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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 52126-1

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CARL CHASTAIN

Appellant/Defendant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1

A. The court erred by resolving issues of fact in a summary judgment motion.

Issues pertaining to Assignment of Error No.1

1. Credibility is an issue for the jury not the judge in a summary judgment motion.

Assignment of Error No. 2

B. The court did not address the issue of whether this was an injury case on the Summary Judgment motion.

INTRODUCTION

Mr. Chastain had a stroke while at work on April 15, 2016. The Board found this not to be an injury at work. There is testimony from Mr. Chastain's treating physician that it was work related and testimony from a neurologist that it is not. The issue was raised on summary judgment before Judge Melly.

Judge Melly resolved the case based on the perceived credibility of Dr. James and not any court of case law as to strokes. He found that there was no occupational disease claim but did not address the injury claim. We appealed claiming Judge Melly's decision was inappropriate at the summary judgment stage.

PROCEDURAL STATEMENT OF THE CASE

This case was denied on Summary Judgment Motion before Judge Melly in the Clallam County Superior Court. Claimant filed a timely appeal and seeks review of the granting of the summary judgment motion.

STANDARD OF REVIEW

This Court reviews orders of summary judgment de novo, and engages in the same inquiry as the Trial Court: Heath v. Uruga, 106 Wn. App. 506, 512-513 (2001) Like the superior court's review of an administrative appeal, our review is based solely on the evidence and testimony presented to the Board. RCW 51.52.115; Bennerstrom v. Dep't of Labor & Indus., 120 Wn.App. 853, 858, (2004).

Summary judgment should not be granted when the credibility of a material witness is at issue. Balise v. Underwood, 62 Wash.2d 195, 200, 381 P.2d 966 (1963); Powell v. Viking Ins. Co., 44 Wash.App. 495, 503, 722 P.2d 1343 (1986).

STATEMENT OF THE CASE

Mr. Chastain worked for the Pacific Coast Salmon Coalition for about 20 years at the time of his April 5, 2016 Stroke. CP Certified Appeal Board Record (CAB) Tr. Chastain Pg. 12. Mr. Chastain stated that working with the funding agencies was not a problem. *Id* at 15. While there was increase in stress over a couple of years, this was not the main cause of Mr. Chastain's problems at work. Mr. Chastain's employer fully believes his

stroke was a result of the increased stress, duties and hours required to work starting with a severe escalation in duties in February 2016. CAB Huelsdonk pg. 139.

Mr. Chastain tried to quit on February 28, 2016 because he knew he could not work with Jeannie based on her treatment of him. He had never experienced this before. The Employer agrees with Mr. Chastain and wants the claim allowed. That is telling as employers do not normally take that position. CAB Transcript Huelsdonk pg 139. Alex, the employer rep, testified that Car's job had changed and there was a lot more stress than there should have been. Id.

Dr. Kushner stated blood pressure is a risk for stroke. CAB Kushner Depo. Pg. 9 ln 13-15 19 ln 8-9 (stress causes a transient elevation in blood pressure.) Finally, he testified he associated Mr. Chastain's stroke with high blood pressure. Id. at 27. Doesn't make any sense to say stress cannot cause strokes if it causes high blood pressure as well.

Dr. Walhoff also states stress is not a common cause but it does contribute to high blood pressure that can cause a stroke. CAB Walhoff depo. 15 ln 13-16.

Dr. Wilbert James, the treating doctor knew Carl the longest. He made the most apt comparison. He said if a guy shows up at his job site, his equipment is gone, he has a heart

attack, the heart attack is related to the missing equipment. We know, that stress contributes to strokes and heart attacks.

Dr. James treated Mr. Chastain for over a year. He knows Carl. He stated stress is a known, studied risk factor for strokes. CAB James Depo. pg 16 3-10. He stated it is a known factor. He read it right off a medical reference cite called UpToDate with no objection from the Department. Id. at 15. Further, the other doctors referenced no specific studies or literature.

Dr. James also testified that under extreme stress or illness your body can have increased sugars. Id. at 19. See Kushner depo pg. 27 ln 2-3. Mr. Chastain had elevated blood sugars in the hospital consistent with elevated stress. He had no other blood work ever suggesting elevated sugars. Id. at 19. This is consistent with a response to high stress, not usual in his normal work environment. Mr. Chastain testified he had controlled or normal blood pressure since the incident being away from work. Id. at 20 -21.

Dr. James testified that he though the stroke was related to undue stress at work. Id. at 25. He admits there are other factors but:

definitely ... stress of the job is on a more probable than not basis causative of his high blood pressure and risk factor for

stroke. Id. Dr. James testified “Carl should not have had a stroke, and he did. He had mild hypertension that he didn’t take care of. He was obese. But he’s young to get a stroke. And did the job -- undue stress of the job cause the stroke? That’s my opinion. You asked for my opinion. I believe the answer is yes.

I. ARGUMENT

1. Assignment of Error 1: Credibility of Witnesses

Case law is clear if the testimony is not to incredible to be believed by reasonable minds, the court should not resolve a genuine issue of credibility/fact on summary judgment. See *Balise v. Underwood*, 62 Wn.,2d 195, 200 (1963). See also *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn.App 424, 428 (Div. 3 1990)

Judge Melly stated: “how can I grant summary judgment when they have this testimony from Dr. James with regard to his opinion on stress and cause and effect but I am persuaded that this is not compelling enough to deny the Summary Judgment Motion.” Report of Proceedings (ROP) pg.28. He states the Mr. James shoots himself in the foot by admitting a

neurologist may be better than him. Id. However, that testimony is still enough to survive until summary judgment as to an issue of fact. The issue of credibility of witnesses is left to the trier of fact, in this case the jury, not the judge. We ask the Court to reverse this dismissal of Summary judgment.

