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COURT OF APPEALS
DIVISION II
2016 JAN 13 AM 11:57
STATE OF WASHINGTON
BY Cm
DEPUTY

NO. 14-2-02796-0
COURT OF APPEALS,
DIVISION II

OF THE STATE OF WASHINGTON

48206-1-II

REYMUNDO FELIPE, *APPELLANT*,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE
STATE OF WASHINGTON, *RESPONDENT*.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The trial court erred in giving instruction No. 14 to the jury requiring that there to be an objective finding of worsening to reopen a claim for headache pain, severe depression, and short term memory loss. Instruction No. 14 is attached as Appendix "A".

Issues pertaining to the first Assignment of Error

1. Did the trial court error in giving instruction No. 14 requiring objective findings to reopen a claim for mental conditions?
2. Was Reymundo Felipe prejudiced by the giving of instruction No. 14 to the jury?

STATEMENT OF THE CASE

On April 19, 2011, Reymundo Felipe fell from the top step of an 8 foot folding ladder while patching drywall as a drywall finisher for JWC Construction on a remodel job at the city hall in Stevenson, Washington. The last thing he remembers is holding a piece of drywall in one hand and a screw gun in the other. The next thing he remembers is being in the hospital at Southwest Washington Medical Center, in Vancouver, Washington. He does not know how he got there, except that a few days later he received a bill for an ambulance trip from Stevenson to Vancouver. When he woke up in the hospital, his wife was by his side and he had a bruise on the top of his head with swelling, and his head was in a lot of pain. He tried to get up to go to the bathroom, became dizzy, experienced nausea, and started vomiting. He was given pain medication to control the pain, but was still in a lot of pain. Two days later he was able to walk out of the hospital with the help of his wife. (Clerks Papers No. 6, Certified Appeal Board Record, Reymundo Felipe, March 28, 2014, Direct, page 9, lines 19, 23 and 25; page 16, lines 11, 21, 23 and 25; page 11, lines 12 and 19; page 13, lines 9, 17, 19, 21 and 24; page 14, lines 8, 13 and 19; page 15, lines 3, 5, 7 and 22; and page 16, lines 1, 7 and 16).

A week after being discharged from the hospital, Mr. Felipe's boss called him and offered light duty work, which lasted 3 weeks. A claim for injury was filed with the Department of Labor and Industries on April 20, 2011, and Mr. Felipe had follow-up treatment for head pain at Lacamas Medical Center, an urgent care clinic, before seeing Dr. Sukachevin in November of 2011. As of May 9, 2012, when his claim was closed by the Department, Mr. Felipe was still taking medication for head pain, but felt the best he had since the head injury of April 19, 2011. Then, in December 2012, Mr. Felipe was lying down, went to get up to go to the bathroom, felt dizzy and fell to the floor. The beginning of 2013, Mr. Felipe was taking his son to the bus stop, and when he got to the bottom of his front steps, he passed out and fell to the concrete, injuring his right wrist. (CABR, Jurisdictional History, page 31; Mr. Felipe, Direct, page 16, line 14 and 17; page 17, lines 3, 9, 19 and 25; page 18, lines 3 and 17; page 19, lines 14, 16 and 25; page 18, lines 3 and 17; page 19, lines 14, 16 and 24; page 20, lines 2, 6, 21 and 23; and page 21, line 3).

Mr. Felipe's treating physician is Jon Sukachevin, MD, a family practice physician. Dr. Sukachevin is licensed to practice medicine in Washington, Oregon and Maryland. He is board certified in family medicine, the first time in 1999, and recertified in 2005. Dr. Sukachevin

treats on the job injuries in Washington, and first saw Mr. Felipe on November 2, 2011, before claim closure for headache, memory loss and depression. Dr. Sukachevin took a history from Mr. Felipe of his falling off an 8 foot ladder in April 2011, and having a CAT scan in emergency which was normal, and had been prescribed Vicodin for headache. His headaches were associated with vertigo, or loss of balance, and he complained of the onset of depression on May 2011 and was taking Amitriptyline. Dr. Sukachevin diagnosed, concussion, headache, and major depression. (CABR, Dr. Sukachevin, Direct, page 4, line 4; page 6, lines 13, 19 and 25; page 7, lines 8 and 20; page 8, lines 14, 16 and 18; page 9, line 18; page 10, lines 3, 9, 21 and 24; and page 11, line 3).

