further treatment for the preexisting condition. Here, ample evidence supports the superior court's application of the "lit up" doctrine and the finding that the activities of Hayden's employment did light up the otherwise non-symptomatic condition. Mr. Hayden requests this Court affirm the superior court's judgment.

COUNTERSTATEMENT OF THE ISSUES

Does substantial evidence support the superior court's finding that Mr. Hayden's pre-existing left shoulder glenohumeral osteoarthritis was aggravated by his accepted shoulder strain condition thereby entitling Hayden to further treatment?

STATEMENT OF THE CASE

A. Procedural History

This matter originated from a workers' compensation claim filed by Hayden in March 2010 for left shoulder symptoms. CP 20. The claim was allowed as an occupational disease effective March 5, 2010. CP 47. In May 2012, the Department issued an order denying responsibility for Hayden's preexisting condition diagnosed as left shoulder glenohumeral osteoarthritis and closed the claim. CP 33. Following a protest by Hayden, the Department of Labor and Industries issued an order on October 29, 2012 holding Boeing responsible for the preexisting condition diagnosed as left shoulder glenohumeral osteoarthritis. CP 40. The self-insured employer appealed that decision to the Board of Industrial Insurance Appeals. CP 38-39.

An industrial appeals judge reversed the Department's order on September 24, 2013. Hayden sought review of this decision, the three-member Board denied Hayden's petition for review and the judge's proposed decision became the final decision and order. CP 5. Hayden appealed the Board's order to superior court. A bench trial was held before the Honorable Richard F. McDermott on November 24, 2014. CP 313. The trial judge was asked to determine whether the Board of Industrial Insurance Appeals was correct in its decision to deny responsibility for the pre-existing condition described as left shoulder

glenohumeral osteoarthritis. CP 313. After reviewing the evidence, in the form of the Certified Appeal Board Record, along with the briefs submitted by counsel and hearing oral argument, the court found in Hayden's favor, determining that the Board of Industrial Insurance Appeals was incorrect. CP 313 - 318

On March 13, 2015, Judge McDermott issued written Findings of Fact and Conclusions of Law concluding that Hayden's preexisting left shoulder glenohumeral osteoarthritis was aggravated by his occupationally-related left shoulder strain and that he was therefore entitled to further treatment under his claim. CP 313-318.

The employer appealed the court's decision to this Court.

B. Facts:

Mr. Hayden had been employed by Boeing since Jan 5, 2007. CP 79. He worked as a factory service attendant performing full-time janitorial work. CP 81-82. In describing his work duties Hayden estimated that he cleaned "an average of 250 to 300 toilets, sinks, urinals, commodes, counter tops, mirrors, complete bathrooms within an eight-hour period at a time". CP 83. In February of 2010, he began experiencing left shoulder pain when he was trying to wipe a mirror overhead. CP 87. Hayden filed an application for benefits on March 27,

2010. CP 20. The condition was allowed as an occupational disease effective March 5, 2010. CP 47. Hayden treated with cortisone injections with some relief, but thereafter he noticed he was having more and more pain in the left shoulder. CP 122.

Hayden was referred to orthopedic surgeon, Peter Verdin, Jr. M.D., on May 26, 2011 for left shoulder pain. CP 274. After reviewing x-rays, Dr. Verdin made the diagnosis of osteoarthritis of his shoulder. CP 275. Dr. Verdin determined that Hayden would benefit from a resurfacing of his shoulder or total shoulder replacement. CP 275 Dr. Verdin preformed the resurfacing procedure on September 13, 2012. CP 278. Dr. Verdin testified that it was his opinion that Mr. Hayden's work activities as a janitor were a cause for the worsening of Mr. Hayden's left-shoulder condition. CP 279. Dr. Verdin explained that "heavier physical activity tends to make arthritic joints much more symptomatic. CP 279.

ARGUMENT

A. Standard of Review –

In a workers' compensation case, the superior court reviews a decision of the Board of Industrial Insurance Appeals de novo on the certified appeal board record. *RCW 51.52.115; Elliot v. Dep't of Labor*

& Indus., 151 Wn. App. 442, 445, 213 P. 3d 44 (2009). On appeal to the superior court, the Board's decision is prima facie correct and a party attacking the decision must support its challenge by a preponderance of the evidence *RCW 51.52.115*; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2 570 (1999.) The superior court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the Board's findings and decision are incorrect. *McClelland v. ITT Rayonier, Inc.* 65 Wn. App. 386, 390, 828 P 2d 1138 (1992). The Court of Appeals reviews the superior court's decision in a workers' compensation case under the ordinary standards of civil review. *RCW 51.52.140* (Appeal shall lie from the judgment of the superior court as in other civil case.") see *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

