Muñoz, Juan

CAUSAL RELATIONSHIP

Physical therapist

EXPERT TESTIMONY

Scope of expertise

A physical therapist is not qualified to render opinions of medical causation. ***….In re Juan Muñoz,* BIIA Dec., 05 11698 (2007)** [*Editor's Note: Overruled In re Adele Palmer,* BIIA Dec., 16 16600 (2017). The Board's decision was appealed to superior court under King County Cause No.07-2-38541-0KNT.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JUAN M. MUÑOZ	**DOCKET NOS. 05 11698 & 05 16392**
CLAIM NO. W-449124	**DECISION AND ORDER**

APPEARANCES:

Claimant, Juan M. Muñoz, by
Law Office of David L. Harpold, per
David L. Harpold

Self-Insured Employer, Hoffman Structures, Inc., by
Slagle Morgan, LLP, per
Richard M. Slagle

Self-Insured Employer, Atkinson Construction, by
Thomas G. Hall & Associates, per
Thomas G. Hall

Self-Insured Employer, PCL Construction Services, by
AMS Law, per
Aaron K. Owada

In Docket No. 05 11698, the claimant, Juan M. Muñoz, filed an appeal with the Board of Industrial Insurance Appeals on February 22, 2005, from an order of the Department of Labor and Industries dated February 7, 2005. In this order, the Department affirmed its prior order dated October 18, 2004, in which the Department denied the claim because there was no proof of a specific injury at a definite time and place in the course of employment; the worker's condition was not an industrial injury; the worker's condition pre-existed the alleged injury and was not related thereto; and the worker's condition was not an occupational disease as contemplated by RCW 51.08.140. The Department order is **REVERSED AND REMANDED**.

In Docket No. 05 16392, the claimant, Juan M. Muñoz, filed an appeal with the Board of Industrial Insurance Appeals on June 8, 2005, from an order of the Department of Labor and Industries dated April 29, 2005. In this order, the Department assessed an overpayment for provisional time-loss compensation paid from July 6, 2004 through September 20, 2004, in the amount of $10,456.25, while the self-insured employer, Hoffman Structures, Inc., gathered information needed to make a decision regarding whether to allow the claim. The Department order is **REVERSED AND REMANDED**.

PRELIMINARY AND PROCEDURAL MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer, Hoffman Structures, Inc., to a Proposed Decision and Order issued on May 10, 2007. The following issues are raised by these appeals:

> Did Mr. Muñoz's left knee osteoarthritis arise naturally and proximately out of his years of work as a carpenter in employment covered by the Washington Industrial Insurance Act?
>
> If so, which employer/insurer is liable under the last injurious exposure rule?

Three self-insured employers participated in these proceedings: Hoffman Structures, Inc., (Hoffman) for the period of employment from March 25, 2002 through January 30, 2004; Atkinson Construction (Atkinson), for the period of employment from February 13, 2004 through March 26, 2004; and PCL Construction Services (PCL), for the period of employment from April 5, 2004 through June 30, 2004. The State Fund did not participate. The industrial appeals judge reversed the Department orders of February 7, 2005 and April 29, 2005; determined that Mr. Muñoz's osteoarthritic left knee condition was an occupational disease arising naturally and proximately out of his employment with multiple employers; determined that Atkinson and PCL were not responsible for the claim; and assigned responsibility to Hoffman.

The Board has reviewed the evidentiary rulings in the record of proceedings. As explained below, the industrial appeals judge erroneously admitted the testimony of the physical therapist Theodore J. Becker, Ph.D., regarding the causation of Mr. Muñoz's left knee osteoarthritis. That testimony, as well as the responsive testimony of John F. Dickson, M.D., and Richard G. McCollum, M.D., is stricken.

During the March 29, 2007 deposition of Mr. Muñoz, Hoffman offered Exhibit No. 13, a Transaction History Report from the Carpenters Trust, for the purpose of showing Mr. Muñoz's work history prior to March 25, 2002, when he began working for Hoffman. The claimant had no objection. Atkinson and PCL objected solely on the basis of relevance. They did not challenge the documents authenticity and specifically waived any hearsay objection. Exhibit No. 13 is admitted. We find that no other prejudicial error was committed. The rulings are affirmed.

DECISION

We have granted review to remand this occupational disease claim to the Department to perform a complete investigation. In his Proposed Decision and Order, the industrial appeals judge thoroughly and accurately reviewed the evidence. The following facts and chronology are critical to our decision.

Mr. Muñoz was born on June 24, 1947. He has worked as a carpenter on various construction projects for all of his working life, beginning in 1976 in San Diego, California. In 1991, he moved to the Northwest, and worked for numerous Washington employers through June 30, 2004. Most of his work has involved building forms for concrete pours. In his testimony, Mr. Muñoz described building upright forms for concrete columns that were anywhere from 10 to 20 feet tall. To climb the forms, he used a whaler, which is a homemade ladder. When he was on the whaler, he would be hooked to the form with a safety belt and harness, and hold on with his knees and feet, causing pressure in his legs and knees. When he built forms for concrete deck pours, he testified that he spent 40 to 60 percent of his time kneeling, sometimes on rebar. When he knelt on one knee, it would usually be his left. He was also required to squat and bend while constructing forms for deck pours.

