NO. 33808-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JESUS OROZCO,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR AND INDUSTRIES' BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

R. Marshall Morales
Assistant Attorney General
WSBA No. 49113
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-5348

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I. INTRODUCTION

This is a substantial evidence case where the appellant Jesus Orozco attempts to relitigate the facts of the case. Orozco seeks to reopen his workers' compensation claim contending that his 2006 industrial injury caused mental health conditions that worsened after his claim was closed. Medical testimony supports that the 2006 injury did not proximately cause any mental health condition, and that any unrelated mental health conditions did not worsen after the claim was closed; substantial evidence thus supports the trial court's decision.

This Court should reject Orozco's invitation to misapply the substantial evidence standard of review by searching for substantial evidence in favor of a decision different from that returned by the superior court. This Court should affirm the superior court decision that affirmed the Department's rejection of Orozco's reopening application.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does substantial evidence support the superior court's finding that Orozco's mental health conditions were not proximately caused by Orozco's 2006 industrial injury, when a medical witness testified that the contended mental health conditions were not caused by Orozco's 2006 work injury?

2. Does substantial evidence support the superior court's finding that Orozco's mental health conditions did not worsen between July 29, 2009, and October 3, 2011, when a fact-finder could determine that he had the same sort of symptoms since the injury with no worsening?

III. COUNTERSTATEMENT OF THE CASE

A. The Department Accepted Orozco's Workers' Compensation Claim and Provided Treatment and Benefits

On April 25, 2006, Orozco was working for Goodwill Industries Columbia when he sustained a head injury. CP 92-94. At the time of the injury, Orozco was working with a supervisor to load boxes on a truck when the supervisor closed the overhead door of the truck and struck Orozco's head. CP 94. Orozco did not lose consciousness, and he received only conservative medical treatment. CP 122. Orozco filed a workers' compensation claim, which the Department allowed in May 2006, and he received benefits, including time-loss compensation and the payment of his medical treatment. CP 49. Orozco reached maximum medical improvement in July 2009, and the claim was closed. CP 52-54.[1]

B. Orozco Later Filed a Reopening Application, Alleging That He Had Mental Health Conditions That Worsened After Claim Closure

After the claim was closed, Orozco sought mental health treatment from Catholic Family Services between March 2010 and July 2011. CP 139. In August 2011, Orozco applied to reopen the claim, contending that he had mental health conditions that had worsened after the claim was

[1] If a worker does not need further treatment and his or her condition is considered to be at maximum medical improvement (meaning it is fixed and stable), the claim may be closed. RCW 51.32.055(1); WAC 296-20-01002 (definition of "proper and necessary").

closed. CP 54.[2] The Department denied Orozco's reopening application in October 2011. CP 36. Orozco then appealed that Department order to the Board of Industrial Insurance Appeals in November 2011. CP 20, 55.

The parties agree that Orozco did not have a physical condition worsen after his claim was closed. App. Br. 6 ("Mr. Orozco's aggravation claim dealt only with a *mental health* disability.").[3] Orozco presented no medical evidence of a change in his physical condition after the claim closed. Orozco also did not present evidence that his alleged mental health conditions arose solely after the claim was closed; rather, his psychologist believed that Orozco had the contended mental health conditions since his injury. CP 138.

After Orozco applied to reopen his claim and the Department rejected his application, Orozco was examined by psychologist Silverio Arenas, PhD, on two occasions in January and March 2012. CP 54-55, 120, 124-34. Dr. Arenas diagnosed Orozco with four conditions: cognitive

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[2] To reopen a claim, an injured worker must prove worsening between two specific dates, known as "terminal dates." RCW 51.32.160(1)(a). The first terminal date is the date of the last previous closure or denial of a reopening application. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The second terminal date is the date of the most recent closure or denial of a reopening application; practically speaking, it is the date of the order currently on appeal. *Id*. Here the first terminal date was July 29, 2009—the date Orozco's claim was closed. CP 52. The second terminal date was October 3, 2011, because this was the date the Department rejected the reopening application. CP 54.

