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NO. 98843-9

SUPREME COURT OF THE STATE OF WASHINGTON

VINCENT SCERRI,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

**ANSWER TO PETITION FOR REVIEW,
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

This case does not present an issue of substantial public interest because Cindy Scerri waived any argument that workers can be permanently and totally disabled when their conditions require further treatment. Ms. Scerri made no such argument to the Board of Industrial Insurance Appeals, to the superior court, or in her opening brief at the Court of Appeals. The argument also fails under the law of the case doctrine because Ms. Scerri did not challenge a jury instruction that directly contradicts her new theory.

Ms. Scerri's opening brief before the Court of Appeals argued only that substantial evidence did not support the jury's finding. Ms. Scerri now effectively concedes that substantial evidence supports the unfavorable jury verdict. The petition instead relies on the argument that workers can be permanently and totally disabled under the law even when they need further treatment. Ms. Scerri's late-raised argument, however, is waived and barred by the law of the case doctrine. Her argument also conflicts with well-settled law because a worker who needs further treatment for an injury does not have a fixed condition and therefore cannot be considered permanently and totally disabled. This Court should deny review.

II. ISSUE PRESENTED

1. Should this Court consider the argument, which Ms. Scerri did not raise below, that Mr. Scerri was permanently and totally disabled despite needing additional treatment at the time of his death?
2. Is a worker who needs more treatment permanently and totally disabled?

III. STATEMENT OF THE CASE

A. Vincent Scerri Injured His Low Back in the Course of Employment

Vincent Scerri sustained an industrial injury to his low back in 2008, while carrying a bucket of paint up stairs. CP 10, 35. The Department of Labor and Industries allowed his workers' compensation claim and provided treatment, including several back surgeries. CP 551, 658, 667, 731, 784. Mr. Scerri developed depression, adjustment disorder, and a pain disorder, which the Department accepted under his injury claim. CP 10, 35, 132.

In May 2013, Mr. Scerri's attending medical provider, physician's assistant John O'Brien, began treating him for his mental health conditions. CP 567-69. O'Brien referred Mr. Scerri to a psychologist and began prescribing an antidepressant. CP 568-69, 732-33.

Mr. Scerri did not comply with O'Brien's treatment plans. CP 576-77. Eventually, O'Brien learned that Mr. Scerri had abused

alcohol during the time O'Brien served as his attending medical provider. CP 574, 577. Mr. Scerri did not inform O'Brien of this history of alcohol abuse. CP 575. But O'Brien eventually concluded that Mr. Scerri's alcohol abuse explained why he disregarded the treatment plans O'Brien proposed. CP 579-80.

In July 2015, Mr. Scerri died of causes unrelated to his industrial injury. CP 10, 35. The Department closed his workers' compensation claim, awarding him permanent partial disability for his low back and mental health conditions. CP 35, 41-44, 796. In a second order, it denied Ms. Scerri's application for survivor's benefits, finding that Mr. Scerri was not permanently and totally disabled at the time of his death. CP 35, 57-58, 60.

B. The Board of Industrial Insurance Appeals Rejected Ms. Scerri's Claim for Survivor Benefits

Ms. Scerri appealed the Department's orders to the Board of Industrial Insurance Appeals. CP 39-45, 57-61. Ms. Scerri challenged the Department's decision to deny her application for survivor's benefits. CP 57. In an evidentiary hearing, Ms. Scerri called as expert witnesses Mr. Scerri's attending provider, O'Brien, a forensic examiner, H. Richard Johnson M.D., and a vocational counselor. CP 129, 549, 644-45. The

Department called an endocrinologist, a neurologist, and an orthopedic surgeon. CP 313-14, 371, 701-02.

These witnesses testified extensively about Mr. Scerri's low-back condition, but only O'Brien offered an opinion about his mental health conditions. He testified that, at the time of Mr. Scerri's death, the claim-related mental health conditions were not fixed and stable and required more treatment. CP 583-84. O'Brien acknowledged that it was hard to say whether Mr. Scerri would have benefited from the treatment, since it was not clear whether he would have complied with it, but still testified that Ms. Scerri had not received treatment to the point that the mental health conditions were fixed and stable. CP 583-84.