Mr. Muñoz probably began having knee problems sometime in 1998 or 1999, but the first documented medical visit in this record occurred on October 16, 2001. On that date, the claimant complained of left knee pain to Edmund Lowinger, M.D, who referred him to James Russo, M.D., an orthopedic surgeon. Dr. Russo saw Mr. Muñoz on December 26, 2001. At that time, he complained of diffused joint pain. Dr. Russo referred the claimant to a rheumatologist, who diagnosed an inflammatory arthritic process involving multiple joints. That condition has been brought under control by Prednisone and Mr. Muñoz is not contending that it is related to employment.

In January 2002, Mr. Muñoz began to focus more on his left knee as the critical issue. Dr. Russo referred him for an MRI, which was obtained on January 11, 2002, and revealed advanced degenerative changes of the knee, with osteophyte formation; medial compartment narrowing; advanced medial compartment chondromalacia; a complex tear of the posterior horn of the medial meniscus; a partial tear of the anterior cruciate ligament; a probable tear of the posterior

cruciate ligament; mild to moderate joint effusion; advanced denudement of the articular surface medially; and a bipartite patella, probably congenital. Mr. Muñoz was diagnosed as having full blown, grade 4 (on a scale of 0 to 4) left knee osteoarthritis. According to Dr. Russo, Mr. Muñoz would probably have had a ratable impairment under the *AMA Guides* at that time and he would have advised against kneeling, squatting, and deep knee bends. Russo Dep. at 22-23; 28-32.

On January 23, 2002, Dr. Russo discussed the MRI results with Mr. Muñoz and treatment options. Mr. Muñoz then began his employment with Hoffman on March 25, 2002. That employment continued through January 30, 2004. Leonard Grinde, Hoffman's general foreman, testified that Mr. Muñoz worked on the City Hall project during most of that period, building forms for stem walls, curbs, bulkheads, and slabs, as well as constructing safety railings for stairways and elevator shafts. He also removed and replaced 18 inch square pieces of carpet, so that registers could be repaired. Mr. Muñoz did not construct forms for columns nor was he required to climb ladders.

Mr. Muñoz apparently sought no further treatment for his left knee until June 24, 2003, when he again saw Dr. Russo, who observed mild left knee effusion. He saw Dr. Russo one last time, on October 1, 2003. During that visit, Mr. Muñoz reported he was doing very well on Prednisone for his other joints, but not for his left knee. The first weight bearing films of the left knee were taken at that time and they showed bone on bone contact. Dr. Russo discussed total knee replacement surgery with the claimant and referred him to Fredrick Huang, M.D., because Dr. Russo was in the process of retiring. Dr. Huang first saw Mr. Muñoz on October 13, 2003, and also recommended surgery.

However, the claimant did not undergo surgery at that time. He continued working for Hoffman through January 30, 2004, and completed his portion of a workers' compensation claim on that date, naming Hoffman as his employer. On February 4, 2004, Dr. Russo's office stamped his signature on the application and Hoffman's third party administrator, G.E. Young, received the claim on February 11, 2004. Exhibit No. 11; 9/18/06 Tr. at 94. The claim number pre-stamped on Exhibit No. 11 was X-621046. As explained in WAC 296-20-010(10): "State fund claims have six digit numbers or a letter and five digits preceded by a letter other than 'S,' 'T,' or 'W' . . . Self-insured

claims are six digit numbers or a letter and five digits preceded by an 'S,' 'T,' or 'W.'" Thus, the form provided to Mr. Muñoz by Dr. Russo's office was for a State Fund claim, not a self-insured claim. Mr. Muñoz was therefore required to re-file, using a Self-Insurer Accident Report that was pre-stamped with Claim No. W-49124. That form was received by G.E. Young on February 26, 2004 and by the Department's Self-Insurance Section on April 12, 2004. Exhibit No. 8.

Mr. Muñoz began working for Atkinson on February 13, 2004, doing what he described as ground work. That job ended on March 26, 2004, and he performed his last stint as a carpenter from April 5, 2004 through June 30, 2004, with PCL, cutting two by fours with a chop saw, which required no kneeling and was lighter work in nature than his regular carpenter duties. Dr. Huang then took him off work on July 1, 2004, and performed a total knee replacement on December 7, 2004.

