IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVEN HULETT, Respondent, v. RAYONIER, INC.; DEPARTMENT OF LABOR & INDUSTRIES, STATE OF WASHINGTON, Appellant.	No. 38561-9-II UNPUBLISHED OPINION

Armstrong, J. — Steven Hulett filed an industrial injury claim against his employer, Rayonier, Inc. An industrial appeals judge proposed an order finding that Hulett was at least temporarily disabled by his injuries. The Board of Industrial Insurance Appeals rejected the proposed order, concluding that Hulett sustained only temporary injuries that had already cleared. On appeal, the superior court found Hulett's injuries serious and permanently disabling. In this appeal, Rayonier asks us to reverse the superior court and reinstate the Board's decision. Because substantial evidence supports the superior court's findings and the findings support its legal conclusions, we affirm.

FACTS

Steven Hulett was born in 1944 and has a high school education. He starting working at Rayonier in 1963. At the time of his 1996 industrial injury, he was working in building maintenance. His job included installing insulation, pipe fitting, replacing windows, sheet metal working, carpentry, installing electrical outlets, making minor electrical repairs, and roofing. He had to be able to lift and carry over 40 pounds while climbing, stooping, bending, twisting, and

working on ladders; his job was classified as medium to heavy level work.

On February 22, 1996, while wearing his hard hat, Hulett was under some timbers at work when he stood up and hit his head on a pipe. All he remembers of the injury is a loud noise; someone else had to tell him where the injury occurred. On February 23, Hulett went to his family physician, Dr. Steven Oakes, who has treated him since the mid-1980s. Hulett complained of visual fuzziness, ringing in the ears, a severe headache, and neck pain. On April 15, 1996, Hulett filed a claim for benefits with the Department of Labor and Industries. Hulett was assigned part-time, light-duty work at Rayonier until the plant closed in 1997. The hours he worked depended on how he felt.

Hulett's symptoms persisted, so in 1998 he was referred to the Virginia Mason Neurological Rehabilitation Clinic, which has a brain injury treatment program. He was diagnosed with post-concussion syndrome and received inpatient and outpatient treatment for 14 weeks. During his treatment, he met with vocational counselor Andrew Camarda. Together, they developed a plan for Hulett to be self-employed as a horse boarder. The Department assisted Hulett in purchasing machinery that would reduce the job's physical demands, and Virginia Mason approved a second set of equipment modifications as medically necessary. The job was classified as heavy level work that involved lifting 90 pound bales of hay, and Hulett was cleared to lift no more than 40 pounds.

Hulett and his family worked to establish the horse boarding business on their property, and it opened in April 2000. Hulett's wife, daughter, and son-in-law helped him with the business because of his continuing headaches, dizziness, memory deficits, and seizures. In 2000, Hulett's

daughter and son-in-law decided to live in a mobile home on the property to assume more responsibility for running the business. While Hulett and his son-in-law were moving the mobile home in December 2000, it slipped and the son-in-law was killed. Hulett's wife works full time outside the home, and Hulett could not keep the business going by himself. By May 2001, the business had folded.

Rayonier, a self-insured employer, had paid Hulett time loss compensation through June 2000. In 2004, the Department issued an order requiring Rayonier to pay loss of earning power benefits effective July 1, 2000. Both Hulett and Rayonier challenged that order. On January 24, 2005, the Department issued an order closing the claim, and Hulett challenged that closure. The appeals were consolidated before the Board of Industrial Insurance Appeals. Several hearings resulted and deposition evidence was presented. Three lay witnesses testified on Hulett's behalf, and nine of the thirteen experts testified on Rayonier's behalf.

1. Lay Testimony

Hulett testified that he has suffered from debilitating headaches, dizziness, memory loss, neck pain, seizures, and depression since the 1996 accident. He admitted having trouble with irritable bowel syndrome before his 1996 injury but said he had no treatment for constant headaches and had no dizziness before the injury. He has good and bad days and is in bed with headaches twice a month. He has seizures that cause him to fall and injure himself, and he cannot always reach up without severe pain. In his deposition, he reiterated that he had no physical limitations at the time of his injury, no physical problems before the injury except irritable bowel syndrome, and no prior problems with anxiety or depression. He relates his depression to the

industrial injury because he can no longer do what he wants and is frustrated.

Jean Simmons, Hulett's sister-in-law, testified that Hulett did not complain of neck problems or headaches or have speech problems before the 1996 injury. She testified that he has had bad headaches, confusion with his speech, and seizures accompanied with loss of bowel control since the accident. Although he has some days when he can function, on average between 2000 and 2004 he was incapacitated four days of the week.

Elva Hulett testified that her husband was extremely active and not prone to headaches before his 1996 injury. She said that he complained of neck problems during his treatment for the injury and still does. She noted that he has speech issues, uses a notebook to keep track of daily responsibilities, and has seizures that precede his bad headaches. During a seizure, he "fades out" and sometimes falls. Cert. Appeal Bd. Record (CABR) at 23. He wanted to keep the business going after his son-in-law died, but it was too dangerous for him to do by himself. Hulett got kicked by horses, chain-sawed his knee, forgot to close gates, forgot to put brakes on equipment or hitch up trailers, could not remember whether he had fed the horses, and let one horse escape.

2. Expert Testimony

Opthalmologist Richard Bensinger examined Hulett in 1996 and 2004. He testified that Hulett had a preexisting optic neuropathy that did not cause any visual or occupational limitations. Although Hulett complained of double vision in 2004, Bensinger could find no change in his vision or explanation for this condition. He admitted that neck problems can cause visual disturbances.

