

73717-1

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**NO. 73717-1**

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

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**Autumn Matto,  
Plaintiff/Respondent,**

**v.**

**Haggen, Inc.,  
Defendant/Appellant.**

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JULIE A. HARRIS

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**BRIEF OF RESPONDENT**

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## **I. STATEMENT OF THE CASE**

This is an appeal by the Self Insured Employer under the Industrial Insurance Act, Title 51 RCW. Autumn Matto was injured her low back at work on September 16, 2008 while working at Haggens. This claim was closed on March 4, 2009. Ms. Matto filed a reopening application which was denied on April 5, 2013. She appealed the order to the Board of Industrial Insurance Appeals and Judge Michael Metzger issued a Proposed Decision and Order finding Ms. Matto's condition proximately caused by the industrial injury objectively worsened between March 4, 2009 and April 5, 2013, thereby reversing the April 5, 2013 order and remanding the claim to the Department to reopen the claim. (CBR 43-74). The Self Insured Employer filed a Petition for Review, which was granted and the Board issued a Decision and Order affirming the April 5, 2013 order on the basis that the preponderance of the evidence showed that while Ms. Matto's low back had objectively worsened, it was due solely to the natural progression of her pre-existing degenerative disc disease. (CP 9-11). Ms. Matto appealed that decision to the Superior Court. A bench trial was held before Judge Susan Cook on April 2, 2015, and Judge Cook issued a written decision dated April 2, 2015 reversing the October 29, 2014 Board Decision and Order. (CR 332-333). Judge Cook entered the Findings of Fact, Conclusions of Law, and Judgment on June 5, 2015,

finding that Ms. Matto's condition proximately caused by the industrial injury had objectively worsened between March 4, 2009 and April 5, 2013, and remanded the matter to the Department of Labor & Industries to reopen the claim. (CR 355-358). Judge Cook's written decision indicated that the Board erred in rejecting the testimony of Ms. Matto's attending physician, Dr. Stephen M. Aldrich. The Self Insured Employer filed an appeal to this court.

## **II. STANDARD OF REVIEW**

When a Board of Industrial Insurance Appeals decision is appealed to the Superior Court, the Board's decision is presumed to be correct, and the party challenging the Board's decision in Superior Court must convince the fact finder from a fair preponderance of credible evidence that the Board's findings are incorrect. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); RCW 51.52.115. Judicial review of a BIIA decision is de novo and is based solely on the evidence and testimony presented to the BIIA. *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002).

The standard of review changes when there is an appeal to a Superior Court decision. The Court of Appeals reviews the Superior Court's decision under the error of law and substantial evidence standards. *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 10, 931 P.2d 907

(1996). This Court determines whether challenged factual findings are supported by substantial evidence and whether the conclusions of law flow from the findings of fact. This court has the jurisdiction to review specific trial court judgments and order claimed to be in error of law. On issues of law, this Court may substitute its judgment for that of the agency, but great weight is accorded to the agency's view of the law it administers.

*Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977

(2000). On issues of fact, it is not within the competency of a reviewing court, to invade the province of a jury and substitute its judgment for that of the jury in weighing the evidence. *Id.* In *Hegwine v. Longview Fibre Co.*, 132 Wn.App. 546, 555 (2006), the court held:

“When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law. *Keever & Assocs., Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).”

As the party challenging the sufficiency of the evidence, Haggens must admit the truth of Ms. Matto's evidence and all inferences that can reasonably be drawn therefrom. *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 653, 833 P.2d 390 (1992). And as stated in *State v. O'Connell*, 83 Wn.2d 797, 839 (1974):

“this court will overturn a jury's verdict only rarely and then only when it is clear that there was no substantial evidence upon which the jury could have rested its verdict. *Valente v. Bailey*, 74 Wn.2d 857, 447 P.2d 589 (1968), and cases cited. This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. *Phelps v. Wescott*, 68 Wn.2d 11, 410 P.2d 611 (1966). The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).”

