

FILED

OCT 04 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289371

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

JORGE CANTU,

Respondent.

v.

DEPARTMENT OF LABOR AND INDUSTRIES AND
WESTFARM FOODS,

Appellants,

APPELLANT'S BRIEF

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APPENDIX B – COURT’S DECISION

A. ASSIGNMENTS OF ERROR

1. The trial court erroneously reversed, by decision dated December 15, 2009, the decision of the Board of Industrial Insurance Appeals dated November 19, 2007, affirming the March 1, 2006 order of the Department of Labor and Industries which affirmed its February 6, 2006 order, denying Cantu's Application to Reopen and determining WestFarm Foods was not responsible for Cantu's low back condition.

2. The trial court erroneously based its determination on the fact that Mr. Cantu was experiencing low back pain as of the date his claim was closed.

3. The trial court erroneously afforded greater weight to the testimony of Dr. Williams over Dr. Robinson.

4. The trial court's Finding of Fact No. 2 is unsupported by the record in that the record does not establish that Cantu's condition proximately caused by his September 17, 2004 industrial injury, objectively worsened and became aggravated between September 6, 2005 and March 1, 2006.

5. The trial court's Finding of Fact No. 3 is unsupported by the record in that the record does not establish that Cantu developed and suffers from a depressive disorder and a pain disorder with psychological

factors and general medical condition proximately related to his September 17, 2004 industrial injury.

6. The trial court's Finding of Fact No. 4 is unsupported by the record in that the record does not establish that as of March 1, 2006, Mr. Cantu was in need of proper and necessary medical treatment proximately related to the September 17, 2004 industrial injury.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A preponderance of expert medical testimony, stated on a more probable than not basis and based on objective medical findings of an industrially-related condition, is required to establish proximate cause between an event and a condition or symptoms as well as entitlement to reopening due to aggravation of a condition. That preponderance is not present in this record, the Board decision is supported by substantial expert medical evidence and should be presumed correct, and the Board's and Department's decisions, which denied Cantu's Application to Reopen and determined WestFarm was not responsible for a low back condition, should be reinstated. Although the Court's memorandum decision cites the law regarding the presumption of correctness of the Board's decision absent substantial evidence to the contrary, it is clear that this is not the standard the Court applied. (Assignment of Error 1, 4-6).

2. The evidence established that as of the date of claim closure, Cantu was not experiencing, nor had he experienced, low back pain. In the alternative, if he were experiencing low back pain at that time, it differed in character and degree from that of which he later complained. (Assignment of Error 2).

3. The record supports that Dr. Robinson's opinion was based on substantiated factors thereby providing a stronger basis for his opinion than did Dr. Williams; therefore Dr. Robinson's opinion should have been accorded greater weight. (Assignment of Error 3).

C. STATEMENT OF THE CASE

This case arises under RCW Title 51, the Industrial Insurance Act and involves Self-insured Employer WestFarm Foods' (Employer) appeal from the December 15, 2009 trial court decision following the December 9, 2009 bench trial¹. CP, 23-27. The trial court determined that Cantu's condition, proximately related to the September 17, 2004 industrial injury objectively worsened and became aggravated between September 6, 2005 and March 1, 2006; that Cantu developed and suffered from a depressive disorder and a pain disorder with both psychological factors and general medical condition proximately related to his September 17, 2004 industrial injury; and that as of March 1, 2006, Cantu was in need of proper and

¹ The trial court's Findings of Fact and Conclusions of Law, CP 9-13, and the Court's Decision, CP 23-27, are attached as Appendices A and B, respectively.

necessary medical treatment proximately related to the September 17, 2004 industrial injury. CP, 18-19.² The trial court reversed the November 19, 2007 Decision and Order, issued by the Board of Industrial Insurance Appeals which, after a thorough evaluation of the evidence and applicable law, determined that Cantu's low back pain, left leg numbness and pain, and peroneal nerve palsy were not due to an industrial injury within the meaning of RCW 51.08.100 nor were they occupational diseases within the meaning of RCW 51.08.140; that during the period from September 6, 2005, through March 1, 2006, Cantu did not develop, or suffer from, any mental health or psychiatric condition proximately caused or aggravated by the industrial injury or its sequelae; and that during the period from September 6, 2005, through March 1, 2006, Cantu's condition, proximately caused by the September 17, 2004 industrial injury, did not objectively worsen within the meaning of RCW 51.32.160. BR, 2-5.

