

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

HOME DEPOT USA, INC.,)	No. 67053-1-I
)	
Appellant,)	
)	
v.)	
)	
THOMAS L. ACKLEY; RITE AID, INC.;)	UNPUBLISHED OPINION
WASHINGTON STATE DEPARTMENT)	
OF LABOR AND INDUSTRIES,)	FILED: August 27, 2012
)	
Respondents.)	
)	

Ellington, J. — The Board of Industrial Insurance Appeals (Board) remanded Thomas Ackley’s claims to the Department of Labor and Industries (Department) with instructions to permit both his application for a new occupational disease claim against Home Depot and his application to reopen a previous claim against Rite Aid to proceed. The question of each employer’s responsibility for claim costs has not been resolved. But that is a question initially decided by the Department, not the Board, the superior court, or the court of appeals. We affirm the superior court, which remanded to the Department for further proceedings.

Thomas Ackley has preexisting degenerative arthritis of the right knee. He was injured on the job in December 2002, when he slipped chasing a shoplifter at Rite Aid.

The Department allowed his industrial injury claim, and Ackley underwent a meniscectomy. His claim was closed in May 2003 with an award of permanent partial disability. Ackley continued to experience right knee pain, and over time these symptoms became more severe.

Ackley began work for Home Depot as a freight team associate in May 2005. The job required him to unpack merchandise, stock shelves, climb ladders, and lift items weighing up to 50 pounds. In October 2005, Ackley was promoted to sales department supervisor, which had lighter physical demands but still required Ackley to walk almost all day on a concrete floor, stock shelves, lift and carry items, and occasionally climb ladders. His condition worsened to the point that at the end of a shift, Ackley could barely get out of a chair.

In September 2006, Ackley filed an application to reopen his claim with Rite Aid. The Department initially reopened the claim for further treatment, but Rite Aid protested and the Department held the claim in abeyance. In May 2007, Ackley filed a new occupational disease application with Home Depot.

The Department issued an order in July 2007 allowing the Home Depot occupational disease claim and denying the Rite Aid aggravation claim. Home Depot filed a protest, and in October 2007, the Department reversed course and issued a joint order denying the Home Depot claim and reopening the Rite Aid claim.

Rite Aid appealed to the Board. After a hearing, Judge Joan O'Connell issued a proposed decision and order. She identified the chief issues as

whether the clear worsening of the claimant's right knee condition was correctly determined by the Department to have warranted the reopening

of Mr. Ackley's 2002 claim for an injury suffered at Rite Aid, and whether the worsening of the claimant's right knee while he was employed in two different capacities with Home Depot from 2005 to 2007 constituted a new occupational disease for which Home Depot should be responsible.^[1]

Judge O'Connell found that the 2002 industrial injury at Rite Aid had worsened and accelerated the preexisting degenerative condition in Ackley's right knee. She affirmed the Department's decision to reopen the Rite Aid claim. She also found that Ackley's distinctive work conditions at Home Depot were another proximate cause of the deterioration of Ackley's knee, and remanded for the Department to issue an order allowing the occupational disease claim against Home Depot.

Judge O'Connell recognized that this situation raised questions about which employer would bear the costs of the claim, noting that

the Department has not yet ruled upon the potential issue of a possible apportionment, and the Board does not have jurisdiction to address it at this time. My decision . . . simply recognizes the fact that there can be more than one causative agent in the development of a compensable occupational disease or aggravation of an accepted condition, a situation which I feel is exactly what the medical evidence in this case is describing.^[2]

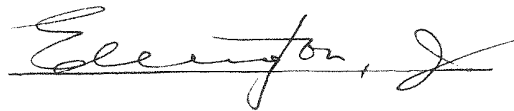
Home Depot appealed to the superior court, arguing that Rite Aid should be responsible for the entire cost of the claim because the evidence did not establish that the work conditions at Home Depot were a "supervening cause" of Ackley's knee problems. The superior court affirmed the Board, observing that the "difficult task of apportioning responsibilities [is] not before this court at this time. The Department hasn't had an opportunity to even act on that issue."³

¹ Clerk's Papers at 34.

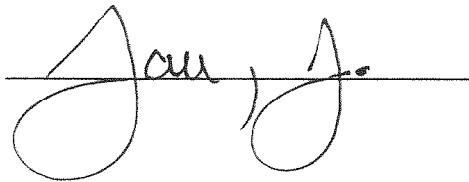
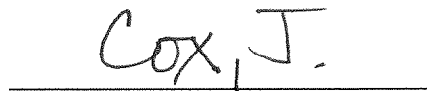
² Clerk's Papers at 38-39.

In this appeal, Home Depot does not assign error to any factual findings or conclusions of law, but maintains that whether Ackley's work with Home Depot represented a supervening cause of his disability must be determined in order to assign responsibility for claim costs. Home Depot asks us to make this determination. But as the Board judge and the superior court judge clearly pointed out, this is an issue to be resolved by the Department in the first instance.⁴ Home Depot's arguments are once again misdirected.

We affirm, and award Ackley attorney fees on appeal under RCW 51.52.130.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "J. J. J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Cox, J.", written over a horizontal line.

³ Report of Proceedings (Mar. 24, 2011) at 33-34.

⁴ Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 573, 141 P.3d 1 (2006) ("The Board and the superior court are limited to appellate review of [industrial insurance] issues. Thus, both the Board and the superior court are limited to considering those issues decided by the Department." (citation omitted)); Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977, 982, 478 P.2d 761 (1970) ("[F]or the [B]oard and the trial court to consider matters not first determined by the [D]epartment would usurp the prerogatives of the [D]epartment, the agency vested by statute with original jurisdiction.").