The claimant presented the testimony of Dr. Huang, an orthopedic surgeon, and Dr. Becker, a physical therapist. Hoffman presented the testimony of Richard G. McCollum, M.D., an orthopedic surgeon who examined Mr. Muñoz on January 6, 2005, at Hoffman's request, and John F. Dickson, M.D., a rheumatologist, who gave opinions based on a review of the medical records. The claimant also took Dr. Russo's deposition at the industrial appeals judge's direction, to determine when Mr. Muñoz's condition became disabling and when that information was communicated to the claimant. Apparently, the industrial appeals judge sought this information based on a misunderstanding of the mechanism for determining the date of manifestation. In the Proposed Decision and Order, he stated that: "The date of manifestation of disease or disability is the point in time when contemporaneous medical evidence of disability or need for treatment is coupled with knowledge on the worker’s part, that a disease or disability exists." Proposed Decision and Order, at 18. However, under *Boeing v. Heidy*, 147 Wn.2d 78 (2002), the worker's knowledge is irrelevant. Instead, RCW 51.32.180(b) provides that "for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim."

Dr. Huang concluded that Mr. Muñoz's occupational duties had a direct relationship to the development of his left knee osteoarthritis. He noted that: "From the description of the duties you

just gave, I think it's clear he was doing very strenuous work, repetitively. And we know that with degenerative joint disease, there is a factor of accumulation of, basically, trauma. And I think your description indicates that he probably subjected his knees to trauma on a daily basis when he was at work." Huang Dep. at 11. When asked if Mr. Muñoz's employment with Hoffman, Atkinson and PCL after January 2002 had caused the conditions documented in the January 11, 2002 MRI, Dr. Huang responded: "It's certainly clear that he had advanced arthritis on the MRI of January 11, 2002. It is difficult to know how severe symptoms are just based on the MRI report. So in answer to your question, yes, it's certainly possible that the employment after the MRI was done did not cause the arthritic problems, but it's certainly possible that duties at those positions could exacerbate his symptoms associated with his arthritis." Huang Dep. at 17. Dr. Huang conceded that he had no opinion regarding causation and Mr. Muñoz's last three employments (Huang Dep. at 18) and that the condition would probably have progressed even if Mr. Muñoz had not continued to work. Huang Dep. at 16-17.

Mr. Muñoz's other witness regarding causation was the physical therapist, Dr. Becker. He testified that one cause of arthritis, aside from rheumatism and genetics, "has to do with the loading in biomechanical forces and joint mechanisms." Becker Dep. at 16. His theories were disputed by both Dr. Dickson (9/27/06 Tr. at 59-69) and Dr. McCollum (McCollum Dep. at 24-26). Dr. Becker related Mr. Muñoz's osteoarthritis to the type of work he was doing. When asked if Mr. Muñoz's knee would have worsened after the January 11, 2002 MRI, as he continued to work through 2004, Dr. Becker responded that "once the structure is degenerated and the force continues to be loaded, it's a very steep curve. So it's very fast in how it will degenerate in a shorter period of time." Becker Dep. at 25.

Dr. McCollum examined Mr. Muñoz on January 6, 2005. He noted that the January 11, 2002 MRI showed "very severe end-stage arthritis of the left knee." McCollum Dep. at 20. When asked whether Mr. Muñoz's degenerative arthritis "was caused in full or in part by his employment between March 25, 2002, and June 30, 2004," he responded in the negative. McCollum Dep. at 21. He came to that conclusion because the January 11, 2002 MRI already showed

end-stage arthritis, two and a half months prior to March 25, 2002; and because the onset of knee pain was December 26, 1999, according to the accident report. Furthermore, as a general proposition, Dr. McCollum does not believe repetitive activities have been shown to cause osteoarthritis.

Dr. Dickson performed a record review at Hoffman's request. Like the other doctors, he noted that Mr. Muñoz had advanced arthritis in his left knee as of January 11, 2002. When asked what role occupation plays in the development of osteoarthritis, he responded:

> That is a very thorny question that has not been completely answered at this point. Those people who view osteoarthritis as a wear-and-tear phenomenon, which it is not, oftentimes look to occupational or use exposures as potential causes for wear and tear. When occupation activity, physical activity, is examined, it shows either one of two things: no association with osteoarthritis in weight-bearing joints; or a very small association that can be totally overridden by the other factors that I previously mentioned as risk factors [i.e., genetics, weight, gender, and age].
>
> 9/27/06 Tr. at 59.

He pointed out that "people have repeatedly looked at runners and compared them with non-runners to determine if they are at risk for osteoarthritis or degenerative joint disease of weight-bearing joints, and the studies show that there is no difference. People who jog 20 to 40 miles a week for 40 years have no increased osteoarthritis compared with non-runners." 9/27/06 Tr. at 61. However, Dr. Dickson did acknowledge that the symptoms of osteoarthritis would likely be affected by working as a carpenter, in the following exchange:

> Q. (by Mr. Hall) Doctor, you -- in response to Mr. Slagle's question, towards the end he asked you whether the distinctive conditions of Mr. Muñoz's occupation as a industrial carpenter between March of '02 and January--end of January '04 had any impact at all on his osteoarthritis. You said it was extraordinarily unlikely that it did. Did I --
>
> A. Let me -- let me hasten to expand on that.
>
> Q. All right.
>
> A. As far as the underlying process of osteoarthritis, I think it would be extraordinarily unlikely. It just has not been shown by scientific evidence to be the case.