Applying the substantial evidence standard, the Court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMohon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (2006). Credibility determinations are solely for the trier of fact and are not reviewable on appeal. *Watson v. Dept. of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006). In *Lewis v. Simpson Timber Co.* 145 Wn.App. 302, 315-316 (2008) the Court stated:

“the trier of fact may disregard the BIIA's findings and conclusions if, even though there is substantial evidence to support them, it believes that other substantial evidence is more persuasive. *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 13, 931 P.2d 907 (1996). Our “‘review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review.’ ” *Ruse*, 138 Wn.2d at 5

(quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).”

### III. ARGUMENT

**A. There is substantial evidence to support the trial court’s decision that Ms. Matto’s condition proximately caused by the industrial injury objectively worsened between March 4, 2009 and April 5, 2013.**

This matter involves is a reopening application filed by Ms. Matto to the Department of Labor and Industries. Generally, an injured worker may have a claim reopened for aggravation of a condition caused by an industrial injury. RCW 51.32.160. Establishing the right to further medical treatment based on aggravation requires medical testimony that objective symptoms show a causal relationship between the injury and increased disability after claim closure. *Phillips v. Dep’t of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). In this case the required testimony was provided by the attending physician, Dr. Stephen M. Aldrich. The Board had determined that Dr. Aldrich did not explain how the industrial injury contributed to the ongoing degenerative changes in her low back. However, Judge Cook held the Board erred in rejecting Dr. Aldrich’s testimony and that Dr. Aldrich did provide testimony to support that the arthritic changes were related to the industrial injury. (CP 332-333).

To establish entitlement to claim reopening, Ms. Matto had to produce medical testimony, some of it based upon objective symptoms, that her injury worsened since her initial claim closure on March 4, 2009, and that her September 16, 2008 injury caused the worsening of the condition. *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). “It is not always necessary, however, to prove every element of such causation by medical testimony. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient.” *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

There is no dispute that Ms. Matto had proven through the medical testimony as all three medical experts agreed there had been an objective worsening after March 4, 2009. However, the Board’s Decision and Order found that the preponderance of the evidence showed that while Ms. Matto’s low back condition had objectively worsened, it was due solely to the natural progression of her preexisting degenerative disc disease. (CP 9). Therefore, the issue presented to Judge Cook was about proximate cause. The pattern of instruction in workers compensation cases for proximate cause is:

WPI 155.06 Proximate Cause—Allowed Claim, which states:

The term “proximate cause” means a cause which in a direct sequence, unbroken by any new independent cause, produces the *condition* complained of and without which such *condition* would not have happened.

There may be one or more proximate causes of a *condition*. For a worker to recover benefits under the Industrial Insurance Act, the *industrial injury* must be a proximate cause of the alleged *condition* for which benefits are sought. The law does not require that the *industrial injury* be the sole proximate cause of such *condition*.

Haggen’s wrongly argues that substantial evidence supported the Board’s decision. (Appellant Brief, page 12). Even if true, this argument is irrelevant, as the issue presented is whether the Superior Court’s decision is supported by substantial evidence. Haggen’s also argues that the preponderance of credible evidence supports the Board’s decision. (Appellant’s Brief, page 13). Again, this is also irrelevant, because the Superior Court found otherwise, and the issue is whether there is substantial evidence to support the Superior Court’s decision.

The medical testimony presented indicates that the worsening of Ms. Matto’s low back condition is related to the industrial injury or related to the natural progression of aging or a combination of both. As there may be more than one proximate cause, the Court in *Wendt v. Dep’t of Labor & Indus.*, 18 Wn.App. 674, 571 P.2d 229 (1977) held that it is error not to give an instruction on multiple proximate causes when there is

evidence to support a theory that the disability resulted from the combined effects of the industrial injury and other unrelated conditions.