After the hearing, the Board judge assigned to the case found these facts:

1. Vincent A. Scerri sustained an industrial injury on May 28, 2008, when he was walking up a flight of stairs while carrying a bucket of paint. [FF 2].
2. The industrial injury proximately caused lumbosacral strain and displaced lumbar intervertebral disk without myelopathy. The industrial injury also proximately caused the following mental health conditions: depression, pain disorder, and adjustment disorder. [FF 3].
3. Mr. Scerri died on July 11, 2015, due to causes unrelated to the industrial injury. [FF 4].
4. As of July 11, 2015, Mr. Scerri's conditions, proximately caused by the industrial injury, were not fixed and stable,

and he was in need of further and proper medical treatment.
[FF 6].

CP 35.¹

The Board judge issued a proposed decision, which concluded that, because Mr. Scerri remained in need of proper medical treatment, he was not permanently and totally disabled at the time of his death. CP 36 (CL 3). The proposed decision affirmed the Department's order denying Ms. Scerri's application for survivor's benefits. CP 36 (CL 3). Ms. Scerri petitioned for review with the Board, arguing that it was not true that Mr. Scerri needed treatment at the time of his death. CP 12-22. Ms. Scerri did not argue that Mr. Scerri was permanently and totally disabled even if he required continued treatment. *See* CP 12-22. The Board denied the petition and adopted the proposed decision as its final decision and order. CP 10.

C. A Jury Found That Ms. Scerri Was Not Entitled To Survivor Benefits Because Mr. Scerri Required Further Treatment at the Time of His Death

Ms. Scerri appealed to superior court, and the court empaneled a twelve-person jury to hear the case. CP 1-3. Ms. Scerri challenged the

¹ Finding of Fact No.5 determined that there was insufficient evidence to support a higher award beyond the permanent partial impairments paid for Mr. Scerri's low-back injury and his mental health conditions. CP 35. The award of permanent partial disability is not part of this appeal. In Court Instruction No. 5, the Board's finding on permanent partial disability was removed by agreement. CP 890 (Instruction No. 5).

Board's finding that Mr. Scerri's claim-related conditions were not fixed and stable. CP 844.

The testimony of each witness at the Board was read to the jury, including that of O'Brien, who served as Mr. Scerri's attending provider from February 2013 through June 2015. CP 550, 577. In May 2013, O'Brien referred Mr. Scerri to a psychologist to address chronic pain and depression. CP 567-69. He prescribed an antidepressant and recommended Mr. Scerri receive trigger point injections to manage his pain. CP 568-71, 732-33. The jury heard O'Brien testify that Mr. Scerri's adjustment disorder, depression, and other psychological pain disorder were related to his industrial injury. CP 582. And it heard O'Brien's testimony that these conditions were not fixed and stable, and that Mr. Scerri still needed treatment for them when he died. CP 583-84.

The jury also heard the testimony of several other medical witnesses, but none of them opined about Mr. Scerri's mental health conditions. So the jury had only O'Brien's unrefuted testimony that Mr. Scerri's claim-related mental health conditions were not fixed and stable and that he still need treatment for them when he died.

At the end of the testimony, the court instructed the jury on the law. The court instructed the jury that "Mr. Scerri was not permanently and totally disabled if he was in need of further curative or rehabilitative

medical care for his industrial conditions on the date of his death, July 11, 2015.” CP 898 (Instruction No. 13). Curative treatment is “intended to produce permanent changes which eliminate or lessen the clinical effects of the condition.” CP 903 (Instruction No. 18). Rehabilitative treatment is “intended to allow an injured or ill worker to regain functional activity on a long-term basis.” CP 903 (Instruction No. 18).

The first question on the verdict form asked the jury: Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Scerri’s conditions due to his industrial injury were not fixed and stable, and he was in need of further necessary and proper medical treatment? CP 844. The verdict form directed the jury to not answer any other questions if its answer to that question was “yes.” CP 844. The jury answered “yes.” CP 844.

Ms. Scerri moved to set aside the jury’s verdict and for a new trial. CP 849-56. Ms. Scerri did not argue that she was entitled to survivor benefits even if Mr. Scerri needed further treatment at the time of his death. *See* CP 849-56. The court denied the motion. CP 879. Ms. Scerri appealed to the Court of Appeals.

In her opening brief, Ms. Scerri argued that the jury’s verdict, which found that Mr. Scerri needed further treatment at the time of his death, was not supported by substantial evidence. Appellant’s Br. at 5,

13-20, *Scerri v. Dep't of Labor & Indus.*, No. 53254-9-II (Wash. Ct. App. June 30, 2020). Ms. Scerri did not argue that she could receive survivor benefits even if the verdict was supported by substantial evidence, and did not assign error to any of the jury instructions or to the verdict form. *See Id.* The Department responded that the verdict was supported by substantial evidence, particularly based on the attending provider's testimony. *See* Resp't Br. at 10-14; *Scerri*, No. 53254-9-II. In her reply brief, Ms. Scerri suggested for the first time that she should receive survivor benefits even if Mr. Scerri needed further treatment at the time of his death. *See* Reply Br. at 8-10; *Scerri*, No. 53254-9-II.