The claim was closed by the Department on May 9, 2012, on the basis that Mr. Felipe's treatment was concluded. Dr. Sukachevin saw Mr. Felipe back on October 24, 2012, for headache. Mr. Felipe had been referred to a psychologist for counseling for his depression. The psychologist thought Mr. Felipe might have a traumatic brain injury, and referred him to a brain injury specialist, but the Department denied the referral. He had seen a neurologist who thought that the headaches were consistent with post-concussion syndrome. Mr. Felipe's headaches resolved by the end of 2011, but had restarted a month prior to October 2012. His

headaches felt similar to the post-concussion headaches he was having before claim closure. Mr. Felipe denied any further head trauma since the April 2011 injury. With the headaches Mr. Felipe was having dizziness, which he described as a spinning sensation. Mr. Felipe also described short-term memory loss, which had only begun after the April 2011 injury. (CABR, page 31; Dr. Sukachevin, Direct, page 19, lines 4, 6, 9 and 18; page 20, line 17; and page 21, line 3).

On October 24, 2012, Mr. Felipe described his headaches as currently at 9 out of 10 in intensity, where they were 4 out of 10 in intensity before claim closure. The headaches were now occurring daily, and he was having at least 4 headaches per day. Naproxen and Ibuprofen 800 milligrams, were helping with the headaches, but Mr. Felipe was afraid to drive. Dr. Sukachevin diagnosed traumatic brain injury and major depression, and filed an application to reopen Mr. Felipe's claim for the injury of April 19, 2012, with the Department. Dr. Sukachevin's plan for treatment was to refer Mr. Felipe to a neurologist and a traumatic brain injury specialist, to have an MRI of the brain, and to follow up with a psychologist. (CABR, Dr. Sukachevin, Direct, page 21, lines 13 and 22; page 22, line 9; page 23, line 12; and page 25, line 11).

An MRI of the brain was performed on November 17, 2012, and as read by the radiologist showed. “Impression, punctuate blooming artifacts, subcortical white matter, white frontal lobe, suspicious for an area of remote small hemorrhage.” Dr. Sukachevin testified that the MRI was consistent with Mr. Felipe’s abrasions to his forehead and the contusion to the back of his head, as noted on the evaluation at Southwest Washington Medical Center in April 2011, and it was reasonable to warrant a referral for further investigation and evaluation by a neurologist. (CABR, Dr. Sukachevin, Direct, page 26, lines 17; and Cross, page 39, lines 9 and 21).

The Department received the application to reopen the claim from Dr. Sukachevin on November 6, 2012, and requested William Stump, MD, a board certified neurologist, to examine Mr. Felipe. Dr. Stump examined Mr. Felipe on January 23, 2013, and diagnosed a closed head injury, but there was no evidence in Dr. Stump’s opinion that Mr. Felipe had a cranial injury. He most likely had a concussive syndrome as a result of the closed head injury, but that had resolved. Mr. Felipe did have persistent pain on the top of his head, but Dr. Stump could not identify any focal neurological deficit that he could attribute to the injury. The brain is concussed when it bounces back and forth inside the cranial cavity, such that there is dysfunction of the neuro elements that produce symptoms of headache,

dizziness, and memory loss difficulties. (CABR, page 31, Dr. Stump, Direct, page 10, lines 12 and 17, page 20, lines 2 and 23).

As to the MRI performed on November 17, 2012, Dr. Stump testified that the MRI is a far more sensitive study than the CAT scan that was performed at Southwest Medical Center following the April 2011 injury, and the MRI will show small items that may not have been seen on the CAT scan. Exactly what this is on the MRI is not clear, and there was no follow-up performed in order to go back over this area. Dr. Stump could not give an explanation for what the radiologist was stating was suspicious for an area of remote small hemorrhage. But if Mr. Felipe was Dr. Stump's patient, he would have called the radiologist, and if he could not tell him what it was, Dr. Stump would have had the radiologist repeat the MRI. (CABR, Dr. Stump, Direct, page 26, lines 3 and 6; Cross, page 39, line 22; and page 40, line 17).

On February 11, 2013, the Department denied the application to reopen claim, which order was affirmed by the Department on August 7, 2013, and Mr. Felipe appealed to the Board of Industrial Appeals. An industrial appeals judge was assigned to the appeal, and a full evidentiary hearing was conducted before the Board. A Proposed Decision and Order was issued by the Industrial Appeals Judge denying reopening, and Mr.

Felipe filed a Petition for Review with the Board. The Board denied the Petition and adopted the Proposed Decision and Order. Mr. Felipe then appealed the Board's order to Superior Court for Clark County. The appeal was assigned to Department No. 9, Judge Robert A. Lewis, and proceeded to a 12 person jury trial on September 21 and 22, 2015. The testimony before the Board was read to the jury, the jury was instructed on the law by the court, retired to deliberate and rendered a verdict in favor of the Department by special verdict form, deciding that the Board was correct in not reopening Mr. Felipe's claim. (Clerk's Paper No. 27 and CABR pages 1, 5-13, 19-25, 27, 28 and 29).

