No. 95718-5

SUPREME COURT OF THE STATE OF WASHINGTON

TERA L. HENDRICKSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF

THE STATE OF WASHINGTON

Respondent,

APPELLANT'S REPLY

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I. INTRODUCTION

The law and policy of the Industrial Insurance Act leads to the conclusion that this Court should grant discretionary review regarding objective evidence of Ms. Hendrickson's October 9, 2007 industrial injury between May 10, 2012, and September 8, 2014, to adhere to the underlying purpose of the Act—reducing economic harm to injured workers. The Court of Appeals' decision, affirming the Superior Court's affirmance of the Board of Industrial Insurance Appeals's dismissal, undercuts the purpose and policy of the Act by holding that Ms. Hendrickson's worsened symptoms, which have been verified through objective examination, did not establish a prima facie case of aggravation. The Department of Labor & Industries's ("Department") Answer to Ms. Hendrickson's Petition for Review raises new issues related to policy interests, which may be addressed in a reply. RAP 13.4(d).

II. ARGUMENT

Claimants do not file worker's compensation claims as an alternative to court action. They are required by law to do so as an exercise of the state's police power. RCW 50.04.010. The present case illustrates an important distinction unique to claimants seeking reopening of previously closed claims: they must expend significant time, money, and

energy for the *opportunity* to have their claim reassessed. Prior to 1971, only "extrahazardous" work was covered by the statute. Laws 1961 c 23 § 51.04.030, 1923 c 136 § 10; RRS § 7719. As the Industrial Insurance Act now covers all workers, the Department covers claims for all injuries sustained in the course of employment. RCW 51.04.030.

An aggravation of a disability means a worsening of a condition caused by an industrial injury or an occupational disease that results in an increase in permanent disability or need for treatment. WPI 155.11. The present case demonstrates a key issue of reopening a claim to determine whether an aggravation claim exists, which carries significant public interest issues.

A. A Distinction Must be Made Between Statements Made to Attending Physicians and Examining Physicians.

To support its proposition that objective findings of worsening are required to reopen cases, though absent from the statute, the Department attempts to cite *Kresoya v. Dep't of Labor and Indus.*, 40 Wn.2d 40, 240 P.2d 257 (1952) as requiring objective worsening of the condition for reopneing. Res. Br. 13. In *Kresoya*, the Department asserted that the claimant's medical expert based his testimony upon subjective statements of the claimant and did not satisfy the requirements for proving an aggravation according to prior case law. *Kresoya,* 40 Wn.2d at 43. The

claimant's medical expert, Dr. Williams, opined based on records, a physical examination of the claimant, and examination of medical history and prior medical imaging that the claimant's back condition had worsened since the first terminal date. *Id.* at 42-43. Addressing the Department's contention that Dr. Williams's opinion was based solely upon subjective symptoms of the claimant, the Supreme Court of Washington stated protective rules regarding only subjective evidence of aggravation

> must not be applied to situations where there is a combination of subjective and objective symptoms, which an expert may be able to tie together, and we think this is made very clear by a careful reading of the cases we have cited. The physician must of necessity obtain some history from the claimant, and has a right to make proper use of it in connection with objective findings which he as an expert may make by an examination, the making of tests, the use of X-ray pictures and other proper data.

Id. at 45-46.

Statements made to a physician for the purposes of diagnosis or treatment are excluded from the hearsay rule. ER 803(a)(4). In personal injury cases, *Kresoya* establishes that such statements raise the same issues regarding hearsay under Washington courts, as numerous statements were excluded from Dr. Williams's testimony. *Kresoya,* 40 Wn.2d at 46. The clear concern addressed by the *Kresoya* court is the idea that a patient's statements regarding treatment can be self-serving if not accompanied by

objective evidence, particularly when reopening of a prior closed claim depends on the claimant's statements to the physician.

But this conclusion presupposes hearsay and inadmissibility of statements made by any claimant regarding aggravation to any physician. A distinction must be made between the types of physicians, particularly in workers' compensation cases. *Kresoya* acknowledges this distinction explicitly by stating the attending physician "is usually in a much better position to draw conclusions than a physician who makes one examination of a claimant for the purpose of giving expert testimony." *Id.* at 45. The physician in *Kresoya* was an examining physician, meeting the plaintiff for the first time. *Id.* at 42.

