SC#93796.6

NO. 338088

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

JESUS OROZCO,

Petitioner

v.

DEPARTMENT OF LABOR & INDUSTRIES

FOR THE STATE OF WASHINGTON,

Respondent

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Jesus Orozco was the Petitioner in the Benton County Superior Court under cause number 13-2-00132-0 and the Appellant in Division III of the Court of Appeals under cause number 338088-III.

B. COURT OF APPEALS DECISION

Mr. Orozco seeks review of the Court of Appeals' unpublished opinion in *Orozco v. Department of Labor and Industries*, 33808-8-III, filed September 22, 2016, which affirmed the superior court's determination that substantial evidence supported the Board of Industrial Insurance Appeals' (Board) decision that his industrial injury of April 25, 2006 did not proximately cause his mental health conditions. A copy of the decision is in the Appendix at Pages A-_____ - _____.

C. ISSUE PRESENTED FOR REVIEW

Was a psychiatrist's (Department witness Dr. Snodgrass) 2009 medical opinion that Mr. Orozco had no mental health

conditions proximately caused by his 2006 industrial injury,[1] relevant and/or applicable to his *entirely new inquiry* nearly two years later regarding whether or not he had any new or worsening mental health conditions proximately caused by his industrial injury as of the date his *aggravation application* was denied on October 3, 2011?[2]

D. STATEMENT OF THE CASE

On April 25, 2006, Mr. Orozco suffered an industrial injury when a commercial truck's back-end overhead metal sliding door closed with great force directly on the top of his head during the loading process. Significant injuries resulted to his face, head, neck and low back. (CP 93-95) Mr. Orozco filed a successful workers compensation claim with the Department of Labor & Industries (Department). (CP 49, 122) Benefits, including medical treatment and wage replacement were provided while he recovered from his injuries. (CP 49-54)

At some point during his recovery process, but prior to the original claim closure in 2009, Mr. Orozco began to suffer from

[1] The Department relied on Dr. Snodgrass's 2009 medical opinion in its decision to close Mr. Orozco's original worker's compensation claim on July 29, 2009. This original claim closure is known in worker's compensation parlance as the first terminal date or T1.

[2] The date of the denial of Mr. Orozco's claim to reopen his claim is known as the second terminal date or T2.

symptoms of depression, anxiety, nearly constant pain and a lack of focus and concentration. The symptoms continued to worsen over time. (CP 82-88, 93-99, 102) Prior to the industrial injury Mr. Orozco had never experienced or exhibited any of these symptoms or any other type of mental health condition. (CP 82-88, 93-102) He was examined by a Department psychiatrist (Dr. Snodgrass) who determined he was not suffering from any detrimental mental health condition. Based on Dr. Snodgrass's opinion the Department closed Mr. Orozco's original worker's compensation claim on July 29, 2009. This date is known in worker's compensation parlance as the first terminal date or T1.[3] (CP 52)

On August 12, 2011, which was approximately two years after his original claim was closed, Mr. Orozco filed an aggravation application to reopen his worker's compensation claim alleging he was suffering from serious mental health symptoms directly related to his 2006 industrial injury, which had worsened or were in need of further proper and necessary medical treatment. The Department ultimately denied his request for reopening on October 3, 2011. This

[3] No formal adjudication was made regarding which medical conditions the Department had and/or had not allowed nor was any physical or mental disability rating made at that time. (RP 5; CP 54) RP refers to the transcript of the superior court hearing of September 29, 2014.

date is known in worker's compensation phraseology as the second terminal date or T2. (CP 36, 54)

Mr. Orozco appealed the Department's (T2) decision to the Board where he presented the testimony of one witness, Dr. Arenas, a licensed psychologist. In rebuttal, the Department presented the testimony of two witnesses, Dr. Haynes, a licensed, Board-certified neurologist and Dr. Snodgrass, a licensed, Board-certified psychiatrist.

