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Division II
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NO. 54085-1-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

PEACEHEALTH, *APPELLANT,*

v.

DULA KICIN, *RESPONDENT.*

BRIEF OF RESPONDENT

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I. INTRODUCTION

The appellant, PeaceHealth, is appealing the Judgment and Decree of the trial court on the jury's verdict on an issue of fact as decided by the Board of Industrial Insurance Appeals. The issue is whether Dula Kicin was injured on December 29, 2015, working as a housekeeper for PeaceHealth Southwest Medical Center.

II. ASSIGNMENT OF ERROR

The trial court did not error in entering its Judgment and Order on the jury's verdict deciding that Dula Kicin did sustain an industrial injury on December 29, 2015.

Issue Pertaining to Assignment of Error:

Was there sufficient evidence to support the jury verdict?

III. STATEMENT OF THE CASE

Dula Kicin is a refugee from Bosnia, and speaks little English. She came to the United States in 1997, and had been employed by PeaceHealth Southwest Medical Center as a housekeeper since January of 2006. As a housekeeper, she cleans patient rooms, toilets, hallways and offices. At

hearing before the Board of Industrial Insurance Appeals, she testified through a Bosnian interpreter. CP 7, CABR, page 106, lines 13, 15, 17, 22 and 24; and page 107, lines 1 and 3.

Ms. Kicin injured herself at work on December 29, 2015. That day there was a shortage of housekeepers, patients had left many rooms, and those rooms had to be cleaned immediately because more patients were arriving. She had to move quickly, move all the beds, and clean everything. At about 2:30 p.m., Ms. Kicin was mopping a room quickly. As she twisted and stooped down, reaching under a bed with her mop, she felt a strong pain in her neck and shoulder that went down her left arm, and her fingers were tingling and numb. CP 7, CABR, page 107, lines 22 and 24; page 108, lines 1, 7, 15, 18 and 23; and page 111, line 3.

After the injury happened, Ms. Kicin went to the break room, took 2 ibuprofen, tried to relax, and went back to work. She did not tell anybody she was injured, because she was afraid she would lose her job. After work, Ms. Kicin felt she could not drive her car home, and asked her friend, Semira to drive her home. She told Semira what happened to her at work on the way home. Ms. Kicin returned to work following the injury, and continued to work, self medicating with ibuprofen and Voltaren, a medication from Bosnia. There were pills and creams, and she tried

everything she could until she could not take the pain anymore, and went to her primary care physician, who referred her to a neurosurgeon, Dr. Le, who performed surgery on February 19, 2016. Ms. Kicin had a fusion so she would not be paralyzed, and could still function. CP 7, CABR, page 110, line 21; page 111, lines 5, 17, 19, 21 and 25; page 113, line 11; page 115, lines 10 and 12; and page 118, lines 10 and 24.

Ms. Kicin filed the Self-Insurance Accident Report on March 7, 2016. Exhibit 1, CP 7, CABR, page 149. On that day Semira drove Ms. Kicin to PeaceHealth Southwest Medical Center and helped her file the claim. There they met Ms. Molton who gave them the Accident Report. Semira, who speaks English, had a device on her phone that they used for translation. Ms. Kicin told Semira how she was injured, and Semira translated, talking into the phone and then wrote down what happened. Ms. Kicin had told Dr. Le that she first had pain 2 years ago, that only hurt when she worked. She did not tell Dr. Le about the injury, and just told him the pain had gotten worse. Dr. Le asked her how she could even work. CP 7, CABR, page 115, line 19; page 120, lines 3 and 22; page 121, lines 1, 4, 17 and 24; and page 122, line 6.

Semira Zolota testified that she had been employed at PeaceHealth Southwest Medical Center for 12 years as a housekeeper. She met Dula

Kicin at work, and does not live far from her. When Ms. Kicin was injured, she called Semira and asked her if she could take her home. When she went out to Semira's car, Ms. Kicin was crying and told her she injured herself at work. Semira asked Ms. Kicin whether she filed an incident report, and she told her that she did not, because she was afraid she would lose her job if she did. Semira took her home, and then was having surgery herself, so was not in contact with Ms. Kicin for a while. CP 7, CABR, page 131, lines 21 and 23; page 132, lines 8 and 13; and page 134, line 19.

