
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 Decree and denying
Ms. Kicin's workers' compensation claim as not compensable under the
Industrial Insurance Act

APPELLANT'S (PEACEHEALTH) REPLY BRIEF

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INTRODUCTION

Appellant (hereinafter, “PeaceHealth”), by and through its counsel, Steven R. Reinisch of Reinisch Wilson Weier, P.C., submits this *Reply Brief*. PeaceHealth respectfully reaffirms its request and asks this Court to reverse the trial court’s *Judgment and Decree*, which was based on the jury verdict. 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.

ARGUMENT

The function of the Court of Appeals in workers’ compensation appeals is to review the superior court decision for sufficient or substantial evidence. *Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). 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). 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.

In examining the record, the Court of Appeals should find the substantial evidence does not support finding Ms. Kicin sustained an industrial injury for which she can recover workers' compensation benefits under Washington's Industrial Insurance Act, Title 51 RCW.

I. There was not substantial evidence to support the jury verdict.

Ms. Kicin's testimony, Ms. Zolota's testimony, and Dr. Gritzka's testimony does not establish Ms. Kicin sustained an industrial injury on December 29, 2015. The issue is whether Ms. Kicin provided substantial evidence by which a reasonable jury could sustain a verdict for Ms. Kicin. The answer is no.

A reasonable jury could not have sustained a verdict for Ms. Kicin, based on Ms. Kicin's evidence. Neither of Ms. Kicin's witnesses provided substantial evidence of an industrial injury or substantial evidence the industrial injury aggravated her preexisting cervical degenerative disc disease condition on a more probable than not basis. First, Ms. Kicin testified she did not file the claim close in time to the date of injury December 29, 2015 because she was afraid of losing her job; however, this fact was not substantiated by any evidence of disciplinary action or employer threats. RP (7/24/2019) at 87. Furthermore, Ms. Zolota's testimony did not add any corroborating evidence to this fact. RP (7/24/2019) at 103. In fact, she testified the employer representative

assisting with filing the claim was “so nice and kind.” RP (7/24/2019) at 105.

Ms. Kicin also relied on Dr. Gritzka to support her position there was a December 29, 2015 injury and the alleged injury aggravated her preexisting cervical degenerative disc disease condition on a more probable than not basis. Respondent’s Br. at 12. However, Dr. Gritzka was unable to opine whether there was an injury and he conceded there was medical probability either way because his medical opinion rested solely upon Ms. Kicin’s credibility—“Well, my opinion is based on the accuracy of her report of a specific event or change, so that's -- that's, of course, what it all boils down to here”—this is not medical probability. RP (7/24/2019) at 184.

Furthermore, Dr. Gritzka’s testimony on cross-examination and re-cross examination did not establish a legally sufficient evidentiary basis for a reasonable jury to have found for Ms. Kicin, construed in the light most favorable to her:

Q. So in Ms. Kicin’s case, if there was no alleged event on December 29 of 2015 but everything else was factored in, all of the history, the symptoms, the progression of symptoms, the kind of symptoms, it would be just as consistent with the picture of progressive degenerative disc disease over time leading to any further surgery and surgeries that were performed by Dr. Le, correct?

A. That’s right. RP (7/24/2019) at 183.

Dr. Gritzka conceded regardless of an injury, Ms. Kicin's condition would have naturally progressed leading to surgery. And, again:

A. I certainly agree that she has signs and symptoms prior to 12/29/15 and they were at least -- they were probably clinically significant. And they do correlate with intervertebral disc herniation at C4-5. Well, you know, the question in this situation I think is whether she was just simply --just a simple natural waxing and waning symptoms that occurred on 12/29/15 or whether there was really some provocative event. If there was a provocative event, then there is an aggravation. If there wasn't, probably not. RP (7/24/2019) at 184.

Dr. Gritzka undermined his own testimony because regardless of any alleged injury, he conceded there would have been symptoms—whether waxing and waning symptoms or aggravation symptoms—the only distinction resting upon Ms. Kicin's credibility. This testimony did not provide substantial evidence finding Ms. Kicin sustained an industrial injury aggravating her preexisting condition on a more probable than not basis. Rather, it reaffirmed the employer's position Ms. Kicin's preexisting condition was not aggravated by the alleged December 29, 2015 industrial injury based on her years of neck pain, years of bilateral arm pain, numbness and weakness progressing over a several month period of time leading up to the January 2016 MRI. RP (7/24/2019) at 182. In the absence of an alleged injury, Dr. Gritzka admitted Ms. Kicin's condition was consistent with a naturally progressing condition leading to surgery.