Dr. Arenas

Dr. Arenas is a licensed, clinical psychologist in the state of Washington. (CP 117) He is bilingual and bicultural. Spanish is his first and primary language and he participates in American and Mexican cultures with relative ease. For 40-plus years Dr. Arenas has provided psychological treatment for mainly monolingual Spanish-speaking patients. (CP 118-120)

After Mr. Orozco's application to reopen his claim was denied in 2011 Dr. Arenas met with Mr. Orozco on two occasions: January 7, 2012 and March 10, 2012. (RP 12; CP 120) Dr. Arenas examined all of Mr. Orozco's prior medical records from the Department file.

Notably, Dr. Arenas reviewed 2010-2011 counseling records[4] from Catholic Family Services where Mr. Orozco had sought mental health treatment. (CP 138-139; RP 12) Dr. Arenas testified that when he initially examined Mr. Orozco, there were immediate psychological areas of concern. They included: sadness, depression, nervousness, anxiety as well as a psychophysiological finding of a chronic pain condition. (CP 123) Dr. Arenas' formal mental health diagnoses regarding Mr. Orozco included: (1) cognitive disorder NOS; (2) anxiety disorder NOS with generalized and post-traumatic features – chronic severe; (3) pain disorder with both psychological factors and a general medical condition – chronic; and (4) depressive disorder NOS with major features – chronic severe. (RP 12; CP 134-135) Dr. Arenas testified on a more probable than not medical basis these diagnoses were related to Mr. Orozco's 2006 industrial injury and had continued unabated into 2012. (RP 12-13; CP 138, 142-43) Dr. Arenas found it hard to believe that Mr. Orozco's "emotional disorders ha[d] not been considered fully [and] ha[d] not been adequately assessed" in the six

[4] Those counseling records had not been created in 2009 so were not reviewed by Dr. Snodgrass at the time of his 2009 Independent Medical Examination (IME) of Mr. Orozco. However, even though they were available to Dr. Snodgrass in 2011 at the time of his deposition, *he chose not to review them.*

years since his industrial injury. (RP 12-13; CP 134-36) Dr. Arenas opined that suggestions by earlier medical examiners that perhaps malingering behavior was something to watch for was very detrimental to Mr. Orozco's receiving an accurate diagnosis of, and treatment for, his mental health conditions from 2006-2012. (CP 137, 146-147) Dr. Arenas was resolute that Mr. Orozco required further workers' compensation benefits in the form of proper and necessary medical treatment of his diagnosed psychological disabilities in order to "perform full-time work of any nature." This opinion was given on a more probable than not medical basis. (CP 143-146)

Dr. Haynes

In support of its decision to deny Mr. Orozco's aggravation claim the Department relied in part on Dr. Haynes, who is a licensed and board certified neurologist, who examined Mr. Orozco in 2009 and 2011. (CP 163) Dr. Haynes, by his own admission is not qualified to diagnose mental health disorders as he is a *physical* medical doctor that specializes in the human nervous system. Mr. Orozco's *aggravation claim* dealt only with a *mental health* disability. (RP 9; CP 164, 189, 191-192) The Court of Appeals properly refused

to consider Dr. Haynes' testimony so no further discussion or argument will be forthcoming.

Dr. Snodgrass

The Department called as a witness Dr. Lanny Snodgrass, a licensed and board certified psychiatrist. (CP 198, 202) Dr. Snodgrass examined Mr. Orozco on two occasions: on November 30, 2007[5] and April 3, 2009[6] both of which occurred while Mr. Orozco's 2006 worker's compensation claim was still open. Dr. Snodgrass did not examine Mr. Orozco at any time after April 3, 2009 although he was deposed by the Department as part of Mr. Orozco's appeal of its denial of his application to reopen his claim. It is both salient and relevant that in his 2011 deposition, Dr. Snodgrass admitted that "Dr. Arenas [in 2012] is seeing an individual [Mr.

[5] In 2007, Dr. Snodgrass did not find evidence of a "major psychological diagnosis" although he did note Mr. Orozco had to deal with many psychosocial stressors on a daily basis such as unemployment which caused financial challenges, low self-esteem, lack of motivation, a disability conviction and chronic pain syndrome. Dr. Snodgrass did not believe psychiatric treatment would be helpful at that time. (CP 209, 221-224)

[6] In 2009 Dr. Snodgrass opined Mr. Orozco had "no significant neuropsychological residuals stemming from the industrial injury of 4/25/06 . . ." and no psychiatric condition. In Dr. Snodgrass's opinion Mr. Orozco's psychosocial stressors remained much the same as in the 2007 exam with the addition of "wife now the gainfully employed" and "no sense of regaining employability."