This case concerns whether Cantu's condition proximately caused by the industrial injury of September 17, 2004 objectively worsened between September 6, 2005 and March 1, 2006, and whether the

² Pursuant to the Designation of Clerk's Papers, the Certified Appeal Board record was transmitted under separate cover and was not re-page numbered. Therefore, the Employer cites directly to the Certified Appeal Board Record. All references to the Certified Appeal Board Record are to "BR" and the stamped page numbers in the lower right corner. All references to the testimony contained in the Certified Appeal Board Record are to the page numbers of the perpetuation deposition or hearing testimony of each source. The Superior Court Clerk's Papers are designated as "CP." The Verbatim Reports of Proceedings are designated as "RP."

conditions that allegedly developed subsequent to the September 17, 2004 industrial injury were proximately caused by such injury. Physical medicine and rehabilitation specialist Jean You, M.D., chiropractor W. Duane Harrington, D.C., both of whom treated Cantu, psychiatrist C. Donald Williams, M.D., psychiatrist Douglas P. Robinson, M.D., orthopedic surgeon E. Pepper Toomey, M.D, and orthopedic surgeon Brent Bingham, D.O, provided expert testimony in this case. A preponderance of the medical opinions established that Cantu's low back condition is unrelated to the industrial injury. The testimony of Dr. Robinson, concerning any potential mental health condition, was more compelling and convincing than the testimony of Dr. Williams, establishing that any such condition was not caused or aggravated by the industrial injury.

On September 17, 2004, Cantu injured his knee at work when he slipped and fell forward while his knee went backwards. BR, 3. This injury became the subject of this claim, which was allowed and eventually closed on September 6, 2005, with a permanent partial disability award of ten percent of the amputation value of the left leg above knee joint with short thigh stump. In December of 2005, Cantu filed an Application to Reopen his claim, which the Department denied on March 1, 2006. The Department further indicated that the self-insured employer was not

responsible for Cantu's low back condition listed on his Application to Reopen.

Cantu testified that at the time the claim closed on September 6, 2005, he did not have any significant back problems nor did he have significant mental health or emotional problems. Cantu, 9. Further, according to Cantu, there did not come a time when he felt he had back problems sufficient enough that he needed to see a doctor. Cantu, 9-10. Even while this claim was open, Cantu never had any significant back problems. Cantu, 12.

On September 26, 2005, Cantu met with his supervisor and a union representative to discuss work performance issues. Cantu, 19. At this meeting, Cantu told those in attendance that he was having back problems that had begun two weeks prior and that, while he was not sure what caused the problem, it was not work related. Cantu, 24-25. At his initial visit with Dr. Harrington on September 27, 2005, Cantu told Dr. Harrington that his back pain had begun a week prior with yard work. Cantu, 25-26. However, in his September 26, 2006 deposition, Cantu stated that the pain he was experiencing had been present since his September 17, 2004 knee injury. Cantu, 27.

W. Duane Harrington, D.C., first saw Cantu on September 27, 2005, and was still seeing him as of March 1, 2007. Dep. of Harrington,

10. Again, at the initial visit, Cantu complained of low back pain resulting from bending he had done a week prior while doing yard work. Dep. of Harrington, 11-12; 25-26. At that time Cantu did not inform Dr. Harrington of the September 17, 2004 industrial injury. Dep. of Harrington, 11-12; 25-26. It was only after learning of the industrial injury months later that Dr. Harrington diagnosed Cantu with cervical, thoracic, lumbar and left sacroiliac subluxation “directly related to the biomechanical instability created by [Cantu’s] knee dysfunction” related to his initial industrial injury. Dep. of Harrington, 17.

According to Dr. Harrington, for the first couple of months he was treating Cantu he believed his low back condition was the result of an incident involving yard work. Dep. of Harrington, 41. He further testified that bending and working in the yard can create the symptoms with which Cantu presented. Dep. of Harrington, 42. Even though Dr. Harrington had been aware from the outset that Cantu had had knee surgery, it was not until November 30, 2005, that he first noted Cantu reporting that his subjective complaints were possibly linked to his left knee surgery. Dep. of Harrington, 35-36. On December 14, 2005, Dr. Harrington completed an application to reopen Cantu’s claim. Dep. of Harrington, 18.

On March 9, 2006 (the date closest to the March 1, 2006 Department Order denying reopening the claim) Dr. Harrington evaluated

Cantu's spinal range of motion; however he made no notation comparing how the Plaintiff was on March 9, 2006, relative to September 27, 2005. Dep. of Harrington, 29-30. According to Dr. Harrington, he was unable to say what the comparison was between March 9, 2006, and September 27, 2005, and whether Cantu's condition had improved or worsened. Dep. of Harrington, 30.

On April 13, 2006, Jean You, M.D. first saw Cantu, at which time he presented with chronic pain, left lower back and left leg pain. Dep. of You, 7-9. On physical examination, Dr. You discovered that Cantu had a limp and that he had a little difficulty with his mobility. Dep. of You, 9. Based on simple observations, Dr. You noted Cantu presented with normal mood and affect. Dep. of You, 10. Dr. You eventually diagnosed Cantu with left peroneal entrapment due to the knee injury. Dep. of You, 12.