[3] An "aggravation claim" is equivalent to a "reopening claim" in workers' compensation parlance.

disorder, anxiety disorder, pain disorder, and depressive disorder. CP 135. Dr. Arenas believed that Orozco's conditions were caused by the 2006 injury. CP 134-35, 143. Dr. Arenas concluded that the conditions had worsened between the terminal dates of July 2009 and October 2011. CP 143, 149-50.

C. The Department's Experts Found That Orozco Did Not Have Any Cognitive or Mental Health Condition Proximately Caused by the Injury

Dr. James Haynes is a board-certified neurologist with expertise in diagnosing and treating injured workers in Washington. CP 163-67. Dr. Haynes examined Orozco in both 2009 and 2011. CP 168-69. Noting that Orozco was not forthright and presented exaggerated symptoms, Dr. Haynes concluded that there was no neurological basis for any complaints by Orozco. CP 177-79, 187-89. Dr. Haynes determined that Orozco did not have the contended cognitive disorder from a neurological perspective. CP 189. He found that no condition had worsened between 2009 and 2011. CP 188.

Dr. Lanny Snodgrass is a board-certified psychiatrist with expertise in diagnosing and treating mental disorders for injured workers in Washington. CP 202-03, 207-08. He examined Orozco in 2007 and 2009. CP 209. Dr. Snodgrass noted that a translator was present to assist with his examination. CP 219. Dr. Snodgrass noticed inconsistencies in

the 2009 exam, including an excessive grimace when sitting down but no grimace when standing up, CP 231, and unreliable reporting of memory. CP 239. On a standardized memory-retention test, Orozco scored five out of 15, but this would mean that he was a "severely brain-damaged patient" or "mentally retarded," according to the testing metric. CP 222-23. In reference to his 2007 examination, Dr. Snodgrass stated that Orozco "did not have a psychiatric condition that was causally related to the current injury on a more-probable-than-not basis." CP 223-24. Dr. Snodgrass noted the presence of Orozco's "very fixed disability conviction," CP 226, and noted that at least three doctors had suggested Orozco was malingering. CP 217-19 (Drs. Chan, Montgomery, and Taylor). When asked about Orozco's condition as of 2009, Dr. Snodgrass did not believe that Orozco had any psychiatric condition caused by the 2006 industrial injury. CP 235-36.

He attributed Orozco's complaints to how he deals with life in general or "the way he deals with stresses in general." CP 243. Dr. Snodgrass was asked whether he could testify about Orozco's condition in 2011 when he did not see him since 2009, and he responded that his opinions would be similar in 2011, if the "variables" did not change. CP 251-52. Dr. Arenas's testimony confirmed that nothing had changed in Orozco's situation, and Orozco did not put on medical evidence that his

physical condition changed during the applicable period. App. Br. 6; CP 143 (stating that nothing in his life has changed). Orozco presented no evidence of intervening accidents or injuries or other events after the claim was closed. Dr. Snodgrass evaluated Dr. Arenas's 2012 report and testified that he did not agree with Dr. Arenas's 2012 evaluation. CP 236-40. Dr. Snodgrass's opinions were offered on a more probable than not basis. CP 211, 222-24, 236.

D. The Board Affirmed the Department Order Denying Reopening of Orozco's Claim

Following hearings at the Board, the industrial appeals judge issued a proposed order affirming the Department order that denied the reopening application. The industrial appeals judge was "unable to find on a more-probable-than-not basis that [Orozco] has any mental health conditions proximately caused by the industrial injury or that his mental health conditions worsened between the two terminal dates." CP 31. The Board judge found Dr. Arenas's testimony was insufficient and unpersuasive because he only saw the worker in 2012 "and merely speculated [that Orozco's] condition worsened since July 2009." CP 31. Orozco petitioned the Board for review. CP 13-14. The Board denied the petition and adopted the proposed order. CP 5.

