

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: JAMES M. FAHEY ) DOCKET NO. 13 13214  
2 )  
3 CLAIM NO. AP-92996 ) PROPOSED DECISION AND ORDER

4  
5 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius

6  
7 APPEARANCES:

8  
9 Claimant, James M. Fahey, by  
10 Williams Wyckoff & Ostrander, PLLC, per  
11 Dane D. Ostrander

12  
13 Employer, Harlow Construction CO, Inc., by  
14 K-Solutions Law, PLLC, per  
15 Karen Galipeau Forner

16  
17 Retrospective Rating Group, Smart Association A Team Retro Group #10005,  
18 None

19  
20 Department of Labor and Industries, by  
21 The Office of the Attorney General, per  
22 Scott A. Douglas, Assistant

23  
24 The claimant, James M. Fahey, filed an appeal with the Board of Industrial Insurance  
25 Appeals on March 14, 2013, from an order of the Department of Labor and Industries dated  
26 January 15, 2013. In this order, the Department affirmed its order dated October 22, 2012 that  
27 assessed an overpayment of \$1,763.40 for time-loss compensation previously paid and rejected  
28 the claim as an industrial injury. The Department order is **REVERSED AND REMANDED**.  
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31 **PROCEDURAL AND EVIDENTIARY MATTERS**

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33 On July 8, 2013, the parties agreed to include the Jurisdictional History in the Board's record.  
34 That history establishes the Board's jurisdiction in this appeal.

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36 **PRELIMINARY MATTERS**

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38 The objection at 11/25/2013 Tr. 79 is overruled. The testimony at 11/25/2013 Tr. 80, lines  
39 11-18 is removed from colloquy.

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41 The deposition of Dr. H. Richard Johnson, taken on October 29, 2013, was published on  
42 receipt. All objections are overruled, except for the objections at pages 10, 19, 27, 29, 30, 33-39,  
43 41, 49, 67 and 70, that are sustained. All motions are denied, except for the motions at pages 10,  
44 27, 30, 34, 39 and 49, that are granted. The testimony at page 10, line 5, beginning with "He  
45 later . . .", through line 7; page 26, lines 2-6 and 23-25, page 27, lines 10-11, page 30, lines 2-13;  
46 page 34, line 19; page 36, line 25; page 37, lines 2,6,8,14,16-18 and 22-23; page 38, lines 1-6 and  
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1 25; page 39, line 3; page 41, lines 6-9 and 14; and page 49, lines 11-12 is stricken. Exhibit Nos. 1  
2 and 2 to the deposition are renumbered Exhibit Nos. 4 and 5; both rejected as cumulative.  
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4 The deposition of Dr. Robert Trent McKay, taken on November 1, 2013, was published on  
5 receipt. All objections are overruled, except for the objections at pages 26 and 28, that are  
6 sustained. All motions are denied, except for the motion at page 26, that is granted. The testimony  
7 at page 27, line 1 is stricken. Exhibit No. 1 is renumbered Exhibit No. 6 and rejected as cumulative.  
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10 The deposition of Dr. D. Casey Jones, taken on December 11, 2013, was published on  
11 receipt. All objections are overruled, except for the objections at pages 17, 20-21, 25, 40-41, 43,  
12 61, 63, 71, 82, 86-88, 90 and 102, that are sustained. All motions are denied, except for the  
13 motions at pages 18, 20, 21, 25, 40, 42-44, 61, 63, 71-72, 83, 86-88 and 102, that are granted. The  
14 testimony at page 18, lines 4 and 8-11; page 20, lines 15-17; page 21, lines 14-21; page 24, line  
15 23, beginning at "There", through page 25, line 9; page 40, lines 15-23; page 42, lines 4-10 and line  
16 18 through page 43, line 15; page 44, lines 2-12, page 61, lines 6-8; page 63, lines 10-17; page 71,  
17 lines 12-18; page 72, line 2; page 83, lines 2-6; page 86, lines 5-6 and line 11 through page 87, line  
18 12; page 87, line 25; page 88, lines 1-8 and page 102, line 17 is stricken.  
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24 **ISSUE**

25 Whether the claimant sustained an industrial injury on or about April 17,  
26 2012, within the meaning of RCW 51.08.100?