Based on the information she had, Dr. You could not arrive at a diagnosis for Cantu's back condition so she ordered a lumbar spine CT scan. Dep. of You, 12. According to Dr. You, the CT scan was unremarkable, revealing no organic cause for Cantu's back problems. Dep. of You, 13-14. Dr. You testified that since she did not see Cantu before his claim was closed she was unable to make the necessary comparisons to determine whether or not his condition worsened between September 6, 2005 and March 1, 2006. Dep. of You, 15. Dr. You opined

that Cantu did not have organic back problems, and that any back problems he did have were not related to his knee problems. Dep. of You, 18. Dr. You testified that in the time she had treated Cantu, since April 2006, his condition had not improved nor worsened and “pretty much is the same.” Dep. of You, 27.

Dr. You testified that Cantu underwent two EMGs, one in her office and one with Dr. Cancado. Dep. of You, 29. Dr. You disagreed with Dr. Cancado’s finding of left S1 radiculopathy because it was not substantiated by clinical findings. Dep. of You, 29-30. Dr. You testified that the November 9, 2005 left peroneal nerve EMG, conducted by Dr. Cancado, was normal. Dep. of You, 30. She testified that her left peroneal nerve EMG, conducted April 27, 2006, was also normal except for mildly abnormal muscle electrical activity. Dep. of You, 30-31. According to Dr. You, out of a series of tests performed on April 27, 2006, the only exception to normal findings was the abnormal muscle electrical activity on the EMG. Dep. of You, 31.

Dr. You’s opinion, that the mild left peroneal nerve findings on the EMG were due to Cantu’s industrial injury, was based on Cantu’s statements that he did not have knee or leg problems prior to his industrial injury. Dep. of You, 32-33. Dr. You did not have Cantu’s surgical records. The records she had from Dr. Cancado, from prior to September

17, 2004, were very limited. Dep. of You, 33. Dr. You testified that while Cantu's peroneal nerve problem was the result of an injury she could not say what injury was the cause. She just had to believe what Cantu told her. Dep. of You, 33-34. According to Dr. You, Cantu did not tell her about any other injury. Dep. of You, 34.

On September 5, 2006, at the request of Cantu's attorney made after the claim was in litigation, C. Donald Williams, M.D., saw Cantu for an independent psychiatric evaluation. Dep. of Williams, 15, 55. Dr. Williams testified that with regard to workers' compensation evaluations, he does them "essentially specifically for plaintiff's attorneys." Dep. of Williams, 68.

According to Dr. Williams, Cantu reported that he had become depressed and had thoughts of suicide. Dep. of Williams, 19. Dr. Williams diagnosed Cantu with major depressive disorder, single episode, severe, with psychotic features and pain disorder associated with both psychological factors and a general medical condition. Dep. of Williams, 36-37. Dr. Williams opined that Cantu's conditions were causally related to his industrial injury. Dep. of Williams, 38-39.

Dr. Williams refused to take into account information regarding non-clinical observations. Dep. of Williams, 57. One such observation, noted in Cantu's physical therapy records, involved someone from the

physical therapist's office observing Cantu on December 8, 2004, at a mall. This person observed Cantu walking at an "accelerated speed compared to his clinical slight limping," not using a cane, and with no physical expression of pain or discomfort. Dep. of Williams, 57-58. When asked to assume the accuracy of such information, Dr. Williams testified that it would be of interest to him in part because it would have been inconsistent with Cantu's presentation in the physical therapy clinic. Dep. of Williams, 59-60. According to Dr. Williams, this information would indicate that Cantu was emphasizing or exaggerating his degree of dysfunction or physical disability when in front of health care providers. Dep. of Williams, 60.

Dr. Williams testified that malingering involves the premeditated conscious production of symptoms for the purpose of avoiding punishment or the achievement of financial gain undertaken for fraudulent purposes. Dep. of Williams, 61. According to Dr. Williams, in cases such as this, where benefits are on the line, malingering occurs more frequently in the general public. Dep. of Williams, 62. Dr. Williams opined that a person can have a real injury and still malingering in the sense that they do not want to return to work or want benefits over and above those to which they are entitled. Dep. of Williams, 64. Cantu reported to Dr. Williams that Dr. Bingham had released him to full duty work but that he wanted to

be referred to another healthcare provider. Dep. of Williams, 21. Cantu further complained to Dr. Williams that he had undergone an IME, after requesting a second opinion, and that the IME physician refused to correctly report his history or make the changes he demanded. Dep. of Williams, 21.

Brent Bingham, D.O., first saw Cantu on October 4, 2004, on referral for a left knee evaluation. Dep. of Bingham, 6. As part of his surgical history, Cantu informed Dr. Bingham that in 1989 he had suffered a knife wound to his left thigh. Dep. of Bingham, 6. Dr. Bingham testified that Cantu did not have any complaints concerning his back. Further, Dr. Bingham opined that Cantu was slow to recover after his knee surgery in that he progressed slower than Dr. Bingham would have thought and that he was “a little difficult to get back to work, for whatever reason.” Dep. of Bingham, 9, 19. As of the last time Dr. Bingham saw him on May 26, 2005, Cantu had never complained of back problems. Dep. of Bingham, 15-16.

