

FILED
SUPREME COURT
STATE OF WASHINGTON
12/5/2018 8:00 AM
BY SUSAN L. CARLSON
CLERK

NO. 95785-1

SUPREME COURT OF THE STATE OF WASHINGTON

ZBIGNIEW LASKOWSKI,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

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I. INTRODUCTION

Settlements at the Board of Industrial Insurance Appeals are binding on the parties to the agreement. Zbigniew Laskowski claims that his workers' compensation claim should not have been closed because his back condition was not at maximum medical improvement. But he ignores that he entered into a settlement commonplace at the Board called a binding medical examination that resolved this issue. In a binding examination, the parties agree that after the claimant attends a medical examination performed by an examining doctor selected by agreement, the parties will be bound by the examiner's conclusions. This procedure is advantageous to the parties because it allows them to avoid the delay and uncertainties of protracted litigation and to resolve their dispute with an objective medical opinion free of cost.

The examining doctor found that although Laskowski had more permanent impairment, he did not require more treatment and so his back condition was at maximum medical improvement. The Board relied on the doctor's opinion to award Laskowski an additional disability payment, and to order the claim closed because he was at maximum medical improvement. Laskowski shows no reason why the Court should unwind the settlement he freely agreed to, and this Court should affirm the trial court.

II. ISSUE

The Board provides a mechanism for parties to a workers' compensation appeal to have an independent medical examination resolve the parties' disputes. WAC 263-12-093(4). Laskowski entered into a settlement to participate in a binding examination, and the Board issued an order on agreement of parties based on the doctor's findings. Did the trial court err in ruling that Laskowski should be bound to the settlement agreement? Does this resolve the claim that he is not at maximum medical improvement?

III. STATEMENT OF THE CASE

Laskowski injured his back in 2006 while working, and the Department accepted his claim for workers' compensation benefits. AR 14, 209. He received several years of treatment and other benefits, and at one point the Department closed his claim and then later reopened it after his back condition worsened. AR 18, 408-20. After reopening the claim and providing additional treatment and time loss compensation, the Department eventually ended time loss compensation and closed his claim again in 2015. AR 24. Laskowski appealed to the Board. AR 1.

At the Board, Laskowski entered into a settlement for a binding medical examination. AR 1, 50-51. In a binding medical examination, the

Board submits a list of proposed questions to a doctor, and the parties agree to abide by the results of the examination. *See* WAC 263-12-093(4). The Board judge sent the agreed questions to the doctor, with medical records. AR 56-400, 401-02. The doctor was asked whether Laskowski had a condition related to the injury that needed further treatment. AR 401. After an examination, the doctor filed her report. AR 407-25. She found Laskowski had more disability than the Department had found in its order, but her findings were otherwise consistent with the Department's closing order. AR 422-25, 426. She agreed that Laskowski required no further treatment and so was at maximum medical improvement. AR 424.

After receiving the report, consistent with the parties' agreement to resolve the claim based on the agreed examiner's findings, the Board entered an order affirming the order ending wage replacement benefits and closing the claim, but providing additional permanent partial disability to Laskowski. AR 1. Laskowski appealed to the superior court, which affirmed the Board order. CP 306-09. He now seeks direct review by this Court.

IV. STANDARD OF REVIEW

This Court applies the ordinary civil standard of review to appeals from a superior court's decision in a workers' compensation case. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d

355 (2009); RCW 51.52.140. An appellate court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 180. The Administrative Procedure Act does not apply. *Id.*

The enforceability of a settlement agreement is reviewed de novo in the absence of disputed material facts. *Kwiatkowski v. Drews*, 142 Wn. App. 463, 479, 176 P.3d 510 (2008).

V. ARGUMENT

A. Laskowski Is Bound by the Settlement Agreement

Laskowski's primary argument that his condition was not at maximum medical improvement was resolved by a settlement agreement under which he agreed that a doctor should examine him, prepare a report, and render an opinion about his condition, and that the Board would base its decision off that medical opinion. AR 1, 50-51. At the Board, "[i]f an agreement concerning final disposition of any appeal is reached by all the parties present or represented at a conference, an order shall be issued in conformity with their agreement, providing the board finds the agreement is in accordance with the law and the facts." WAC 263-12-093(1). WAC 263-12-093(4) provides for agreed examinations:

The parties present at a conference may agree to a vocational evaluation or a further medical examination of a worker or crime victim, including further evaluative or diagnostic tests, except such as require hospitalization, by medical or vocational experts acceptable to them, or to be

selected by the industrial appeals judge. In the event the parties agree that an order on agreement of parties or proposed decision and order may be issued based on the report of vocational evaluation or medical examination, the industrial appeals judge may arrange for evaluation or examination and the board will pay reasonable and necessary expenses involved. Upon receipt by the board, copies of the report of such examination or evaluation will be distributed to all parties represented at the conference and further appropriate proceedings will be scheduled or an order on agreement of parties or proposed decision and order issued.

This procedure is consistent with CR 2A, which provides that settlements “made and assented to in open court on the record, or entered into the minutes,” will be followed. CR 2A applies in workers’ compensation cases under RCW 51.52.140. When the CR 2A requirements are met, the court will enforce the agreement. *Condon v. Condon*, 177 Wn. 2d 150, 157, 298 P.3d 86 (2013). “The purpose of CR 2A is to give certainty and finality to settlements.” *Id.* At the Board, parties are bound by settlement agreements entered into on the record, including binding examinations. CR 2A; WAC 263-12-093(4); *Doris E. Slater*, No. 860407, 1987 WL 61354, at *2 (Wash. Bd. Indus. Ins. Appeals Apr. 2, 1987) (party bound by agreement for binding examination even if party disagrees with result of examination).