27 **EVIDENCE**

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29 In support of his appeal, Mr. Fahey testified and presented the testimony of his treating  
30 orthopedic surgeon, Dr. McKay as well as an examining orthopedic surgeon, Dr. Johnson. The  
31 claimant offered photographs of the accident scene, the claim form, and a letter from Mr. Fahey to  
32 the Department of July, 2012, that were admitted as Exhibit Nos. 1-3.  
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34  
35 In response, the employer presented the testimony of its employees, Mr. Hopkins, the shop  
36 foreman and Mr. Erskine, a fellow truck driver employed by Harlow Construction Co., Inc.  
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38 In reply, the Department presented the testimony of an orthopedic surgeon, Dr. Jones.

39 From the evidence and testimony, the following chronology of events emerged:  
40

41 Mr. Fahey was born on November 4, 1948. Mr. Fahey was nearly 6 feet tall and weighed  
42 about 300 pounds at the time of the incident on April 17, 2012. At that time, Mr. Fahey was  
43 employed as a truck driver with Harlow Construction. Mr. Fahey had been a truck driver for about  
44 40 years and worked for the employer for four years prior to April 17, 2012.  
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1 Mr. Fahey blacked out while driving a truck at 35 miles per hour. The truck was towing a  
2 48-foot long trailer filled with dirt. The trailer tipped to a 45 degree angle and spilled dirt on the  
3 road. The truck blew out two tires before it stopped in a ditch. Mr. Fahey was still belted into the  
4 driver's seat, leaning at about a 30 degree angle.  
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7 Mr. Fahey testified that upon awakening from the blackout, he released his seatbelt, slid out  
8 of his seat and extended his right hand to catch his fall. Mr. Fahey felt sharp pain in his right  
9 shoulder when he struck the passenger side door with his arm extended.  
10

11 Mr. Fahey testified that he was disoriented but pulled himself back into the driver's seat until  
12 medics assisted Mr. Fahey's climb out of the truck. The medics placed him on a gurney. Mr. Fahey  
13 testified that he complained of pain to the right shoulder, left shoulder, and right knee. Mr. Fahey  
14 was hospitalized for four days.  
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17 Mr. Erskine was driving the same route as Mr. Fahey on April 17, 2012, and came upon the  
18 accident scene. Mr. Erskine observed Mr. Fahey on a stretcher. Mr. Erskine testified that  
19 Mr. Fahey appeared distressed.  
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22 Mr. Hopkins arrived at the accident scene after Mr. Fahey left. Mr. Hopkins and Mr. Erskine  
23 eyeballed the trailer angle at 45 degrees and the truck's angle at about 30 degrees. 11/25/2013 Tr.  
24 75, 82, 84, and 100.  
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### 27 DECISION

28 "Injury" means a sudden and tangible happening, of a traumatic nature, producing an  
29 immediate or prompt result, and occurring from without, and such physical conditions as result  
30 therefrom.  
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32 As the appealing party, Mr. Fahey has the burden of proving his entitlement to benefits by a  
33 preponderance of the evidence. Although the industrial insurance laws are remedial in nature and  
34 to be liberally construed, he must satisfy this strict and unyielding burden of proof requirement.  
35 RCW 51.52.050. *Olympia Brewing Co. v. Department of Labor and Indust.*, 34 Wn.2d 498 (1949).  
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38 As stated in *Zip v. Seattle School District*, 36 Wn. App. 598 (1984), "[m]edical testimony must  
39 establish that it is more probable than not that the industrial injury caused the subsequent  
40 disability."  
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### 43 Sudden and tangible happening, of a traumatic nature

44 Dr. Trent McKay, an orthopedic surgeon, treated Mr. Fahey for the right shoulder conditions  
45 on three occasions. On May 25, 2012, Dr. McKay took a history that Mr. Fahey popped himself out  
46 of his seat belt and slammed his right shoulder, resulting in shoulder pain. Dr. McKay reviewed the  
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1 photographs admitted as Exhibit No. 1, and found the depiction consistent with Dr. McKay's  
2 understanding of the accident as occurring when Mr. Fahey reached out with his right arm bearing  
3 his body weight resulting in right shoulder pain.  
4

5 Dr. McKay reviewed the emergency room notes of April 17, 2012, that described the  
6 claimant's complaints of right shoulder pain.  
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8 Dr. D. Casey Jones, an orthopedic surgeon, testified that all of the information about exactly  
9 what happened was speculative. Dr. Jones lacked a clear understanding of exactly what happened  
10 immediately following the accident when Mr. Fahey was "helped to get out of the vehicle." Jones  
11 Dep. at 95.  
12