Dr. Bingham opined that he did not believe the knee surgeries resulted in mild left peroneal nerve palsy because at no time during follow-up care did Cantu have any complaints indicative of a nerve problem. Dep. of Bingham, 17. Dr. Bingham further opined that it was

extremely unlikely that a mild limp would be the cause of Cantu's back pain. Dep. of Bingham, 18.

When asked to assume that Cantu was observed in December of 2004 walking without difficulty, Dr. Bingham testified that this would have been inconsistent with what Cantu said and demonstrated in his office. Dep. of Bingham, 20. Based on the assumption that Cantu suffered a knife injury to his left thigh in 1989 and that he had been treating with a chiropractor since September 27, 2005, for back complaints, Dr. Bingham opined that it was extremely unlikely that Cantu's industrial injury was causing his back pain. Dep. of Bingham, 20-21.

On June 4, 2005, Cantu underwent an IME with Eugene Pepper Toomey, M.D. Dep. of Toomey, 8. According to Dr. Toomey, with regard to Cantu's past medical history, the left thigh stab wound from 1989 was of particular significance because Cantu's complaints were of numbness over the lateral side of his leg. Dep. of Toomey, 14. Dr. Toomey opined that a wound of the type described by Cantu could easily have cut a portion of one of his nerves which would be enough to cause the seemingly mild peroneal neuropathy and toe numbness of which Cantu complained. Dep. of Toomey, 15. Dr. Toomey further opined that he was

“a little concerned” that such conditions were a direct result of the stab wound. Dep. of Toomey, 15.

Based on his physical examination, Dr. Toomey opined that the muscles that would be “innervated” by the peroneal nerve were not affected, as far as muscle function was concerned, because there was no evidence of weakness or atrophy in these muscles. Dep. of Toomey, 16. Dr. Toomey opined that if there was any peroneal neuropathy it would have been “purely a sensory thing and not a motor thing.” Dep. of Toomey, 16-17. He testified that while Cantu had a limp favoring his left side, he could heel-toe walk which a person with a significant peroneal nerve injury is unable to perform. Dep. of Toomey, 17.

According to Dr. Toomey, Cantu’s current complaints showed “No history of back injury or problem.” Dep. of Toomey, 19. Dr. Toomey was certain he asked Cantu about back pain because a patient’s complaints of leg numbness raise the question of back pain. In his report, Dr. Toomey noted a lack of back injury or problem. Dep. of Toomey, 19.

Dr. Toomey opined that Cantu’s left mild peroneal nerve findings on the EMG by Dr. You did not result from his industrial injury. Dep. of Toomey, 20-21. Dr. Toomey testified that a permanent nerve injury is caused by a severe stretch of the nerve, loss of blood supply to the nerve, or a direct laceration to the nerve. Dep. of Toomey, 22. He opined that

none of these things occurred with Cantu's industrial injury. Dep. of Toomey, 22.

Dr. Toomey further opined that Cantu's complaints of low-back pain and pain on his left side were not the result of his industrial injury because Cantu did not complain of back pain when he evaluated him, which was six-months after the injury, and Dr. Harrington's initial evaluation noted an onset of back pain with yard work. Dep. of Toomey, 23-24. Dr. Toomey opined that Cantu's back complaints did not result from his limp because there is no correlation between a limp and developing back pain. Dep. of Toomey, 23-25. According to Dr. Toomey, the chiropractic records showing treatments for Cantu's back did not indicate a worsening attributable to the industrial injury. Dep. of Toomey, 25-26.

On November 10, 2006, Douglas P. Robinson, M.D., evaluated Cantu. Dep. of Robinson, 9. Dr. Robinson testified that about half of his work is doing Independent Medical Examinations, and that of that about ten percent of them are referrals from plaintiff's attorneys. Dep. of Robinson, 39-40. Cantu reported to Dr. Robinson that his emotional problems began around December of 2005 and that he attributed them to being in pain and having self-doubt. Dep. of Robinson, 15. Dr. Robinson performed a mental-status examination, which he stated is intended to

provide objective information obtained through observation of how a person behaves, their mood, speech and thought patterns. Dep. of Robinson, 18.

According to Dr. Robinson, Cantu exhibited much pain behavior, including squinting, which he appeared to use as a means of communicating that he was in pain. Dep. of Robinson, 19. Dr. Robinson testified that Cantu was intensely focused on physical complaints and problems, to the point that he would bring them up to the exclusion of other information. Dep. of Robinson, 19. Dr. Robinson did not observe a depressed mood. Dep. of Robinson, 19.

According to Dr. Robinson, Cantu's discussion of hearing voices differed from what he has seen in others with hallucinations. Dep. of Robinson, 20. Dr. Robinson testified that in his experience people with auditory hallucinations do not usually bring them up voluntarily; they do not talk about having conversations with the voices; and the command hallucinations Cantu described as having are relatively uncommon and a severe manifestation that usually contain malevolent instructions. Dep. of Robinson, 21. By contrast, according to Dr. Robinson, Cantu was eager to discuss the voices and hallucinations and provided a great number of details. Further, the conversations Cantu described were very normal and casual conversations. Dep. of Robinson, 22.

