

NO. 45793-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

NATHAN M. COOPER, *APPELLANT/PLAINTIFF*

v.

DEPARTMENT OF LABOR AND INDUSTRIES, *RESPONDENT/DEFENDANT*.

REPLY BRIEF OF APPELLANT

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FILED
COURT OF APPEALS
DIVISION II
2014 SEP -5 AM 11:59
STATE OF WASHINGTON
BY Steven L. Busick
DEPUTY

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Assignments of Error

There is an error in the Brief of Appellant designating Assignment of Error No. 1, at pages 1 and 10, as to Issues Pertaining to the First Assignment of Error. Paragraph B should be corrected to read, “Does it make any difference whether the first (not the second) industrial injury was an accepted condition?”

Statement of the Case

At page 2 of the Brief of Respondent, the Statement of the Case starts out by stating that the need for the two level fusion at L4-5, L5-S1 in September 2006 was due to progressive back problems, rather than the fall that Mr. Cooper took at Royal Oaks Country Club in July 2006 when he slipped on a floor mat covering water on the floor. Mr. Cooper had health insurance at the time and did not file a worker compensation claim, but that does not mean that he did not have an industrial injury, because the injury occurred on the job, and was an industrially related condition.

In footnote 2, at the bottom of page 3 of the Brief of Respondent, the Department states that Mr. Cooper appears to allege that the fusion is related to an industrial injury, referencing a second industrial injury, which was actually the first industrial injury, and this violates an oral ruling granting the Department motion in *limine*. The Report of Proceedings at pages 5 and 6 is

devoid of any such ruling. Mr. Cooper is not making claim for the first injury, and there is no statute of limitations issue.

Pursuant to RAP 10.3(a)(5), the Statement of the Case is to be a fair statement of facts and procedure relevant to the issues presented for review, without argument. Commencing at page 7 of the Brief of Respondent, first paragraph, last three sentences, through page 8, first paragraph, except for the first and last sentence, is argument, and should be stricken.

At page 9 of the Brief of Respondent, last sentence, the Department states that the Board pointed out in its decision that Mr. Cooper did not establish a *prima facie* case to support reopening, citing the Certified Appeal Board Record, page 27. Reviewing the Proposed Decision and Order adopted by the Board of Industrial Insurance Appeals, the Board did not decide that Mr. Cooper had not presented a *prima facie* case, but only that the facts did not establish reopening, and the case was decided as an issue of fact. (CABR, page 2, and pages 21-31).

Footnote 5 at the bottom of page 10 in the Brief of Respondent states that Mr. Cooper compares his instruction to the esoteric instruction from *Wendt v. Department of Labor and Industries*. The Department there argued the failure to give the lighting up instruction was not prejudicial error, because the other instructions, which were given here, permitted *Wendt* to adequately present and argue his theory of the case to the jury. The *Wendt Court* stated that such a general or stock instruction might suffice were a less technical proposition involved. However, a jury of lay persons might well consider the lighting up theory esoteric, to say the least, and it was reversible

error not to give the lighting up instruction. *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 679, 571 P.2d 229 (1977).

ARGUMENT

First Assignment of Error

At page 16 of the Brief of Respondent, the Department of Labor and Industries argues that for the lighting up instruction to be appropriate, there must be a showing that the injury lit up or made symptomatic a condition that was asymptomatic before the injury occurred. The entire instruction from *Wendt* is being quoted here:

If an industrial injury lights up, or makes disabling, a latent or preexisting infirmity, or weakened condition (emphasis added), then the resulting disability is to be attributed to the industrial injury. If the industrial injury is a proximate cause of the condition from which the worker suffers, then the previous physical condition of the worker is immaterial, and the industrial injury is considered to be the legal cause of the full disability, regardless of any preexisting weakness or infirmity.

Though the evidence supports that Mr. Cooper was asymptomatic before the second industrial injury, the instruction specifically states “or weakened condition.” So it is an either or condition, either asymptomatic or weakened, and not one to the exclusion of the other.

Thomas Gritzka, MD, the occupational orthopedist who testified on

behalf of Mr. Cooper states at page 32, line 18, through page 33, line 19, of the Certified Appeal Board Record:

When I palpated his low back and was poking around to see if it was tender, it felt to me as if there was a stepoff that I could feel between L3 and L4, and that seemed to be his tender area, and he also had muscle swelling adjacent to this area.

The significance of this finding is that people who have had lumbar fusions are at risk for injury above the portion of the lumbar spine that was made stiff by the fusion. In this case any motion, any flexion that might occur in the lumbar spine in Mr. Cooper's case would have to occur at the L3-4 because L4 and L5 are fused to the sacrum. They don't move.

So one of the consequences of a lumbar fusion is developing super adjacent degenerative spondylolisthesis. The disc level above the fusion is subjected to abnormal stress and strain, and it tends to wear out at an accelerated rate, and if a person has an injury superimposed on the prior fusion this will concentrate the forces at the level above the fusion, in this case L3-4, and injure it, or may injure it.