E. The Superior Court Concluded That Orozco's Mental Health Conditions Were Not Caused by the Industrial Injury and Had Not Worsened

Orozco appealed the Board decision to superior court, where the judge reviewed the testimony that was presented at the Board. The superior court found that Orozco's 2006 work injury did not cause the contended mental health conditions and that the mental health conditions had not worsened after the claim was closed in 2009. CP 268. The court concluded that "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 268. Orozco appealed to this Court.

IV. STANDARD OF REVIEW

Orozco offers the wrong standard of review, asking for de novo review of a factual finding. App. Br. 14. This is contrary to well-established principles that findings of fact involving causation are review at the appellate level under a substantial-evidence standard of review.

In an industrial insurance case, the appellate court reviews the decision of the superior court, as opposed to reviewing the decision of the Board. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80,

210 P.3d 355 (2009).[4] The court applies the substantial evidence standard of review to findings of fact. *See* RCW 51.52.140; *Rogers*, 151 Wn. App. at 180.

Orozco attempts to recharacterize the finding of fact involving proximate cause as a question of law seeking to invoke de novo review by this Court. Finding of Fact 1.4; *see* App. Br. 14. However, causation is a question of fact. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *White v. Twp. of Winthrop*, 128 Wn. App. 588, 595, 116 P.3d 1034 (2005); *see* 6A WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. 155.06 (6th ed. 2012) [hereinafter, WPI] (proximate cause jury instruction in workers' compensation case). The appropriate standard of review in addressing whether the industrial injury caused the mental health condition is substantial evidence because this dispute is a factual issue. *See Dellen Wood Products, Inc. v. Dep't of Labor & Indus.*, 179 Wn. App. 601, 619, 319 P.3d 847 (factual issues reviewed under substantial evidence standard), *review denied*, 180 Wn.2d 1023 (2014).

On substantial evidence review, the court limits its review to whether substantial evidence supports the trial court's factual findings and

[4] The Board decision is not reviewed. *Rogers*, 151 Wn. App. at 180. The Washington Administrative Procedure Act, RCW 34.05, does not apply to workers' compensation cases under RCW Title 51. RCW 34.05.030(2)(a), (b); *see Rogers*, 151 Wn. App. at 180.

whether the trial court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

Substantial evidence exists if there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the stated premise. *Zavala v. Twin City Foods*, 185 Wn. App. 838, 859, 343 P.3d 761 (2015). The court does not reweigh or rebalance the competing testimony and inferences presented to the fact-finder. *Zavala*, 185 Wn. App. at 859. Credibility determinations are solely for the fact-finder and the court does not review such determinations on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). The court also views the record in the light most favorable to the party who prevailed in superior court—here, the Department. *See Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

V. ARGUMENT

Orozco's claim of relief rests on his contention that this Court should reweigh the evidence under a de novo standard rather than apply substantial evidence to his appeal. App. Br. 14. As noted above, causation—contrary to Orozco's unsupported assertion—is a question of fact. *Hertog*, 138 Wn.2d at 275. Turning the substantial evidence standard upside down, Orozco asks this Court to apply the substantial evidence test to conclude that the testimony of his testifying psychologist, Dr. Arenas,

supports a finding that he had mental health conditions proximately caused by the industrial injury and that they worsened after the Department closed his claim. App. Br. 22 (claiming "that no medical testimony supports a contrary result"). But this ignores the testimony of Dr. Snodgrass, who testified that Orozco had *no* mental health conditions proximately caused by the 2006 injury. CP 223-24, 234, 236. Dr. Haynes similarly testified that there was no basis to conclude that the 2006 injury caused the alleged cognitive disorder from a neurological standpoint. CP 187-89.

The fact-finder believed there was no cognitive or mental health condition caused by the industrial injury, based on testimony to that effect from Drs. Snodgrass and Haynes. If there is no condition, there is nothing to worsen. In any event, a fact-finder could also surmise from this record that there was no worsening of Orozco's claimed conditions. The court does not reweigh the evidence on appeal, and the Court takes the inferences that Orozco had a disability conviction and secondary gain in the Department's favor. Substantial evidence supports the superior court's decision, and this Court should affirm.

