

**FILED**

**AUG 05 2011**

No. 289371

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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JORGE CANTU,

Respondent.

v.

DEPARTMENT OF LABOR AND INDUSTRIES AND  
WESTFARM FOODS,

Appellants,

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SUPPLEMENTAL BRIEF OF APPELLANT

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**A. INTRODUCTION**

Questions were raised concerning whether the Board of Industrial Insurance Appeals Findings should be treated as a verity to a party that was not aggrieved by the decision and order of the Board. Questions were also raised concerning what standard of proof was required concerning the Claimant's psychiatric condition in an aggravation case.

**B. ARGUMENT**

**1. THE TRIAL COURT INCORRECTLY TREATED THE BOARD'S FINDING OF FACT NUMBER FOUR AS A VERITY**

Findings of fact made by the Board of Industrial Insurance Appeals are not verities in Superior Court as against a party not "aggrieved" by the Board's decision. RCW 51.52.110 provides that within thirty days after the Board's final decision is communicated:

...such worker, beneficiary, employer or other person **aggrieved by the decision and order of the board** may appeal to the superior court. If **such worker**, beneficiary, employer, or other person fails to file with the superior court its appeal... the final decision and order of the board shall become final.

RCW 51.52.110 (emphasis added). This statute only applies to persons "aggrieved" by the Board's decision. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn.App. 657, 665, 879 P.3d 326 (1994); *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 117 P.3d 385 (2005). In fact, the Court in *Hanquet*, noting that Mr. Hanquet was not an "aggrieved party," stated

“Indeed, it is unclear whether Hanquet would have been entitled to appeal, since RCW 51.52.110 addresses the right of a ‘worker, beneficiary, employer or other **person aggrieved**, to appeal a decision of the Board.” *Id.* at 664-665. Because the statute only addresses the effect of a failure to appeal on a party aggrieved by the Board’s decision, it follows that findings would not ‘become final’ with respect to a party not aggrieved by that decision.

Furthermore, the rule that unchallenged agency findings are verities on appeal arises from provisions of the Administrative Procedure Act in chapter 34.05 RCW. *Gallo v. Dep't of Labor & Indus.*, 119 Wn. App. 49, 54, 81 P.3d 869 (2003) *aff'd*, 155 Wn. 2d 470, 120 P.3d 564 (2005). However, the Administrative Procedure Act does not apply to Superior Court appeals from the Board because the Industrial Insurance Act specifically provides for de novo review in Superior Court in RCW 51.52.115. See RCW 34.05.510(3). Instead, appeals from the Board to Superior Court are governed by the provisions of RCW 51.52.110, a provision which applies only to “person[s] aggrieved by the decision and order of the board.” RCW 51.52.110. Given that RCW 51.52.110 provides a party that was **not** aggrieved by a Board decision with no means of contesting those findings on appeal to Superior Court, it would be incongruous to conclude that those unchallenged findings must be treated as verities by the Superior Court to a non-aggrieved party.

In our case, as the record clearly reflects, the Superior Court Judge treated the Board's Finding of Fact No. 4 as a verity. Court's Decision, CP, 24, l. 8-9; CP 25, l. 12-14 & l. 16-18. It is evident that the trial court judge would likely have affirmed the Board had he not treated this Finding as a verity when he states "My analysis of the testimony may very well have been different had it not been for the undisputed finding that Mr. Cantu had been experiencing low back pain as of the date his claim closed." CP, 25, l. 16-18. "I must assume [Cantu] was experiencing low back pain, because that is what the Board found." *Id.* at l. 20-21. The Appellant urges this Court to review the Court's Decision (CP 23-27) to view the fallacies in the trial court's logic and legal analysis. It is also notable the trial court ignored the Board's Finding of Fact No. 5 which found that the Claimant's low back pain was neither caused nor aggravated by his industrial injury.

By ignoring the Board's Finding of Fact No. 5 and applying the wrong legal standard to Finding of Fact No. 4, the court erred. Had it not done so, the Board's decision would have been affirmed.

**2. Price v. Dep't of Labor & Indus.**

During oral argument, counsel for Respondent pointed out that in an "aggravation" case, the typical rule/standard requiring "objective" evidence of worsening did not apply to psychiatric conditions. *Price v.*

*Dep't. of Labor & Indus.*, 101 Wn.2d. 620, 682 P.2d 307 (1984). The Court in *Price* stated that given psychiatric symptoms are necessarily subjective, evidence of worsening could be based solely on subjective complaints rather than being based, at least in part, on objective medical findings. *Id.*

The Appellant incorporates by reference its discussion of the legal standard in aggravation cases. Appellant's Brief, Sec. D. 3, pp. 29 et. seq. The Board record has **no expert testimony** that established any of the Claimant's physical conditions "objectively worsened." During oral argument, Respondent's counsel could not point to any place in the Board record where the requisite expert testimony could be found to legally establish worsening of the physical conditions. A worker seeking to reopen a closed claim for additional benefits "must provide a medical opinion that reflected an actual comparison to the baseline condition at the time of the first terminal date, that is based, at least in part, on objective medical findings." *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 661 (2009). Accordingly, the Court's Decision finding worsening of the Claimant's physical conditions is error as a matter of law.

Likewise, while the psychiatric assessments contained no "objective" findings, there also was **no comparative evidence** presented between the original closing date and the date the Department denied

reopening to establish worsening. However, even had there been comparative evidence, the evidence failed to meet the proximate cause standard concerning the Claimant's low back condition. The Claimant's expert testified that the psychiatric condition was related to the Claimant's low back complaints. However, if the Claimant's low back complaints between September 6, 2005 and March 1, 2006 were either unrelated to the industrial injury (as the Board found, F of Fact No. 5) or had not objectively worsened, the psychiatric condition would necessarily not be covered because the proximate cause of the psychiatric condition would not have the requisite causal nexus.

The trial court erred as a matter of law in finding the Claimant's low back and peroneal nerve palsy objectively worsened between September 6, 2005 and March 1, 2006. Court's Decision, CP, p. 27. For this reason alone this Court must reverse the trial court. Additionally, the court erred in attributing the Claimant's psychiatric condition to the alleged worsened low back and peroneal nerve conditions. If the physical conditions were unrelated or not objectively worse, as a matter of law there can be no proximate cause nexus of the psychiatric complaints.

**C. CONCLUSION**

The trial court erred as a matter of law by applying the wrong legal standard in its review of the Board decision. The trial court also erred as a matter of law in finding "aggravation" considering there was no testimony comparing the physical conditions on September 6, 2005, the date of claim closure, and March 1, 2006, the date the Department denied reopening.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of August, 2011.

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