
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PEACEHEALTH,
Appellant,

v.

DULA KICIN,
Respondent.

Support for reversing the trial court's Judgment and Order and denying
Ms. Kicin's workers' compensation claim as not compensable under the
Industrial Insurance Act

APPELLANT'S OPENING BRIEF (EMPLOYER)

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INTRODUCTION

The Appellant (self-insured employer PeaceHealth) respectfully asks this Court to reverse the trial court's *Judgment and Order*, which was based on the verdict of a jury. That jury reached a decision wholly and completely different from the determination issued by the Department of Labor and Industries and, upon further appeal by Ms. Kicin, the Board of Industrial Insurance Appeals. The superior court's determination is not supported by substantial evidence and should be reversed.

ASSIGNMENT OF ERRORS

The self-insured employer, PeaceHealth, assigns error to the conclusion of the superior court that Ms. Kicin sustained an industrial injury during the course and scope of her employment with PeaceHealth.

STATEMENT OF THE CASE

This is an appeal brought under the Industrial Insurance Act, Washington's statutory framework related to workers' compensation claims. Ms. Kicin sought allowance of an alleged industrial injury claim. An injury is a sudden and tangible happening, producing an immediate result. RCW 51.08.100. The parties stipulated at trial on July 24, 2019 that the issue of an occupational disease would not be raised, and the superior court did not rule on that issue.

Medical timeline

For two years prior to this alleged injury, Ms. Kicin sought treatment with providers for left arm pain similar to what she felt after the alleged injury in December 2015. CABR 113:15-24. Ms. Kicin treated on June 20, 2014 and reported depression, epicondylitis, left arm pain, bicipital tendinitis. CABR 226:15-25. On November 4, 2014, she reported pain in her left arm, worsening every day with radiation into her neck. CABR 227:24 – 228:12.

On December 11, 2015, Ms. Kicin told her doctor that her left arm pain was worsening, and that it was worse at night. CABR 126:17 – 127:7. These symptoms are hallmarks of degenerative disc disease, which slowly and progressively worsen over time and with age. CABR 229:13-22. X-rays of the cervical spine taken on December 11, 2015 were interpreted to show arthritic or degenerative changes in her spine. CABR 224:22 – 225:8.

Ms. Kicin testified that she worked as a housekeeper for PeaceHealth for ten years. CABR 106:20-25. She reported an injury that took place on December 29, 2015. CABR 107:23-24. In describing the injury, she stated she was busy cleaning rooms, working quickly, when she felt a sharp pain in her neck and shoulder while mopping. CABR

108:1-13. After this alleged incident, she stated she took medication and continued working. CABR 110:20-24.

On January 13, 2016, Ms. Kicin treated with a doctor and reported left upper extremity weakness and pain since 2014. CABR 230:13 – 231:3. Ms. Kicin treated with a surgeon on February 15, 2016. CABR 115:10-12. Ms. Kicin told the surgeon about the two years of pain, but she testified that she did not tell him about the alleged injury. CABR 115:18-24. She underwent surgery on February 19, 2016. CABR 118:6-13.

Ms. Kicin then filed a claim for an industrial injury on March 7, 2016. CABR 119:22 – 120: 2. She underwent a second surgery on December 14, 2016. CABR 17-21.

Department of Labor and Industries: Actions and Orders

On March 7, 2016, Ms. Kicin filed an *Application for Benefits* alleging a December 29, 2015 injury to her back and neck. CABR 77. On June 30, 2016, the Department of Labor and Industries issued an order rejecting the claim. *Id.* The Department affirmed that decision by order dated December 12, 2016. *Id.*

Board of Industrial Insurance Appeals: Appeal and Decision

The Board held a hearing and considered expert witness medical testimony from both parties. On February 5, 2018, the Board issued its decision and concluded that: (1) Ms. Kicin did not sustain an industrial

injury within the meaning of RCW 51.08.100 on December 29, 2015; (2) Ms. Kicin's conditions were not an occupational disease within the meaning of RCW 51.08.140; and (3) the Department order dated December 12, 2016 was correct and affirmed. CABR 34 – 43.