Physiatrist Michael Weinstein treated Hulett at Virginia Mason in late 1998 and early

1999, and last saw him in a September 1999 follow-up examination. He said that Hulett tended to somaticize, or express emotional difficulties as physical complaints. Hulett's testing showed no unresolved brain injury, but to validate his complaints, Virginia Mason gave him an "umbrella" diagnosis of post-concussion syndrome. CABR at 61-62. No seizure activity showed up during his treatment at Virginia Mason or on his tests. Dr. Weinstein opined that Hulett's headaches were related to the 1996 injury but were not a significant medical problem. Hulett's "spells" also were related to the injury but appeared to be resolved, and Dr. Weinstein saw no depression at the program's completion. CABR at 71-72. Dr. Weinstein testified that Hulett was capable of working as a horse boarder or doing building maintenance repair, as long as any lifting was infrequent. On cross-examination, he admitted that typical problems associated with post-concussion syndrome include headaches, dizziness, emotional difficulties, attention and concentration deficits, and memory issues. He also admitted that Hulett's problems are quite real and debilitating to him.

Vocational counselor Camarda worked with Hulett at the end of the Virginia Mason rehabilitation program to get him self-employed as a horse boarder. Camarda thought that Hulett's horse boarding business was doing well by November 2000 when he last saw him. Camarda added that Hulett received compensatory aids to perform the necessary work and was not to lift more than 40 pounds. He also testified that Hulett's business lost money over a three-month period through June 2000 and that Hulett received time loss compensation while the rehabilitation plan was being developed.

Psychologist David Fordyce did a neuropsychological evaluation on Hulett in 1996 and

reviewed his records at Rayonier's request in 2004. Hulett told Dr. Fordyce that he had trouble seeing, speaking, had constant headaches and ringing in his ears, was forgetful, tended to lose his balance and coordination, and had a general sense of fatigue. Dr. Fordyce noted that Hulett was experiencing some depression and anxiety in 1996 and felt himself to be "highly symptomatic." CABR at 7. Dr. Fordyce thought that Hulett had experienced a mild concussion and would benefit from rehabilitative intervention. He added that when Hulett was at Virginia Mason, he was anxious and had problems coping and pacing his activities. Dr. Fordyce found no permanent brain injury, with the possible exception of a partial complex seizure disorder. Dr. Fordyce added that Hulett's deterioration after he left rehabilitation was not typical of a brain injury. He reviewed Hulett's medical records before 1996 and found 6 to 8 visits to medical clinics over the preceding 20 years where Hulett at times reported headaches, dizziness, or fainting episodes. He also noted that no clinician had ever witnessed one of Hulett's self-reported seizures. Although he found it difficult to ascribe Hulett's deterioration after the Virginia Mason program to the 1996 injury, there was no evidence that Hulett had any impairment to his ability to function before the 1996 injury. Dr. Fordyce acknowledged that it is possible to have protracted symptoms after a mild head injury, that Hulett had complaints after his discharge from Virginia Mason, and that he never stopped reporting post-concussive symptoms.

Neurologist William Stump evaluated Hulett in 2004 at Rayonier's request. Dr. Stump had performed an electroencephalography (EEG) on Hulett in 1998 that was normal. Hulett reported neck pain, steady headaches, memory problems, dizziness and ear ringing, falling, and finger numbness. Dr. Stump also reviewed Hulett's medical records and observed that a 1992 x-

ray revealed cervical degenerative disc disease. Hulett reported stiffness and discomfort in his upper back and neck but no neck pain in 1995, although he did report some neck pain during the range of motion testing. Dr. Stump found no evidence that Hulett suffered a brain injury in 1996 or that he aggravated his preexisting cervical disease. Dr. Stump had no explanation for Hulett's condition but concluded that it was not related to the 1996 injury, and he would have placed no work restrictions on Hulett due to that injury.

Orthopedic surgeon James Green also saw Hulett in 2004 and reviewed some of his records at Rayonier's request. He agreed that Hulett suffered from cervical degenerative disc disease that was not related to the 1996 injury. Dr. Green thought that Hulett's 1996 injury would have healed in 6 to 8 weeks and that he was capable of continuous employment from July 1, 2000.[1]

Jeffrey Powel, a clinical neuropsychologist, evaluated Hulett in 2004 at Rayonier's request. He concluded that factors other than a concussion or brain injury explained Hulett's cognitive difficulties, although he conceded that Hulett was diagnosed with a concussion shortly after the 1996 injury. Powel opined that emotional issues were responsible for Hulett's post-injury recovery difficulties. He observed that Hulett had two "catastrophic losses" when his son-in-law died and when Rayonier closed without giving him retirement benefits. CABR at 20-21. He also observed that Hulett had some prior injuries but no record of ongoing neck problems immediately before his 1996 injury, and that Hulett exhibited depression or "mood disorder" in

[1] The period at issue was July 1, 2000 to January 24, 2005, because Rayonier paid Hulett time loss compensation up to June 30, 2000, and the Department closed Hulett's claim as of January 24, 2005. Some experts limited the relevant time period, however, to the dates of their 2004 evaluations and reports.

1996 and before his son-in-law died, perhaps due to the plant closure and his incapacity to perform. CABR at 36-40. He admitted that an evaluation in August 1996 concluded that Hulett could no longer perform his old job.

Psychiatrist Richard Carter evaluated Hulett and his records at Rayonier's request in 2004. Hulett told Carter that he blamed himself for the mistakes that killed his son-in-law. Carter thought Hulett was "functioning fairly well" and that his 1996 injury did not cause his characteristics. CABR at 67-68. He admitted that the anti-depressants Hulett was taking when he saw him could have minimized his symptoms. He added that Hulett had headaches before 1996 as well as two prior head injuries, but he did not know whether Hulett had headaches within a year of the 1996 injury.