A careful examination of Dr. Gritzka's testimony reveals he had an inaccurate and incomplete medical history when he examined Ms. Kicin at the request of her attorney. This further clarifies Dr. Gritzka was under the impression there were no symptoms prior to the alleged December 29, 2015 injury and yet the record clearly reveals the contrary:

Q. In your report you said that while there was a preexisting degenerative condition of the neck, this condition was probably not symptomatic before December 29 of 2015, correct?

A. That's probably -- that's what I said, yes.

Q. And in fact you then went on in this report to conclude that in your opinion there was some connection between the condition that led to surgery and something that allegedly occurred on December 29 of 2015, correct?

A. That's what I concluded based on primarily her description.

Q. Now, in fact, when you put in your report there is not -- excuse me. Now, in fact, what you put in your report there is not accurate based on the statements you've made as I've questioned you. She, in fact, was symptomatic related to her degenerative cervical disc disease before December 29 of 2015, correct?

A. I probably should have modified that by saying -- by saying, not significantly symptomatic. But she was symptomatic. RP (7/24/2019) at 177-178.

It is clear Dr. Gritzka had already made up his mind regarding a causal relationship between the alleged December 29, 2015 injury and Ms. Kicin's condition in spite of the fact he relied on an inaccurate and incomplete medical history. This underscores a flawed analysis and

seriously calls into question the credibility of his subsequent medical opinion.

Dr. Gritzka's medical opinion was further undermined when he conceded Ms. Kicin's symptoms were so severe prior to the injury on December 29, 2015 that she required both cervical x-rays and an MRI. RP (7/24/2019) at 173. Dr. Gritzka also admitted Ms. Kicin exhibited classic signs of herniated or extruded discs in the cervical spine impacting the nerve root(s) prior to the alleged December 29, 2015 injury:

Q. In your practice, Doctor, when you were still performing surgery many years ago, if a patient came to you and reported neck pain, bilateral arm pain in a radiating fashion, weakness and numbness in the upper extremities, progressively worsening over an eight-month period of time before seeing you, you in some instances would have referred that patient for a cervical MRI, correct?

A. I'd get pretty excited about that, yes, I would.

Q. And one reason would be that based on your training and experience, all of the symptoms that I described can be classic signs that there's a disc or discs in the neck that are herniated or extruded to a degree that is impacting the cervical nerve root or nerve roots, true?

A. Yes. RP (7/24/2019) at 174-175

Dr. Gritzka also stated with medical probability the likelihood Ms. Kicin's extruded disc at C4-5 was present before the alleged December 29, 2015 injury based on Ms. Kicin's prior history and entire constellation of symptoms. RP (7/24/2019) at 174-176.

Ms. Kicin's evidence is not sufficient to convince a fair-minded, rational individual that she sustained a December 29, 2015 injury and would have only experienced the progression of symptoms and need for treatment due to the alleged December 29, 2015 injury. In fact, Dr. Gritzka's opinion further supported the medical opinions of Dr. Bauer and Dr. Curcin finding Ms. Kicin had a preexisting degenerative disc disease that progressed on its own unaffected by the alleged December 29, 2015 injury. Brief of Respondent at 12. Dr. Gritzka conceded he was not able to opine based on the medical evidence as to whether there was an industrial injury—this rested solely on Ms. Kicin's credibility. Additionally, Dr. Gritzka undermined his own testimony by agreeing it was just as probable Ms. Kicin's condition would have naturally progressed leading to surgery regardless of the alleged December 29, 2015 injury.

Dr. Gritzka's failure to opine as to the presence of an industrial injury and unwillingness to find a higher medical probability as to whether aggravation existed was not substantial evidence sufficient to persuade a fair-minded, rational jury to have found for Ms. Kicin, especially in light of the strong opinions by Dr. Bauer and Dr. Curcin. After reviewing the evidence in the light most favorable to Ms. Kicin, the Court of Appeals should determine the superior court incorrectly relied on the jury verdict and reverse the trial court's determination.

CONCLUSION

Appellant respectfully reaffirms its request and asks this Court to reverse the trial court's *Judgment and Decree*. The superior court's determination is not supported by substantial evidence and should be reversed. 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,

A handwritten signature in cursive script, reading "Steven R. Reinisch". The signature is fluid and includes a long, sweeping underline that extends to the left.

Steven R. Reinisch, WSBA 13332
Attorney for Appellant, PeaceHealth

REINISCH WILSON WEIER

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| |) | OF SERVICE |
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A handwritten signature in black ink, appearing to read "CRH".

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