13 Dr. Jones examined Mr. Fahey a single time on August 7, 2012. At the time of his  
14 examination, Dr. Jones was not provided a letter of explanation authored by Mr. Fahey but after the  
15 Department requested an addendum report, Dr. Jones reviewed the letter dated July 1, 2012,  
16 admitted as Exhibit No. 3, and issued an addendum report on September 27, 2012.  
17

18 Dr. Jones took a history from Mr. Fahey that Mr. Fahey recalled right shoulder pain while  
19 riding in the ambulance to the hospital.  
20

21 Dr. H. Richard Johnson, an orthopedic surgeon, examined Mr. Fahey a single time on  
22 June 27, 2013. Drs. Jones and Johnson reviewed the pertinent medical records. Dr. Jones agreed  
23 that Dr. Johnson's report was reasonably thorough. Jones Dep. at 85.  
24

25 Dr. Johnson testified that Mr. Fahey clearly showed willingness to participate in strength  
26 testing of most muscle groups and the giveaway noted on the right arm was consistent with the  
27 pathology seen on imaging studies. Dr. Johnson administered Waddell's tests and found they were  
28 negative. Dr. Johnson testified that Mr. Fahey exhibited no pain behaviors and was perceived as  
29 giving his best effort throughout the evaluation. Dr. Jones testified that there was no evidence  
30 Mr. Fahey magnified symptoms or exaggerated pain complaints. Jones Dep. at 97.  
31

32 Dr. Jones agreed that the emergency room and hospital records referred to a prior shoulder  
33 surgery but that was the only reference to a prior shoulder surgery. There were no surgical reports,  
34 chart notes, or documented scars that established a prior shoulder surgery. Dr. Jones did not  
35 assume Mr. Fahey underwent a prior shoulder surgery. Jones Dep. at 89-92. Dr. McKay took a  
36 history of no prior shoulder problems. Mr. Fahey persuasively described his pre-accident condition  
37 as limited to soreness after exertion that resolved within one day.  
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39 Dr. Johnson testified that a cardiac EKG and CAT scans of the head and neck were  
40 performed along with X-rays of the right knee and shoulder. The X-rays of the right shoulder  
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1 revealed no acute injury, in the form of a fracture or dislocation, but did reveal evidence of  
2 moderately severe degenerative joint changes in the glenohumeral (GH) joint and the  
3 acromioclavicular (AC) joint.  
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5 Arthritis of both joints pre-existed the incident because the development of the arthritis took  
6 more time than the 10 days that elapsed between the incident on April 17, and the X-ray taken on  
7 April 27, that first depicted the arthritis of the GH joint and the AC joint.  
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10 Dr. McKay compared the results of the right shoulder X-rays taken in April, to the X-ray  
11 ordered on May 25, 2012, and concluded they did not look appreciably different. Mr. Fahey  
12 presented current complaints of pain and limited motion in his right shoulder. Dr. McKay testified  
13 that the degree of the claimant's limitations was related to an exacerbation by a direct blow and  
14 ordered an MRI of the right shoulder.  
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17 On June 22, 2012, Dr. McKay reviewed the results of the MRI taken on June 15, 2012.  
18 Dr. McKay explained that the technology of an MRI works by looking at different concentrations of  
19 water in the tissues. Dr. McKay testified that most of the time he believed that increased water in  
20 the tissues was due to either swelling or tearing. Dr. McKay's impression was that the rotator cuff  
21 was intact, even though there were some areas that had fairly intense signal.  
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25 Dr. Johnson testified that no rotator cuff tears were present before April 17, 2012, but tears  
26 were present in the subscapularis and supraspinatus tendons of the rotator cuff after April 17, 2012.  
27 Dr. Johnson explained that build up of scar tissue around the tear may indicate how long a tear has  
28 been present. Dr. Johnson testified that there was no mention of buildup of scar tissue.  
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31 Dr. McKay relied on Mr. Fahey's history of fairly minimal limitations before April 17, 2012.  
32 Dr. McKay testified that the claimant presented a consistent history of the mechanics of the injury.  
33 Dr. McKay initially concurred with the August 7, 2012 report of Dr. Jones as 75 percent of the time  
34 he agreed with independent medical examiners. Dr. McKay testified that his opinion changed after  
35 receiving a letter from the claimant's attorneys on March 21, 2013.  
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38 Dr. McKay's later opinion was that there was an exacerbation of the pre-existing arthritis  
39 resulting from the incident of April 17, 2012. Dr. McKay determined the right shoulder was  
40 extremely arthritic and progressed fairly rapidly since April 17, 2012.  
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43 Dr. McKay testified that the industrial incident had likely exacerbated the glenohumeral  
44 arthritis but the damage to the rotator cuff was relatively minimal and arthroscopic repair was  
45 unwarranted. Dr. McKay testified that Mr. Fahey's best chance of obtaining relief from his current  
46 problem was for a shoulder surgery.  
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1 Dr. McKay testified that the increased amounts of pain caused an increased restriction and  
2 removed Mr. Fahey from work because the demands of his truck driving threatened to damage  
3 Mr. Fahey's right shoulder further.  
4