Orozco] that is much different than what I saw [in 2007 and 2009]." (CP 234-236, 244)

Dr. Snodgrass admitted he did not review the sworn (deposition) testimony of Mr. Orozco or Dr. Arenas but said he had read Dr. Arenas' 19-page report in support of Mr. Orozco's application to reopen his worker's compensation claim. Dr. Snodgrass specifically acknowledged he had not reviewed the 2010-2011 counseling records from Catholic Family Services, the organization through which Mr. Orozco, on his own, sought *mental health counseling.* (CP 247-249; RP 15) In fact, Dr. Snodgrass testified he was "unable to provide a meaningful opinion of Mr. Orozco's mental health condition as of October 3, 2011" (T2) because Dr. Snodgrass last physically examined Mr. Orozco in 2009. (CP 248) When asked if his opinion would be the same in 2011, "assuming no intervening accidents or injuries," Dr. Snodgrass replied: ". . . it would no doubt be the same. I can't say for sure . . . Really there's no way of knowing . . . I would assume that that would have been similar." (CP 251-252)

Appellate Procedure

After a full hearing, taking into consideration the testimony of Dr. Arenas and Dr. Snodgrass, the Board, in late 2012, determined the Department had properly denied Mr. Orozco's application to reopen his 2006 claim on October 3, 2011. (CP 20-34) Mr. Orozco filed a Notice of Appeal with the Benton County Superior Court, which also upheld the Department decision. (CP 1-2) This decision was appealed to the Division 3 Court of Appeals, which mistakenly framed the issue as one involving the credibility of the mental health experts. (CP 270-271) It neglected to discuss the real issue which was that the Department, then the Board failed to follow the statutory requirements and legal precedent regarding the grant or denial of injured workers' aggravation applications.

E. WHY REVIEW BY THIS COURT SHOULD BE ACCEPTED

(1) Summary

The Department, Board and lower court decisions each relied on information that was not significant, appropriate or relevant to the

actual question on appeal which was whether Mr. Orozco's diagnosed mental health conditions in 2011 were proximately related to his 2006 industrial injury and if so, whether he presented evidence of worsening or further treatment needed between T1 in 2009 and T2 in 2011 pursuant to RCW 51.32.160.[7] It was and he did. As this court will see, Dr. Arenas' 2012 medical opinion was the *only* testimony that satisfied the statute and case law interpreting that statute. After Mr. Orozco's application to reopen his claim was denied he was examined by Dr. Arenas on two occasions in 2012. He diagnosed several mental health disorders and determined they were directly related to the sequelae of the original industrial injury. Dr. Snodgrass, the Department's apparent expert, completely failed to rebut Dr. Arenas' medical opinion regarding the diagnoses or causation. As noted above, Dr. Snodgrass admitted he was "unable to provide a meaningful opinion of Mr. Orozco's mental health

[7] RCW 51.32.160(1)(a) provides that under Title 51 RCW (the Washington Industrial Insurance Act (the Act)) injured workers whose original worker's compensation claims have been closed may seek to reopen their claim for further benefits upon establishing an aggravation of the disability. *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 654, 219 P.3d 711 (2009).

condition as of October 3, 2011." Even with the stark contrast between the mental health providers' interactions with Mr. Orozco and Dr. Snodgrass's self-professed inability to make a meaningful mental health diagnosis at T2, it is clear from the decisions that the Department, Board, Superior Court and Court of Appeals each relied solely on *Dr. Snodgrass's 2009 mental health opinion* of Mr. Orozco in making their rulings regarding the appropriateness of the Department's denial of his application to reopen his claim. This error did not allow Mr. Orozco to present his theory of the case and results in a violation of the statutory mandate, which requires a medical showing of worsening *between* T1 (in 2009) and T2 (in 2011). As a result, the agency decisions and court opinions are legally unsupportable and could destroy the precedential value of cases such as *Price v. Dep't of Labor and Indus.*, 101 Wn.2d 520, 628 P.2d 307 (1984) (*infra*), that interprets a worker's right to file an application to reopen their closed worker's compensation claim based on the worsening of a mental health condition. Without correcting the Court of Appeals decision, future injured workers will be exposed to preventable, unnecessary and lengthy litigation just to gain the right to receive medical benefits under the Industrial Insurance Act.