Prior to instructing the jury outside of their presence in the afternoon of September 21, 2015, the trial court reviewed with counsel the proposed jury instructions on the law, which the court was considering giving. The Department's proposed instruction No. 14 came up for discussion on objective verses subjective findings to support aggravation and claim reopening; whether there needed to be an objective finding of worsening to reopen a claim for aggravation. (Report of Proceedings, page 4, line 8).

During cross examination of Mr. Felipe's treating physician, Dr. Sukachevin, the attorney general was able to establish that there were no objective findings to support reopen of the claim for headache, dizziness,

depression, or memory problems, and that there would not necessarily be any objective findings of these conditions on physical examination. Also, that the MRI of November 17, 2012, was only “suspicious for an area of remote small hemorrhage”, and could not be considered an objective finding. (CABR, Dr. Sukachevin, Cross, page 36, line 23, through page 39, line 13).

Mr. Felipe’s attorney objected to the giving of proposed instruction, No. 14 to the jury and cited *Price v. Dep’t. of Labor & Inds.*, 101 Wn.2d 520 (1984), and *In re Charles Lewis*, BIIA Dec., 07 16483, a significant decision of the Board of Industrial Insurance Appeals, to the trial court. *Price* had to do with a psychiatric or mental condition, and *Lewis* was an erectile dysfunction case, which held that there did not need to be objective findings of worsening to reopen a claim for aggravation of those conditions. Mr. Felipe had closed head injury and there would not necessarily be any objective findings of worsening of that condition, and the MRI was inconclusive, to support reopening. Mr. Felipe’s condition was comparable to those cases, and it would be error to give instruction No. 14. (RP, page 8, line 1 through page 10, line 7).

The trial court decided to give instruction No. 14 to the jury. The Department’s attorney commenced closing argument by addressing

Instruction No. 14, and that to support reopening of a claim for aggravation there must be medical testimony based in part on one or more objective findings. The Department's attorney then reviewed the testimony of the doctors in the case, and maintained that there were no objective findings to support reopening of the claim for treatment. Department's attorney also argued that there were two CAT scans of the initial injury that were very good at finding blood on the brain, despite Dr. Stump's testimony that an MRI is a far more sensitive study than a CAT scan. (RP, page 14, line 5; page 20, line 24; and page 23, line 20).

STANARD OF REVIEW

It is well established that it is within the trial court's discretion whether to give a particular jury instruction. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996) Abuse of discretion means a disregard of "attendant facts and circumstances." *Samantha A. v. Dep't of Social and Health Serv.*, 171 Wn.2d 623, 645 (2011). Alternatively, the trial court abuses its discretion when it makes a decision contrary to the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

The Superior Court must give a jury instruction, supporting a party's theory of the case, so long as there is substantial evidence to support it. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980)

(“a party is entitled” to its jury instruction). When determining substantial evidence, the court views the evidence in the light most favorable to the party who requested it. *Mina v. Boise Cascade Corp.*, 37 Wn. App. 445, 448, 681 P.2d 880 (1984), *aff'd*, 104 Wn.2d 696, 710 P.2d 184 (1985).

ARGUMENT

In *Price v. Dep't of Labor & Indus.*, 1101 Wn.2d 520, 523, 682 P. 2d 307 (1984), the exact same instruction was given as was given here, except that here the objective-subjective distinction was amplified by a third paragraph that called greater attention to the necessity for objective findings made by a physician to reopen a claim. There, as well as here, the claim was sought to be reopened for purely psychological injury that had been accepted as a part the initial injury. There as well as here, the Department's attorney relied upon this instruction several times in closing argument. Price appealed, alleging that the trial court erred by giving Instruction No. 14, which is incidentally the same numbered instruction given here. The Court of Appeals split on the issue. The majority recognized that the instruction had been criticized, but held that it adequately permitted Price to argue her theory of the case to the jury. *Price v. Dep't of Labor & Indus.*, 1001 Wn.2d at page 524.

The Supreme Court in *Price* held in a unanimous opinion that it was improper to instruct the jury on the objective-subjective distinction in a case involving psychiatric disability. Instruction No. 14 did not properly state the law as to psychiatric disability, and Price was prejudiced from arguing her theory of the case to the jury. *Price v. Dep't of Labor & Indus.*, 101 Wn.2d, at page 529. The sole basis for reopening the claim in *Price* was an increase in subjective pain. The instruction given in *Price* was taken practically verbatim from Washington Patrol Instructions No. 155.09, and *Price* referenced the Note on Use to the instruction which states that this instruction may not be proper in instances of mental, emotional, post-concussion syndrome, loss of hearing and loss of sight cases, because these conditions may not have objective findings present. *Price v. Dep't of Labor and Indus.*, 101 Wn. 2d, at page 525. Mr. Felipe's conditions for which reopening is sought are headache pain, severe depression and memory loss. Mr. Felipe was diagnosed with post-concussion syndrome, and even Dr. Stump, the Department's medical expert, agreed with this diagnosis, which produces symptoms of headache, dizziness and memory loss, all of which Mr. Felipe was suffering.