Jim Hoppe is a vocational counselor whom Rayonier hired in April 2004 to assess Hulett's ability to work after July 1, 2000. He never met or talked to Hulett but reviewed his records and talked to some of the doctors who had treated him. He opined that Hulett could perform in medium and heavy work categories, especially in building maintenance repair, and he noted that there was an open job market for this occupation from July 2000 to July 2004, the time of his report. He admitted he did not contact any prospective employers before 2004. He also admitted that two of the physicians he consulted had not seen Hulett since 1996 and 1999 and that the third had concerns in 2004 about Hulett's ability to work an eight-hour day. He acknowledged that a 1996 physical capacity evaluation limited Hulett to light to medium level work.

Hulett's attorney asked vocational rehabilitation counselor John Berg to evaluate Hulett in 2004. Berg stated that Hulett had a medium-duty skilled occupation at Rayonier before his injury

and that Virginia Mason found that he could perform work in the light-duty range afterward. Hulett had no transferable skills after his injury, which was why he needed retraining as a horse boarder. Berg concluded that the horse boarding business was not successful because Hulett did not make money and because the job exceeded his physical restrictions. He added that Hulett was without job skills to obtain or sustain full-time work from July 2000 to January 2005 and that Hulett's disability is permanent.

Dr. Guy Earle saw Hulett at his attorney's request in 2004 and reviewed his records. He opined that Hulett has symptoms consistent with seizures and diagnosed Hulett as having post-concussion syndrome, depression, cervical strain with degenerative disc disease, and a seizure disorder. Except for the seizures, Dr. Earle found these conditions related to Hulett's 1996 injury. He could say only that Hulett's seizures were possibly related to the injury. He declined to attribute Hulett's depression to the death of his son-in-law, finding instead that it had multiple causes. Dr. Earle opined that Hulett was capable of light-duty work from 2000 to 2004.

Daniel Brzusek, a doctor of osteopathy and a rehabilitation specialist, saw Hulett at his attorney's request in 2005. He diagnosed Hulett with post-concussion syndrome, depression, neck strain with aggravation of preexisting arthritis, possible seizure disorder, and vocational impairment. He concluded that these conditions were related to the 1996 injury. He opined that Hulett had been unemployable since his self-employment effort and that a cost/benefit analysis did not support trying to get Hulett back to work.

Dr. Richard Oakes, Hulett's treating physician, first saw Hulett in the mid-1980s and stated that before the 1996 injury, Hulett had no problems similar to those following his 1996

injury. Dr. Oakes saw Hulett the day after the injury and testified that his symptoms have persisted since then. Dr. Oakes has seen a definite change in Hulett's ability to function since the accident and does not view him as suffering from somatization. Rather, he finds Hulett's symptoms consistent with post-concussion syndrome. He testified that Hulett has not been capable of gainful employment since July 2000 because of the 1996 injury, although he added that Hulett could have done some work outside the home from 2000 to 2004. Finally, he stated that Hulett may have a seizure disorder and that he takes seizure medication.

3. Conflicting Decisions

After considering the evidence, the industrial appeals judge issued a proposed decision and order finding that Hulett's 1996 industrial injury caused post-concussion syndrome, depression, a cervical strain with aggravation of degenerative disc disease, and a possible seizure disorder. The industrial appeals judge further found that Hulett was in need of treatment as of January 2005 and was totally disabled from July 2000 to January 2005 because of the industrial injury.

Rayonier petitioned for review. The Board rejected the proposed decision, finding that the industrial injury caused a cervical strain with aggravation of cervical disease but that Hulett was employable as of July 1, 2000. The Board concluded that Hulett's permanent total disability was caused by his son-in-law's death rather than the 1996 injury. The Board found that Hulett was not entitled to compensation for the period from July 1, 2000, through January 24, 2005.

Hulett appealed. Following a bench trial, the trial court concluded that he was totally and permanently disabled as a result of the 1996 injury. The trial court expressly disagreed with the Board's assessment of the impact of the son-in-law's death on Hulett's ability to work, reasoning

that Hulett's disabling headaches, seizures, fatigue, and loss of ability to concentrate were present before his son-in-law died.

ANALYSIS

I. standard and scope of review

1. Standard of Review

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.2d 570 (1999). On review, the superior court reviews the record de novo and can substitute its own findings and decision for the Board's only if it finds, from a fair preponderance of credible evidence, that the Board's findings and decision are incorrect. *Ruse*, 138 Wn.2d at 5. Our review is then 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 therefrom. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996); *see also* RCW 51.52.140 (appeal shall lie from the superior court's judgment as in other civil cases). We review issues of law de novo. *See Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

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.

Rayonier contends that the trial court did not apply the proper standard of review. But the trial court noted in its memorandum decision that the Board's decision was presumed correct

and that the burden of proof was on Hulett. In any event, our review focuses on whether substantial evidence supports the trial court's findings, most of which are challenged, and whether those findings support the conclusions of law.

2. Scope of Review

Rayonier also contends that the trial court improperly relied on the industrial appeals judge's proposed decision and order and that this reliance constitutes reversible error. As support, Rayonier cites *Stratton v. Department of Labor and Industries*, 1 Wn. App. 77, 459 P.2d 651 (1969). Where the Board rejected a proposed decision but referred to it in a finding, it was error for the trial court to then advise the jury of the proposed decision's inconsistent findings. *Stratton*, 1 Wn. App. at 79. A hearing examiner is a Board employee whose proposed decisions and orders do not become Board decisions until the Board formally adopts them. *Stratton*, 1 Wn. App. at 79. A proposed decision and order is not prima facie correct; only the Board's findings and decision are entitled to that presumption. *Stratton*, 1 Wn. App. at 80; *see also Rosales v. Dep't of Labor & Indus.*, 40 Wn. App. 712, 715, 700 P.2d 748 (1985) (Board has power to substitute its judgment for the examiner's on all issues, including credibility of witnesses observed only by the examiner).