Trial Court: Motions, Verdict, and Decisions

Ms. Kicin appealed to superior court on only the industrial injury theory. A six-person jury heard the case. On July 25 2019, the jury returned a verdict finding the Board of Industrial Insurance Appeals was not correct when it found that Ms. Kicin did not sustain an industrial injury on December 29, 2015. CP 187 – 188. The superior court ordered the Department of Labor and Industries accept the claim for the December 29, 2015 injury. CP 188.

ARGUMENT

Washington's Industrial Insurance Act, Title 51 RCW, governs judicial review of workers' compensation cases. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179, 210 P.3d 355 (2009). The superior court conducts a de novo review of the Board's decision, relying exclusively on the certified board record. RCW 51.52.115; *McCaulley v. Dep't of Labor & Indus.*, 5 Wn. App. 2d 304, 312, 424 P.3d 221 (2018). The Board's findings and decision are prima facie correct; the individual

challenging the decision has the burden of proof. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 727, 389 P.3d 504 (2017).

The Court of Appeals reviews the superior court's decision, not the Board's order. *City of Bellevue v. Raum*, 171 Wn. App. 124, 139, 286 P.3d 695, 703–04 (2012); RCW 51.52.140 (appeal shall lie from the trial court judgment). If the sufficiency of the evidence is challenged by a party, the Court reviews whether substantial evidence supports the superior court's factual findings and whether the superior court's conclusions of law flow from those findings. *Rogers*, 151 Wn. App. at 180.

Like the superior court, the Court of Appeals' 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, 86 P.3d 826 (2004). The Court of Appeals reviews the record in the light most favorable to the party who prevailed in superior court. *Rogers*, 151 Wn. App. at 180.

I. Substantial evidence does not support the superior court's factual findings.

The function of the Court of Appeals in workers' compensation appeals is to review the superior court decision for sufficient or substantial evidence. *Rogers*, 151 Wn. App. at 180. Substantial evidence is evidence that is sufficient to persuade a fair-minded, rational person that the

premise is true. *Jenkins v. Weyerhaeuser Co.*, 143 Wn.App. 246, 254, 177 P.3d 180 (2008). Further, while the Board of Industrial Appeals' decisions are not binding on the courts, it is appropriate for the Court of Appeals to consider the Board's interpretation of the workers compensation laws it is charged with enforcing, in addition to the relevant case law. *Id.* at 210.

Substantial evidence does not support the trial court's factual finding that Ms. Kicin's alleged workplace incident proximately caused or aggravated her cervical neck complaints. Whether a condition "is the result of injury or solely of a preexisting infirmity[] is normally a question of fact." *Jacobson v. Dep't of Labor & Indus.*, 37 Wn.2d 444, 448, 224 P.2d 338 (1950); *Brittain v. Dep't of Labor & Indus.*, 178 Wash. 499, 504, 35 P.2d 49.(1934). This question of fact turns on whether the claimant would experience the condition for which she seeks compensation under the Act even if she had not experienced the work place incident. *See Jenkins*, 143 Wn.App. at 254.

The testimony presented by the employer, PeaceHealth, in this matter could readily convince a fair-minded, rational individual that Ms. Kicin would experience the same progression of symptoms and need for treatment, even if she had not experienced the alleged December 29, 2015 accident, meaning that the accident did not proximately cause or aggravate her cervical conditions.

a. The preponderance of the evidence establishes that Ms. Kicin did not sustain an industrial injury within the meaning of RCW 51.08.100.

Pursuant to the Industrial Insurance Act, an injury is a “sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.” RCW 51.08.100. If an industrial injury causes a previously asymptomatic degenerative condition to become symptomatic, the industrial injury is said to have “lit up” the underlying degenerative condition. *Miller v. Dept. of Labor & Indus.*, 200 Wash 674, 683 (1939).

The convincing medical evidence in this record establishes that an industrial injury did not occur on or about December 29, 2015, which could have caused, aggravated, or “lit up” any preexisting degenerative condition. The preponderance of the convincing medical evidence also establishes that no injury occurred to cause the symptoms described by Ms. Kicin.