In an unpublished decision, the Court of Appeals affirmed the superior court, finding that substantial evidence supported the verdict. *Scerri v. Dep't of Labor & Indus.*, No. 53254-9-II (Wash. Ct. App. June 30, 2020) (slip op.). The Court declined to address Ms. Scerri's theory that she could receive survivor benefits even if Mr. Scerri needed further treatment because Ms. Scerri failed to raise the issue in her opening brief, as required by RAP 10.3(a)(6). *See Scerri*, No. 53254-9-II, slip op. at 2 n.2.

Ms. Scerri then petitioned for review with this Court.

IV. ARGUMENT

A. Ms. Scerri' Sole Basis for Review Is Waived and Barred by Law of the Case

This Court should not grant review to consider an argument that Ms. Scerri waived. Ms. Scerri never presented the argument, to the Board of Industrial Insurance Appeals, to the superior court, or in the opening brief before the Court of Appeals, that Mr. Scerri was permanently and totally disabled at the time that he died even if he required further medical treatment for his injury at that time as she now argues. Pet. at 3-8.

Under the express language of RCW 51.52.104, a party must raise an issue in the petition for review filed with the Board to preserve the issue for court review. RCW 51.52.104 states that the petition for review: [S]hall set forth in detail the grounds therefore and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein. A party waives an issue by failing to raise it in the petition for review with the Board. *Dep't of Labor & Indus. v. Lyons Enters., Inc.*, 185 Wn.2d 721, 743 n.5, 374 P.3d 1097 (2016).

Here, Ms. Scerri's petition for review with the Board argued that the evidence showed that Mr. Scerri did not need further treatment at the time of his death, but did not argue that he should be considered

permanently and totally disabled *even if* he required further treatment at that time. Pet. at 3-8; CP 12-22. Ms. Scerri, therefore, waived this issue.

Furthermore, Ms. Scerri did not raise the issue at superior court and therefore waived the issue under RAP 2.5. *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). Under RAP 2.5, the appellate courts need not consider arguments that were not raised to the superior court, except in limited circumstances not present here. *Id.*

Additionally, Ms. Scerri did not raise this issue in the opening Court of Appeals brief. She instead raised this issue for the first time in her appellate reply brief. *Scerri*, No. 53254-9-II, slip op. at 2 n.2. But a party does not properly present an issue on appeal by raising an argument “for the first time in a reply brief.” *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Ms. Scerri thus waived this issue on appeal.

Ms. Scerri’s argument is also precluded by the law of the case doctrine because the superior court gave jury instructions, which Ms. Scerri did not challenge on appeal and which preclude any argument that a worker can be considered permanently and totally disabled no matter if the worker requires further treatment. *See Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975) (“No assignment of error has been directed to these instructions, hence they constitute the law of the case.”); *Williams*

v. Dep't of Labor & Indus., 56 Wn.2d 127, 130, 351 P.2d 414 (1960).

Instruction No. 13 informed the jury: Mr. Scerri was not permanently and totally disabled if he was in need of further curative or rehabilitative medical care for his industrial conditions on the date of his death, July 11, 2015. CP 898.

Ms. Scerri's petition now argues that Mr. Scerri *was* permanently and totally disabled even though he needed further curative or rehabilitative care at the time of his death. Pet. at 3-8. But this argument directly conflicts with a jury instruction that Ms. Scerri never challenged, and thus it conflicts with the law of the case. *Washburn v. City of Federal Way*, 169 Wn. App. 588, 591, 283 P.3d 567 (2012).

B. The Law Is Well Settled That a Worker Cannot Be Classified as Permanently and Totally Disabled if the Worker Continues To Need Further Medical Treatment

Even if the Court considers Ms. Scerri's new argument, it fails on the merits. First, contrary to Ms. Scerri's suggestion (Pet. at 3-8), the parties disputed whether Mr. Scerri was permanently unable to work based on the conditions that did not require further treatment alone. The Department presented evidence that Mr. Scerri could have become employable, notwithstanding his injury and its effects on him, had he undergone vocational rehabilitation. *See* CP 351, 395, 431-32.