In this appeal, review is limited to examining the record to see whether substantial evidence supports the superior court's findings and, if so, whether the court's legal conclusions flow from the findings. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P. 2d 402 (1996). Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise. *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn.App. 335, 340, 725 P. 2d 463

(1986). Where there is disputed evidence, the substantial evidence standard is satisfied if there is any reasonable view that substantiates the trial court's findings, even though there may be other reasonable interpretations. *Garrett Freightlines, Inc.*, 45 Wn. App. At 340. When undertaking substantial evidence review, the appellant court does not reweight the evidence or rebalance the competing testimony presented to the fact finder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d. 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wash. App. 475, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inference from the evidence in the light most favorable to the prevailing party. *Korst v. McMahoan*, 136 Wn. App. 201, 206, 148 P.3d 1081 (2006); *Harrison*, 110 Wash. App. At 485. "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Korst*, 136 Wn. App. at 206.

B. Sufficiency of the Evidence -- Substantial Evidence supports the superior court's conclusion that the accepted work-related left shoulder condition proximately caused an aggravation of Hayden's pre-existing shoulder osteoarthritis.

The Boeing Company contends substantial evidence does not

support the superior court's finding that the Hayden's preexisting left shoulder glenohumeral osteoarthritis was aggravated by the occupationally-related left shoulder strain. This argument is without merit.

A worker who has an occupational disease is entitled to receive benefits under the Industrial Insurance Act. RCW 51.32.180. An occupational disease is a "disease or infection as arises naturally and proximately out of employment." RCW 51.08.140. In *Dennis v. Dep't of Labor & Indus.*, 109 Wash. 2d at 477, 745 P. 2d 1295, the Washington Supreme Court addressed whether the aggravation of a preexisting disease by employment conditions should be subject to workers compensation coverage. Citing the *Miller* decision, as well as several other cases, the Washington Supreme Court held in *Dennis* that if distinctive conditions of employment aggravate a preexisting disease, the resulting disability is covered under the Industrial Insurance Act as an occupational disease. "A worker is entitled to benefits if the employment either causes a disabling disease or aggravates a preexisting disease so as to result in a new disability." *Ruse*, 138 Wn. 2d at 7.

The worker must prove a condition of the job "more probably than not" caused the disability and the disability "came about as a matter

of course as a natural consequence or incident of distinctive conditions of his or her particular employment”. *Dennis*, 109 Wash. 2d at 477, 745 P. 2d 1295.

A worker is entitled to benefits for any condition or disability that the injury or occupational exposure aggravated, accelerated or in combination with the condition caused the disability or condition. *Harbor Plywood v. Dep’t of Labor & Indus.*, 48 Wn.2d 553, 556, 295 P.2d 310 (1956) (“preexisting disease or infirmity of the employee does not disqualify a claim under the ‘arising out of employment’ requirements if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought”); *Towne v. Dep’t of Labor & Indus.*, 51 Wn.2d 644, 647, 320 P.2d 1094 (1958) (the test is not whether the injury occasioned by the workman's exertion in the course of his employment was the sole cause of his death, but whether it contributed in any material degree); *Guiles v. Dep’t of Labor & Indus.*, 13 Wn.2d 605, 613, 126 P.2d 195 (1942).

Boeing contends that the trial court erroneously applied the Washington workers’ compensation “lit up” doctrine. Boeing’s position is that such an analysis is only applicable in determining the extent of

permanent partial disability and is irrelevant when determining proximate cause for allowance of a preexisting condition. *Brief of Appellant page 22-24*. In Washington, a worker is entitled to compensation under the Industrial Insurance Act for a disability resulting from work-related aggravation of a nonwork-related disease. *Simpson Timber Co. v. Wentworth*, 96 Wash.App. 731, 981 P.d 878 (1999). If injury lights up or makes active latent or quiescent infirmity or weakened physical condition occasioned by decease, resulting disability is to be attributed to injury and not to preexisting physical condition, and it is immaterial whether the infirmity might possibly have resulted in eventual disability or death, even without injury. *See Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 295 P.2d 310 (1956).

Any treatment, disability, or impairment resulting from the “lighting up” of a preexisting, but latent or asymptomatic condition, is covered under the industrial injury claim. *Miller v. Dep’t Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939). In *Wendt*, the court found that substantial evidence supported the giving of an instruction on the “light up“ theory and failure to give the requested “lighting up” instruction was reversible error. *Wendt v. Dep’t of Labor & Indus.*, 18

Wn. App 674, 571 P.2d 229 (1977). The court reasoned that when medical testimony shows that an industrial injury or occupational disease made a preexisting and previously quiescent arthritic condition symptomatic, the claimant is entitled to a lighting-up instruction. *Wendt*, 18 Wn. App. at 679-80. In *Wendt*, the claimant contended that he was entitled to an instruction based upon the so-called “lighting up” theory.