Board-certified orthopedic surgeon R. David Bauer, M.D. testified on behalf of the employer. Dr. Bauer maintained an active practice with a subspecialty in spine surgery. CABR 215:6-9. He performed a review of Ms. Kicin’s medical records and provided a report regarding that review. *Id.* at CABR 221:2-10. Dr. Bauer testified that when it comes to issues of causation, decisions are made on the history and the scientific facts and

not necessarily a physical examination. CABR 223:23-25. The doctor noted a history of pain in Ms. Kicin's left arm which pre-dated the December 29, 2015 alleged injury. CABR 224:22-25. On December 11, 2015, two weeks before the alleged injury, Ms. Kicin underwent x-rays of the cervical spine that were interpreted to reveal arthritic or degenerative changes in her cervical spine. CABR 225:1-8.

Dr. Bauer testified regarding additional evidence that demonstrates Ms. Kicin's cervical degenerative condition pre-dated December 29, 2015. She treated with a Dr. Salvadori on June 20, 2014. CABR 226:15-25. At that time, she reported left arm pain. *Id.* Left arm pain can result from the compression of nerves in the cervical spine caused by degenerative arthritis. CABR 227:4-13.

A year before the alleged injury, on November 4, 2014, Ms. Kicin reported pain in her left arm, worsening every day. CABR 228:7-12. On December 11, 2015, Dr. Mujcic treated Ms. Kicin for chronic left arm pain, worsening daily. CABR 228:19 – 229:7. Dr. Bauer testified this evidence showed the manifestation and progression of degenerative disease long before any work incident or activity. CABR 229:17-22.

Further, Ms. Kicin did not report a work injury to any medical provider until after she underwent surgery. On February 15, 2016, she treated with Dr. Le, who eventually performed surgery. CABR 231:20 –

232:6. She reported to Dr. Le a three-year history of neck pain with progressive weakness and numbness in the left arm over the previous eight months. *Id.* Dr. Bauer testified the worsening over that eight-month period was significant because it is consistent with an arthritic condition progressing over time. CABR 232:13-20.

Dr. Bauer diagnosed cervical spondylosis, an arthritic condition, with spontaneous development of myelopathy. CABR 233:20-25. He testified based on the history provided by Ms. Kicin in the records and the development of this disease, there was no evidence of any injury. CABR 234:12-16. Dr. Bauer specifically testified Ms. Kicin's work activities did not "light up" or aggravate any underlying condition in her neck. CABR 242:5-11.

Aleksandar Curcin, M.D. is also a board-certified orthopedic spine surgeon. CABR 263:13-25. Dr. Curcin performed an independent medical examination of Ms. Kicin on July 20, 2017. CABR 269:9-13. At the time of that examination, Ms. Kicin described lifting up her arm while holding a mop and development of pain and numbness. CABR 270 7-12. Dr. Curcin reviewed the records from Dr. Salvadori and Dr. Mujcic that predated this alleged injury. The doctor noted the documentation by Dr. Salvadori of left arm pain indicated Ms. Kicin was symptomatic starting as early as 2014. CABR 272:2-6. He also reviewed a November 4, 2014

chart note from a Dr. Tiganus. CABR 272s:13-24. In that record, Dr. Tiganus noted constant left arm pain, worsening over eight months. *Id.* This record also significantly predates December 29, 2015.

Dr. Curcin reached the same conclusion as Dr. Bauer: these records represent evidence of a cervical degenerative disease process with radiculopathy symptoms beginning at least two years prior to December 29, 2015. CABR 273:3-8. Dr. Curcin, like Dr. Bauer, also opined the December 11, 2015 treatment note from Dr. Mujcic further illustrates a history of chronic and worsening cervical degenerative disc disease. CABR 273:9 – 274:5. Dr. Curcin reviewed the February 15, 2016 chart note from Dr. Le, which documented a two year history of neck pain with progressive weakness and numbness. CABR 274:18 – 275:1. Dr. Curcin also noted that Dr. Le did not document any report of injury on or around December 29, 2015. CABR 275:12-16.

Dr. Curcin diagnosed a cervical disc herniation and multilevel degenerative disc disease, unrelated to the industrial claim. CABR 279:1-4. The doctor noted no activities related to Ms. Kicin's job that would cause or aggravate this medical condition. CABR 279:9-14. He testified that he saw no evidence of a discrete injury on December 29, 2015 that would cause or affect degenerative disc disease or a disc herniation. CABR 279:15 – 280:1. Dr. Curcin specifically noted the mechanism of

injury described by Ms. Kicin is inconsistent with causing or aggravating her degenerative disc disease or a disc herniation. CABR 280:2-5. He also noted the timeline presented in Ms. Kicin's treatment record clearly documented the presence of preexisting left upper extremity radicular symptoms. CABR 280:5-9. For these reasons, he specifically opined her work activities did not "light up" or make worse any symptoms or underlying condition related to the cervical degenerative disc disease. CABR 281:2-5.