Industrial injuries have devastating emotional, financial and physical consequences that effect not just injured workers but their families and loved ones as well. If RCW 51.32.160 and the cases interpreting it are ambiguous to the agency that is tasked with implementing it, the time is right for a state Supreme Court opinion that sets forth the appropriate and essential proof an injured worker must provide and which the Department *must* or *must not* consider when making determinations regarding an injured worker's application for the aggravation of medical conditions related to the original industrial injury.

(2) ANALYSIS

In a nutshell, the essence of the granting of an aggravation claim is that an injured worker's *current* medical or mental health condition at T2 is different from, and worse than it was when the original claim was closed at T1, which warrants further worker's compensation benefits including proper and necessary medical treatment. RCW 51.32.160 governs applications to reopen a claim and provides in pertinent part:

> (1)(a) If aggravation, diminution, or termination of disability takes place, the director [of the Department] may, upon the

> application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section . . .

Establishing A Physical Injury Aggravation Claim versus A Mental Health Aggravation Claim

The four elements an injured worker must present when seeking to successfully reopen their *physical* medical claim under RCW 51.32.160 differs slightly, but significantly from that of the injured worker seeking to reopen their claim based on worsening *mental health* conditions. The required elements must be presented through medical testimony[8] specified on a more probable than not medical basis. Both types of reopening claims require: (1) proof of the causal relationship between the injury and the subsequent disability; (2) the symptoms must show the aggravation of the injury resulted in increased disability; (3) the increased aggravation-caused-disability occurred between the two terminal dates of the aggravation period; and (4) the symptoms that existed on or prior to the T2 closing date were greater than the Department found it was

[8] The term "medical testimony" simply refers to testimony given by medical experts. *Loushin v. ITT Rayonier*, 84 Wn. App. 113, 118, 924 P.2d 953 (1996).

on T1. *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657-58, 219 P.3d 711 (2009).

A vital difference exists between establishing an aggravation of a physical medical claim and a mental health medical claim. Because Mr. Orozco's reopening claim involved the worsening of a mental health claim the holding of *Price v. Dep't of Labor and Indus.*, 101 Wn.2d 520, 628 P.2d 307 (1984) is relevant. The *Price* court addressed the question of whether a worker's compensation claim based solely on a *psychological* disability may be awarded on the basis of expert medical testimony derived solely from the injured worker's exclusively *subjective* symptoms. *Id.* at 521. (Emphasis added). In a significant departure from prior case law the *Price* court held that it could on the basis that medical opinions formed after a psychiatric examination are primarily based on conversations with the patient, which is entirely subjective information. The court held: "symptoms of a psychiatric injury are necessarily subjective in nature." *Id.* at 528-529. Pursuant to *Price*, when testimony of a mental health nature is considered, the requirement of subjective evidence has replaced the objective/subjective evidence requirement of general physical health testimony.

Applying the *Price* holding to the facts of Mr. Orozco's case reveals the following:

(1) Dr Snodgrass examined Mr. Orozco in 2009 and found no evidence of mental health conditions related to his 2006 industrial injury.

(2) The Department apparently relied on Dr. Snodgrass's medical opinion and closed Mr. Orozco's original worker's compensation claim on July 29, 2009, which established the first terminal date (T1).

(3) Approximately two years later Mr. Orozco filed an application to reopen his claim based on the worsening of his mental health symptoms.

(3) Prior to filing to reopen his claim, Mr. Orozco sought mental health counseling at Catholic Family Services in 2010-2011.

(4) On October 3, 2011 the Department denied Mr. Orozco's application to reopen his claim, establishing the second terminal date (T2).

(5) Mr. Orozco was examined by Dr. Arenas, a licensed clinical psychologist on two occasions, January 7, 2012 and March 10, 2012.