> His occupation as a carpenter would definitely affect the symptoms in his joint. As I say, osteoarthritis is a disease where activity aggravates the symptoms without necessarily aggravating the underlying disease. That's the crucial thing that people don't understand: Because something causes a symptom doesn't mean it was the cause of a problem.

9/27/06 Tr. 75-76.

Dr. Dickson also stressed the significance of symptoms, saying that it is the combination of the MRI findings, the symptoms, and joint dysfunction that lead to total knee replacement surgery. One would never perform the surgery based solely on an MRI. 9/27/06 Tr. at 77.

The industrial appeals judge requested that Dr. Russo's testimony be taken by deposition. As he noted, the purpose of that testimony was not to address causation, but rather the question of when Mr. Muñoz's condition became disabling or was in need of treatment, for purposes of establishing the date of manifestation. Nonetheless, Dr. Russo was questioned regarding causation, without objection. He agreed that the January 11, 2002 MRI showed full blown left knee arthritis. Regarding causation, he said "I'm not sure to this day that we absolutely know the etiology of degenerative arthritis." Russo Dep. at 19. He agreed that "certain occupations expose people to more risk of injury, and if they've had documented evidence of episodic injuries to their knees, things that we know can progress down the [road] to arthritis, then I think job relatedness becomes an issue. But I am not sure that simply walking and climbing in and of itself is likely to lead to an arthritic condition of the knee." Russo Dep. at 19.

In the current case, Dr. Russo did not file a claim for Mr. Muñoz because he did not believe his condition was work-related. He noted that degenerative arthritis is a progressive disorder, although the rate of decline varies. He had no opinion regarding whether Mr. Muñoz's employment after January 11, 2002 contributed in any way to the progression of his degenerative arthritis. However, he echoed Dr. Dickson, saying that one would never perform total knee replacement surgery based solely on an MRI. "It's always a decision that's based on symptom level. You can see some horrible looking MRIs, but it's what their symptom level is primarily that drives a decision to joint replacement . . . never would you say someone needed a total knee just looking at an MRI." Russo Dep. at 41.

ANALYSIS

In its Petition for Review, Hoffman renews its objection to the admissibility of a physical therapist's testimony regarding medical causation. The employer argues that, in the absence of that testimony, there is no medical evidence that Mr. Muñoz's employment at Hoffman affected his already symptomatic osteoarthritis, which was described as full blown prior to his employment with Hoffman. In tandem with that argument, Hoffman contends that Washington has not adopted the last injurious exposure rule as a method of proving causation, but only as a rule of assignment of responsibility. The employer therefore contends that Mr. Muñoz was required to prove that his employment at Hoffman caused or contributed to his osteoarthritis, not just that his years of employment as a carpenter caused the condition. Hoffman relies on *Safeway, Inc. v. Martin*, 76 Wn. App. 329 (1994), for that proposition.

Admissibility of a physical therapist's testimony regarding medical causation.

We begin with the question of whether the worker has proved that his left knee osteoarthritis arose out of his employment. Medical testimony is required to prove that employment caused the condition complained of. *Dobbins v. Commonwealth Aluminum Corp.*, 54 Wn.App. 788 (1989); and *Jackson v. Department of Labor & Indus.*, 54 Wn.2d 643 (1959). The question here is whether Theodore Becker, Ph.D., a physical therapist, is qualified to give a medical causation opinion and whether he should have been allowed to give his opinion regarding the cause of Mr. Muñoz's osteoarthritis.

The Board has previously addressed Dr. Becker's expert qualifications as a physical therapist, with a specialty in biomechanics. We have approved the use of his findings based on a physical capacities evaluation (PCE) as the basis for an impairment rating. *In re Bertha Ramirez,* BIIA Dec., 03 14933 (2004). Likewise, we have held that an occupational therapist is competent to testify to her PCE findings and the limitations she would impose on the worker. *In re Peter Kunst*, BIIA Dec. 04 14164 (December 6, 2005).

Performing a PCE and determining a patient's limitations are well within the scope of practice for a physical therapist. Indeed, under WAC 296-20-01002, the Department requires that a PCE be conducted by a licensed occupational or physical therapist. In the current case, however, Dr. Becker's testimony was offered solely on the question of medical causation. He conducted a

forensic evaluation on August 4, 2006, and apparently reviewed no medical records. He did not review the January 11, 2002 MRI, noting that reading MRIs is not part of his practice. Becker Dep. at 26-27.