Dr. Robinson opined that the history Cantu provided Dr. Williams differed from that which Cantu provided him during his evaluation. Dep. of Robinson, 23. According to Dr. Robinson, the major differences were in the ways Cantu described his suicidal thoughts and command hallucinations. Dep. of Robinson, 23-24. To Dr. Williams, Cantu described a “virtual preoccupation with suicidal thoughts” and a “potentially malevolent quality” to the voices. Dep. of Robinson, 23-24. To Dr. Robinson, Cantu described periodic thoughts of suicide and “almost banal conversations” with the alleged voices he heard. Dep. of Robinson, 22-24.

Dr. Robinson opined that he had no Axis I or current psychiatric diagnosis for Cantu because he was “clearly engaged in a pattern of accentuation and simulation of disability.” Dep. of Robinson, 24-25. Dr. Robinson opined that with Cantu’s physical and psychiatric complaints “the level of transparency of this effort is quite high.” Dep. of Robinson, 25. As an example, Dr. Robinson was convinced Cantu was either making up or exaggerating that he was hearing voices. Dep. of Robinson, 25.

Dr. Robinson opined that Cantu did not have a psychiatric condition. Dep. of Robinson, 26. In particular, Dr. Robinson opined that Cantu had not developed a psychiatric condition as a result of the September 17, 2004 industrial injury. Dep. of Robinson, 26-27. Dr.

Robinson felt that psychiatric treatment was unnecessary and ill-advised. Dep. of Robinson, 27. Dr. Robinson opined that there were no psychiatric limitations with regard to Cantu being capable of gainful employment. Dep. of Robinson, 27. Dr. Robinson testified that Cantu's complaints of back pain in conjunction with the September 26, 2005 meeting, and his limping while around Ms. Fernandez but otherwise being observed walking normally, supported his conclusions that Cantu's complaints "arise for utilitarian purposes" as opposed to accurately describing his medical condition. Dep. of Robinson, 29-30.

Dr. Robinson testified while in the past he has concluded that depression can be the result of chronic pain, he did not do so in Cantu's case because, based on objective information, there was no reason to believe that the level, locations, and nature of pain Cantu described were reasonable. Dep. of Robinson, 43. According to Dr. Robinson, in situations where periods of disability lead to depression, the disability is not something the person is interested in pursuing, which was not the case with Cantu. Dep. of Robinson, 43-44. Dr. Robinson opined that Cantu did not suffer from major depressive disorder because he did not describe symptoms meeting the criteria and the symptoms he did describe were "an obvious part of the pattern of exaggeration and illness behavior." Dep. of Robinson, 44.

D. ARGUMENT

1. SCOPE AND STANDARD OF REVIEW

The Board's interpretation of the Industrial Insurance Act, although not binding upon this Court, is entitled to great deference. *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991), citing, *Dolman Dep't of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986); *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968). RCW 51.52.115 provides superior and appellate courts with the statutory authority to review decisions of the Board. RCW 51.52.115. That statute further provides that in all court proceedings, the findings and decision of the Board are presumed correct and the burden of proof is on the party challenging the Board's findings and decision. RCW 51.52.115.

The Board's decision is considered *prima facie* correct if there is substantial evidence to support it. *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 903, 810 P.2d 500 (1991), citing *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977). In addition, the Board's factual determinations will be upheld by an appellate court if supported by substantial evidence. *Springstun v. Wright Schuchart, Inc.*, 70 Wn. App. 83, 88, 851 P.2d 755, review denied, 122 Wn.2d 1019, 863 P.2d 1353 (1993). The Supreme Court has defined substantial evidence as evidence

that would convince “an unprejudiced, thinking mind.” *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). The challenging party must prove by a preponderance of competent, credible evidence that the Board’s decision should be overturned. *Hadley*, 116 Wn.2d at 902, *citing*, *Scott Paper Co. v. Dep’t Labor & Indus.*, 73 Wn.2d 840, 843-844, 440 P.2d 818 (1968).

Substantial evidence supported the Board’s decision in this claim. Cantu failed to prove by a preponderance of competent, credible evidence that the Board’s decision should be overturned. The overwhelming weight of credible medical testimony established that Cantu did not have a low back condition at all, let alone a condition related to his industrial injury. Further, the testimony established that Cantu’s nerve palsy was not related to his industrial injury. To the extent he may have had low back pain, left leg numbness and pain, and peroneal nerve palsy at the time of claim closure, Cantu failed to provide medical testimony that any of these conditions objectively worsened subsequent to the closure of his claim. Since Cantu asserted that his mental health condition resulted from the pain from these alleged conditions, as they are unrelated to the industrial injury any mental health condition from which Cantu suffers is likewise unrelated to the industrial injury.