A. Orozco Had the Burden of Establishing That He Had a Mental Health Condition That Was Proximately Caused by His 2006 Industrial Injury and That It Worsened Between July 2009 and October 2011

A worker may reopen a workers' compensation claim by establishing "aggravation" of his industrial injury. *See* RCW 51.32.160(1)(a). To succeed in a reopening claim, the worker must prove, by medical testimony, that (1) his or her condition was worse after the original injury, (2) the worsening was caused by the original injury, (3) his or her condition worsened between the terminal dates, and (4) the worsening warranted more treatment or disability beyond what the Department had provided. *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189 (2015).[5] The first terminal date is the date of the last previous closure or denial of an application to reopen a claim for aggravation. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The second terminal date is the date of the most recent closure or denial of an application to reopen a claim. *Id.* at 561. In

[5] *Price v. Department of Labor & Industries*, 101 Wn.2d 520, 521, 682 P.2d 307 (1984), confirmed that experts may rely on subjective findings alone to support the worsening of a mental health condition. However, *Price* did not diminish the worker's burden to establish the worsening between the first and second terminal dates by competent medical evidence. The Department does not contend that Orozco needed to demonstrate objective findings in Dr. Arenas's testimony.

this case, the first terminal date is July 29, 2009, and the second terminal date is October 3, 2011.

Because the mental health disorders alleged in the reopening application were not accepted as work-related conditions prior to closing Orozco's claim, Orozco had the burden at trial to show that the mental health conditions were both (1) proximately caused by the 2006 injury, and (2) worsened after the claim was closed. Both of these questions are questions of fact. WPI 155.06; WPI 155.12; *see also* discussion *supra* Part IV. The superior court found that Orozco failed to establish that the contended mental health conditions were proximately caused by the 2006 industrial injury and that they worsened between July 29, 2009, and October 3, 2011. CP 268-69. Substantial evidence supports each of these determinations.

B. Substantial Evidence Supports the Finding That Orozco's Mental Health Conditions Were Not Proximately Caused by the 2006 Injury

Substantial evidence supports a finding that Orozco did not have any mental health conditions proximately caused by his industrial injury. The testimony of Dr. Snodgrass provides substantial evidence that Orozco did not have any mental health conditions proximately caused by the industrial injury. CP 221, 234, 236. The trial court found both Dr. Snodgrass and Dr. Haynes credible, and the appellate court does not

revisit credibility determinations. Based on their examinations of Orozco and review of his medical records, the doctors were of the ultimate opinion that Orozco did not have a cognitive condition or mental health condition proximately caused by the industrial injury. CP 187-89, 235-36.

The fact-finder could also rely upon Dr. Haynes's opinion about Orozco's candor to medical professionals and the neurologic component of his alleged cognitive disorder, and use it form the basis of an opinion on credibility and his alleged cognitive disorder. Dr. Haynes testified that Orozco did not have cognitive disorder from a neurological standpoint, so it could not have been caused by the 2006 injury. CP 189. Dr. Haynes concluded that Orozco's pain complaints were due to secondary gain. CP 187. He called into question Orozco's credibility by noting "dramatic" behavior that was less than candid. *See* CP 186 ("highly egregious" behavior—"more dramatic than most."); *see also* CP 233 (Dr. Snodgrass testifying to "dramatic" behavior).

The fact-finder could reasonably rely on Dr. Snodgrass's opinion that Orozco did not have any psychiatric condition caused by the 2006 injury. CP 223. Misapplying the substantial-evidence standard, Orozco argues that "substantial evidence supports Dr. Arenas's medical opinion, especially when one considers the additional records he reviewed but Dr. Snodgrass did not." App. Br. 17. This is asking that the Court consider the

validity of Dr. Arenas's opinion, instead of the sufficiency of the trial court's findings. It also asks that more weight be given to Dr. Arenas based on the records he reviewed. Neither request is proper under the substantial evidence standard of review, which does not involve the appellate court reweighing evidence.

