

COURT OF APPEALS
DIVISION II

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DEPUTY

No. 41351-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CATHY THARALDSON, Respondent,

v.

PROVIDENCE HEALTH AND SERVICES OF WASHINGTON,
Appellant.

REPLY BRIEF

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I. ARGUMENT

A. Standard of Review

Respondent argues that Title 51 should be liberally construed, and that the purpose of the Act is to provide sure and certain relief, using a guiding principle of resolving all doubts in favor of the worker. *Respondent Brief* at 7. While the court should liberally construe the Industrial Insurance Act in favor of “those who come within its terms, persons who claim rights thereunder should be held to *strict proof* of their right to receive benefits provided by the act.” Emphasis added. *Cy v. Dept. of Labor and Industries*, 47 Wn.2d 92, 97 (1955); *Boeing Co. v. Rooney*, 102 Wn.App. 414, 419 (2000). The rule of ‘liberal construction’ does not apply to questions of fact. *Ehman v. Department of Labor and Industries*, 33 Wn.2d 584, 595 (1949).

Nor does the rule dispense with the requirement that the plaintiff must produce competent evidence to prove the facts upon which he or she relies to substantiate eligibility for the benefits sought. *Id.* at 595; *Jenkins v. Department of Labor and Industries*, 85 Wn.App. 7, 14 (1996) (the court will not liberally interpret what constitutes a material fact).

Thus, the strict standard of proof an industrial insurance claimant must in all cases meet, in order to establish the right to receive benefits, is not diminished by the rule that the Industrial Insurance Act is liberally construed to affect its remedial purpose.

Second, liberal interpretation only applies in cases where the law is not clear. The Court has held that “If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20 (2002), citing *State v. Keller*, 143 Wn.2d 267, 276 (2001), *cert. denied*, 534 U.S. 1130, (2002). The *Kilian* court went on to state, “This court has repeatedly held that an unambiguous statute is not subject to judicial construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.” *Id.*, citing also *Wash. State Coalition for the Homeless v. Dept. of Soc. & Health Services*, 133 Wn.2d 894, 904 (1997).

Thus, while a general assertion is made that this Court shall afford the claimant liberal interpretation, there is no real reference to what statute is in dispute that is in need of interpretation by this Court.

B. A Lack of Substantial Evidence that Treatment Recommendations are Curative or Rehabilitative.

Respondent advances arguments that are factually deficient and logically inconsistent. To start, while Dr. Lang estimated that he saw Ms. Tharaldson approximately 15 times, the number of office visits is no substitute for a lack of objective findings. In other words, quantity is not a substitute for the quality of findings, or in this case, the lack thereof.

Respondent argues that Dr. Lang wanted the injections to get rid of the inflammation, but the problem is that there was no objective evidence either of inflammation, or that any injections would be curative or rehabilitative. A careful review of Dr. Lang's testimony reveals that he formed his opinion that Ms. Tharaldson had radiculopathy at the time of his first visit. Then, after a plethora of diagnostic tests and examinations failed to support that diagnosis, he refused to change his opinion and is recommending a treatment plan for a condition Ms. Tharaldson does not have.

This leads to a second fallacy in Respondent's argument. There is an assertion that Dr. DeVita's opinion the treatment can reduce inflammation and be therapeutic in some cases means it will reduce inflammation and be therapeutic for Ms. Tharaldson. This generalization does not logically flow to Ms. Tharaldson's case.

In fact following the two cited questions in Respondent's brief regarding Dr. DeVita, it is noteworthy what counsel elicited with regard to whether this generalization applied to Ms. Tharaldson.

Q: And in this specific cause, referring to Ms. Tharaldson, it apparently is your opinion that that isn't an appropriate treatment, because in your opinion, she does not have inflammation in the shoulder or the trapezius area that would require any kind of epidural; correct?

A: No, that mischaracterizing a physician's or neurologist's way of thinking of things.

Q: OK

A: We're referring to potentially injecting a corticosteroid with lidocaine, or whatever, into the nerve-root area to see if there's going to be any help of her symptoms that would be going down the entire right arm, not limited to the shoulder. That, by itself, is not enough clinically to call something as being radiculopathy.

Furthermore, the MRI findings I just read are not at all suggestive that a nerve root is being pinched. There is no neuroforaminal narrowing, which you would expect if there's a nerve getting pinched. And so these findings are consistent with the C6/7 degenerative disk bulge.

Q: In your opinion?

A: Yeah, which is clearly the way it's written in the records. There's no evidence of nerve-root impingement.

Again, as the Board judge stated, Dr. Lang's diagnosis of radiculopathy from an impingement lacks empirical support. CABR 26. Essentially, Dr. Lang is recommending a series of epidural injections for a problem Ms. Tharaldson does not have.

Respondent asserts another generalization that is not supported by the evidence. That Ms. Tharaldson felt relief to her hand or back from prior cortisone shots does not mean she has a problem in her neck. There is simply no logical flow, or medical evidence for that matter, that problems in other parts of her body are proof of a problem in her neck for which injections would be curative or rehabilitative.

While Respondent asserts that, “There was no medical evidence that a similar result would not be obtained with shots to the neck” (*Respondent’s Brief* at 9) there was also no medical evidence that she had a problem, diagnosed as radiculopathy, that these injections would cure. Not only is there a logical fallacy in trying to apply relief for one problem to prove the existence of a separate problem, but also counsel’s assertion of the failure to prove a negative is not the issue. The issue is the lack of substantial evidence that the disputed treatment would be in fact curative or rehabilitative. This is especially clear when the underlying issue for which the injections are proposed, radiculopathy, is not supported by empirical evidence.

II. CONCLUSION

Based on a lack of substantial evidence to find that the disputed treatment is either curative or rehabilitative, Providence respectfully seeks a reversal of the Judgment and Order from superior court, a reversal of the fee and cost award, and a determination that Ms. Tharaldson's condition, proximately caused by the November 8, 2006, injury, was not in need of further proper and necessary treatment, per RCW 51.36.010, as of October 10, 2008, which would thus affirm the decision of the Board on December 7, 2009.

DATED this 10th day of March 2011.

Respectfully submitted,



Robert M. Arim
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WSBA #27868

COURT OF APPEALS
DIVISION II

MAR 10 2011

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CATHY THARALDSON,)	No. 41351-5-II
)	
Respondent,)	
v.)	CERTIFICATE OF SERVICE
)	
PROVIDENCE HEALTH)	
AND SERVICES OF)	
WASHINGTON,)	
)	
Appellant.)	

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DATED this 10th day of March, 2011.

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