2. **CANTU'S LOW BACK PAIN, LEFT LEG NUMBNESS AND PAIN, AND PERONEAL NERVE PALSY ARE NOT DUE TO AN INDUSTRIAL INJURY**

The overwhelming weight of credible medical evidence supports the Board's conclusion that Cantu's low back pain, left leg numbness and pain, and peroneal nerve palsy are not due to an industrial injury. Such evidence established that Cantu does not suffer from any low back condition, or at least a back condition causally related to his industrial injury, and that any peroneal nerve injury and related left leg numbness and pain is more likely related to Cantu's prior non-industrial stab wound injury to his thigh.

To prove entitlement for the claimed conditions as a result of an industrial injury, a claimant is obligated to prove by medical evidence that his industrial injury was the proximate cause of such conditions. In a workers' compensation case, an injury is compensable "if it occurs in the course of employment and a causal connection between the injury and the condition for which compensation is sought is established by *sufficient medical testimony*." *Goyne v. Quincy-Columbia Basin Irr. Dist.*, 80 Wn. App. 676, 682, 910 P.2d 1321 (1996) (emphasis added).

While an industrial injury or occupational disease need not be the sole cause of a worker's disability, the industrial injury or occupational

disease must still meet the definition of a “proximate” cause. WPI 155.06

(5th Ed.) states:

The term “proximate cause” means a cause which in a direct sequence [, unbroken by any new independent cause,] produces the [condition] [disability] [death] complained of and without which such a [condition] [disability] [death] would not have happened.

There may be more than one proximate cause of a [condition] [disability] [death]. For a worker to recover benefits under the Industrial Insurance Act, the [industrial injury] [occupational disease] must be a proximate cause of the alleged [condition] [disability] [death] for which benefits are sought. The law does not require that the [industrial injury] [occupational disease] be the sole proximate cause of such [condition] [disability] [death].

WPI 155.06 (5th Ed.).

Further “the causal connection between a claimant’s physical condition and his or her employment must be established by competent medical testimony which shows the disease is probably, as opposed to possibly, caused by the employment.” *Dennis v. Dep’t of Labor and Indus.*, 109 Wn. 2d 467, 477, 745 P.2d 1295 (1987), *citing Ehman v. Dep’t of Labor and Indus.*, 33 Wn. 2d 584, 206 P. 2d 787 (1949), and *Seattle-Tacoma Shipbuilding Company v. Dep’t of Labor and Indus.*, 26 Wn. 2d 233, 173 P. 2d 786 (1946). Medical testimony which shows a possibility

of a causal relation is not sufficient to establish causation; it must appear that the injury probably caused the disability. *Jackson v. Dep't of Labor and Indus.*, 54 Wn.2d 643, 649, 343 P.2d 1033 (1959).

In any workers' compensation appeal where the issue is a workers' entitlement to benefits, the ultimate burden of proof is at all times with the worker. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Dept. of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958). This is so regardless of which party has brought the appeal. *See also Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 192, 286 P.2d 1038 (1955). "This strict standard of proof of entitlement to benefits is not limited or obviated by the rule of liberal construction of the Act." *In re: Karl Simmons*, Dckt. No. 96 6068 (September 23, 1998), *citing*, *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7 (1996), *Ruse v. Dep't of Labor & Indus.*, 90 Wn. App. 448 (1998). Moreover, the doctrine of liberal construction of the Industrial Insurance Act is a rule of statutory construction and does not apply to the interpretation of facts. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 206 P.2d 787 (1949). Finally, medical testimony must establish that it is more probable than not that the industrial injury caused the subsequent disability or worsening. *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979).

The trial court focused very intently on the Board's Finding of Fact No. 4, which concluded in part that at the time the claim closed on September 6, 2005, Cantu "was experiencing low back pain." BR, 4. It is notable that the Board did not find the low back pain in Finding of Fact No. 4 was causally related to the industrial injury. Moreover, the Board ultimately concluded that Cantu's low back pain that was the subject of his application to reopen his claim was unrelated to his industrial injury. Cantu carried the burden to show that the Board's conclusion was not supported by substantial evidence. The trial court decision noted that "the defense offers no explanation for the cause of [the back pain on the date Cantu's claim was closed]." CP, 25. This comment by the Court illustrates the fallacy of the Court's ultimate conclusion and that the Court ignored the significance of Finding of Fact No. 4 as well as the law regarding the burden of proof and the presumption that the Board's findings are correct. As the burden was on Cantu to prove his back pain was related to the industrial injury, the employer was not required to offer such an explanation. Further, even if Cantu suffered from back pain at claim closure, which he denied, when reviewed in its entirety, the evidence in the Board record reflects that any back pain prior to the September 6, 2005 claim closure, was quite different than the low back

pain Cantu reported following a September 20, 2005 low back injury he suffered while working in his yard.

With respect to low back problems at or prior to the claim being closed on September 6, 2005, Cantu testified that at the time of claim closure he did not have any significant back problems. Cantu, 9. He further testified that there did not come a time when he felt he had back problems for which he needed to see a doctor. Cantu, 9-10. Lastly, according to Cantu at no time during the time the claim was open did he have any significant back problems. Cantu, 12.