On March 7, 2016, Ms. Zolota went to visit Ms. Kicin at her home. Ms. Kicin was in pain and crying. Ms. Zolota asked her if she had filed a claim for injury. Ms. Kicin said she was so scared, and Ms. Zolota took her to Employee Health at PeaceHealth and helped her fill out the Accident Report, using her phone to translate for Ms. Kicin. CP 7, CABR, page 137, line 25; page 138, lines 6, 14 and 16.

Thomas Gritzka, MD, is a Board Certified orthopedic surgeon by training who practices occupational orthopedics, which is doing medical examinations for the Department of Labor and Industries, self-insured employers, and claimants. Dr. Gritzka also has a non-surgical direct patient care practice treating injured workers and others who often times have a complicated history. Dr. Gritzka evaluated Ms. Kicin at her attorney's

request, and testified before the Board of Industrial Insurance Appeals by deposition. CP 7, CABR, page 153, lines 14, 23 and 25; page 154, line 12; and page 163, line 3.

Ms. Kicin had an x-ray of her cervical spine on December 11, 2015, which was normal with some degenerative disc disease at C5-6 and C6-7. She then had an MRI (magnetic resonance imaging) on January 26, 2016, after the work injury of December 29, 2015, that showed a large central disc extrusion at C4-5, which was moderately to severely deforming the spinal cord. An extrusion means that there is a large piece of disc material protruding out into the spinal canal pressing on the spinal cord. CP 7, CABR, page 170, lines 1, 10 and 25; and page 171, line 13.

Dr. Gritzka was provided medical records for Ms. Kicin going back to 2014. Ms. Kicin had conservative treatment for left arm pain and left leg pain. The left arm pain had not been defined. The left leg pain had improved. Before December 29, 2015, Ms. Kicin had been prescribed medication for her left upper extremity. There was concern about a left shoulder problem, and Ms. Kicin had trigger point injections in the left upper back area. CP 7, CABR, page 173, lines 13 and 15; page 174, line 11; and page 175, line 2.

Dr. Gritzka had the treatment records of Dr. Le, who reported that Ms. Kicin had been having neck pain for 2 years, and over the last 8 months, she had developed progressive weakness and numbness of her left arm. She eventually developed right arm symptoms as well. Dr. Le recommended urgent medical treatment for cord compression and myelopathy, which means Ms. Kicin was having symptoms that correlated with spinal cord damage. On February 19, 2016, Dr. Le performed an anterior discectomy and fusion at C4-5 and C5-6. CP 7, CABR, page 172, lines 5, 21 and 23.

In Dr. Gritzka's opinion, Ms. Kicin had arm symptoms before December 29, 2015, which were likely some early signs of a neck problem developing. Dr. Gritzka attributed Ms. Kicin's symptoms on December 29, 2015, to an aggravation or worsening of her pre-existing condition that produced the injury that resulted in the need for surgery. Ms. Kicin had symptoms before which were consistent with a bulging disc that were converted to a more symptomatic condition in her case by mopping. Based on reasonable medical probability, the history that Ms. Kicin gave Dr. Gritzka was correct, and the December 29, 2015, injury caused an aggravation of her prior condition. CP 7, CABR, page 186, line 10; page 188, lines 1 and 22; and page 189, lines 3 and 18.

Dr. David Bauer, a Board Certified spine surgeon from Garland, Texas, conducted a records review at the request of PeaceHealth Southwest Medical Center and testified that Ms. Kicin's paracervical degenerative disc condition would have continued to progress and produce the symptoms resulting in the need for surgery, even if she had never been working at PeaceHealth. Dr. Bauer had no idea how long Ms. Kicin had been working for PeaceHealth. CP 7, CABR, page 214, line 7; page 221, line 5; page 238, line 7; and page 247, line 6.