Wendt sought and was denied the following instruction:

You are instructed that if an injury lights up or makes active a latent or quiescent infirmity or weakened condition, whether congenital or developmental, then the resulting disability is to be attributed to the injury and not to the preexisting condition. Under such circumstances, if the accident or injury complained of is a proximate cause of the disability for which compensation or benefits is sought, then the previous physical condition of the workman is immaterial and recovery may be received for the full disability, independent of any preexisting or congenital weakness.

After noting that the above instruction has been approved by our Washington courts, *See Harbor Plywood Corp. v. Department of Labor & Industr.*, 48 Wash.2d 553, 295 P.2d 310 (1956); *Jacobson v. Dep’t of Labor & Indus.*, 37 Wash 2d 444, 224 P.2d 338 (1950), the court held: “Our review of the record leads us to conclude there was substantial evidence to support the giving of such an instruction in this case and that it was prejudicial error not to do so. Mr. Wendt, his wife and a family

friend all testified that the claimant suffered increased pain, muscle spasms and limitation of motion between terminal dates; in addition, he had medical support for his position.” *Wendt* at 679-80. The court noted that Wendt’s doctor stated:

...He did have pre-existing disability involving the left shoulder, and of course, I cannot evaluate what role the industrial injury had upon this left shoulder except by his history of increased symptoms. One must recognize that this pre-existed the industrial injury with which we are concerned today. However, he did have an injury to the right upper extremity which included a rupture presumptively of the long head of the biceps or the biceps muscle and an injury also to the right elbow. The residual effects of this injury to the upper extremity have been described in physical findings. Presumptively, too, he had either a rib fracture or several rib fractures. At any rate, those rib fractures have healed without offset and without demonstrable bony change insofar as alignment is concerned. The injury to the posterior chest however was one which created not only rib fractures but also the initiation of symptoms which have created spasms and pain since that time. I believe that these symptoms refer to the hypertrophic osteoarthritis which is seen in the mid and low back and that this was not caused by industrial injury. These changes pre-existed the industrial injury but have come into symptomatic being through the trauma which the industrial injury visited upon these pre-existing but asymptomatic areas.

Although the Department’s doctors disputed the above findings and attributed the claimant’s disability solely to his chronic progressive arthritis, the court found that these differences of opinion “merely served

to create issues of fact for ultimate resolution by the jury”. *Wendt at 678*. Based on the above testimony the court found that “...a jury could have found that the injury lighted up or made symptomatic the preexisting and previously quiescent or asymptomatic arthritic condition. They could then further have found that this condition rendered the claimant more disabled than he had been when his claim was closed...” *Wendt*.

Here, the trial court found that the accepted occupationally related shoulder strain lit up or made symptomatic the preexisting condition. The trial court relied on Hayden’s testimony with respect to a lack of symptoms or problems with his left shoulder up to and until the time he began to compensated for his injured right shoulder to be credible. (Findings of Fact 18.) The court further found that while Hayden clearly had significant diagnostic findings relating to the osteoarthritis in his left shoulder, according to his testimony and his wife’s testimony the left shoulder pain complaints started in 2010. (Findings of Fact 19.)

The record is clear that Hayden’s preexisting shoulder condition was not symptomatic or disabling prior to the accepted work-related shoulder condition. This fact is established by Boeing’s own hired medical expert, Dr. Patrick Bays, who examined Hayden in July 2011.

CP 203. Dr. Bays agreed that there is no indication that Mr. Hayden received or sought shoulder treatment, during the time period of ten years prior to when he examined him in 2011. CP 249. He also acknowledged that he had no medical restrictions due to his left shoulder condition in the ten years prior. CP 249. The record also establishes that Hayden was able to work full-time without restriction prior to onset of the accepted occupation disease claim. CP 50-51.

Hayden's March 27, 2010 claim for workers' compensation benefits was allowed, without dispute, as an occupational disease, effective March 5, 2010. CP 314 (Findings of Fact 1 and 2) Thereafter, Hayden treated under the claim with cortisone injections, but continued to have more pain in his left shoulder. CP 314 (Findings of Fact 3).

The Appellant cites *Zavala* in contending that the "lighting up" analysis is not applicable in this case. (Appellant Brief, page 24); *Zavala v. Twin City Foods*, 185 Wn. App. 838, 343 P.3d 761 (2015). In *Zavala*, the claimant argued that her testimony and the testimony of friends and family that she experienced no pain before her work injury required that trial court find that she suffered from no preexisting condition, despite medical testimony to the contrary. *Zavala at 841*. However, the court found that: "Because the trial court has the discretion to believe the

testimony of physicians over lay witnesses and because we defer to the trial court's finding, we affirm the superior court." *Zavala at 841*.