In *McClure v. Dep't of Labor & Indus.* 61 Wn. App. 185, 187, 810 P.2d 25 (1991), the appellate court pointed out that the trial court has broad

discretion in deciding how instructions will be worded, and whether more specific and clarifying instructions are necessary to avoid misleading the jury. Instructions are sufficient if read as a whole, they are not misleading, they properly inform the jury of the applicable law, and they allow the parties to argue their theories of the case, citing *Gammon v. Clark Equipment Co.*, 144 Wn.2d 513, 617, 707 P.2d 685 (1985). McClure proposed an instruction that psychological injuries may be based solely on the workers subjective complaints, and objective medical findings need not be the basis for an expert's opinion. The trial court concluded that the instruction was not necessary, and the Court of Appeals agreed. There the case was not tried or argued on the basis of lack of objective findings. The testimony clearly indicated that psychiatric evaluations were primarily subjective, and nobody suggested that objective findings were necessary. *McClure v. Dep't of Labor & Indus.* 61 Wn. App. at page 188.

Since there was no distinction made in the testimony and the instruction between objective and subjective findings, *McClure* was free to argue to the jury that subjective findings were a sufficient basis to reopen her claim. The Court of Appeals held that based on the record it was not error for the trial court to refuse to give the requested instruction. However, they expressed no opinion as to whether on a different trial record such an

instruction might be appropriate or even necessary. *McClure v. Dep't of Labor & Indus.*, 61 Wn. App., at page 189. Here, the Department was able to exclude objective findings as a basis for the opinion of Dr. Sukachevin that his headache pain, depression and memory loss had worsened, and emphasized in closing argument that there were no objective findings to support reopening as requires by instruction No. 14. Unlike in *McClure*, Mr. Felipe was prejudiced by the giving of instruction No. 14.

ATTORNEY FEES

Reymundo Felipe maintains that if the decision of the trial court is reversed on appeal and he prevails upon in retrial, he should be award his reasonable attorney fees in Superior Court and the Court of Appeals as provided by RCW 51.32.130 which provides:

If an appeal to superior court or appellate court from a decision and order of the board, said decision is revered or modified and additional relief is granted to a worker or beneficiary, a reasonable fee for the services of the workers or beneficiary's attorney shall be fixed by the court. . . If in a worker or beneficiary appeal the decision and order is revered or modified and the accident or medical aid fund is affected by the litigation, . . . the attorney's fee fixed by the court for services before the court only, . . . shall be payable out of the administrative fund of the department.

CONCLUSION

The trial court erred in giving instruction No. 14 to the jury requiring one or more objective findings to reopen a claim for aggravation of a mental condition, including, headache pain, major depression, and short term memory loss, and the case should be remanded to the trial court for retrial.

Dated January 11, 2016

/s/ STEVEN L. BUSICK

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Attorney for Reymundo Felipe,
Appellant

INSTRUCTION NO. 14

Aggravation of Reymundo Felipe's industrially related condition and the extent of Reymundo Felipe's increased disability on the date of claimed aggravation must be supported by medical testimony based at least in part upon one or more objective findings.

Statements of complaints by the worker made to a physician are called subjective complaints. Findings of disability that can be seen, felt, or measured by an examining physician are called objective findings.

In determining whether aggravation has occurred and the extent of any resulting increased disability, a physician cannot rely solely upon complaints, but must have some objective basis for his or her opinion. On the other hand, a physician need not rely solely upon objective findings. If there are objective findings, then the physician may also consider subjective complaints.

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SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

REYMUNDO FELIPE,)	No. 14-2-02796-0
)	
Plaintiff,)	
)	PROOF OF SERVICE
v.)	
)	
DEPARTMENT OF LABOR AND)	
INDUSTRIES OF THE)	
STATE OF WASHINGTON)	
)	
Respondent.)	

The undersigned states that on Monday, the 11th day of January 2016, I deposited in the United States Mail, with proper postage prepaid, Brief of Appellant and Proof of Service, addressed as follows:

Dane Henager, Assistant Attorney General
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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:

January 11, 2016, Vancouver, WA

/s/ STEVEN L. BUSICK

STEVEN L. BUSICK