A worker's description of events and subjective reporting of symptoms does not amount to objective proof when the medical record establishes otherwise. The reporting of symptoms, no matter how credible, does not in itself demonstrate an exposure nor does it provide a nexus between the symptoms and the workplace. *Potter v. Dep't of Labor & Indus.*, 172 Wash. App. 301, 315, 289 P.3d 727, 734 (2012) *review denied*, 177 Wash. 2d 1017, 304 P.3d 114 (2013). Further, there must be objective proof of the relationship between the employment and the disease. *Favor v. Department of Labor and Indus.*, 53 Wash.2d 689, 336 P.2d 382 (1959). Ms. Kicin failed to submit any objective proof.

The medical testimony Ms. Kicin did present is flawed. Dr. Thomas Gritzka's opinion relies heavily on the logical fallacy that because the symptoms followed the alleged exposure, they must be caused by it.

“Such reasoning is nothing more than speculation.” *See Potter* 172 Wash. App. at 314. This logical fallacy is also at work in Ms. Kicin’s arguments for claim allowance. Dr. Gritzka’s opinions thus carry little weight given his reliance on this fallacy despite substantial evidence otherwise. He is also a general orthopedic surgeon and not a spine specialist, compared to Dr. Curcin and Dr. Bauer. Dr. Curcin continued to regularly perform spine surgery as the primary focus of his practice as of the date of his testimony. CABR 282:6 – 18. Dr. Bauer performed surgery until July of 2017, and then continued to consult and treat with patients regarding orthopedic spinal conditions. CABR 219: 15 – 24.

The medical evidence in this record establishes no discrete injury within the meaning of the Industrial Insurance Act occurred on December 29, 2015 to cause, aggravate, or “light up” any preexisting conditions. In fact, the evidence conclusively demonstrates Ms. Kicin’s underlying degenerative process worsened over time and as a natural part of the aging process. There is no substantial evidence in this record for a fair-minded, rational person to find otherwise.

b. The entirety of the evidence establishes that Ms. Kicin's preexisting degenerative conditions were not caused or aggravated by her work activities on or about December 29, 2015.

Dr. Bauer testified the work activities Ms. Kicin performed are typical daily living activities for most people. CABR 236:25 – 237:28. The arthritic condition Ms. Kicin has is prevalent in the population. CABR 237:19-21. It is no more likely to occur because of the type of work Ms. Kicin did for the employer on December 29, 2015. CABR 237:21-24. Dr. Bauer further testified that Ms. Kicin's degenerative disease process would have continued to progress on the same timetable and necessitate surgery on that basis, regardless of her work with the employer. CABR 238:1-10. The number of years Ms. Kicin worked for the employer is irrelevant to this analysis, as her condition would have progressed with age regardless. CABR 254:4-9. Additionally, Ms. Kicin is not claiming she sustained an occupational disease. This case centers solely on the alleged December 29, 2015 date of injury.

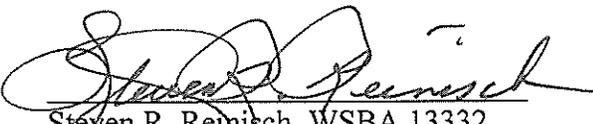
Dr. Curcin likewise testified Ms. Kicin's work activities did not cause her to develop these conditions. CABR 280:10-18. Dr. Curcin stated the cervical degenerative disease process would have continued to progress to the point it did even if she had never worked for the employer. CABR 280:19 – 281:1.

In sum, the medical testimony in this record clearly shows that no industrial injury occurred on December 29, 2015, except by Ms. Kicin's report, and her work activities on that day would not have resulted in her subsequent need for treatment.

CONCLUSION

The Appellant asks this Court to reverse the trial court's *Judgment and Order*. The superior court's determination is not supported by substantial evidence and should be reversed. The Appellant further seeks an order affirming the decision to deny this alleged industrial injury claim, as found by the Department of Labor and Industries and Board of Industrial Insurance Appeals.

Respectfully submitted,


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Dated this 31st day of January 2020.



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