Here, Dr. Martin is Ms. Hendrickson's attending physician, providing diagnosis and testimony based upon years of detailed history with Ms. Hendrickson. A patient meeting with an attending physician expressly makes statements for the purposes of treatment, thereby avoiding hearsay concerns. Examining physicians, those examining the patient for determination of injury or occupational disease as an expert witness, require more skepticism in the claimant's words because they are evaluating the claimant for the Department's purposes. An attending physician does not require such skepticism because the claimant has little incentive to lie when seeking treatment.

Concerns regarding fraudulent claims should not exist in this case. The *Kresoya* court's concerns were based in part on the version of the industrial insurance statute in effect at the time, enacted in 1923 to cover only "extrahazardous" employment. Since amendment of the statute in 1971, a worker has had no other recourse to seek compensation for injuries in the course of employment except through the Department. The concerns expressed by the *Kresoya* court, then, do not apply to the same degree regarding the distinction of subjective and objective evidence. As is the case here, the Department may decline to reopen a closed claim, but if it does the claimant has no other recourse to seek compensation. As a result, no claimant with a previously closed claim has incentive to make a fraudulent claim to a physician regarding aggravation. Statements to an attending physician can therefore form the basis for objective findings pursuant to the hearsay exception under ER 803(a)(4).

B. Ms. Hendrickson's Requested Relief Only Requires Objective Findings, not Objective Worsening.

Ms. Hendrickson seeks to reopen a formerly closed claim to assess potential aggravation, and does not request any financial relief. No concerns about Ms. Hendrickson's credibility should exist because she is only seeking reopening of her previously closed claim. Only after the claim is reopened can the Department address economic issues regarding time-

loss, treatment, or pension to assess additional benefits. Since no pecuniary gain or loss exists by Dr. Martin's reliance on Ms. Hendrickson's statements in seeking reopening for further assessment, by definition she cannot make a fraudulent claim.

Dr. Martin testified that her claim should be reopened because "she was having worsening symptoms, again that fit with the pathology that she had on her imaging studies." CP at 170-1. Dr. Martin explained that an individual's "symptoms can worsen without any demonstrable change on the imaging studies," and testified that Ms. Hendrickson's increased pain fit with the pathology on her imaging studies. CP 169, 172. The conditions presented in Ms. Hendrickson's August 2011 MRI provided a sufficient basis for Dr. Martin, a board certified orthopedic spine surgeon, to make clinical findings of worsened symptoms verified by his knowledge of Ms. Hendrickson's history and medical imaging. The causal link between her current symptoms and prior imaging falls within the doctor's independent knowledge, and therefore qualify as objective evidence.

Ms. Hendrickson sustained an injury, and now asserts an increase in pain related to the injury, a proximate cause of the disability for which she seeks to reopen her claim. Failure to allow her claim for concerns of reliability would contradict the long-established tradition of Washington courts recognizing "lighting up" of pre-existing bodily or mental conditions

which were asymptomatic prior to the industrial injury. *See, e.g.,* WPI 155.20. For the purposes of addressing an application to reopen claims, the closed claim should be considered a pre-existing condition to which the claimant can reopen to assess whether additional treatment or disability for conditions that have arisen since the closing date should be allowed.

The Department cites several authorities to require objective medical worsening of Ms. Hendrickson's injuries. *See* Res. Br. 13. Further, it argues reopening should be denied because of underlying concerns that reopening would expose the claimant to unnecessary and risky medical procedures. *Id.* at 16 (citing *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 219 P.3d 711 (2009)).

But the category listings present in regulations do not cite a requirement of worsening. So long as the subjective concerns correspond to objective symptoms, no change is necessary. Moreover, *Eastwood* is distinguishable from the present case and the concerns raised by the Department. To begin, *Eastwood* deals with a right arm and shoulder condition, a very different claim than Ms. Hendrickson's spinal condition. *Eastwood,* 152 Wn. App. at 655. Contrary to the Department's claim, the medical testimony provided in *Eastwood* is far inferior to Ms. Hendrickson's.

In *Eastwood*, two physicians, Drs. Ellingson and Parker, testified for the claimant, opining that her condition had worsened between the two terminal dates and recommended the closed claim be reopened for additional treatment. *Id.* at 658-63. Dr. Ellingsen based his finding that Eastwood's condition had worsened on an "irritable shoulder exam" but did not clarify or define any quantitative range of motion data. *Id.* at 652. Dr. Parker concurred with Dr. Ellingsen's opinion but did not independently review the medical evidence at the first terminal date to determine whether the condition of Eastwood had worsened by the second terminal date. *Id.* at 662. On these bases, the Court found neither doctor provided opinions based on objective medical evidence. *Id.* at 665.