We have not previously resolved the question of whether a physical therapist is competent to offer an opinion regarding medical causation. The issue was raised, but not addressed, with respect to Dr. Becker's testimony in *In re William Hood, Jr.*, Dckt. No. 02 16117 (June 15, 2003). At that time, we suggested that the testimony of a physical therapist was insufficient to establish medical causation. We noted:

> Because it is not material to our decision, we decline to address whether this testimony, which appears to be medical opinion, should have been allowed. We note, however, that discussion of biomechanics or human behavior as it relates to whether Mr. Hood's left shoulder condition arose from work or from a fall, does not seem to have anything other than medical significance. The witness conceded that this was not the kind of thing he was usually asked about.
>
> *Hood*, at 2.

RCW 18.74.010 defines physical therapy as follows:

> (3) "Physical therapy" means the care and services provided by or under the direction and supervision of a physical therapist licensed by the state. The use of Roentgen rays and radium for diagnostic and therapeutic purposes, the use of electricity for surgical purposes, including cauterization, and the use of spinal manipulation, or manipulative mobilization of the spine and its immediate articulations, are not included under the term "physical therapy" as used in this chapter.

This statutory language does not authorize physical therapists to diagnose medical conditions or to determine causation, an integral part of the diagnostic process. The language of RCW 18.74.010 stands in marked contrast to RCW 18.225.010, which defines social work as follows:

> (6) "Independent clinical social work" means the diagnosis and treatment of emotional and mental disorders based on knowledge of human development, the causation and treatment of psychopathology, psychotherapeutic treatment practices, and social work practice as defined in advanced social work. Treatment modalities include but are not limited to diagnosis and treatment of individuals, couples, families, groups, or organizations.

Based on that provision, we have permitted social workers to testify regarding the causation of mental health conditions. *In re Kathleen Bojano*, Dckt. No. 02 23177 (April 7, 2004). In the same way, we have permitted psychologists to testify regarding causation. *In re Robert Hedblum*, BIIA Dec., 88 2237 (1989). However, we have concluded that medical testimony is required to establish a causal connection between occupational noise and hearing loss; an audiologist's testimony is not sufficient. *In re Virgil Degolier,* BIIA Dec., 60,471 (1983).

In determining whether physical therapists are qualified to offer opinions regarding medical causation, we note that the Department has not included physical therapists within the group of practitioners who are permitted to sign accident forms or certify time-loss compensation. WAC 296-20-01002. Two of the key questions in the filing of a claim are the diagnosis of the worker's condition and a determination of causation. Thus, the Department has excluded physical therapists from the list of providers who may make those determinations.

In addition, Dr. Becker candidly admitted that he cannot read MRIs, nor did he review the medical records. There is no suggestion in this record that the diagnosis of osteoarthritis is within the expertise of a physical therapist. Indeed, the problem with a physical therapist making such a diagnosis is well illustrated here, where Mr. Muñoz was referred to a rheumatologist, who diagnosed an inflammatory arthritic condition, which is separate from the osteoarthritic left knee condition. A physical therapist would clearly not be qualified to make such a differential diagnosis. Dr. Becker appeared to concede as much. He was asked: "Is the result of that dysfunction or that excessive force represented in traumatic arthritis?" He responded: "Well, it can ultimately be presented in a number of clinical presentations and, of course, that could be one that a physician would diagnose ultimately . . .." Becker Dep. at 17. We hold that it was not within the scope of Dr. Becker's practice as a physical therapist to determine the cause of Mr. Muñoz's left knee osteoarthritis. Dr. Becker's testimony is therefore stricken, as is the responsive testimony of Drs. Dickson and McCollum.

The claimant's burden of proof with respect to causation.

We turn then to the question of whether Mr. Muñoz was required to prove that his employment at Hoffman contributed in some way to his osteoarthritis, or only that his condition arose out of years of employment as a carpenter. The answer depends on the nature of the last

injurious exposure rule, adopted by the Supreme Court in *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128 (1991). Under *Tri*, the insurer on the risk during the most recent exposure that bears a causal relationship to the disability is solely liable for the entire claim. *Tri*, 117 Wn.2d at 136. The last injurious exposure rule has two parts, the rule of proof (i.e., proof of causation) and the rule of assignment of responsibility. *Tri*, 117 Wn.2d at 134-135. Hoffman argues that the Supreme Court only adopted the rule of assignment in *Tri*, citing *Safeway, Inc. v. Martin*, 76 Wn. App. 329, 333 (1994). In *Martin*, the Court of Appeals noted that the Supreme Court had not explicitly adopted the rule of proof. According to Hoffman, Mr. Muñoz was therefore required to prove that his left knee osteoarthritis arose out of his employment with Hoffman from March 25, 2002 through January 30, 2004, not just that it arose from his years of employment as a carpenter.

