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Division II
State of Washington
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NO. 53254-9-II

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

VINCENT A. SCERRI,

Appellant.

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

COMES NOW the appellant, the late Vincent Scerri, by and through his widow Cynthia Scerri and his counsel of record and submits this Reply Brief. The appellant's position is that the jurors for this matter delivered a verdict so contrary to the medical evidence presented to them that Mrs. Scerri is entitled to relief under CR 59, with the interests of justice demanding the vacation of the jury verdict and the remanding of the case for a new trial.

The brief of respondent plucks a few ambiguous lines of testimony from one of the medical providers who testified in the matter and declares that as evidence substantial enough to sustain the verdict, while ignoring the testimony of that same provider that reflects his genuine opinion, as well as other medical witnesses who testified on the key question in the case: Was Vincent Scerri permanently incapacitated from performing any work at any gainful occupation? The answer to that question is "yes" – the jury received no medical testimony stating otherwise.

The jury verdict is based upon the proposition that in all workers' compensation cases, medical testimony is required to confirm that all conditions sustained in an industrial injury have been treated completely and exhaustively before an injured worker can be declared incapable of gainful employment, regardless of the injured worker's ability or

willingness to undergo treatment for all conditions. Applying the law to the circumstances of Mr. Scerri's case when applied to the law show that the jury verdict is a miscarriage of justice.

II. DISCUSSION

1. **There is no disagreement between the parties that the jury's verdict must be supported by substantial evidence, and what the definition of "substantial evidence" is.**

From their initial briefs, the parties agree that substantial evidence is required to support the jury's verdict (CR 59; *Ruse v. Dept. of Labor & Indus.*, 138 Wn.2d 1, 977 P.2d 570 (1999)); and that "substantial evidence" is defined as "evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." (*Reynolds Metal Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 483 P.2d 880 (1971); *Brown v. Superior Underwriters*, 30 Wn. App. 303, 632 P.2d 887 (1980); *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 32 P.3d 250 (2001); *Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986))

Where the parties differ is whether the testimony of all five medical witnesses who testified comprises the substantial evidence in this case, or if one medical witness's testimony concerning Mr. Scerri's mental health condition is evidence substantial enough to support the jury's answer to this question: "Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Scerri's conditions due to his industrial injury

were not fixed and stable, and he was in need of further necessary and proper medical treatment?”

2. The “declared premise” of this case is whether the Board of Industrial Insurance Appeals was correct in determining that Mr. Scerri required further medical treatment, with all medical testimony clearly showing that he required no more treatment.

The question as to whether Mr. Scerri required further necessary and proper medical treatment is the “declared premise” that, by definition, must be supported by substantial evidence in order for the jury verdict to stand. In assessing whether the evidence supports that premise, “the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party.” *Korst v. McMahan*, 136 Wn. App 202, 148 P.3d 1081 (2006)

As outlined in Appellant’s Brief, there were five medical witnesses who testified to that premise – H. Richard Johnson, MD and John O’Brien, PA-C for Mr. Scerri, and Mark Holmes, MD; David Smith, MD; and Mary Higley-Carbone, MD. The latter testified primarily as to whether Mr. Scerri’s pre-existing diabetes was aggravated by the industrial injury, she said “Not in my opinion,” (CP at 464) thus Mr. Scerri obviously did not require any additional treatment. The other four providers testified explicitly that no additional treatment was required (CP at 225 (O’Brien), 303 (Johnson), 352 (Holmes), 396 (Smith)). Looked at

from a perspective most favorable to the Department, No matter how the evidence is viewed, it is crystal clear that 100% of the providers' opinions (i.e. "sufficient quantity") are that Mr. Scerri required no additional treatment, and therefore the BIIA and the jury answered the question wrong.

3. No reasonable inference can be drawn from the testimony of John O'Brien, PA-C that Mr. Scerri required additional treatment.

As there is sufficient quantity of medical testimony to show that the BIIA and jury incorrectly determined that Mr. Scerri required additional treatment, Respondent's Brief identifies an excerpt of the testimony from John O'Brien, PA-C on Mr. Scerri's mental health treatment as testimony that presumably a "reasonable inference" can be drawn from to support the BIIA and jury decisions that Mr. Scerri required additional treatment; and that a preponderance exists in the Department's favor as there is no testimony from any other medical witness on the narrow question of additional mental health care.