Dr. Aleksandar Curcin, MD, also Board Certified spine surgeon from Coos Bay, Oregon, conducted a defense medical evaluation of Ms. Kicin. Dr. Curcin testified Ms. Kicin had a very hectic day performing housekeeping at PeaceHealth Southwest Medical Center. She lifted up her arm while holding a mop, and developed sharp pain in her neck and numbness involving her entire left upper extremity. Dr. Curcin then testified that he did not think that there were any activities related to her job that would have caused or aggravated her medical condition. CP 7, CABR, page 266, line 13; page 269, line 13; page 270, line 7; and page 279, line 11.

On appeal to the Board of Industrial Insurance Appeals was the Order and Notice of the Department of Labor and Industries dated

December 12, 2016, affirming the Order and Notice of the department dated June 30, 2016, denying Ms. Kicin's claim. CP 7, CABR, pages 86-89. An Industrial Appeals Judge following the evidentiary hearing, denied the claim as an industrial injury and occupational disease as an issue of fact. CP 7, CABR pages 34-44. Ms. Kicin through her attorney petitioned for review to the board on the issue of an industrial injury, PeaceHealth responded through their attorney, and the board on February 5, 2018, denied Ms. Kicin's Petition for Review. CP 7, CABR, pages 1-24.

Ms. Kicin then appealed to Superior Court for Clark County, requested a jury trial, and the case was tried before a jury on July 24 and 25, 2019. The jury rendered a verdict in favor of Ms. Kicin reversing the decisions of the board and department, and allowed the claim as an industrial injury occurring on December 29, 2015, while employed by PeaceHealth as a housekeeper. CP 33 and 37. PeaceHealth then appealed the Judgment and Decree to the Court of Appeals, Division II.

In consideration of the proposed instructions to the jury, the attorney for PeaceHealth conceded that Ms. Kicin's proposed instruction No. 11 which became the trial court's instruction No. 12, was a correct statement of the claim and took no exception to instruction No. 12. That instruction reads as follows:

> If you find that:
>
> (1) At the time of the industrial injury, Dula Kicin had a bodily condition that was symptomatic or disabling; and
>
> (2) Because of the industrial injury the pre-existing condition was made worse;
>
> then Dula Kicin is eligible for benefits for her need for treatment even though Dula Kicin's need for treatment may be greater than it would have been for a person in the same circumstances without that pre-existing condition.
>
> A worker may not be eligible for benefits, however, for any treatment that resulted from the natural progression of the pre-existing condition independent of this industrial injury.

Instruction No. 12 was also proposed by PeaceHealth as instruction No. 14, and their attorney agreed that this instruction should be given rather than their proposed instruction No. 13, which is a lighting up instruction. The difference is that Ms. Kicin had an active pre-existing condition, rather than a quiescent pre-existing condition. RP, page 269, line 22.

IV. SUMMARY OF ARGUMENT

Dula Kicin met her burden of proof by a preponderance of the evidence that she sustained an industrial injury on December 29, 2015,

while employed as a housekeeper for PeaceHealth Southwest Medical Center.

V. ARGUMENT

When an appeal is taken from a superior court judgment on judicial review of a decision by the Board of Industrial Insurance Appeals, under RCW 51.52.140 the appellate court reviews the superior court judgment as it does in other civil cases. The appellate court examines the record to see whether there is substantial evidence to support the verdict. *Labor & Indus., v. Rowley,* 185 Wn. App. 154, 160, 340 P.3d 929 (2014). Under RCW 51.52.115, a decision of the board is presumed to be *prima face* correct for purposes of judicial review. The burden of proof is on the party challenging the decision to show that decision is incorrect. The trier of fact, be it the court or a jury, is at liberty to disregard the board's findings and decision if, notwithstanding the presence of substantial evidence, the trier of fact is of the opinion that other substantial evidence is more persuasive. *City of Bellevue v. Raum,* 171 Wn. App. 124, 139, 286 P.3d 695 (2012).