In *Tri*, causation was conceded, so only the rule of assignment was at issue. The Supreme Court stated: "Today we adopt the rule only for purposes of determining liability among successive insurers in occupational disease cases." *Tri*, 117 Wn.2d at 140 n.1 (1991). However, the Supreme Court also referred approvingly to our decision in *In re Lester Renfro*, BIIA Dec. 86 2392 (1988), noting that: "The rule also provides the benefit of not requiring the disabled worker to meet the often impossible burden of proving how a given exposure contributed to his or her disease." *Tri*, 117 Wn.2d at 137. Furthermore, in its subsequent opinion in *Fankhauser v. Department of Labor & Indus.*, 121 Wn.2d 304, 311 (1993), the Supreme Court relied on *Tri* and reiterated that: "The last injurious exposure rule is actually two rules: a rule of proof and a rule for assignment of responsibility." *Fankhauser*, 121 Wn.2d at 311. As in *Tri*, only the rule of assignment was at issue in *Fankhauser*, because causation was conceded.

Nonetheless, the Supreme Court has twice stated that the last injurious exposure rule includes the rule of proof. We therefore agree with our industrial appeals judge. The Supreme Court has adopted the last injurious exposure rule in its entirety, not just one aspect, as Hoffman argues. We hold that, in an occupational disease case involving alleged exposures with multiple employers, the worker is only required to prove that the medical condition arose naturally and proximately out of the aggregate occupational exposure. If the worker satisfies that burden, then the insurer on the risk during the most recent exposure that bears a causal relationship to the disability is solely liable for the entire claim under *Tri* and *Fankhauser.* That employer/insurer may

avoid liability by showing there was no causal injurious exposure during its period of employment. *In re Charles Jones,* BIIA Dec., 70,660 (1987); *In re Frank Johannes,* BIIA Dec., 67,323 (1985); and *In re David Swendt,* BIIA Dec., 61,790 (1983).

The role of the Department in multiple employer occupational disease cases.

Finally, we turn to the critical role played by the Department in multiple employer occupational disease cases. When the Department receives an occupational disease claim involving multiple employers, it should first determine whether the worker suffers from an occupational disease arising naturally and proximately out of the distinctive conditions of employment with all potentially responsible employers covered under the Washington Industrial Insurance Act. If so, the Department should then determine the responsible employer/insurer.

In the current appeal, the Department failed to follow this two-step process. It did not first determine whether Mr. Muñoz's left knee osteoarthritis was an occupational disease and then determine the responsible insurer. Instead, it apparently looked only at the limited question of whether Mr. Muñoz's left knee condition arose out of his employment with Hoffman for the period of March 25, 2002 through January 30, 2004. This approach is reflected in the fact that the October 18, 2004 and February 7, 2005 orders were mailed to Hoffman alone, not to any other employers. It is reflected in the fact that, when Mr. Muñoz appealed the denial of his claim, the Department reassumed jurisdiction to permit Hoffman to schedule a medical examination, rather than scheduling an IME itself. And it is reflected in the language of the October 18, 2004 Department order, in which the Department rejected the claim in part because "the worker's condition pre-existed the alleged injury and was not related thereto." There is no evidence that Mr. Muñoz suffered from left knee osteoarthritis prior to beginning his Washington employment in 1991. Instead, the Department was presumably referring to the findings on the January 11, 2002 MRI, which pre-existed his employment with Hoffman.

The problem with this narrow approach is that the Department appears not to have considered the impact of Mr. Muñoz's employment up through January 11, 2002, the date of the MRI. Nor does it appear that the Department determined whether any of those employers were self-insured or insured with the State Fund. Likewise, the Department failed to consider the subsequent employments with Atkinson and PCL for the periods of February 13, 2004 through March 26, 2004, and April 5, 2004 through June 30, 2004.

On appeal, Hoffman filed a motion to join Atkinson and PCL with respect to those periods of employment, and the industrial appeals judge granted that motion. In its first appearance, as well as its Post Hearing Brief, Atkinson argued that there was no authority for joining subsequent employers. Instead, according to Atkinson, the Department was required to make the allowance determination based on whatever exposure had occurred up to the date the claim was filed, which was prior to Mr. Muñoz's employment with either Atkinson or PCL. Atkinson has renewed that argument in its Reply to Petition for Review, with which PCL has joined. They contend that the rights of the parties are fixed as of the date the claim is filed, citing *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22 (1963); *Lynch v. Department of Labor & Indus.*, 19 Wn.2d 802 (1944); and *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991). None of those cases stands for that proposition. *Ashenbrenner* and *Landon* involve the applicable schedule of benefits, as determined by the date of injury or the date of manifestation. *Lynch* simply holds that the law in effect at the time of injury applies to the claim.