Based on his qualifications, examination of Orozco, and review of medical records, Dr. Snodgrass was competent to provide an expert opinion regarding Orozco's four alleged mental health diagnoses, as well as addressing the issue of malingering and intercultural challenges with mental health. CP 237-40.[6] Moreover, Dr. Snodgrass reviewed and provided a detailed opinion regarding Dr. Arenas's 19-page report issued in 2012. CP 236-47. He offered detailed criticism of Dr. Arenas's opinions, which a fact-finder could reasonably adopt. CP 236-42.

The fact-finder could rely on the testing performed by Dr. Snodgrass that showed that Orozco's self-reported conditions were suspect. CP 214-15, 225. For example, based on Orozco's self-reporting he scored as a "severely brain-damaged patient" and "mental retarded"

[6] Orozco complains that there was no formal diagnosis of malingering by the Department witnesses and therefore it should not have been included in the trial court's findings of fact and conclusions of law. App. Br. 22. Dr. Snodgrass points to malingering. CP 221. But assuming that there is insufficient evidence to support a conclusion that Orozco was malingering, such an inclusion is harmless error in any case because Orozco claims he does not have a diagnosis of malingering in the first place. *See* App. Br. 22. Appellate courts do not reverse a trial court simply because it includes a finding that is extraneous to the ruling in the issue before it. *See, e.g.*, *State ex. rel. Carriger v. Campbell Food Markets, Inc.*, 65 Wn.2d 600, 606-07, 398 P.2d 1016 (1965).

patient even though there was no evidence of this. CP 222-23. Dr. Snodgrass concluded that Orozco had a disability conviction based on inconsistent and dramatized pain behavior. CP 233-35.

While Orozco presented testimony to support the theory that the contended mental health conditions were caused by his 2006 work injury, a reasonable fact-finder could disbelieve Dr. Arenas because he appears to have prompted Orozco in his answers to tests. CP 34, 132. Dr. Arenas dismissed the opinions of other experts because of the use of translators, but a fact-finder could reasonably conclude that the use of a translator does not invalidate a psychiatric or neurological exam based on Dr. Snodgrass's testimony that rebutted that issue. CP 236-40. A fact-finder could also reasonably conclude that Dr. Snodgrass's extensive professional intercultural experience in Latin America, Europe, and Asia would support his ability to appropriately examine and diagnose Orozco. CP 199-207 (detailing Dr. Snodgrass's experience in Mexico, Germany, Vietnam, and Singapore).

A fact-finder could reasonably consider Dr. Arenas's dismissiveness regarding any suggestion from the other experts' reports that called into question Orozco's credibility. Dr. Snodgrass provided ample detail on Orozco's unreliability as a witness. CP 219-23. Dr. Snodgrass also testified at length to explain why he disagreed with Dr.

Arenas. CP 236-40. In contrast, Dr. Arenas dismissed the notion of malingering without explanation, CP 138, and he made a similar cursory and broad statement that Orozco's conditions had worsened without referring to the requirements for each in the diagnostic manual used to assess psychiatric conditions, the DSM-IV. CP 142-43. The fact-finder could reasonably rely on the opinions of Drs. Snodgrass and Haynes over Dr. Arenas's opinion. The appellate court does not reweigh the evidence or substitute its own judgment for the fact-finder. *Zavala*, 185 Wn. App. at 859.

Orozco nonetheless asks this Court to reject Dr. Snodgrass's testimony because he did not examine Orozco in 2011. App. Br. 20-21. This argument misses the point. Dr. Snodgrass rejected the proposition that Orozco had a mental health condition related to the industrial injury. CP 234. This belief was consistent across Dr. Snodgrass's examinations in 2007 and 2009 as well as his review of the reopening application and Dr. Arenas's report in 2012. If there was no mental health condition related to the industrial injury, there was nothing to worsen—this supports rejection of Orozco's reopening application.