Citing RCW 51.04.060, Laskowski argues that the agreed examination is not binding because, he alleges, a worker cannot agree to

relinquish any right. AB 5. RCW 51.04.060 provides “No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.” But courts have long recognized that this statute does not prevent a worker from entering into an agreement to stipulate to medical facts from which the workers’ claim may be resolved. *Le Bire v. Dep’t of Labor & Indus.*, 14 Wn.2d 407, 418-19, 128 P.2d 308 (1942); *Solven v. Dep’t of Labor & Indus.*, 101 Wn. App. 189, 197, 2 P.3d 492 (2000).¹

In *Le Bire*, the Court held that a party may stipulate that a medical condition is not related to the injury based on medical evidence, and this did not violate RCW 51.04.060 because it was a result based on the facts. 14 Wn.2d at 418-19. Likewise, the *Solven* Court recognized that an agreed examination “merely stipulates to a method of finding facts; it does not prevent the employee from demanding all compensation to which he is entitled.” 101 Wn. App. at 195.

Here, the order on agreement of parties was based on medical evidence and was “in conformity with the facts.” AR 1. Laskowski agreed to enter into a binding examination on the record. AR 1, 50-51. As part of

¹ The courts do not allow a settlement if it is not reflective of the facts. *Hicks v. Dep’t of Labor & Indus.*, 1 Wn.2d 686, 689, 97 P.2d 111 (1939).

this agreement, he agreed that an examination would take place and then the Board would enter an order based on the examination report:

At the conference, the parties agreed to resolve this matter by means of a binding medical examination.

....

The examining physician's ultimate opinions will resolve all issues in this appeal. The parties will be bound by these opinions. The Board will issue an Order on Agreement of Parties based on these opinions.

AR 50-51. Laskowski agreed to this resolution. AR 51.

Laskowski agreed that the Board should decide the case based on the facts as found by the doctor performing the binding examination. AR 50. This is not a waiver of benefits under RCW 51.04.060. It is merely an agreement about the manner of resolving the claim based on the facts of the case. And the result of the examination was that—based on the medical evidence—while Laskowski was entitled to an increased permanent partial disability award, he did not require further treatment.

AR 1.

Settlements based on medical facts play an important role in workers' compensation cases, and it would fundamentally alter practice at the Board to find that a worker could not enter into agreement about a binding examination. The express public policy of the state is to encourage settlement. *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997). The law "strongly favors" settlement. *Seafirst Ctr. Ltd. P'ship v.*

Erickson, 127 Wn.2d 355, 365, 898 P.2d 299 (1995) (citation omitted).

The trial court correctly affirmed the Board's use of the binding examination report.

B. The Court Should Not Reach Laskowski's Arguments

This case is resolved by the settlement agreement. Laskowski argues that his condition was not at maximum medical improvement and so his claim should not have been closed. AB 22-23. The Department does not provide treatment benefits when a condition is at maximum medical improvement. WAC 296-20-01002 (definition of proper and necessary). Maximum medical improvement means that "no fundamental or marked change in an accepted condition can be expected, with or without treatment." WAC 296-20-01002. Whether Laskowski was at maximum medical improvement was resolved by the binding agreed examination. The doctor performing the examination found he was not in need of further treatment so he was at maximum medical improvement. AR 424. Throughout his brief, Laskowski provides details about his medical condition, but they are irrelevant as this matter is resolved by the settlement. He also references facts that are not in the record. *E.g.*, AB 24.

Laskowski alludes to other arguments in his brief, including an unsupported claim of ex parte contact between the industrial appeals judge and the examiner. AB 5. Nothing in the record supports this allegation. He

generally alleges malpractice, fraud, and corruption, but provides no argument or citation to the record in support of these claims, and so this Court should disregard them. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, nothing in the record supports such claims. The trial court correctly affirmed the Board.

VI. CONCLUSION

Laskowski freely entered into a settlement. The doctor found additional impairment present but did not think Laskowski's condition warranted more treatment. Given Laskowski's agreement to submit to the binding examination, the Board properly based its decision on the results. The trial court correctly affirmed.

If the Court determines that the settlement agreement was invalid, the remedy would be to remand to the Board to determine whether the Department's May 13, 2015 and May 14, 2015 orders were correct. The settlement agreement was valid, so the trial court's order affirming the Board order that affirmed these orders should be affirmed.

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RESPECTFULLY SUBMITTED this 5th day of December, 2018.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "A. Sandstrom". The signature is written in a cursive, flowing style.

Anastasia Sandstrom
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

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CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Brief of Respondent and this Certificate of Service in the below described manner:

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Susan L. Carlson
Supreme Court Clerk
Supreme Court of the State of Washington

Via First Class United States Mail, Postage Prepaid to:

Zbigniew Laskowski
PO Box 6195
Olympia, WA 98507

DATED this 5th day of December, 2018.



SHANA PACARRO-MULLER
Legal Assistant

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

December 05, 2018 - 7:16 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95785-1
Appellate Court Case Title: Zbigniew Laskowski v. Washington State Labor and Industries
Superior Court Case Number: 16-2-04012-5

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Sender Name: Shana Pacarro-Muller - Email: shanap@atg.wa.gov

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