(6) As a result of his two examinations Dr. Arenas formally diagnosed four mental health conditions from which Mr. Orozco was currently suffering: (1) cognitive disorder; (2) anxiety disorder with generalized

and post-traumatic features; (3) pain disorder with both psychological factors and a general medical condition; and (4) depressive disorder with major features. Dr. Arenas testified under oath that the diagnosed mental health conditions were the result of Mr. Orozco's 2006 industrial injury.

(7) Dr. Arenas did not examine Mr. Orozco in 2009 prior to T1 but based on his long-standing symptoms opined that it was more probable than not he suffered from mental health conditions on some level from 2006 through 2012.

(8) Dr. Arenas was the *only* mental health provider that examined Mr. Orozco as the result of the Department's T2 denial of his application to reopen his claim in 2011.

(9) Dr. Snodgrass was deposed in August 2012 to testify about his medical opinion that Mr. Orozco was not suffering from any mental health conditions in 2009 at T1.

(10) In the same deposition Dr. Snodgrass was asked his medical opinion about Mr. Orozco's current state of mental health (in 2012 just after T2), even though Dr. Snodgrass had not examined Mr. Orozco since 2009, had not reviewed his sworn testimony and had not reviewed his counseling records from 2010-2011. Dr. Snodgrass initially equivocated then admitted he could not state with medical

probability what Mr. Orozco's current state of mental health was in 2011. Even so, Dr. Snodgrass testified that he disagreed with Dr. Arenas' assessment of Mr. Orozco's mental health at T2.

As set forth above, a causal relationship between the injury and the subsequent disability must be established by medical testimony. After an exhaustive review of the entire evidence developed below, Dr. Arenas testified on a more probable than not medical basis the industrial injury was the cause of Mr. Orozco's mental health conditions. The basis for his conclusion was that he found no other issue in Mr. Orozco's life that would be a significant contributing factor. He was a happy, productive worker that financially supported his family and enjoyed their company and that of his friends prior to the injury. He had no symptoms of anxiety or depression and his body did not hurt prior to the injury. Dr. Snodgrass had an opinion about Mr. Orozco's mental health condition in 2009 but did not know the status in 2011 at the time of claim closure. Dr. Snodgrass did not and could not rebut Dr. Arenas' mental health diagnoses or their cause. The Department presented no other medical testimony, objective or subjective, that rebutted Dr. Arenas' diagnosis either. Common sense dictates only one result. Although disputed by Mr. Orozco, if one assumes Dr. Snodgrass

made no formal mental health diagnosis in 2009 and Dr. Arenas testified there *was* a mental health diagnosis in 2012, it follows that Mr. Orozco's medical condition worsened between the terminal dates, which is the medical opinion put forth by Dr. Arenas on a more probable than not medical basis. Dr. Arenas reviewed records from 2006-2007, 2009, and 2011. And, as noted above, he was able to review 2010-2011 records from Catholic Family Services where Mr. Orozco sought mental health counseling. All this information went into his final medical opinion that Mr. Orozco's mental health condition worsened during the aggravation period.

F. CONCLUSION

Because the Court of Appeals mistakenly framed the issue on appeal as a credibility determination between competing experts instead of the mandatory statutory requirements of RCW 51.32.160, the decision was legally flawed. As a result, the Department, the Board, claimants and worker's compensation practitioners need a Washington state Supreme Court opinion that discusses the legal standards governing the granting or denial of an aggravation application that applies to mental health conditions. Improper denials and the subsequent lengthy litigation process have

preventable yet deleterious effects on injured workers and their families. For this reason, Mr. Orozco respectfully petitions this court to grant review and reverse the decision of the Court of Appeals.

G. ATTORNEY FEES

If successful in his appeal, Mr. Orozco requests attorney fees pursuant to RAP 18.1, RCW 51.52.130[9] and *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose behind the statutory attorney fees award is to ensure adequate representation for the injured worker who is forced to appeal from Department rulings in order to obtain compensation due on their claim. *Id.* at 667-70. Mr. Orozco has waited and litigated the Department's denial of his aggravation application for 5 years. If this court determines the denial was in error, Mr. Orozco respectfully

[9] The relevant portion of RCW 51.52.130(1) provides: "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

submits an award of attorney fees both at this court and the court of appeals is warranted.