Hoffman counters by citing *Metropolitan Stevedore Co. v. Crescent Wharf, et. al.*, 339 F.3d 1102 (9th Cir. 2003), a case arising under the Longshore and Harbor Workers' Compensation Act. However, while the facts in *Metropolitan* are remarkably similar to the facts here, there is one crucial difference. In *Metropolitan*, the worker did not file his claim until after the third employment. Here, the claim was filed prior to the last two employments. Thus, *Metropolitan* does not answer the question of whether the subsequent employers may be joined in proceedings before the Board or, more importantly, whether the Department had the authority to address the potential responsibility of either Atkinson or PCL for Mr. Muñoz's left knee osteoarthritis while the claim was still before the Department.

With respect to the joinder question, CR 19(a)(1) provides for the "joinder of persons needed for just adjudication" as follows: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties." We have consistently held that, in occupational disease cases involving multiple employers, the issue of claim allowance cannot be fully decided unless all potentially responsible

insurers participate. *In re Richard L. Eades*, Dckt. No. 01 17639 (December 20, 2002); *In re Sidney T. Jones, Jr.*, Dckt. No. 00 15875 (January 29, 2002); and *In re Daniel G. Pingley*, BIIA Dec., 01 16177 (2003). The current case is somewhat different from *Pingley*, *Eades*, and *Jones*, because Mr. Muñoz filed his claim prior to his employment with either Atkinson or PCL and did not file any subsequent claim, as far as we can discern.

However, the worker is not required to determine the correct employer/insurer. The sole requirement is to file the claim. It is then incumbent on the Department to determine whether the worker has an occupational disease arising out of all relevant employments and, if so, which employer/insurer is responsible. Here, the Department issued the ultimate order in which it rejected Mr. Muñoz's claim on February 7, 2005, seven months after Mr. Muñoz last worked on June 30, 2004. There is no question that the Department was authorized to adjudicate all issues through the date its order was issued, which would have included the periods of employment with Atkinson and PCL. Unfortunately, the Department does not appear to have addressed any question other than the narrow issue of whether Mr. Muñoz's left knee osteoarthritis arose out of his employment with Hoffman from March 25, 2002 through January 30, 2004.

That failure is of particular concern in light of the January 11, 2002 MRI and the medical evidence presented by Hoffman, which raises a significant question concerning whether Mr. Muñoz's employment after January 11, 2002, with Hoffman, Atkinson, and PCL, was injurious. The record contains two exhibits listing Mr. Muñoz's employers over the years, Exhibit Nos. 10 and 13. Prior to his employment with the three employers who participated in this appeal, Mr. Muñoz worked for Landel Corporation, Bellevue Masters, and PCL in 2001, and for PCL and Howard S. Wright Company in early 2002, apparently before he began working for Hoffman on March 25, 2002. 9/18/06 Tr. at 45; See also, Exhibit Nos. 10 and 13. The only one of those employers to participate in these proceedings was PCL, but that was for the period of employment from April 5, 2004 through June 30, 2004. Indeed, at hearing the parties focused almost exclusively on Mr. Muñoz's employment after March 25, 2002. We do not know whether PCL was a self-insured employer or insured with the State Fund during the prior employments, nor do we know the status of the other non-participating employers. In addition, the Department did not participate in this appeal to represent the interests of the State Fund.

The absence of the Department and any employers for periods prior to March 25, 2002, hampers our ability to fairly resolve this appeal. As an appellate entity, we are not equipped to investigate and determine Mr. Muñoz's various employers, their insurance status, and the periods of employment. That is the Department's role. In the current case, that problem has been compounded by the narrow way the Department addressed this claim. Under CR 19(a)(1), we may have the authority to join the subsequent employers, Atkinson and PCL. However, we are concerned that our scope of review may not include the question of their liability, in the absence of any prior determination by the Department regarding that question. Therefore, the best option appears to be a remand to the Department, to complete its evaluation of this claim. That approach has the added advantage of avoiding piecemeal litigation and the potential of inconsistent results. *In re Timothy L. McBride*, Dckt. No. 05 21297 (February 21, 2007); *In re Gloria Cartagena-Go*, Dckt. No. 95 1747 (January 10, 1997).

FINDINGS OF FACT

1. On February 26, 2004, the claimant, Juan M. Muñoz, filed an Application for Benefits in Claim No. W-449124 with Hoffman Structures, Inc., a self-insured employer, in which he alleged that his ability to use his knees, arms and right ankle, was becoming limited due to work-related wear and tear. The claim was received by the Department of Labor and Industries on April 12, 2004. On April 19, 2004, the Department allowed the claim on an interlocutory basis. On October 18, 2004, the Department denied the claim.

   On November 5, 2004, Mr. Muñoz filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On November 23, 2004, the Department reassumed jurisdiction and on November 29, 2004, the Board returned the case to the Department for further action.

   On February 7, 2005, the Department affirmed its order dated October 18, 2004. On February 22, 2005, Mr. Muñoz filed a Notice of Appeal with the Board and on March 16, 2005, the Board issued an Order Granting Appeal and assigned the appeal Docket No. 05 11698.