This issue arose during the bench trial when Hulett's attorney cited the industrial appeals judge's observation that his client's life had become a "living nightmare." Report of Proceedings at 10. Rayonier objected, arguing that this reference as well as other references to the proposed decision in Hulett's brief were improper because only the Board's decision was before the court. Rayonier acknowledged that the proposed decision was part of the certified appeals board record

but insisted that only the Board decision was at issue. Hulett's attorney replied that he was not relying on the 31-page proposed decision as the Board's decision but that the industrial appeals judge's decision was well reasoned and could be cited where consistent with his position.

The trial court was charged with conducting a de novo review of the record, and the proposed decision was part of that record. The court did not cite the proposed decision in either its findings or its memorandum decision. The trial court entered 31 findings, as opposed to the industrial appeals judge's 9 findings, and its conclusion that Hulett was permanently disabled differed from the industrial appeals judge's conclusion that Hulett would benefit from additional treatment. The trial court exhibited its familiarity with the record during the trial, and there is no support for the charge that it erroneously relied on the proposed decision rather than its own review of the evidence. We find no error in the trial court's scope of review.

II. Substantial Evidence

The key issue is whether the industrial injury Hulett sustained in 1996 proximately caused his subsequent physical and mental condition. Rayonier challenges the type and strength of the evidence used to show causation and argues that either preexisting or post-developing conditions are to blame in whole or in part for Hulett's situation.

1. Residuals from 1996 Industrial Injury

Title 51, Washington's Industrial Insurance Act, provides the exclusive remedy for workers injured in the course of employment. RCW 51.04.010; *Rushing v. ALCOA, Inc.*, 125 Wn. App. 837, 841, 105 P.3d 996 (2005). We liberally construe the act, resolving all doubts in the worker's favor. RCW 51.12.010; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470,

745 P.2d 1295 (1987). The worker's disability must be work related, however, and the causal connection between his physical or mental condition and employment must be established by competent medical testimony showing that the condition is probably, rather than possibly, caused by the employment. *Dennis*, 109 Wn.2d at 474, 477; *see also McClure v. Dep't of Labor & Indus*., 61 Wn. App. 185, 810 P.2d 25 (1991) (worker may claim psychiatric disability). A medical opinion on the ultimate issue, however, is not necessary. *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979). If, from the medical testimony and other evidence, a reasonable person can infer a causal connection between the industrial injury and the claimant's condition, the claimant has met his burden. *Sacred Heart Med. Ctr.*, 92 Wn.2d at 636-37.

Rayonier contends that the trial court improperly relied on the causation standard set forth in *Intalco Aluminum Corporation v. Department of Labor and Industries*, 66 Wn. App. 644, 833 P.2d 390 (1992). *Intalco* is an industrial disease case and stands for the principle that the workers' compensation statute does not require a claimant to identify the specific chemical in the workplace that caused his disease. *Intalco*, 66 Wn. App. at 656. Hulett argued to the trial court, as he argues here, that *Intalco* is relevant because it supports the proposition that the law does not require scientific certainty as to how an injury caused a condition. Rather, the law requires only that a causal relationship between the injury and condition be established on a more probable than not basis.

The trial court cited *Intalco* in its memorandum opinion after stating that "evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given,

a reasonable person can infer that a causal connection exists." Clerk's Papers (CP) at 49; *Intalco*, 66 Wn. App. at 655. This is an accurate statement of law. The trial court did not refer to Hulett's broader interpretation of *Intalco*, and Rayonier's argument that the trial court applied an improper causation standard lacks merit.

The more significant issue is whether substantial evidence supports the trial court's findings regarding causation. These findings attribute Hulett's current physical and mental conditions, as well as the Virginia Mason rehabilitation program, to the 1996 industrial injury. The key finding in this regard is:

> 10. As a result of the significant February 22, 1996 industrial injury, Steve Hulett has experienced headaches, seizures, neck pain, dizziness, ringing in his ears, numbness in his hands, difficulty finding words, transposing numbers or letters, fatigue, memory problems and difficulty concentrating.

CP at 32. In addition, finding 20 discounts the opinions of Drs. Stump and Green that the 1996 injury was minor and resolved relatively soon. Findings 26-30 reiterate that Hulett's disabling symptoms are proximately related to his 1996 industrial injury.

The lay testimony depicted Hulett as someone who was physically active and suffered from none of the symptoms outlined above before the 1996 injury. Dr. Oakes, the only physician who treated Hulett both before and after his injury, confirmed this contrast. Dr. Oakes found Hulett's symptoms consistent with post-concussion syndrome, the Virginia Mason diagnosis. Dr. Brzusek reached similar conclusions, as did Dr. Earle, though Dr. Earle could not say that the 1996 injury probably caused Hulett's seizures. Dr. Earle noted that a neurological evaluation in 2002 found that Hulett was suffering from symptoms of prolonged post-concussion syndrome, contaminated with depression and anxiety. Dr. Powel testified that an evaluation shortly after the

accident showed that Hulett could no longer physically perform his old job. Dr. Fordyce thought that Hulett had experienced a mild concussion, noted that Hulett had never stopped reporting post-concussive symptoms after his discharge from Virginia Mason, and found no evidence that Hulett had any impairment to his ability to function before 1996. Dr. Weinstein thought that Hulett's headaches and seizure disorder were related to the industrial injury.