Second, for Ms. Scerri to be eligible for permanent disability benefits under Mr. Scerri's injury claim, Ms. Scerri must be able to establish that Mr. Scerri was permanently and totally disabled at the time of his death. *Hiatt v. Dep't of Labor & Indus.*, 48 Wn.2d 843, 845-47, 297 P.2d 244 (1956); RCW 51.32.067(1) (providing for benefits for a worker's beneficiary "if the worker dies during a period of permanent total disability"). But as *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766, 215 P.2d 416 (1950), explains, a worker's condition as a result of an injury must reach a fixed state before the worker can be classified as having a permanent disability. A worker reaches a "fixed" state when no further treatment is likely to improve the worker's condition as a result of an injury. *Id.* So if a worker requires further medical treatment for the effects of an injury, the worker's condition is not "fixed" and the worker cannot be classified as having permanent total disability.

The Legislature incorporated this principle into the Industrial Insurance Act by enacting RCW 51.32.055(1), which provides that the Department makes a determination regarding permanent disability only when the condition caused by the injury becomes "fixed." Further, the WAC 296-20-01002 definition of "proper and necessary" treatment refines this concept, providing that a worker's condition is fixed and

stable—which means that the claim may be closed—when the worker reaches maximum medical improvement following an injury.

Because Mr. Scerri required further medical treatment for his injury when he died, he cannot be classified as having permanent total disability at that time. This is true even if some of his medical conditions caused by the injury no longer required treatment because a worker's condition only becomes "fixed" when a worker does not require any further treatment for the effects of the worker's injury. *See* RCW 51.32.055(1) (stating that permanent disability is determined "only after the injured worker's condition becomes fixed"); WAC 296-20-01002; *Franks*, 35 Wn.2d at 766; *In re Pike*, No. 88 3366, 1990 WL 304835, at *2 (Wash. Bd. Indus. Ins. App. April 18, 1990) (claim cannot be closed with a permanent disability determination until all of the conditions caused by the injury have become fixed and stable); *contra* Pet. at 3-8.

As *Franks* explains, a worker cannot be classified as *simultaneously* having both temporary and permanent disability: at any given time, a worker is either temporarily disabled (because the worker requires further treatment for an injury) or permanently disabled (because no further treatment will improve the worker's condition). *Franks*, 35 Wn.2d at 766. It follows that a worker cannot be classified as permanently

disabled until *all* of the worker's conditions have reached a fixed state; otherwise, contrary to *Franks*, the worker would have to be simultaneously classified as having a *temporary* disability for the conditions that still require treatment and a *permanent* disability for the conditions that do not require treatment. And the Board has expressly held that a claim cannot be closed with a permanent disability determination unless all of the conditions caused by an injury have become fixed and stable. *Pike*, 1990 WL 304835, at *2.

Ms. Scerri's argument, if adopted, would have significant negative consequences on a worker's ability to obtain medical treatment for any disability requiring ongoing treatment. And importantly, closing a worker's claim and classifying the worker as having a permanent disability terminates the worker's right to medical treatment under RCW 51.36.010, which would be improper if some of the worker's conditions still require medical care. Ms. Scerri suggests that this negative impact is obviated because a permanently and totally disabled worker can receive further treatment on a discretionary basis under RCW 51.36.010(4). Pet. at 6-7. But the possibility of a worker receiving treatment on a discretionary basis under RCW 51.36.010(4) is qualitatively different than the right to continue receiving ongoing medical treatment for a continuing partial disability. While their claims are open,

workers have a *statutory right* to proper and necessary medical treatment. But any treatment after a worker's claim is closed and the worker is placed on a pension is provided *at the Department's sole discretion*, and is subject to additional statutory limitations, such as precluding the provision of medications that are classified as controlled substances.

RCW 51.36.010(4).


While Ms. Scerri herself would benefit from a rule of law that allows a worker to be classified as permanently and totally disabled even if the worker requires further medical treatment, other workers would be harmed by such a rule of law because they would be precluded from obtaining needed treatment.

V. CONCLUSION

Ms. Scerri's petition raises no issues of substantial public interest warranting this Court's review. The petition turns on an argument that Ms. Scerri waived, and the petition abandoned the only issue that Ms. Scerri had properly preserved given that substantial evidence supports the jury's verdict. Her argument also deviates from settled law. The petition should be denied.

RESPECTFULLY SUBMITTED this 29th day of September 2020.

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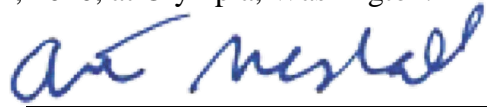
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