The medical testimony also supports that the industrial injury “lit up” (made symptomatic) a pre-existing condition. In *McDonagh v. Dep’t of Labor & Indus.*, 68 Wn.App. 749, 845 P.2d 1030 (1993), the court held that a proximate cause instruction does not serve the same purpose as a “lighting-up” instruction, and that it is reversible error not to give an instruction on a claimant’s “lighting-up” theory if it is raised as an issue and there is substantial evidence to support it. In *Zavala v. Twin City Foods*, 2015 Wash. App. LEXIS 273, 30-31 (February 12, 2015) the Court stated:

“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. *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d at 471; *Miller v. Dep’t of Labor & Indus.*, 200 Wash. 674, 682, 94 P.2d 764 (1939); *Austin v. Dep’t of Labor & Indus.*, 6 Wn. App. 394, 395, 492 P.2d 1382 (1971). Washington courts have restated this principle of law in other language. Ordinarily the previous physical condition of the worker is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness if the worker’s prior physical condition is not deemed the cause of the injury but merely a condition on which the real cause operated. *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d at 117; *Bennett v. Dep’t of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

The worker whose work injury acts upon a preexisting disease to produce disability where none existed before is just as injured in his or her employment as is the worker who contracts a disease as a result of employment conditions. *Dennis*, 109 Wn.2d at 471. Benefits are not limited to those workers previously in perfect health. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 44, 395 P.2d 633 (1964). The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities. *Dennis*, 109 Wn.2d at 471; *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977)."

The Court in Zavala at 32 also stated:

"There remain limits to recovery. In order for a claimant to recover under the workers' compensation act, she must establish a causal connection between the work injury and the subsequent physical condition. *Jacobson v. Dep't of Labor & Indus.*, 37 Wn.2d 444, 448, 224 P.2d 338 (1950). A given disability must be the result of injury rather than solely of a preexisting infirmity. *Jacobson*, 37 Wn.2d at 448. The employee must minimally show that the employment was more likely than not a contributing factor to the injury. *Harbor Plywood Corp. v. Dep't of Labor & Indus.*, 48 Wn.2d 553, 557, 295 P.2d 310 (1956). A preexisting condition is not lit up if the weight of the evidence reveals that the condition was a naturally progressing condition that would have progressed to the same symptoms without the injury. *Matson v. Dep't of Labor & Indus.*, 198 Wash. 507, 516, 88 P.2d 825 (1939); *Austin*, 6 Wn. App. at 398."

The Board's Decision and Order on October 29, 2014 affirmed the Department's denial of the reopening finding that "Dr. Aldrich never adequately explained how the minor strain in 2008 contributed to (the

claimant's) ongoing degenerative changes in her low back." Upon de novo review, the Superior Court found that:

"The Board's Decision and Order ignores Dr. Aldrich's testimony that when he saw the claimant on September 22, 2008, she was experiencing symptoms down the back of her left leg which were consistent with the MRI findings showing disc bulging at L5-S1. He later testified that when he reviewed her x-rays from July 2012, he found a loss of disc height at L5S1 from 1.11 centimeters in 2007 to 0.66 centimeters in 2012. He also found arthritic changes as a result of the disc thinning. He says "(s)he definitely had objective evidence of worsening, narrowing of L4-5, L5-S1 disk with associated arthritis... (s)o. I think there is significant roots of this symptom that come about from the industrial injury of a box lifting in September of 2008."

There exists substantial evidence that Ms. Matto's low back condition has objectively worsened related to her industrial injury. Dr. Aldrich, who was the other medical witness who examined Ms. Matto both before and after the industrial injury, testified of her conditions existing prior to September 16, 2008:

"I don't think she had any symptoms complaining of pain going down either leg. Most of the pain, if she had it, it was abdominal-pelvic and somewhat in the low back. She had not demonstrated any peripheral neurological symptoms that I would expect with sciatica and so this was a game changer, something shifted and this was a new onset of symptoms." (CP 180)

Dr. Aldrich also testified as to the impact of the industrial injury:

"So we establish that she had mild degenerative disk problems and a previous annular tear which should heal in six months but it did not. So I am thinking these kinds of

injuries probably have some kind of remote, initial injury and the nature of her work and the lifting of the cucumber box probably made things subjectively much worse and when she didn't have any sciatica symptoms before and now has then something had changed.” (CP 183)

Finally, Dr. Aldrich testified that:

“I don't think her problems in 2013 would be as bad had she not had the injury and so these accumulations of injuries, activities are a progressive add-on to whatever baseline injury occurred.” (CP 195)

and

Q “So is it your opinion that they only reason she has these findings on her MRI, and let's go to the July 17, 2013 MRI is because of her industrial injury in September 2008?”