So essentially that's what I thought had happened to Mr. Cooper, that this event as he described where he was struck from behind and fell over backwards onto his back injured his lumbar spine at the level above his spinal fusion, that level being fragile and at risk because of the fusion.

The testimony of Dr. Gritzka supports that Mr. Cooper's low back condition from the two level fusion as of March 21, 2007, when the industrial injury occurred, was asymptomatic and weakened, and that could have been argued to the jury either way.

Commencing at page 21 of the Brief of Respondent, the Department argues that pursuant to *Miller v. Dep't of Labor & Indus.*, 200 Wn. App. 674, 682-683, 94 P.2d 764 (1939)¹ there was no evidence of increase in disability to support reopening of the claim for aggravation. The case here was submitted to the jury to reopen the claim for additional treatment, not an increase in disability. See the Court's Instructions to the Jury Nos. 11 and 13 included in the appendix as A and B (Clerk Papers No. 19). Compare the instructions given to Washington Pattern Instructions Nos. 155.12 and 155.12.01, copies attached to the appendix as C and D.

Since there was no exception taken by the Department to the giving of instructions Nos. 11 and 13, they became the law of the case, and it was not necessary for Mr. Cooper to show an increase in disability to reopen his claim. *Bryant v. Dep't of Labor & Indus.*, 23 Wn. App. 509, 596 P.2d 291 (1979). A claim can be reopened for aggravation after the closing date if there has been a worsening of a condition proximately caused by the industrial injury establishing a need for treatment, without establishing an increase in disability. *Loushin v. ITT Rayonier*, 84 Wn. App. 113, 924 P.2d 953 (1996).

Commencing at page 24, first full paragraph of Brief of Respondent,

¹ Also see Summary of the Argument in Brief of Respondent at page 21.

the Department argues that Mr. Cooper did not sustain his burden of proof. The issue was not before the trial court, nor before this court, as to whether Mr. Cooper sustained his burden of proof, only whether it was error of the trial court in refusing to give the proposed lighting up instruction No. 8a, a copy of that instruction is attached as Appendix E.

Commencing at page 25, first full paragraph, the Brief of Respondent claims that Dr. Gritzka did not provide any testimony related to the first terminal date of January 22, 2008, and he did not review any medical records created at that time. Dr. Gritzka did have the report of injury on March 1, 2007. Dr. Gritzka then had the medical records of Dr. Paul Won, an occupational physician at Kaiser Permanente, who treated Mr. Cooper following the injury from March 2, 2007, through September 28, 2007. There is no evidence of any treatment records beyond September 24, 2007, through January 22, 2008. (CABR – Dr. Gritzka – Direct, page 13, line 24, and page 14, line 25).

To reopen a claim for aggravation, there must be objective findings of worsening between the closing dates of January 22, 2008, and July 7, 2011, when the Department last acted upon the claim. Dr. Gritzka testified as to the objective findings of worsening between the terminal dates at page 39, line 3, through page 40, line 12, as follows:

Q. Doctor, do you have an opinion, based upon reasonable medical probability, as to whether there are objective findings of worsening of Mr. Cooper's low back condition as it would relate to the injury of March 1st, 2007, between the dates of January 22nd, 2008, and July 7th of 2011 when the Department of Labor & Industries last acted upon his reopening of that application?

A. Yes.

Q. What is your opinion?

A. I think he has probably worsened.

Q. And what objective findings are there of that worsening?

A. Well, first of all, there is a fixed muscle spasm in his right lumbar paravertebral muscles. They don't completely relax with alternate weightbearing like they should. Then there is some swelling that you could see along the – basically on each side of his lumbar spine parallel to the level of where he had had the fusion. Then he was tender at – specifically at the top of the fusion mass.

Then at least by report there was an increase in this wedge deformity of the L4 vertebrae, at least by report on – of an imaging study before his event and after the event at Royal Oaks.

Q. Are you comparing the MRI scan of May 27th of 2010 to the previous MRI scans that were performed?

A. Well, I'm comparing the qualitative description of the severity of the deformity at L4. I didn't actually see these studies, but I saw the two reports. One before the event says it's mild and then after the event it is moderate to severe. So assuming these radiologists know what they're talking about, which they probably do, there has been some change.

There was no objection to the lack of foundation or otherwise to Dr. Gritzka's testimony, and the testimony establishes that there were objective findings of worsening between the terminal dates to reopen the claim for aggravation.

Second Assignment of Error

RCW 4.84.030 provides that in any action commenced in superior court, the prevailing party shall be entitled to costs and disbursements, unless the costs are taxed as attorney fees in actions within the jurisdiction of the district court when commenced in superior court. The statute is talking about original actions commenced in superior court, and if the action could have been commenced in district court, attorney fees are not recoverable in superior court. Here, the action was not commenced in superior court, but the Department of Labor and Industries as the prevailing party is entitled to reasonable attorney fees, because the attorney general represented the Department in superior court. *Allen v. Dep't. of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992). Because the depositions here were not taken in the superior court action, but before the Board of Industrial Insurance Appeals, the costs of the depositions should not be recoverable in superior court.