Respectfully submitted this 24th day of October, 2016

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H. APPENDIX A

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

JESUS OROZCO,	)	No. 33808-8-III
	)	
Appellant,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
DEPARTMENT OF LABOR AND INDUSTRIES,	)	
	)	
	)	
Respondent.	)	

LAWRENCE-BERREY, A.C.J. — Jesus Orozco appeals the superior court's decision denying his request to reopen his 2006 industrial injury claim. In addition to other issues, he argues the superior court erred when it found his 2006 injury did not proximately cause his mental health conditions. Because this issue is dispositive, we do not address the other issues he raises. We hold that substantial evidence supports the superior court's finding, and affirm.

FACTS

On April 25, 2006, Mr. Orozco injured his head while working for Goodwill Industries. Mr. Orozco was loading a box into a truck when a coworker closed the truck's

overhead metal door and struck Mr. Orozco's head. The door injured Mr. Orozco's face, head, neck, and lower back. Mr. Orozco filed a workers' compensation claim. The Department of Labor & Industries (Department) allowed the claim and determined Mr. Orozco was entitled to time-loss compensation and medical treatment. While Mr. Orozco was receiving benefits, he was examined by Dr. James Haynes, a neurologist, and Dr. Lanny Snodgrass, a psychiatrist. On July 29, 2009, the Department determined treatment was no longer necessary and closed the claim.

In August 2011, Mr. Orozco filed an aggravation application to reopen his claim. On October 3, 2011, the Department denied his application on the basis that the medical condition caused by the injury had not worsened since the final claim closure. Mr. Orozco appealed the Department's order to the Board of Industrial Insurance Appeals (Board), which granted his appeal. After he appealed the Department's order, Mr. Orozco was examined by Dr. Silverio Arenas, a clinical psychologist.

At the Board hearing, Mr. Orozco and his wife both testified, and Mr. Orozco presented Dr. Arenas's deposition testimony. Dr. Arenas testified that he examined Mr. Orozco in January 2012 and in March 2012. He determined Mr. Orozco was cognitively compromised either because of pain, emotional factors, or possibly because of post-concussive syndrome, which is a collection of symptoms that affect a person after he or

she has suffered a concussion. He diagnosed Mr. Orozco with four mental health conditions: a cognitive disorder, anxiety disorder, pain disorder, and depressive disorder. Dr. Arenas did not believe Mr. Orozco was malingering.

Dr. Arenas further testified that Mr. Orozco did not have these conditions before his injury, and that these four conditions began in April 2006 when Mr. Orozco was injured and continued through the present. Other than the injury, Dr. Arenas did not see any other causes for the conditions. Finally, Dr. Arenas testified that Mr. Orozco's mental health conditions had worsened between the terminal dates. He believed Mr. Orozco had been deteriorating since his injury and would continue to deteriorate into the future.

The Department presented the deposition testimony of Dr. Haynes, the neurologist.[1] Dr. Haynes testified he examined Mr. Orozco in April 2009 and in September 2011. During the 2009 examination, Dr. Haynes noted that Mr. Orozco exhibited "dramatic pain behavior," which was not consistent with the residuals of any injury. Clerk's Papers (CP) at 178. Dr. Haynes did not "want to say malingering," but

[1] Mr. Orozco argues that this court cannot consider Dr. Haynes's testimony because his injury caused a psychiatric condition and Dr. Haynes is a neurologist. Mr. Orozco preserved this issue for review by raising it before the industrial appeals judge (IAJ), who denied his argument. For purposes of this particular appeal, we need not accord Dr. Haynes's testimony any weight.

called it a "performance such as you would see on a Broadway stage, as opposed to the product of any injury or disease or condition." CP at 179. Dr. Haynes questioned whether a relatively minor head injury would result in an "ever-progressing and spreading total body pain, resulting in total disability, unsupported by any neuroimaging." CP at 187.