Orozco misconstrues the record in his favor to imply that Dr. Snodgrass testified that he was unable to give an opinion about Orozco in 2011. *E.g.*, App. Br. 9. Dr. Snodgrass did believe he could testify about

Orozco's condition in 2011. He was familiar with Orozco's claims from reading Dr. Arenas's 2012 report. CP 236-40. Dr. Snodgrass was asked whether he could testify about Orozco's condition in 2011 when he did not see him since 2009, and he agreed that his opinions would be similar in 2011, if the "variables" did not change. CP 251-52.[7] As noted above, Dr. Arenas's testimony confirmed that nothing had changed in Orozco's situation, and Orozco does not contend that his physical condition changed during the applicable period. App. Br. 6; CP 143 (nothing in his life has changed). Orozco puts on no evidence of intervening accidents or injuries or other events since claim closure. Dr. Snodgrass's opinions were on a more probable than not basis. CP 211. Therefore, Dr. Snodgrass's testimony must be read in the light most favorable to the Department on this point.

Most significantly, Orozco's arguments go to the weight of Dr. Snodgrass's opinion, and overlook that the fact-finder could give no weight to Dr. Arenas. Just like a fact-finder could discount Dr. Arenas's opinion because he did not see Orozco in 2009 or until after the closing order in 2012, so too could a fact-finder question Dr. Snodgrass's opinions. But the fact that a fact-finder could draw inferences against the

[7] Contrary to Orozco's brief, the inference that can be taken from Dr. Snodgrass's statement that "Dr. Arenas is seeing an individual that is much different than what I saw," is a criticism of Dr. Arenas's assessment of Orozco, as was apparent throughout Dr. Snodgrass's testimony. CP 244.

Department is not relevant now on appeal under the substantial evidence standard of review, where the inferences are drawn in the Department's favor.

Ample reasons exist why the fact-finder could reject Dr. Arenas's diagnosis in 2012. *See also* Part V.C. *infra*. A fact-finder is not required to accept a witness's statements as true when there is a reason to discount the statements. *Ramos v. Dep't of Labor & Indus.*, 191 Wn. App. 36, 40, 361 P.3d 165 (2015). Orozco seeks to have this Court invade the province of the fact-finder to weigh the evidence and assess credibility, which it cannot do. *Zavala*, 185 Wn. App. at 859.

Dr. Snodgrass testified that Orozco did not have a mental health condition proximately caused by the industrial injury. This provides substantial evidence to support the finding that Orozco did not have a mental health condition proximately caused by the industrial injury. This Court need not inquire further.

C. Substantial Evidence Supports the Superior Court's Finding That the 2006 Industrial Injury Did Not Worsen

If the Court decides that substantial evidence does not support the finding that the industrial injury did not cause the claimed mental health conditions, substantial evidence supports that Orozco's conditions did not worsen. A worker has to prove that his or her condition worsened between

the terminal dates to prove an aggravation case. *Phillips,* 49 Wn.2d at 197. The terminal dates here are July 2009 and October 2011. Dr. Arenas believed that he had the conditions and symptoms all along from the date of his injury. CP 138, 148.

The industrial appeals judge concluded that Orozco did not show worsening. CP 34. She did not accept the testimony of Dr. Arenas for several reasons that the trial court could have used to discredit the testimony. Believing Dr. Snodgrass's opinion, the industrial appeal judge found the slight variations in global assessment of function (GAF) scores were more indicative of normal day-to-day variations rather than worsening. CP 31; 139-40. In the record there was evidence of small variations, and no testimony that the small fluctuations in functioning were caused by the industrial injury. CP 140.

The industrial appeals judge also questioned the validity of Dr. Arenas's psychometric testing because of Dr. Arenas's testimony that he prepares patients before taking the test and prompts their answers. CP 132 (noting how he prepares patients to provide answers towards admitting emotional symptoms). Ultimately, the Board judge found the testimony of Dr. Snodgrass more compelling because Dr. Arenas failed to identify which symptoms claimant had in 2009 or 2012, and failed to specify which symptoms worsened between 2009 and 2012. CP 32. For example,

Dr. Arenas mentions suicidal ideation, but does not say that this was an increase in symptoms from 2009. CP 126. The trial court could have also adopted these reasons to find worsening.