A “No, I don't think that is a fair statement. I think she had evidence of early, mild degenerative disk changes when we were imaging her in 07 and 08. I think the acceleration over the four and a half or so years was likely contributed to be the injury of record.” (CP 207)

Haggens spends considerable effort to present its interpretation of the evidence in an attempt to rebalance competing testimony and the credibility weight of the witnesses. This ignores the substantial evidence provided by the interpretation of the diagnostics testing and testimony of Dr. Aldrich. Although Haggens disagrees with the Superior Court's weighing of the evidence and which evidence it found more persuasive, when viewing all reasonable inferences from the evidence in the light

most favorable to the prevailing party, there is substantial evidence that a proximate cause of the objective worsening was the industrial injury of September 16, 2008.

**B. Ms. Matto's degenerative disc disease, including the increasing disc space narrowing at L5-S1 and L4-L5 are related to her industrial injury.**

Haggans wrongly argues that Ms. Matto's degenerative disc disease, including the increasing disc space narrowing at L5-S1 and L4-L5 are not due to her industrial injury. Again, Haggans wrongly argues that the Superior Court ignores substantial evidence that Ms. Matto's degenerative disc disease, including the increasing disc space narrowing at L5-S1 and L4-L5 are not due to her industrial injury. Even if true, this is not the standard of review. Ms. Matto is not arguing the fact that her medical records show she has degenerative disc disease and was minimally symptomatic prior to working at Haggen's. Dr. Aldrich was aware of her prior medical history. Ms. Matto holds claim to the degenerative disc disease being aggravated and "lit up" by the industrial injury, and that the industrial injury was a cause of the progression of her low back condition. This is supported by the testimony of the treating physician, Dr. Aldrich. Dr. Aldrich's testimony is substantial evidence. Dr. Aldrich was the only medical witness that had actually seen Ms. Matto prior to the industrial injury to know her condition before and after.

Further, Dr. Aldrich clearly testified on March 20, 2014 that “She had objective evidence of a sensory difference on the left side at the L4-5 distribution, which was consistent with her exams historically but these were not present prior to the onset of her worsening symptoms following the L&I case.” (CP 189) Haggen argues that Dr. Aldrich could not pin down and say with precision whether the L4 changes were precipitated by the industrial injury or was hereditary, but Haggens admits that Dr. Aldrich did state on a more probable than not basis it was related to the industrial injury. (Appellant’s Brief p. 7). Proximate cause does not require “precision” but what is more likely than not. When asked whether Ms. Matto’s low back condition as of April 5, 2013 was causally related to or aggravated by the industrial injury he stated, “on a more probable than not basis I have to absolutely say yes.” (CP 195)

There is clear substantial evidence to support the decision of the Superior Court. Haggens is attempting to argue a different interpretation of the facts, but viewing the evidence and all reasonable inferences from the evidence in the light most favorable to Ms. Matto, substantial evidence exists to support the Superior Court’s decision regardless how hard Haggens attempts to reweigh the evidence.

**C. Dr. Aldrich’s testimony should be given greater weight or credibility since it is supported by the preponderance of evidence.**

Haggens also attempts to argue its interpretation of the credibility and weight given to Dr. Aldrich's testimony. In *Hamilton v. Department of Labor and Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988), the Washington Supreme Court held that the following instruction given by the trial court did not constitute an unconstitutional comment on the evidence:

“In cases under the Industrial Insurance Act of the State of Washington, special consideration should be given to the opinion of the plaintiff's attending physician.”

The court found that this instruction did not give the personal opinion of the trial judge and that it embodied a long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician. Dr. Aldrich is the attending physician entitled to special consideration. In addition, substantial evidence exists to give Dr. Aldrich's testimony greater weight. Dr. Aldrich has been a practicing physician in Burlington, Washington for over 40 years. (CP 157). He is in the best position to know the accurate facts since he was the only physician to see Ms. Matto before the industrial injury, treat her for the industrial injury, and treated her again at the time the Department denied the reopening application.