It is obvious from Cantu's own testimony that the back pain he alleges he now has is distinctly different from any type of low back pain he had before September 6, 2005. The overwhelming evidence in the Board record reflects that any back pain Cantu now experiences is unrelated to his industrial injury.

Cantu called two medical witnesses in support of his contention that the low back condition was caused by the sequelae of his industrial injury. Dr. You, a medical doctor, could not arrive at a diagnosis for Cantu's low back condition without first ordering a lumbar spine CT scan. The CT scan was unremarkable, revealing no organic cause for Cantu's reported back problems. Absent any organic indications of a back

problem, Dr. You concluded that Cantu did not have a back condition casually related to his industrial injury.

W. Duane Harrington, D.C. treated Cantu from September 27, 2005, until March 1, 2007. Cantu initially reported to Dr. Harrington that his low back pain was the result of doing yard work around September 20, 2007. While he ultimately related Cantu's low back complaints to his altered gait, for the first two months he treated Cantu, Dr. Harrington opined that his low back condition was not work related; instead, he related it to the September 20, 2005, yard work. It was not until Cantu changed his story at the end of November 2005, in conjunction with filing his reopening application, that Dr. Harrington changed his opinion.

Dr. You opined that Cantu's mildly abnormal left peroneal nerve EMG findings were the result of an injury, though she could not say what injury. Dr. You based her opinion, that Cantu's peroneal nerve condition was related to his industrial injury, strictly on what Cantu told her.

The Washington Supreme Court, in *Sayler v. Dep't of Labor and Indus.*, 69 Wn.2d 893, 421 P.2d 362 (1966), addressed the value of an expert medical opinion based on incomplete information. The Court in *Sayler* stated:

An expert medical opinion concerning causal relationship between an industrial injury and a subsequent disability must be based upon full knowledge of all material facts.

An expert opinion given in response to a hypothetical question is without probative value if it is based upon the existence of conditions or facts not included in the question or established by the evidence and not necessarily inferable therefrom. *Berndt v. Department of Labor and Industries*, 44 Wash.2d 138, 265 P.2d 1037 (1954); *Cyr v. Department of Labor and Industries*, 47 Wash.2d 92, 286 P.2d 1038 (1955). The same rule applies to medical opinions based upon incomplete or inaccurate medical history. *Parr v. Department of Labor and Industries*, 46 Wash.2d 144, 278 P.2d 666 (1955). If the doctor has not been advised of a vital element bearing upon causal relationship, his conclusion or opinion does not have sufficient probative value to support an award.

Sayler v. Dep't of Labor and Indus., 69 Wn.2d 893, 896, 421 P.2d 362 (1966).

Dr. You's assessment was based on such incomplete and inaccurate information. Cantu told her that prior to the industrial injury he had no knee or leg problems, or injuries. Therefore, Dr. You's assessment was made without knowledge of Cantu's 1989 left thigh stab wound. As her opinion was based on an incomplete and inaccurate medical history, which included a vital element bearing upon causal relationship, her opinion lacks sufficient probative value to support an award.

In contrast, Dr. Toomey had a much more complete picture of Cantu's past. During his June 4, 2005 IME, Cantu informed Dr. Toomey of his left thigh stab wound prior to the industrial injury. Dr. Toomey found no indication that Cantu's seemingly mild peroneal neuropathy and

toe numbness were related to his industrial injury or resultant knee surgery. Instead, based on his examination and more complete knowledge of Cantu's prior leg injury, Dr. Toomey opined that any peroneal nerve damage would be related to the stab wound and not the industrial injury. Dr. Toomey's opinion, being based on a more complete and accurate picture of Cantu's medical history, is more credible than Dr. You's opinion.

Dr. Bingham performed two knee surgeries on Cantu. At no time during Dr. Bingham's follow-up care did Cantu have complaints indicative of a nerve problem. While Dr. Bingham did not have an opportunity to examine Cantu subsequent to claim closure, as of June 6, 2005, he had found him fixed and stable; on August 4, 2005, he concurred with Dr. Toomey's IME findings; and he opined that Cantu's industrial injury was not the cause of his alleged back pain.

The opinions of the three medical doctors, including Cantu's own medical expert, Dr. You, contrasted with the opinion of chiropractor Harrington, establish a preponderance of opinions that any low back condition is unrelated to the industrial injury. Further, the preponderance of credible medical testimony establishes that Cantu's peroneal nerve palsy was not proximately caused by the industrial injury.

Moreover, WestFarm Foods asserts that the most credible statements of Cantu and Dr. Harrington are those made prior to the filing of a reopening application and this matter going into litigation. Such statements indicate that prior to any benefits being at stake, Cantu reported that he hurt his low back on September 20, 2005, doing yard work, and that Dr. Harrington treated Cantu's complaints as being related to that history. The subsequent change in stories is nothing more than an *ex post facto* attempt to make compensable a condition that clearly is not related to the September 17, 2004 industrial injury.