With regard to his 2011 examination, Dr. Haynes testified that "[t]he pain was a little more extensive," and "it seemed like things were getting worse." CP at 181-82. When asked whether Mr. Orozco's conditions objectively worsened between the terminal dates, Dr. Haynes testified that they had not. When asked about Dr. Arenas's cognitive disorder diagnosis, Dr. Haynes testified that he would defer the cognitive discussion to a psychiatrist but that he did not see a neurological basis for Dr. Arenas's diagnosis. Finally, he noted there was really nothing wrong with Mr. Orozco, other than the fact that Mr. Orozco had a major psychological collapse.

The Department also presented the deposition testimony of Dr. Snodgrass, the psychiatrist. Dr. Snodgrass testified he examined Mr. Orozco in November 2007 and in April 2009. When asked whether he was able to come to a diagnosis during the 2007 examination and, if so, whether the diagnosis was related to the industrial injury, Dr. Snodgrass testified there was no major psychiatric diagnosis for Mr. Orozco. Dr.

Snodgrass then opined that Mr. Orozco "did not have a psychiatric condition that was causally related to the current injury on a more-probable-than-not basis, and that malingering, in accordance with a detailed examination, had to be seriously considered." CP at 223-24. He testified "there was no clear evidence of a cognitive disorder related to a closed-head injury." CP at 224.

With regard to his April 2009 examination, Dr. Snodgrass testified that he noted "[n]o significant neuropsychological residuals stemming from the industrial injury of 04/25/06." CP at 234. He reiterated "there was no psychiatric condition that was causally related to the covered injury." CP at 236. Dr. Snodgrass perceived other factors weighing in, but these were unrelated to the injury. Dr. Snodgrass reviewed Dr. Arenas's psychological evaluation and disagreed with Dr. Arenas's diagnoses. Finally, Dr. Snodgrass assumed that Mr. Orozco's psychiatric conditions were the same in October 2011 as they were when he last examined him in 2009, assuming no changes in variables. But Dr. Snodgrass was unable to provide a meaningful opinion as to Mr. Orozco's condition in 2011, and stated that he "[could not] say for sure" and there was "no way of knowing" without actually seeing Mr. Orozco. CP at 251.

Following the hearing, the IAJ issued a proposed decision and order finding that Mr. Orozco's industrial injury did not proximately cause his mental health conditions and

that these conditions did not worsen between the two terminal dates. Accordingly, the IAJ affirmed the Department's order that denied reopening Mr. Orozco's claim. Mr. Orozco petitioned the Board for review. The Board denied Mr. Orozco's petition and adopted the IAJ's proposed decision and order.

Mr. Orozco appealed the Board's order to the superior court. The superior court reviewed the certified Board record, including the experts' depositions, the Board's order, and the Department's trial memorandum. In its findings of fact, the superior court found that

> [o]n a more-probable-than-not basis the mental health conditions described as: cognitive disorder; anxiety disorder; pain disorder with both psychological factors and a general medical condition; depressive disorder; and malingering were not proximately caused by the industrial injury and did not worsen between July 29, 2009 and October 3, 2011.

CP at 268. Accordingly, the superior court concluded that "[b]etween July 29, 2009 and October 3, 2011, Jesus Orozco's conditions proximately caused by the industrial injury did not worsen within the meaning of RCW 51.32.160." CP at 268. The superior court concluded the Department's order was correct, and affirmed the Board's decision denying reopening of Mr. Orozco's claim. Mr. Orozco appeals to this court.

ANALYSIS

The Industrial Insurance Act (IIA), Title 51 RCW, governs review of workers' compensation cases. The superior court reviews the Board's order de novo, and its review is based solely on the evidence and testimony presented to the Board. RCW 51.52.115. On appeal to the superior court, the Board's decision is prima facie correct, and a party challenging the decision must support its challenge by a preponderance of the evidence. RCW 51.52.115.

A. STANDARD OF REVIEW

This court reviews the superior court's decision, not the Board's order. RCW 51.52.140. This court reviews the superior court's decision the same way it does other civil cases. *Id.*; *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. 859, 863, 271 P.3d 381 (2012). This court reviews whether substantial evidence supports the superior court's factual findings and then reviews de novo whether the superior court's conclusions of law flow from those findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). Substantial evidence exists when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012).