To be sure, there is evidence that Hulett's condition was not related to the 1996 injury. Drs. Stump and Green, who evaluated Hulett in 2004, found no connection between Hulett's symptoms and the 1996 injury. Dr. Powel thought that emotional rather than physical injury was the source of Hulett's condition. Dr. Fordyce found it difficult to attribute Hulett's deterioration to the 1996 injury, and Dr. Weinstein thought that any inability to work following the Virginia Mason program was due to Hulett's failure to "follow through" rather than his injury. CABR at 78. Finally, when Dr. Carter saw Hulett in 2004, he thought he was functioning fairly well.

The trial court recognized that there was inconsistent medical testimony as to the cause of Hulett's condition but deferred to Dr. Oakes. We must address this deference in resolving the causation issue.

2. Trial Court's Reliance on Dr. Oakes's Testimony

At issue here are the findings of fact accepting Dr. Oakes's conclusions regarding the 1996 injury as the source of Hulett's disability and discounting the opinions of Drs. Weinstein and Fordyce. The trial court stated in its memorandum decision that "[t]he opinion of Dr. Oakes, as Mr. Hulett's treating physician, as well as the doctor who had the most contact with Mr. Hulett both before and after the injury, should be entitled to great weight and special consideration." CP

at 49.

A longstanding rule of law in workers' compensation cases provides that special consideration should be given to the opinion of a claimant's attending physician. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). "This is because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case." *Intalco*, 66 Wn. App. at 654. Furthermore, the physician who has attended a patient for a considerable period of time is better qualified to give an opinion as to the patient's disability than a doctor who has seen and evaluated the patient only once. *Young*, 81 Wn. App. at 128 (quoting *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 128-29, 186 P.2d 76 (1947)).

Rayonier contends that in addition to Dr. Oakes, Hulett had two other attending physicians: Drs. Fordyce and Weinstein. It also argues that Dr. Oakes deferred to Dr. Weinstein in assessing Hulett's employability and that the trial court should have considered this deference.

Dr. Fordyce performed a neuropsychological evaluation on Hulett in June and July of 1996 after a referral from Virginia Mason. Dr. Fordyce testified that Dr. Oakes was Hulett's treating physician. Dr. Weinstein, a physiatrist and director of outpatient neurorehabilitation services at Virginia Mason, began working with Hulett in December 1998, did some follow-up work with Hulett after his discharge, and last saw him in September 1999. Dr. Oakes first saw Hulett in the mid-1980s. He saw Hulett the day after the 1996 industrial injury and last saw him on January 28, 2005. Without referring to Dr. Weinstein, Dr. Oakes disagreed with his conclusion that Hulett suffered from a somatization disorder.

> [T]he facts speak to the idea that he's had a definite change in his ability to function . . . [a]nd if he has some degree of somatization or symptom magnification, it's--it's not anything that I can definitely see. I mean, this fellow is

> pretty straightforward. He's--he's gone through a big change in his life with this accident. And the kinds of things he has had, the headaches, the dizziness, the fatigue, cognitive changes, are certainly consistent with a postconcussion

> syndrome[, which is] . . . a complex of symptoms that occur after head injuries. And they can be even minor injuries.

CABR at 13. Dr. Oakes did refer to Dr. Weinstein in a letter he wrote to Jim Hoppe addressing the opinions of Drs. Weinstein and Fordyce that Hulett could perform as a building maintenance worker. Dr. Oakes stated in the letter that he would defer to their judgment but noted his concern about Hulett's ability to work an eight-hour day.

Hulett characterized Dr. Oakes as his treating physician, as did Dr. Fordyce, and that characterization appears accurate. Dr. Oakes is the only physician who saw Hulett both before and after the 1996 injury. We conclude that the trial court did not err in giving Dr. Oakes's opinion as to causation special consideration.

3. Preexisting Disability

At issue here are the trial court's findings that Hulett had no preexisting disabling conditions before his 1996 injury that affected his employment or employability, that the degenerative disc disease he did have was asymptomatic before the injury, and that before the injury, he did not suffer from significant headaches, seizures, neck pain, dizziness, ringing in his ears, numbness in his hands, difficulty finding words, transposing numbers or letters, fatigue, memory problems, or difficulty concentrating.[2]

Benefits under the act are not limited to workers previously in perfect health. *Dennis*, 109 Wn.2d at 471. If the injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the worker is immaterial and recovery

[2] Finding 3 duplicates the Board finding that on February 22, 1996, Hulett struck his head on a pipe and felt immediate pain in his head and neck. "This sudden traumatic event proximately caused a condition diagnosed as cervical strain with aggravation of cervical degenerative disc disease." CP at 31, 105.

may be had for the full disability independent of any preexisting or congenital weakness. *Dennis*, 109 Wn.2d at 471 (quoting *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 682-83, 94 P.2d 764 (1939)). The worker is to be taken as he is, with all of his preexisting frailties and bodily infirmities. *Dennis*, 109 Wn.2d at 471.

Where a sudden injury "lights up" a quiescent infirmity or weakened physical condition, the resulting disability is attributable to the injury and compensation is awardable. *Dennis*, 109 Wn.2d at 472. Under the lighting-up doctrine, compensation may be due where disability results from work-related aggravation of a preexisting disease or injury. *Dennis*, 109 Wn.2d at 474-76; *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 676, 571 P.2d 229 (1977).