Substantial evidence exists to give Dr. Alrich's testimony greater weight than Haggens medical witnesses. Dr. Stump and Dr. Seligman saw Ms. Matto once after the reopening application was filed. In addition, both of the physicians hired by the employer make significant income from performing IMEs. Dr. Stump testified he performs an average of 5 ½ exams per day, 3-4 days per week, and is paid \$250.00 per exam. (CP 302, 312). Dr. Seligman, on the other hand, retired from active practice in 2008, and now performs 3-8 exams per week. (CP 279).

This case ultimately depends on the weight given to the expert opinions regarding the issue of proximate cause. It is the function of the jury or trial court, however, to evaluate the credibility of witnesses. *Stiley v. Block*, 130 Wn.2d 486, 925 P.2d 194 (1996) (quoting *State v. Dietrich*, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969)). It is within the province of the jury to accept or reject, in whole or in part, an expert's opinion. *Kohfeld v. Pacific Ins Co.*, 85 Wn.App 34, 42-43 (1997). In *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 653 (1973) the court stated:

“It is well established that the qualification of an expert is within the discretion of the trial court, and, absent abuse, will not be disturbed on appeal. *In re Estate of Hastings*, 4 Wn. App. 649, 484 P.2d 442 (1971). Once basic qualifications are shown, deficiencies in the qualifications go to weight, rather than admissibility. *Palmer v. Massey-Ferguson, Inc.*, 3 Wn. App. 508, 476 P.2d 713 (1970). Similarly, the thoroughness of an expert's examination of the real evidence is a matter of weight for the jury. *Ulmer v.*

*Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969). The limitations on expert opinion testimony are also well settled. The opinion must be founded on facts in evidence, whether disputed or undisputed, and all material facts necessary to the formulation of a sound opinion must be considered. *Vaupell Indus. Plastics, Inc. v. Department of Labor & Indus.*, 4 Wn. App. 430, 481 P.2d 577 (1971). If the expert's opinion assumes the existence of conditions or circumstances not of record, its validity dissolves and the answer must be stricken. *Hansel v. Ford Motor Co.*, 3 Wn. App. 151, 473 P.2d 219 (1970). So long as the answer is fairly based on material facts, supported by substantial evidence under the examiner's theory of the case, however, the opinion testimony is proper. The trial court has wide discretion to determine whether expert testimony falls within the above rules. *Myers v. Harter*, 76 Wn.2d 772, 459 P.2d 25 (1969); *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 381 P.2d 605 (1963).”

In this case the Superior Court trial judge reviewed and weighed the evidence of record and made its decision with consideration of all expert witnesses. Substantial evidence exists that Dr. Aldrich was in the best position and had the accurate information about Ms. Matto’s low back condition before and after the September 16, 2008 industrial injury. The Superior Court judge determined that the testimony of Dr. Aldrich was entitled to greater weight than the opinions of Dr. Stump and Dr. Seligman. This determination is supported by the evidence as Dr. Stump opined that the worsening was due to an injury in 2007 and the natural progression of aging. Dr. Stump and Dr. Seligman also disagreed whether the industrial injury lit up or aggravated the degenerative disc

disease. Dr. Stump testified Ms. Matto's degenerative disc disease was not lit up or aggravated by the industrial injury. (CP 261). On the other hand, Dr. Seligman testified the injury was significant enough to temporarily aggravate the pre-existing degenerative changes. (CP 305). These opinions raise questions about Dr. Stump's opinion that Ms. Matto's current condition is related to a 2007 injury (so apparently an injury can aggravate degenerative changes) and the progression of aging, but at the same time says the 2008 injury had no impact. Dr. Stump's and Dr. Seligman's opinions are based on inaccurate or incomplete facts. Dr. Stump inaccurately believed Ms. Matto sustained a low back injury in 2007 with similar symptoms as those after the industrial injury. (CP 251). Dr. Stump admitted he did not have sufficient evidence to make a definitive statement. (CP 262). Dr. Stump did not review all the diagnostic tests. (CP 259-260). Dr. Seligman likewise based his opinions on a mistaken belief that Ms. Matto had chronic back pain for many years prior to the industrial injury. (CP 324-325).