2. Assignment of Error 2: Mr. Chastain suffered an industrial injury as defined by RCW 51.08.100 and relevant Board Case law.

Judge Melly's second reason for denial was based on the occupational disease statute. Or an understanding that there is no statute of case law to support allowance of a stress claim as to occupational disease. The problem is Mr. Chastain is asking for allowance of his claim under Spino v. Dep't, 1 Wn. App 730 (1969) as an injury not an occupational disease.

Spino stands for the proposition that the statute requires we objectively connect the alleged injury to "some identifiable happening, event, cause or occurrence capable of being fixed as some point in time and connected with employment." Id. at 733. In other words, can we be specific about a time frame such that it subjects that time frame to investigation. See. Lehtinen v. Weyerhaeuser Co., 63 Wn. 2d 456 (1964). Can we

fix the perceived injury to a “fixed as to time” period versus an indefinite period?

The indefinite time often being the reason for occupational disease claims because we know there are exposures at work but do not know which exposure or at which time the exposure caused the condition to develop. Only that, an exposure of that found at work, is a likely to cause the condition to develop. *Id.* This does not apply to an injury claim where we can define the exact time frame.

The most relevant Board case is In re: David Erickson, Dec’d, BIIA dec., 65,990 (1985). In Erickson the Board found that three weeks of harassment by co-workers, producing a mental condition, constituted an injury. Id. In that case the Board found that it was “certainly fixed as to time from January 6 to January 31, 1982.” Id. It was “susceptible to investigation” and was “in fact” investigated. Id. The Board went on to say the trauma here was well defined and continuous over a three-week period of time. As such it qualified as a “sudden and tangible happening” under RCW 51.08.100. Id. In Erickson they allowed the mental condition caused by stress as an injury.

Our case is similar but deals with stress causing a physical condition of ischemic stroke. Mr. Chastain had increasing

stress over two years but that is not the issue. Mr. Chastain and the employer agree that as of February 2016, specifically the February 26, 2016 meeting with the two agencies and his request for termination within a couple days is when his stress sky rocketed at work. Mr. Chastain was required to remain in a hostile environment, by his Board, from February 26, 2016 until his stroke on April 5, 2016. Importantly the employer agrees with this period as being the relevant stress period. Thus, under Erickson we have a period of time that is “fixed as to time.”

As in Erickson, the issues are subject to investigation. We can go back and look at the emails, testimony of witnesses, Carl Chastain, Alex Huelsdonk his replacement and Heather Lewis who was working at the same time with him. In fact, investigation has been done by the employer, the claimant and his attorney to identify what were the real precursors to the stroke and why the stress was unusual. Also his doctor has reviewed the studies, and the declarations and stated that the stroke was at least in part caused by the high levels of stress. This is further supported by Dr. James stating that the blood pressure readings were high prior to the stroke and since being released from work the levels are healthy or normal. Dr. James also notes that there is a correlation between blood pressure and

strokes and that Mr. Chastain's blood pressure was increased because of stress at work.

The testimony from both the employer and Mr. Chastain is that the stress was twice or more what was normal at work. He was working twice as hard and there was a real threat of the operation being closed. Importantly these threats and working conditions had not ever existed in the 20 years he was previously employed with the company.

Comparing this case to Sutherland v. Dept., 4 Wn. App 333 (1971) is not spot on. While Sutherland focuses on the results of one day, combined with Erikson above, the stress that Mr. Chastain was under over 5 weeks was like that of Sutherland in that it was unusual, not normal for the business, and had never been experienced before. Thus, there is at least an issue of fact as to whether this is an injury claim.

The only doctor on the claim states that the stroke was precipitated by the unusual stress at work. Based on this alone there is enough to get past a summary judgment motion and proceed to a jury trial.

The treating doctor on this claim states that the stroke was precipitated by the unusual stress at work. Based on this alone there should be enough to get past a summary judgment motion and proceed to a jury.

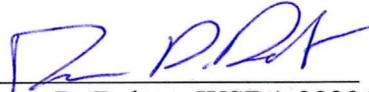
Nobody knew Carl like Dr. James. While not having the same qualifications of the other doctors he is the only one that looked at medical literature. Also as the attending physician he should be given “special consideration.” All of this was not done and as such the decision should be overturned in favor of Carl Chastain.

The evidence shows Mr. Chastain had two possible increasers in stress. The five-week period and the faxing of the 501 documents. Both of these are unusual. Dr. James testified they were causative. The Superior Court failure to submit this to a jury is no consistent with the law and the facts.

II. CONCLUSION

The issue is whether Mr. Chastain had an identifiable period in which he had increased/unusual stress for his job that could have or did contribute to his stroke and medical testimony says it was related. In this case, Dr. James testified that there is evidence the stroke and other findings were caused by stress. Mr. Chastain and the employer will testify the stress was more than twice the normal amount and the Employer would not let him leave the stressful environment from February 26, until the stroke on April 5, 2016. As such, there is a triable issue of fact and this case should proceed to the jury.

DATED: October 19, 2018



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CERTIFICATE OF SERVICE

1
2 I hereby certify under penalty of perjury that I faxed the document to the
3 Court of Appeals and mailed the document referenced below on October
4 12, 2018.

4 Claim No. : ZB-16529
5 Docket No. : 16 17482
6 Court of Appeals No : 52126-1-II
7 Clallam County No : 17-2-00683-4
8 Claimant : Carl E. Chastain
9 Document : **Motion for Extension of Time**

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