5 On September 13, 2012, Dr. McKay defined the disability as preventing Mr. Fahey from  
6 using his right shoulder for any type of work. Dr. McKay described the force of the incident as  
7 disabling because of the forces exerted by a 300 pound man falling.  
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10 Dr. McKay testified that post accident, the right shoulder depicted a significant decrease in  
11 function. Dr. McKay concluded that the motor vehicle accident, in part, aggravated or lit up the  
12 claimant's pre-existing arthritis. Dr. McKay testified that it was unlikely that Mr. Fahey's right  
13 shoulder before the incident of April 17, 2012, was anything like the disability following the incident.  
14 Dr. Johnson testified that Mr. Fahey's function had decreased as shown by the right shoulder  
15 symptoms and objective clinical findings of rotator cuff tears after the April 17, 2012 incident.  
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19 The preponderance of the evidence was persuasive that Mr. Fahey suffered a sudden and  
20 tangible happening, of a traumatic nature on April 17, 2012.  
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### 22 Resulting in a Physical Condition

23 The term "proximate cause" means a cause which in a direct sequence, unbroken by any  
24 new independent cause, produces the condition complained of and without which the condition  
25 would not have happened. There may be one or more proximate causes of a condition. The  
26 industrial injury need not be the sole proximate cause of the condition. *Wendt v. Department Labor*  
27 *& Indus.*, 18 Wn. App. 674 (1977). The "lighting up" doctrine is irrelevant to the claim allowance  
28 analysis. *In re Harry Q. Findley*, Dckt. No. 01,19588 (August 1, 2002). To prevail, Mr. Fahey does  
29 not have to show he was asymptomatic prior to the industrial injury. *In re Donald Plemmons*, BIIA  
30 Dec. 04 12018 (2005).  
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35 The claimant must show that but for the new injury, "something" new or materially different,  
36 be it a new condition, or a change in the frequency, duration, or intensity of symptoms would not  
37 have occurred. A flare up or worsening of symptoms to the point of requiring treatment is a  
38 consideration that has been found to be sufficient, in light of the other factors, such as cessation of  
39 exposure resulting in diminished symptoms. *In re Doris E. Long*, Dckt. No. 04,22508 (February 14,  
40 2006).  
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44 Dr. Jones testified that the accident could have caused an uptick in experiences of pain in  
45 the presence of advanced arthritis in the GH joint, even though the underlying condition did not  
46 objectively change. Dr. Jones indicated that there was not good concordance between imaging  
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1 appearances and symptomatology but the presence of clinically significant arthritis may provoke  
2 temporary symptoms.  
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4 Dr. Jones offered the example of the symptoms following ascending flights of stairs with a  
5 badly arthritic knee. Dr. Jones testified that the soreness that occurred after that activity did not  
6 show that walking up those two flights of stairs either caused or worsened the arthritis. "It just  
7 means that you are having symptoms related to your condition. So the provocation of symptoms  
8 and causation are different things." Jones Dep. at 105-107. Dr. Jones agreed that being  
9 unprepared to take a step could possibly cause a more painful effect.  
10

11 Dr. Jones testified that determining if a compression injury to Mr. Fahey's arthritic and  
12 weakened shoulder would result in an injury depended on multiple variables, i.e., the magnitude of  
13 force and density of the bone. Dr. Jones testified that if he assumed Mr. Fahey fell and reached out  
14 to stop the fall, it was a relatively short distance with relatively low forces so that a direct  
15 compressive force of a relatively low magnitude was not likely to cause any additional anatomic  
16 change to a joint that was arthritic in the nature of Mr. Fahey's arthritis. Jones Dep. at 95.  
17