Despite the inaccuracies in the testimony of its own expert witnesses, the Haggen attempts to reweigh the credibility of Dr. Aldrich and his testimony and in doing so is wrongly requesting reconsideration of factual evidence. Applying the substantial evidence standard, the Court views the evidence and all reasonable inferences from the evidence in the

light most favorable to the prevailing party. *Korst v. McMohon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (2006). Credibility determinations are solely for the trier of fact and are not reviewable on appeal. *Watson v. Dept. of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006).

In *City of Bellevue v. Raum*, 171 Wn. App. 124, 151, 286 P.3d 695, 710 (2012), *review denied* 176 Wn.2d 1024 (2013), determined that the court's "review is limited to examination of the record to see whether substantial evidence supports the findings made after the Superior Court's *de nova* review, and whether the court's conclusions of law flow from the findings." (*Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 97 P.2d 570 (1999); (*Young v. Dep't of Labor & Indus.*, 81 Wn.App. 123, 128, 913 P.2d 402 (1996)). "[E]ven if the [appellate] court were convinced that a wrong verdict had been rendered, it should not substitute its judgment for that of the Superior Court so long as there was evidence which, if believed, would support the verdict rendered." *Retail Clerks Health & Welfare Trust Funds v. Shop/and Supermarket, Inc.*, 96 Wn2d 939, 943, 640 P.2d 1051 (1982). This Court further concluded in *Raum* that more extensive appellate review of facts found in the Superior Court abridges the right to jury trial provided by RCW 51.52.115:

“Our function is to review for sufficient or substantial evidence,taking the record in the light most favorable to the party who prevailed in Superior Court. We are not to reweigh or rebalance the competing testimony and inferences,or to apply to a new burden of persuasion, for doing that would abridge the right to trial by jury.”

Substantial evidence supports Judge Cook’s decision.

**D. The trial court did not improperly rely upon the Proposed Decision and Order of the Industrial Appeals Judge in reaching its decision.**

Haggens argues that the Superior Court Judge improperly reviewed and cited the proposed decision and order by the IAJ, and claims that improper consideration was given to the length of the IAJ argument. The Superior Court ruling was made de novo, giving right to having all records reviewed. The ruling referenced the length of the PD&O, but provided no evidence to suggest that the Judge’s decision was based on the length of the decision as opposed to her own review of the certified record. The Appellant cites no authority to support the argument that a Superior Court judge cannot review and consider portions of the certified record (which the proposed decision was) in evaluating the evidence. Haggens apparently questions the Superior Court Judge’s independent review of all of the evidence in reaching its own decision, but provides no evidence the Judge did not do so. In fact, the Judge’s written letter merely refers to the Proposed Decision and Order to point out that the IAJ had given

appropriate special consideration to the treating physician, which Judge Cook determined the Board had failed to do. As mentioned above, substantial evidence exists to support the Court's interpretation of the evidence and the weight given to the testimony of the expert witnesses.

#### **IV. CONCLUSION**

For the foregoing reasons, Ms. Matto respectfully requests this Court to affirm the June 5, 2015 Findings of Fact, Conclusions of Law, and Judgment by the Skagit County Superior Court. Ms. Matto also requests this Court award reasonable attorney fees pursuant to RCW 51.52.130 as a party other than the worker is the appealing party and the worker's right to relief is sustained.

Respectfully submitted this 14<sup>th</sup> day of December, 2015.

A handwritten signature in black ink, reading "Brock D. Stiles". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Brock D. Stiles, WSBA 15707  
Attorney for Respondent

AFFIDAVIT OF MAILING

I, Sandy Nannen, hereby certify under penalty of perjury that on this 14<sup>th</sup> day of December, 2015, I placed in the United States Mail, first class postage prepaid the following documents:

RESPONDENT'S BRIEF

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