It is difficult to imagine any reasonable person examining the testimony the Department points to in support of the jury verdict, even under a bright light while squinting, and drawing a reasonable inference that Mr. Scerri required additional treatment for depression, adjustment disorder, or other psychological pain disorders. Mr. O'Brien's opinion (CP

at 583-584) was “I can’t make an opinion – I can’t express an opinion as to if [treatments are] curative because treatment was not successful in that those treatments require a compliance on the part of the patient.”

Also, Mr. O’Brien presented his non-opinion on Mr. Scerri’s that the non-curative treatment was necessary as of the date of Mr. Scerri’s death – July 11, 2015. It is difficult to imagine what curative treatment could be provided to an injured worker who has already passed away.

The only reasonable inference to draw from the testimony purported by the Department as supportive of the jury verdict is that Mr. O’Brien has no opinion as to whether any curative treatment could be recommended for Mr. Scerri’s mental health conditions.

4. The Board of Industrial Insurance Appeals was not correct in deciding that Mr. Scerri’s conditions due to his industrial injury were not fixed and stable, as its decision rested on an incorrect reading of RCW 51.08.160; thus the jury verdict was incorrect.

The Conclusion of Law reached by the Board of Industrial Insurance Appeals and that formed the basis of the initial question to the jurors on the verdict form was:

As of the date of his death on July 11, 2015, Mr. Scerri’s conditions, proximately caused by the industrial injury, were not fixed and stable. He was, therefore, not permanently and totally disabled as a result of the industrial injury, within the meaning of RCW 51.08.160, and his surviving spouse, Cynthia Scerri, is not entitled to benefits under RCW 51.32.067.

CP at 35

The BIIA, and thus the jury, relied on a gross misreading of RCW 51.08.160 in reaching a decision. The statute reads:

"'Permanent total disability' means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." An injured worker need only suffer from a condition (singular) that is permanently incapacitating. Even conceding for the sake of argument that Mr. O'Brien's testimony on Mr. Scerri's mental health treatment does contain a firm opinion on additional care required before he was at maximum medical improvement is attained, the statute does not require an injured worker to be at maximum medical improvement for all injuries received in an industrial injury in order to be considered permanently and totally disabled.

There is case law to support the notion that a worker need not be at maximum medical improvement from all industrial injuries in order to be considered permanently and totally disabled. "The statutory language requiring the claimant to prove that he is incapable of performing any work at any gainful employment does

not require that he be physically helpless. *The intent of the [Industrial Injury Act] is to insure against loss of wage earning capacity.*” *Fochtman v. Dept. of Labor & Indus.*, 7 Wn. App. 286, 499 P.2d 255 (1972), citing *Kuhnle v. Dept. of Labor & Indus.*, 12 Wn.2d 191, 120 P.2d 1003 (1942), emphasis added.

If the BIIA action of mandating requirements beyond those required by statute is allowed to stand, and the jury’s acquiescence in those requirements, it completely subverts the intent of the Industrial Insurance Act, “to insure against loss of wage earning capacity.” Mr. Scerri’s interests with regard to his wage earning capacity have been transferred to his surviving spouse, who is left empty-handed as a result of the jury ignoring the substantial evidence presented to them and delivering an unjust verdict.

III. CONCLUSION

The ultimate medical opinions rendered by all five medical witnesses in this case are clear and unequivocal – Vincent Scerri did not require any additional medical treatment as a result of his industrial injury.

That the jury returned a verdict so unabashedly contrary to the facts of the case has created a substantial injustice and subverted the intent of the Industrial Insurance Act.

Appellant respectfully renews the request that the jury verdict in this matter be set aside, and the matter be remanded to the Superior Court for a new trial.

RESPECTFULLY SUBMITTED this 12th day of August, 2019.

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CERTIFICATE OF SERVICE

I certify that I served, or caused to be served, a copy of the foregoing BRIEF OF APPELLANT on the 12th day of August, 2019, to the following at the following addresses:

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DATED this 12th day of August, 2019.



Robert Diamond
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