A different rule applies, however, where a worker is already permanently partially disabled within the act's meaning. In such a case, the preexisting disability must be segregated, and the award for any disability from a later injury reduced accordingly. *Dennis*, 109 Wn.2d at 476; RCW 51.32.080(5). If the preexisting disability was symptomatic, the segregation rule applies. *See Dennis*, 109 Wn.2d at 476. Permanent partial disability is measured by the loss of bodily function and is established by medical testimony. *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 294, 499 P.2d 255 (1972). Without a link between a physical abnormality and an actual loss of function, however, the existence of a preexisting abnormality is immaterial. *Boeing Co. v. Hansen*, 97 Wn. App. 553, 557, 985 P.2d 421 (1999).

Although the trial court did not expressly refer to the lighting-up doctrine, it found that Hulett's preexisting neck condition was asymptomatic before the 1996 injury and that he had no preexisting disabling conditions that affected his employment or employability before the 1996

injury. Hulett argues that the lighting-up doctrine applies and that the trial court properly found that the 1996 injury aggravated an asymptomatic condition. Rayonier responds that Hulett's preexisting conditions were not asymptomatic and that their effect on Hulett's employability or job performance is irrelevant to whether they constituted a preexisting permanent partial disability. Rayonier contends that medical testimony established that Hulett had a previous neck impairment causing a loss of function that should have reduced any recovery for worker's compensation.

The only preexisting problem Hulett identified was irritable bowel syndrome that occurred several years before the 1996 injury. He said he received no medical treatment for headaches before February 1996 and experienced no preexisting dizziness. He reiterated in his deposition that he had no physical limitations at the time of his 1996 injury, but he added that he had a car accident in 1969 in which his head broke the windshield, and that safety glasses gave him headaches until he replaced them. Hulett's wife and sister-in-law agreed that Hulett was physically active and did not complain of neck or speech problems or headaches before the 1996 injury.

Dr. Fordyce reviewed Hulett's medical records and found that he made six to eight visits to medical clinics during the 20 years before the injury with complaints of headaches, dizziness, and some sort of fainting or light headedness. He saw no evidence that Hulett had any impairment to his ability to function before the 1996 injury.

Dr. Stump testified that x-rays taken after the accident showed that Hulett had degenerative disc disease in his neck. He reported that Hulett had told him that he had had prior

back injuries and an injury to his elbow and head in 1992 but that a 1995 medical evaluation revealed no report of neck impairment or pain. Dr. Green agreed with Dr. Stump that Hulett's cervical degenerative disc disease was preexisting and unrelated to the 1996 injury.

Dr. Powel testified that Hulett had work injuries that preceded the 1996 injury. He had a cervical strain when some roofing hit his elbow and neck, a back injury, and some bowel problems, but no ongoing neck problems immediately before the 1996 injury. He acknowledged a May 1996 evaluation stating that Hulett's degenerative disc disease was aggravated by the February 1996 injury.

Dr. Carter testified that Hulett had headaches long before the 1996 injury as well as two prior head injuries. He did not know whether Hulett had suffered headaches within a year of the 1996 injury, adding that such a matter was best addressed by his treating physician at the time.

Dr. Earle testified that Hulett's post-concussion syndrome, depression, and cervical strain with aggravation of degenerative disc disease were related to his 1996 injury. Dr. Brzusek diagnosed a neck strain with aggravation of preexisting arthritis as a result of the 1996 injury and said that Hulett had recovered from prior shoulder and lower back injuries by 1996. Both doctors found that Hulett had a Category 2 cervical impairment, which Dr. Brzusek said was due to the aggravation of preexisting arthritis in his neck.[3] Dr. Brzusek also attributed Hulett's current physical and mental conditions to his 1996 injury.

Dr. Oakes testified that Hulett did not exhibit any of his post-injury symptoms before the 1996 injury. Dr. Oakes noted that Hulett had had a few prior industrial accidents and some bowel

[3] The Category 2 assessment is based on the categories of permanent cervical impairment in WAC 296-20-240.

problems but added that Hulett had always been "highly functional." CABR at 9. He specified that he saw Hulett in 1980 for diarrhea and in 1992 for an elbow laceration and cervical strain that showed degenerative changes in his neck. In an unrelated 1992 referral of Hulett to an otolaryngologist, however, he described his patient as having a variety of "weird symptoms" that were mostly functional, or psychological in nature. CABR at 22-23. He saw Hulett a few months later for shoulder and knee injuries and fuzzy vision.

Where the medical testimony shows that an industrial injury 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. Similarly, a defendant is entitled to a lighting-up instruction where his employment causes a major depressive illness, despite the Department's argument that his personality characteristics were manifest and active throughout his life. *McDonagh v. Dep't of Labor & Indus.*, 68 Wn. App. 749, 755, 845 P.2d 1030 (1993).

The Board held that a claimant was entitled to a lighting-up instruction for a 2000 industrial injury even though he had prior neck injuries in 1967, 1976, 1988, and 1999, and was treated for headaches in 1992 and 1999 that were related to those neck injuries. *In re Alfred G. Schrank*, BIIA No. 02 22634, 2004 WL 1900977 (May 11, 2004).[4] The claimant suffered no neck or headache symptoms after October 1999 until he struck his head on a doorframe on August 1, 2000. His wife testified that he suffered no symptoms immediately before the 2000 injury, and the Board found that he prevailed on a lighting-up theory because the 2000 injury aggravated his previously dormant cervical degeneration.

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

> To qualify as a latent condition, the cervical condition must have been causing no symptoms and presenting no subjective evidence of disease prior to the industrial injury. The preponderance of the evidence establishes that Mr. Schrank was not suffering from cervical symptoms prior to the August 1, 2000 industrial injury. It

> is true that he re-injured his neck ten months before the injury. However, his cervical symptoms resolved following a cortisone shot and chiropractic adjustments for headaches. There is no evidence to suggest that he was suffering from any neck-related symptoms at the time of the industrial injury.