Additionally, the trial court could have rejected the fundamental thesis of Dr. Arenas's explanation of why he found worsening. Dr. Arenas said that Orozco had the conditions since the injury and then deteriorated because "people deteriorate if they are not treated properly." CP 151. In contrast, Dr. Snodgrass said the conditions have a self-resolving cycle. CP 245. The fact-finder could believe Dr. Snodgrass on the progression of mental health conditions over Dr. Arenas. In particular, the fact-finder could discount Dr. Arenas because he did not examine Orozco until 2012, well after 2009 when the claim closed. CP 120.

The trial court could have also concluded that Dr. Arenas's opinion was based on his acceptance of Orozco's reports, but find this reliance flawed as Orozco was not credible given the multiple reports calling Orozco's veracity into question. A fact-finder may choose to disbelieve self-serving statements. *See Ramos,* 191 Wn. App. at 40.

Finally, this Court should reject any attempt to discredit Dr. Snodgrass based on cultural competency. Not only does this go to the weight of Dr. Snodgrass's testimony, the record shows that Dr. Snodgrass is well equipped to testify about people from different cultures than his

own. As an explanation for the lack of evidence of Orozco's worsening, Dr. Arenas asserted that there was insufficient evidence of Orozco's symptoms in 2009 because Orozco was not adequately assessed for mental health due to cultural aspects of the Hispanic community and mental health. CP 132-33. Despite Dr. Arenas's testimony regarding a lack of cultural competency in Orozco's prior examinations, CP 132-33, Dr. Snodgrass has extensive experience with navigating cultural issues and mental health issues from attending graduate school in Mexico and professional assignments in Asia. CP 199, 204-7. Dr. Snodgrass was sensitive to cultural issues and was able to address the potential evasiveness during exams of Orozco that Dr. Arenas discussed. CP 238-40. A reasonable fact-finder could credit Dr. Snodgrass's ability to navigate cultural issues in diagnosing and treating mental health conditions, and this Court should reject Orozco's invitations to discredit Dr. Snodgrass's opinion based on cultural issues because his credibility was accepted by the trial court.

Orozco suggests that substantial evidence supports reversing the Department order and reopening his claim, App. Br. 21-22, but substantial-evidence review does not involve determining if substantial evidence supported Orozco's theory at trial. Rather, the question for this Court is whether substantial evidence supports the superior court's

decision to affirm the Department order that denied the reopening application. Similarly, Orozco's claims that he presented "substantial evidence that his mental health conditions were worse" misunderstands the appropriate issue on appeal, which is whether substantial evidence supports the actual outcome at superior court, rather than whether substantial evidence would have supported a decision in favor of Orozco. *See* App. Br. 21.[8]

The Board and trial court found Dr. Snodgrass's evaluation of causation and worsening more persuasive than that of Dr. Arenas.

VI. CONCLUSION

Substantial evidence supports finding that Orozco did not have mental health conditions proximately caused by the industrial injury and that any mental health condition did not worsen between July 29, 2009, and October 3, 2011.

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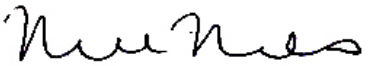
[8] Orozco is only entitled to attorney fees if he prevails in the action and "if the accident fund or medical aid fund is affected by the litigation." RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011).

Accordingly, the Department requests this Court to affirm the superior court decision.

RESPECTFULLY SUBMITTED this 17th day of March 2016.

ROBERT W. FERGUSON
Attorney General



R. Marshall Morales
Assistant Attorney General
WSBA No. 49113
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-5348

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COURT OF APPEALS, DIVISION III
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JESUS OROZCO, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on March 17, 2016, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below-described manner:

Via E-filing:

Renee S. Townsley
Court Administrator/Clerk
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

//

//

Via First Class United States Mail, Postage Prepaid to:

Christopher Childers
Smart Connell Childers & Verhulp PS
PO Box 7284
Kennewick, WA 99336

Signed this 17th day of March, 2016, in Seattle, Washington by:

JESSICA SPARKS
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6067