WAC 263-12-117 provides that each party shall bear its own costs except when requested by a party, the industrial appeals judge may allocate costs to the parties. Since WAC 263-12-117 governs the awarding of costs before the Board, the Department cannot first seek recovery of the costs of

depositions before the Board in the superior court action. Since the Department did not seek recovery of their deposition costs before the Board, they cannot now seek those costs in Superior Court.

Since RCW 51.32.115 provides that superior court shall not receive testimony other than or in addition to what was offered before the Board, the testimony before the Board is read to the jury. The statute provides no options in superior court as would be the case under the use of depositions in superior court pursuant to CR 32. There is no discretion given to the court or arbitrator pursuant to RCW 4.87.010(7) to find that it was necessary to use a deposition to achieve a successful result. The use of depositions in superior court is mandated by RCW 51.52.115.

WAC 263-12-125 provides that in so far as not in conflict with these rules, the rules regarding procedures in superior court shall be followed. Since WAC 263-12-117 is in conflict with CR 32(a)(5)(B), the regulation controls the use of depositions before the Board. Pursuant to WAC 263-12-117, the industrial appeals judge may permit or require the perpetuation of testimony by depositions. Here, the cost of deposition before the Board is of a health care professional. CR 32(a)(5)(B) provides that the deposition of a health care professional, even though available to testify at trial, may be used, but is not required to be used. Since the industrial appeals judge may

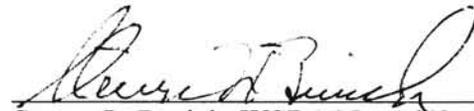
require perpetuation depositions of health care professionals, their testimony is most always taken by deposition. To allow the prevailing party to recover the cost of each of those depositions in superior court would be onerous, as well as in conflict with WAC 263-12-117, where the prevailing party before the Board and superior court did not first seek recovery of costs before the Board.

Conclusion

The court of appeals should reverse the Judgment and Order of Superior Court for Clark County dated December 20, 2013, for failure to give the lighting up instruction No. 8a as proposed by Nathan Cooper, and decide whether the prevailing party can recover the costs of depositions before the Board to govern future actions.

Dated September 3, 2014

Respectfully submitted,



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INSTRUCTION NO. 11

This is an aggravation case. "Aggravation" means a worsening of a condition caused by the industrial injury that results in a need for further treatment. The aggravation period in this case is from January 22, 2008, to July 7, 2011.

INSTRUCTION NO. 13

To establish that there is a need for further treatment because of aggravation, the worker has the burden of proving each of the following propositions by medical testimony based at least in part upon a comparison of objective findings:

1. That the aggravation resulted in a need for further treatment;
2. That the need for further treatment was proximately caused by the industrial injury;
and
3. That the aggravation occurred between January 22, 2008, and July 7, 2011.

INSTRUCTION NO. _____

This is an aggravation case. When Nathan Cooper's claim was closed on January 22, 2008, it was determined that there was no permanent partial disability resulting from the industrial injury. That determination is binding on all parties.

"Aggravation" means a worsening of a condition caused by the industrial injury that results in a need for further treatment.

The aggravation period in this case is from January 22, 2008, to July 7, 2011.

INSTRUCTION NO. _____

To establish that there is a need for further treatment because of aggravation, the worker has the burden of proving each of the following propositions by medical testimony based at least in part upon a comparison of objective findings:

1. That the aggravation resulted in a need for further treatment;
2. That the need for further treatment was proximately caused by the industrial injury;
and
3. That the aggravation occurred between January 22, 2008, and July 7, 2011.

INSTRUCTION NO. 8 a

If an industrial injury lights up, or makes disabling, a latent or preexisting infirmity, or weakened condition, then the resulting disability is to be attributed to the industrial injury. If the industrial injury is a proximate cause of the condition from which the worker suffers, then the previous physical or mental condition of the worker is immaterial, and the industrial injury is considered to be the legal cause of the full disability, regardless of any preexisting or congenital weakness or infirmity.

Simpson Timber Co. v. Wentworth, 96 Wn. App. 731, 740 (1999)
Dennis v. Labor & Indus., 109 Wn.2d. 467, 471 (1987)

Plaintiff

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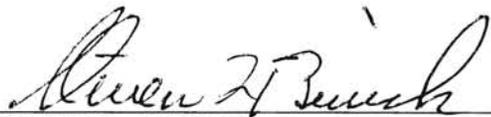
Nathan M. Cooper,)
Appellant,)
v.)
Department of Labor and Industries,)
Respondent.)
Court of Appeals Case No. 45793-8-II
Clark County Case No. 12-2-03779-9
PROOF OF SERVICE

The undersigned states that on Wednesday, the 3rd day of September, 2014, I deposited in the United States Mail, with proper postage prepaid, Reply Brief of Appellant, dated September 3, 2014, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

September 3, 2014 Vancouver, WA


STEVEN L. BUSICK