The court highlighted an appellate court's role in undertaking a substantial evidence review in a case such as this:

Washington courts have held in an unbroken line of decisions that if an industrial injury lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition...

...In many decisions, Washington appellate courts affirm trial court decisions and jury verdicts in favor of the employee to the effect that the work injury caused the employee's entire disability, despite the injury triggering a preexisting condition... Some of the decisions entitled a worker with a preexisting degenerative spine of arthritis. *Ana Zavala* cites these cases, but fails to recognize the factual nature of each decision. *The trial court could have ruled in favor of Zavala, but we do not agree the trial court necessarily needed to rule for Zavala.* Whether a given disability is the result of injury or solely of a preexisting infirmity is normally a question of fact.

Zavala at 862, emphasis added)

In *Zavala* the trial court ruled against the claimant on the facts and the appellate court appropriately refused to reweight the facts.

Zavala at 775.

Here, in addition to other testimony, the trial court relied on Dr. Verdin's testimony where he stated: "Well I recorded that I felt that he

had a degenerative joint disease of the shoulder, secondary to osteoarthritis. And that the activities that he was doing on the job were exacerbating the underlying condition.” Dr. Verdin further stated that “while the assessment was pretty much the same as I had stated before: that he was having pain that started while he was doing heavy janitorial work. It was what brought him to us. And he was continuing to have discomfort.” Further, the trial court relied on Dr. Verdin’s answer when he was asked whether Hayden’s work activities as a janitor aggravated or worsened his shoulder condition on a more probable than not basis. The doctor answered in the affirmative stating, “I feel that it probably did make his overall symptomology in his shoulder worse with time, yes.”

While Boeing produced expert testimony to highlight the fact that Hayden had a preexisting left shoulder condition, a jury (or judge in as in this case) could reasonably conclude from the testimony that the accepted work-related shoulder strain exacerbated the preexisting condition. In reaching this conclusion the trial court accepted the testimony of Hayden’s medical expert over those of Boeing. Thus, substantial evidence existed to support a finding that the Board incorrectly denied Boeing responsibility for the left shoulder

osteoarthritis.

Hayden did not have any ongoing symptoms that impaired his ability to function before the allowed March 2010 occupational claim. In fact, there was no evidence that Hayden was suffering from any left shoulder-related symptoms at the time of the 2010 claim, despite his osteoarthritis. He and his wife testified that he was fully functional and without physical complaints prior to his 2010 claim. All that is required is proof that work is a cause. It is rational and reasonable that someone with Hayden's findings would experience pain by working as a janitor under the conditions described in this record. Dr. Verdin found that said work aggravated Hayden's symptoms only, not the underlying condition. But that distinction should not matter. The Board has previously held that aggravation of symptoms rather than pathology is sufficient to allow a claim as an occupational disease. See for example, *In re Geraldine Clawson*, Dckt. No. 977773 (January 19, 1999); and *In re Santos Saucedo*, Dckt. No. 99 18557 (January 25, 2001).¹

There was substantial evidence that his preexisting condition was asymptomatic and that the occupational-related left shoulder strain

¹ This court is not bound by Board decisions but may consider the Board's interpretation of the laws it is charged with enforcing. *Lynn v. Dep't Labor & Indus.*, 130 Wn.App. 829, 836, 125 P. 3d 202 (2005)

aggravated it and caused Hayden's subsequent pain complaints. The evidence supports the trial court's findings.

C. Attorney Fees – Sterling Hayden is entitled to reasonable attorney fees under RCW 51.52.130.

RCW 51.52.130 provides that when a decision and order from the Board is reversed or modified on appeal and additional relief is granted to a worker or a beneficiary, then a reasonable fee for the services of the worker's attorney shall be fixed by the court. Here, Hayden is defending the order of the superior court which reversed the Board of Industrial Insurance Appeals. Because Hayden has proven that the Order of the Board of Industrial Insurance Appeals was incorrect, and was thereafter required to defend the superior court's order before the Court of Appeals, he is entitled to an award of reasonable attorney fees and expenses for the work on the matter before this Court.

CONCLUSION

The Superior Court correctly reversed the order of the Board of Industrial Insurance Appeals.

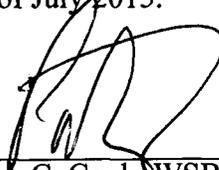
As to the employer's assignments of error based on the court's conclusions of law, the conclusions are all accurate conclusions of the

law. All conclusions are well within the discretion of judge that heard the case. The court made no prejudicial errors.

As to the employer's assignments of error based on the court's findings of fact, the findings are supported by the record.

For the forgoing reasons, Mr. Hayden requests that this Court affirm the Superior Court's judgment.

Dated this 29th day of July 2015.



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