Schrank, 2004 WL 1900977, at *2 (citation omitted).

Rayonier argues that a recent decision from Division One of our court shows that a preexisting injury need not impact job performance or be active immediately before the industrial injury to bar application of the lighting-up doctrine and establish a previous disability that reduces a claimant's recovery. *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 205 P.3d 979, *review granted*, 167 Wn.2d 1009, 220 P.3d 207 (2009). At issue in *Puget Sound Energy*, however, was whether the preexisting disability was a "previous bodily disability" that entitled the employer to second injury fund relief under RCW 51.16.120(1). *Puget Sound Energy*, 149 Wn. App. at 878-79. The relevance of this opinion is questionable here, as is its status, and it is not particularly helpful to Rayonier. While noting that permanent partial disability must be proved by medical testimony showing loss of bodily function, the court supported the applicable medical evidence with the claimant's testimony that he suffered from ongoing intermittent symptoms from previous injuries that substantially impaired his ability to function before the industrial injury in question. *Puget Sound Energy*, 149 Wn. App. at 883.[5]

Hulett did not describe ongoing intermittent symptoms that substantially impaired his ability to function before the 1996 injury. Indeed, there was little evidence that Hulett was suffering from any neck-related symptoms at the time of the 1996 injury, despite his degenerative

[5] Judge Becker disagreed that the employer was entitled to second injury fund relief, arguing that Lee was a fully functional worker until his industrial injury. *Puget Sound Energy*, 149 Wn. App. at 893-94 (Becker, J., dissenting).

disc disease or cervical arthritis. He, his family, and Dr. Oakes testified that Hulett was fully functional and without physical complaints at the time of his 1996 injury. There was substantial evidence that his preexisting condition was asymptomatic and that the industrial injury aggravated it and caused Hulett's current complaints. The evidence supports the trial court's finding that Hulett had no preexisting disabling condition.

III. Wage Replacement Benefits

Rayonier paid Hulett time loss compensation through June 30, 2000. Rayonier argues that he was not entitled to additional wage replacement benefits because he was not temporarily totally disabled as a result of the 1996 injury from July 1, 2000 through January 23, 2005, and because he was not permanently totally disabled thereafter.[6]

The only difference between temporary and permanent total disability is duration. *Herr v. Dep't of Labor & Indus.*, 74 Wn. App. 632, 635, 875 P.2d 11 (1994). A prima facie case of total disability exists when it is established that a worker was able to work prior to injury and is unable to do so after injury because of pain and the nature of the injury; when medical experts have testified to the loss of function and limitations on the worker's ability to work; and when vocational experts have concluded that the worker is not employable in the competitive job market. *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 918, 640 P.2d 1 (1982).

Time loss compensation is available during periods of temporary total disability. *Hunter v. Bethel Sch. Dist.*, 71 Wn. App. 501, 506, 859 P.2d 652 (1993); RCW 51.32.090(1). The act

[6] Rayonier also contends that Hulett is not entitled to loss of earning power benefits, which are awarded if a claimant's earning power is partially restored after an injury. RCW 51.32.090(3)(a); *Hunter*, 71 Wn. App. at 506-07. The trial court did not award Hulett loss of earning power benefits, however, so we do not address them further.

directs the insurer to discontinue such payments as soon as earning power is fully restored "at any kind of work." RCW 51.32.090(3)(a); *Hunter*, 71 Wn. App. at 506-07. Thus, temporary total disability terminates as soon as the claimant's condition has become fixed and stable and he is capable of reasonably continuous employment at any kind of generally available work. *Hunter*, 71 Wn. App. at 507. A claimant who is permanently totally disabled qualifies for pension benefits. *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 257, 26 P.3d 903 (2001) (compensation for permanent total disability is paid as monthly pension or lump sum).

Total disability is not a purely medical question. *Fochtman*, 7 Wn. App. at 294. The loss of function and disability are considered along with the inability to perform and to obtain work as a result of the industrial injury. *Fochtman*, 7 Wn. App. at 294. A worker may be totally disabled, in spite of sporadic earnings, if the physical disability caused by the injury disqualifies him from regular employment in the labor market. *Fochtman*, 7 Wn. App. at 294. Total disability is typically proved by lay testimony together with medical testimony as to loss of function and disability and a medical opinion that the injured worker is totally disabled. *Fochtman*, 7 Wn. App. at 295.

This issue implicates the trial court's findings of fact regarding Hulett's horse boarding business. Rayonier contends that Hulett's business was going well before his son-in-law's death, that Hulett left the business voluntarily, that he has skills to do that job as well as building maintenance work, and that any wage loss he experienced did not result from the 1996 injury. *See* RCW 51.32.090(8) (payment of wage replacement benefits is precluded where claimant voluntarily retires).

The trial court found that as a result of the Virginia Mason rehabilitation program, a job goal for a home-based program of boarding horses was developed for Hulett. Hulett was not capable of conducting the business as it is normally done, so the job was substantially modified to minimize its physical demands, and those modifications were a result of the effects of Hulett's 1996 injury. Hulett was motivated to pursue the business, but family members and others helped him substantially because he was not capable of reasonably continuous gainful employment on his own due to the industrial injury. Hulett required daily assistance with the horse boarding business and invited his relatives to live on the property because he could not effectively work independently on the business. Dr. Brzusek testified that Hulett is permanently totally disabled as a result of the 1996 injury. Dr. Oakes did not identify any curative medical treatments for Hulett, and his testimony and the lay testimony demonstrates that Hulett is totally and permanently disabled as of the date of claim closure. Hulett has not been able to engage in regular continuous gainful employment since July 1, 2000. The effects of the industrial injury on Hulett are such that his employment efforts have been sporadic, inconsistent, and irregular despite full motivation and effort. The trial court concluded that Hulett suffered from temporary total disability from July 1, 2000, through January 23, 2005, and that he has been permanently totally disabled ever since.