In performing this review, this court takes the record in the light most favorable to the party who prevailed in superior court. *Rogers*, 151 Wn. App. at 180. This court does not reweigh or rebalance the competing testimony and inferences, nor does it apply anew the burden of persuasion. *Id.* at 180-81. When the record contains a battle of experts regarding a disputed factual finding, this court defers to the superior court's credibility determinations even if it would have weighed the experts' testimony differently. *Cantu*, 168 Wn. App. at 28.

The parties dispute whether the superior court's finding that Mr. Orozco's mental health conditions were not proximately caused by the industrial injury is a finding of fact subject to substantial evidence review or a conclusion of law subject to de novo review. Proximate cause, at least in this context, is a question of fact—i.e., whether Mr. Orozco's mental health conditions would have occurred but for his 2006 industrial injury.

Proximate cause includes both factual causation and legal causation. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008). Factual causation, or "but for" causation, asks whether the result would have happened had the event not occurred. *Id.* In contrast, legal causation asks whether, as a matter of logic, common sense, justice, and policy, the connection between the event and the ultimate result is too attenuated to impose liability. *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 204,

15 P.3d 1283 (2001). The fact finder determines factual causation, whereas the court determines legal causation. *Jenkins*, 143 Wn. App. at 254. Here, the superior court's finding that Mr. Orozco's mental health conditions were not proximately caused by the industrial injury refers to factual causation, not legal causation. Thus, this court reviews the Board record to determine whether substantial evidence supports the challenged superior court finding.

B. LACK OF PROXIMATE CAUSE

RCW 51.32.160(1)(a) allows a closed workers' compensation claim to be reopened for aggravation or worsening of a condition proximately caused by an industrial injury. *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657, 219 P.3d 711 (2009). To succeed in an aggravation claim, a worker must establish the following four elements: (1) the condition was worse after the original injury, (2) the worsening was caused by the original injury, (3) the condition worsened between the terminal dates, and (4) the worsening warranted more treatment or disability beyond what the Department had provided. *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189 (2015). Because lack of proximate cause is dispositive, we confine our analysis to this, the second element.

Mr. Orozco argues that Dr. Arenas testified that his injury caused his mental health conditions. In so arguing, Mr. Orozco fails to address the crucial issue, which is whether the superior court's findings are supported by substantial evidence. Instead, he argues that there is substantial evidence in the record to support *his* desired finding. This argument fails because this court does not reweigh or rebalance the competing testimony and inferences, but rather determines whether substantial evidence supports the superior court's findings.

Here, substantial evidence supports the superior court's finding that Mr. Orozco's injury did not proximately cause his mental health conditions. Dr. Snodgrass testified that there was no major psychiatric diagnosis for Mr. Orozco, that Mr. Orozco "did not have a psychiatric condition that was causally related to the current injury," and that "there was no clear evidence of a cognitive disorder related to a closed-head injury." CP at 223-24. With regard to the 2009 examination, Dr. Snodgrass reiterated that "there was no psychiatric condition that was causally related to the covered injury," and while Mr. Orozco might have other factors weighing in, these were unrelated to the injury. CP at 236.

Mr. Orozco essentially challenges the superior court's determination that Dr. Snodgrass's testimony was more credible and persuasive than Dr. Arenas's. This court

must defer to the superior court's credibility determinations in a battle of the experts. Because Dr. Snodgrass's testimony was sufficient to persuade a fair-minded, rational person that Mr. Orozco's injury did not cause his mental health conditions, substantial evidence supports the superior court's finding on lack of proximate cause.

Affirmed.

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

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Pennell, J.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2016, I sent for delivery a true and correct copy of the foregoing Petition for Review by the method indicated below, and addressed to the following:

U.S. Mail – Two (2) Copies - also via facsimile (509) 456-4288

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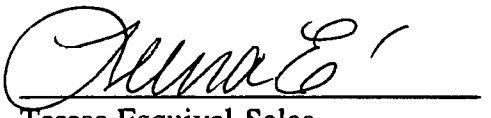

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