   On February 14, 2005, Hoffman Structures, Inc. (Hoffman), filed a request with the Department, seeking reimbursement of benefits paid. On April 29, 2005, the Department directed Mr. Muñoz to repay Hoffman the sum of $10,456.25 for provisional time-loss compensation benefits paid for the period July 6, 2004 through September 20, 2004. On June 8, 2005, Mr. Muñoz filed a Notice of Appeal with the Board. On July 5, 2005, the Board issued an Order Granting Appeal and assigned the appeal Docket No. 05 16392.

2. Mr. Muñoz was born on June 24, 1947. He has worked as a carpenter on various construction projects for all of his working life, beginning in 1976 in San Diego, California. In 1991, he moved to the Northwest, and worked for numerous Washington employers through June 30, 2004.

3. On January 11, 2002, Mr. Muñoz underwent an MRI that revealed advanced degenerative changes of the left knee. He was diagnosed as having full blown, grade 4, left knee osteoarthritis.

4. From March 25, 2002 through January 30, 2004, Mr. Muñoz worked as a carpenter for Hoffman Structures, Inc. (Hoffman), a self-insured employer.

5. On January 30, 2004, Mr. Muñoz completed his portion of an application for industrial insurance benefits, alleging bilateral knee, bilateral arm, and right ankle problems arising out of 22 years of work as a carpenter. On February 11, 2004, that application was filed with the third party administrator for Hoffman. The claim number pre-stamped on the Application for Benefits was Claim No. X-621046, which applies to State Fund claims. For that reason, the claim was not processed and Mr. Muñoz was required to re-file, using a Self-Insurer Accident Report that was pre-stamped with Claim No. W-449124. On that form, Mr. Muñoz alleged that his ability to use his knees, arms and right ankle was becoming limited due to work-related wear and tear. The second form was received by Hoffman's third party administrator on February 26, 2004, and by the Department's Self-Insurance Section on April 12, 2004.

6. From February 13, 2004 through March 24, 2004, Mr. Muñoz worked as a carpenter for Atkinson Construction, a self-insured employer.

7. From April 5, 2004 through June 30, 2004, Mr. Muñoz worked as a carpenter for PCL Construction Services, a self-insured employer.

8. On April 19, 2004, the Department allowed Claim No. W-449124 on an interlocutory basis.

9. As of July 1, 2004, Mr. Muñoz was taken off work by his physician.

10. On October 18, 2004, the Department denied Claim No. W-449124 because there was no proof of a specific injury at a definite time and place in the course of employment; the worker's condition was not an industrial injury; the worker's condition pre-existed the alleged injury and was not related thereto; and the worker's condition was not an occupational disease as contemplated by RCW 51.08.140.

11. The October 18, 2004 order was mailed to Hoffman, but not to any other employers.

12. Mr. Muñoz appealed the October 18, 2004 order to the Board and the Department reassumed jurisdiction, placing the October 18, 2004 order in abeyance, pending the completion of an independent medical examination (IME) to be scheduled by Hoffman.

13. On December 7, 2004, Mr. Muñoz underwent total left knee replacement surgery.

14. On January 6, 2005, Mr. Muñoz underwent an IME scheduled by Hoffman with Richard G. McCollum, M.D.

15. On February 7, 2005, the Department affirmed the October 18, 2004 order and Mr. Muñoz appealed to the Board.

16. By his appeal Mr. Muñoz is contending that his left knee osteoarthritis arose naturally and proximately out of his years of work as a carpenter in employment covered by the Washington Industrial Insurance Act.

17. Atkinson Construction and PCL Construction Services, Inc., were joined as parties in these proceedings with respect to the periods of employment from February 13, 2004 through March 26, 2004, and from April 5, 2004 through June 30, 2004.

18. Mr. Muñoz was employed by Landel Corporation, Bellevue Masters, and PCL Construction Services, Inc., in 2001, and by PCL Construction Services, Inc., and Howard S. Wright Company in early 2002, prior to his employment with Hoffman. Details regarding these employments cannot be discerned from this record, nor is it known whether these employers were self-insured or insured by the State Fund during those periods of employment. None of these employers are parties to this appeal.

19. The Department of Labor and Industries did not participate in this appeal.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. When the Department issued its February 7, 2005 order, it had the authority to adjudicate whether Mr. Muñoz's left knee osteoarthritis arose out of any or all of his employments, covered under the Washington Industrial Insurance Act, through that date, and should have done so.

3. The February 7, 2005 and April 29, 2005, orders are reversed. This matter is remanded to the Department with directions to first determine whether Mr. Muñoz's left knee osteoarthritis arose naturally and proximately out of the distinctive conditions of his multiple employments as a carpenter with employers covered by the Washington Industrial Insurance Act from 1991 through June 30, 2004, and, if so, to determine the responsible employer/insurer, and to take further action as indicated by the law and the facts.

It is **ORDERED.**

Dated: November 5, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
CALHOUN DICKINSON Member