Hulett testified that his son-in-law helped him get his horse boarding business started, though he admitted that he did most of the work until the son-in-law moved to Washington in April 2000. He said he decided to pursue the horse boarding business because he could work at his own pace and have help and a flexible schedule. He stated that he had trouble running the business, including some accidents, before his son-in-law died. His wife testified that when the

horse boarding business started, they had two to five horses and Hulett could not keep up without help from his family. He was boarding seven horses by November 2000. After their son-in-law died, the Huletts decided it was too dangerous for Hulett to try to keep the business going by himself. The farm did not board horses for pay after May 2001.

Vocational expert Jim Hoppe assessed Hulett's ability to work after July 1, 2000, at Rayonier's request. Although a 1996 physical capacity evaluation limited Hulett to light to medium level work, Hoppe thought that Hulett could perform medium and heavy categories of work, that he had transferable skills, and that he could have worked in building maintenance from July 1, 2000, to August 2004. Vocational expert John Berg, who met with Hulett in 2004 at his attorney's request, testified that Hulett was retrained as a horse boarder because he had no transferable skills after his injury. He testified that the business was not successful and that it exceeded Hulett's physical restrictions. He added that Hulett lacked the skills to obtain or retain full-time work from July 2000 through 2004. In a deposition, he emphasized that Hulett was unemployable and that his disability was permanent.[7] Andrew Camarda, the vocational rehabilitation counselor who helped Hulett establish the horse boarding business, testified that he was initially skeptical about Hulett starting his own business. Camarda testified that someone with transferable skills would not qualify for the vocational services Hulett received. He said that Hulett wanted to try the horse boarding business, worked hard to get it going, and was doing fine as of November 2000. Camarda thought that Hulett could have been employed from July 2000 to

[7] Hulett argues that Berg's testimony shows that the "odd lot" doctrine applies. Once a claimant establishes that he cannot perform general light duty work, the employer must prove there is specialty or "odd lot" work that he can both perform and obtain. *Herr*, 74 Wn. App. at 636. The trial court did not refer to this doctrine, and we do not addressed it further.

2004. He did not know, however, that Hulett's son-in-law was helping him with the horse boarding business. He also conceded that Hulett's business lost money over a three-month period.

Dr. Powel confirmed that an August 1996 evaluation found that Hulett could no longer perform building maintenance work at Rayonier. Dr. Weinstein thought that Hulett could perform the horse boarding job as well as building maintenance work if the lifting was infrequent. Although he had not seen Hulett since 1999, he thought Hulett could do such work through August 2004. On cross-examination, he stated that Hulett was able to consistently perform at a light-duty level upon his discharge from Virginia Mason. Dr. Carter did not think Hulett's psychiatric symptoms would preclude his employment during the period at issue.

Dr. Earle testified that Hulett was capable of light-duty work between 2000 and 2004. He added that Hulett's Category 2 cervical impairment would create some lifting restrictions.

Dr. Green testified that Hulett had no work restrictions apart from avoiding overhead work and that he was capable of full-time employment. Dr. Oakes opined that Hulett was not capable of regular gainful employment since July 2000 because of the 1996 injury. Dr. Brzusek agreed that Hulett had been unemployable since his self-employment effort, and he found that a cost/benefit analysis did not support trying to get Hulett back to work.

Substantial evidence shows that Hulett suffered from temporary total disability between July 2000 and January 2005 and that he has been totally disabled since. The evidence from those who saw him during that time period reveals that he was unable to pursue the horse boarding business without accommodation and assistance. His symptoms allow him to work intermittently

but not "with a reasonable degree of continuity." *See Fochtman*, 7 Wn. App. at 292; *see also Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 197, 120 P.2d 1003 (1942) (mere fact that worker owns farm from which he derives some income by performing minor tasks does not prove he has wage earning capacity). The trial court did not err in finding that Hulett's physical and mental disabilities resulting from the 1996 injury disqualify him from regular employment and in concluding that he is entitled to wage replacement benefits because of total disability.

IV. Proximate Cause Between 1996 Injury and 2000 Accident

Rayonier addresses this as its final issue. Although Hulett argued to the trial court that his son-in-law's death was causally related to his 1996 injury, the trial court made no findings regarding the role Hulett's industrial injury played in his son-in-law's death. Hulett made this argument because the Board stated that his total disability was attributable to the death of his son-in-law. Hulett argued if that were the case, the death was proximately attributable to the industrial injury. The trial court referred to the son-in-law's death only by stating it disagreed with the Board's conclusion that the death was a supervening event that caused Hulett's disability. Given the trial court's decision that the son-in-law's death was not a supervening event, we need not further address the issue.

V. Attorney Fees

A worker whose appeal to the superior court or appellate court results in a reversal or modification of the Board decision, as well as a worker whose right to relief is sustained when the employer appeals, is entitled to attorney fees. *Young*, 81 Wn. App. at 132; RCW 51.52.130. Because we affirm the trial court's conclusions that Hulett has been totally disabled as a result of

the 1996 industrial injury since July 2000, Hulett is entitled to attorney fees upon his compliance with RAP 18.1.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, C.J.

Penoyar, J.