Here, Ms. Hendrickson applied to reopen the claim, and Dr. Martin proposed no specific treatment. Dr. Martin testified Ms. Hendrickson's acute symptoms caused her increased pain and disability, her symptoms fit the pathology contained on the imaging studies, and that her condition had worsened between the two terminal dates on a more probable than not basis. CP at 169-172. Ultimately, Ms. Hendrickson's claim fits the standard to provide objective evidence of a condition to reopen her claim. Ms. Hendrickson's application to reopen her claim should have been granted because it is consistent with general principles recognized by courts in this

state. The law does not require objective evidence to explain the degree of symptoms, only asking whether objective evidence supports the symptoms.

The other case cited by the Department, *Phillips v. Dept. of Labor & Indus.*, 49 Wn.2d 159, 298 P.2d 1117 (1954), also does not apply. *Phillips*, like *Kresoya*, discusses the former version of the statute. The only requirement cited as objective evidence is that objective symptoms "either existed prior to the closing date...or left their record in or on the claimant's body on or prior to the closing date." *Id.* at 197 (citation omitted). The issue in *Phillips*, therefore, was whether any objective findings existed, not whether a change in objective findings existed. *Id.* at 197-8. *Phillips* therefore supports Ms. Hendrickson's request for relief because she meets the objective findings standard.

C. The Purported Rule Requiring Objective Worsening is Incorrect and Harmful to Claimants Seeking Reopening of Closed Claims.

Ms. Hendrickson's specific circumstances and request for relief show that any purported rule requiring a showing of objective worsening, rather than objective evidence, is incorrect and harmful. By casting suspicion on statements made by claimants who have already suffered injuries, the Department's interpretation of the objective evidence requirement would create a chilling effect on attempts to reopen claims. The mandatory nature of worker's compensation means a claimant has no other recourse but to

seek aid from the Department if his or her condition worsens. A claimant seeking to reopen her claim should have the option to do so without expressly seeking treatment, if only to establish an objective finding to reopen for the Department to determine if aggravation has occurred. The concerns expressed by the Department requiring investigation and expenditures are mirrored by the costs borne by the claimant in seeking reopening, particularly if the claimant seeks no immediate pecuniary gain. Seeking reopening, then, is its own deterrent for claimants due to the level of investment involved.

This case presents several distinctions with significant policy and public interest implications: between types of physicians, purposes for reopening claims, and what constitutes objective evidence to be considered by the Board. Ms. Hendrickson's statements, Dr. Martin's testimony and the specific facts of this case favor reopening Ms. Hendrickson's claim.

III. CONCLUSION

When viewing the evidence and all inferences in a light most favorable to Ms. Hendrickson, substantial evidence supports finding that her condition worsened between the two terminal dates. Ms. Hendrickson had worsened symptoms that fit with the pathology that she had on her objective imaging studies, and her testimony only seeks to reopen the claim,

whereby a decision can be made regarding her entitlement to additional disability benefits.

For the above listed reasons, Ms. Hendrickson respectfully requests that the Court reverse the Court of Appeals's affirmance of the Superior Court's affirmance of the Board of Industrial Insurance Appeals's granting of the Department's motion to dismiss, which determined that Ms. Hendrickson failed to establish a prima facie case.

Respectfully submitted,

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CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 20th day of June, 2018, the document to which this certificate is attached, Appellant's Reply, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Anastasia Sandstrom
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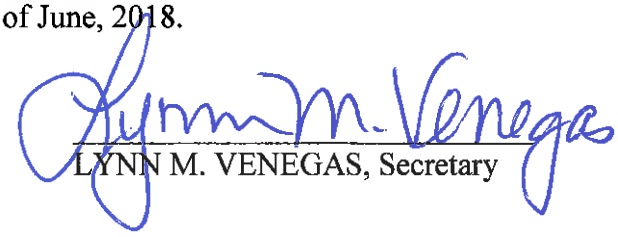
DATED this 20th day of June, 2018.



LYNN M. VENEGAS, Secretary

VAIL CROSS AND ASSOCIATES

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