More extensive appellate review of facts found in superior court abridges the jury trial right provided in RCW 51.52.115. The appellate court's function is to review for sufficient or substantiated evidence taking the record in the light most favorable to the party who prevailed in superior court. The

appellate court is not to reweigh or balance the competing testimony and inferences, or apply a new burden of persuasion, and doing so would abridge the right to a trial by jury. *Rogers v. Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009).

PeaceHealth agreed that the courts instruction to the jury No. 12 was a correct statement of the law. Instruction No. 12 reads that if at the time of the industrial injury Ms. Kicin had a bodily condition that was symptomatic or disabling, and because of the industrial injury the pre-existing condition was made worse, Ms. Kicin is eligible for benefits. CP, page 31. Instruction No. 12 is a Washington Pattern Instruction, WPI 155.21. A jury instruction to which no exception is taken becomes the law of the case *Hudson v. United Parcel Service, Inc.*, 163 Wn. App. 254, 269, 258 P.3d 87 (2011).

Thomas Gritzka, MD, a board certified orthopedic surgeon, testified that Ms. Kicin had a major intervertebral disc herniation, described as an extrusion, mostly going to the central right, which compressed on the spinal cord. She had arm symptoms before the acute onset on December 29, 2015, which were likely signs of an early problem developing. Dr. Gritzka attributed Ms. Kicin's symptoms on December 29, 2015, to an aggravation or worsening of a pre-existing condition. She had symptoms before which were consistent with a bulging disc that can be converted to a more symptomatic condition

that produced the injury that resulted in the need for surgery. She had some symptoms before which were consistent with a bulging disc that can be converted to a more symptomatic condition, in her case by mopping. Based on reasonable medical probability, the history that she gave Dr. Gritzka was correct, and the December 29, 2015, injury caused an aggravation of the prior condition. CP 7, CABR, page 186, line 18; page 188, lines 1 and 22; and page 189, lines 3 and 18.

In addition, Dr. Gritzka testified that Ms. Kicin acknowledged that she had prior upper extremity symptoms, but the significant features of the history was that she had a sudden change in her symptoms with increasing neck pain and more arm pain which was associated with her work activity on December 29, 2015. The work activity on December 29, 2015, that Ms. Kicin describes probably caused a sudden worsening or enlargement of an evolving disc herniation. CP 7, CABR, page 189, line 23; and page 190, line 22.

Both Dr. Bauer and Dr. Curcin were convinced that Ms. Kicin had a pre-existing degenerative disc disease that progressed on its own unaffected by an injury on December 29, 2015. The appellate court's review is limited to examination of the record to see whether substantial or sufficient testimony supports the verdict, and a more extensive appellate review of the facts abridges the right to a jury trial embodied in RCW 51.52.115. The appellate

court does not reweigh or rebalance the competing testimony and inferences. *Rogers v. Labor & Indus.*, 151 Wn. App., at pages 180-181.

VI. CONCLUSION

The Court of Appeals should affirm the Judgment and Decree of the trial court on the jury's verdict.

VII. ATTORNEYS FEES

Pursuant to RCW 51.52.130, if the respondent, Dula Kicin, prevails in this appeal, she is entitled to an award of reasonable attorney fees. *Hudson v. United Parcel Services,* 163 Wn. App. At page 270.

Dated: February 27, 2020.

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WASHINGTON STATE COURT OF APPEALS

DIVISION II

PEACEHEALTH, Appellant, v. DULA KICIN, Respondent.	)))))))))	No. 54085-1-II PROOF OF SERVICE

I certify that on Thursday, the 27th day of February, 2020, I served a copy of the Brief of Respondent, dated February 27, 2020, by E-mail via Washington State Appellate Courts' Portal:

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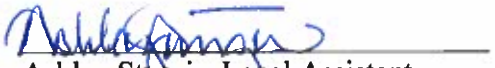
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

Dated: February 27, 2020.



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