18 Dr. Johnson testified that the claimant's pre-existing arthritis made the right shoulder more  
19 prone to injury because the arthritis affected the overall mobility of the joint. The spongy effect of  
20 normal cartilage better withstood stresses than the inflammatory changes to the joint surface that  
21 created diffuse weakness in the rotator cuff, particularly the articular surface tear in the  
22 subscapularis tendon. Dr. Jones agreed that arthritic damage to the cartilage surfaces of the joint  
23 could make the trauma of the injury a direct compressive force. However, Dr. Jones testified that  
24 catching oneself as one falls, particularly in this circumstance, where he was going to the side and  
25 reaching out, would be unlikely to cause further joint or cartilage damage. Jones Dep. at 93  
26

27 Dr. Johnson testified that the jamming injury of the claimant's right shoulder was the  
28 mechanism of injury that occurred when Mr. Fahey released his seat belts and slid down towards  
29 the passenger side. Dr. Johnson testified that the impact affected the GH joint. The GH joint is a  
30 ball and socket joint with the joint being a shallow dish. The force of the impact slid the ball  
31 because the socket joint was not sitting perfectly at a right angle but was sitting slightly facing  
32 forward. That created a shear force to the GH joint and significantly stressed the rotator cuff  
33 tendons, tearing two of them. Johnson Dep. at 53. Dr. Johnson's opinion was based on a  
34 foundation containing all material facts.  
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36 Dr. McKay indicated in his later reports that there was an exacerbation of the pre-existing  
37 arthritis in Mr. Fahey's right shoulder resulting from the incident of April 17, 2012. As an attending  
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1 physician, Dr. McKay's opinion is entitled to special consideration. *Hamilton v. Department of Labor*  
2 & *Indus.*, 111 Wn.2d 569 (1988). The "special consideration" rule set out in *Hamilton* does not  
3 require that the testimony of the attending physician be given more weight or credibility, just "careful  
4 thought." *Hamilton* at 572; *In re Albert L. Stewart*, Dckt. No. 11,18667 (February 25, 2013).  
5

6 Cervical X-rays taken at the request of Dr. McKay in 2012 did not indicate significant arthritis  
7 or degenerative disc disease and were relatively normal. Jones Dep. at 96. The preponderance of  
8 the medical evidence was persuasive that the aggravation of Mr. Fahey's arthritis of the right  
9 shoulder was not the natural progression of degenerative changes.  
10

11 The preponderance of the evidence was persuasive that the right shoulder symptoms were  
12 more frequent, longer lasting, and more intense after April 17, 2012. Most importantly, the  
13 preponderance of the evidence was persuasive that the emergency treatment of the right shoulder  
14 conditions after the April 17, 2012 incident was "something" new or materially different, along with  
15 the change in the frequency, duration, or intensity of symptoms that would not have occurred but for  
16 right shoulder injury on April 17, 2012.  
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18 The preponderance of the evidence was persuasive that Mr. Fahey sustained an industrial  
19 injury on April 17, 2012, during the course of his employment with Harlow Construction Co., Inc.  
20 The January 15, 2013 Department order in which the Department affirmed the order dated  
21 October 22, 2012, that rejected the claim and sought recoupment of \$1,763.40 in time-loss  
22 compensation benefits was therefore incorrect. The matter is remanded to the Department to allow  
23 the claim as an industrial injury.  
24

#### 25 FINDINGS OF FACT

- 26 1. On July 8, 2013, an industrial appeals judge certified that the parties  
27 agreed to include the Jurisdictional History in the Board record solely for  
28 jurisdictional purposes.
- 29 2. Mr. Fahey sustained an industrial injury on April 17, 2012 while in the  
30 course of his employment with Harlow Construction Co., Inc. as a truck  
31 driver following a motor vehicle accident that injured his right shoulder,  
32 aggravating an arthritic condition of the right shoulder.  
33

#### 34 CONCLUSIONS OF LAW

- 35 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
36 parties and subject matter of this appeal.
- 37 2. Mr. Fahey did sustain an industrial injury within the meaning of  
38 RCW 51.08.100 on April 17, 2012.  
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1 3. The Department order dated January 15, 2013, is incorrect and is  
2 reversed. The matter is remanded to the Department to issue an order  
3 allowing the claim.  
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5 DATED: FEB 19 2014  
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11 **TOM M. KALENIUS**  
12 Industrial Appeals Judge  
13 Board of Industrial Insurance Appeals  
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