3. **CANTU'S CONDITION DURING THE PERIOD OF SEPTEMBER 6, 2005, THROUGH MARCH 1, 2006, PROXIMATELY CAUSED BY THE INDUSTRIAL INJURY OF SEPTEMBER 17, 2004, DID NOT OBJECTIVELY WORSEN WITHIN THE MEANING OF RCW 51.32.160**

The industrial injury that gave rise to this claim involved Cantu's left knee. Cantu does not allege, nor is there any testimony establishing, a worsening of this left knee condition. Cantu sought to reopen his claim for other conditions he alleged arose out of the sequelae of his initial knee injury. The medical evidence presented failed to establish that any alleged low back pain, left leg numbness and pain, or peroneal nerve palsy are due to Cantu's industrial injury. As such, none of these conditions can be the source of a reopening of his claim.

If, in spite of the above, this Court determines that any of Cantu's conditions that were present at the time of the September 6, 2005 claim closure, are causally related to the industrial injury, the burden is on Cantu to show by medical testimony based at least in part on objective findings that the condition, proximately caused by the subject industrial injury, worsened between September 6, 2005 and March 1, 2006. It is insufficient for a physician to rely solely upon complaints. There must be some objective basis for his or her opinion. See *Dinnis v. Department of Labor & Industries*, 67 Wn.2d 654, 409 P.2d 477 (1965); *Quine v. Department of Labor & Industries*, 14 Wn. App. 340, 540 P.2d 927 (1975); and *Lewis v. ITT Continental Baking Co.*, 93 Wn.2d 1, 603 P.2d 1262 (1979).

Pursuant to RCW 51.32.160, a claim may be reopened for aggravation of a condition proximately caused by an industrial injury. RCW 51.32.106(1)(a). As stated by the Court of Appeals in *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 219 P.3d 711 (2009):

Workers seeking to reopen their claims under this provision must establish the following elements:

- (1) The causal relationship between the injury and the subsequent disability must be established by medical testimony.
- (2) The claimant must prove by medical testimony, some of it based on objective symptoms, that an aggravation of the injury resulted in increased disability.

- (3) The medical testimony must show that the increased aggravation occurred between the terminal dates of the aggravation period.
- (4) A claimant must prove by medical testimony, some of it based on objective symptoms which existed prior to the closing date, that his disability on the date of the closing order was greater than the supervisor found it to be.

Eastwood v. Dep't of Labor & Indus., 152 Wn. App. at 657-58, citing *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). As the Court of Appeals explained in *Eastwood*, 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*, 152 Wn. App. at 661 citing *Phillips*, 49 Wn.2d at 197, 298 P.2d 1117.

In determining whether aggravation has occurred, a physician cannot rely solely upon complaints but must have some objective basis for his or her opinion. See *Dinnis v. Department of Labor & Industries*, 67 Wn.2d 654, 409 P.2d 477 (1965); *Quine v. Department of Labor & Industries*, 14 Wn. App. 340, 540 P.2d 927 (1975); and *Lewis v. ITT Continental Baking Co.*, 93 Wn.2d 1, 603 P.2d 1262 (1979). Medical testimony must establish that it is more probable than not that the industrial injury caused the subsequent disability or worsening. *Sacred*

Heart Med. Ctr. v. Carrado, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979). Testimony that goes no further than to indicate that the injury might have caused the condition is insufficient; there must be some evidence of probative value that removes the question of causal relation from the field of speculation and surmise. *Jacobson v. Dep't of Labor & Indus.*, 37 Wn.2d 444, 451, 224 P.2d 338 (1950); *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 601, 676 P.2d 538, *review denied*, 101 Wn.2d 1023 (1984).

Dr. You began treating Cantu one month after the relevant time period. As such, Dr. You was unable to determine if Cantu's condition had worsened between the terminal dates. However, in the almost two years she treated Cantu his condition stayed the same.

The record contains no medical opinion/evidence that Cantu's left leg/peroneal nerve palsy symptoms "objectively" worsened between September 6, 2005 and March 1, 2006. Dr. You related this condition to the industrial injury, however she did so based on the inaccurate information provided her by Cantu. She had no objective basis for her opinion. As for any aggravation of Cantu's peroneal nerve palsy, Dr. You could not say whether this condition was worse because she had no records with which to compare her findings. Further, Dr. You was equivocal as to the cause of this diagnosis.

Likewise, the record is devoid of any medical opinion/evidence that Cantu's back pain at the time of claim closure objectively worsened. Dr. You opined that Cantu's low back condition was essentially normal for a man his age. Dr. You found no diagnosis or organic basis for Cantu's complaints of low back pain. Dr. You did not support the notion that a low back condition worsened at all. Dr. Harrington opined that Cantu's low back condition was worse. However, he based such opinion solely on his evaluations **after** the claim closed. Dr. Harrington made no reference to any clinical low back findings prior to the claim being closed (assuming the low back complaints present at the time of claim closure were related to the industrial injury).

Cantu carried the burden of showing what clinical findings were present in the low back at the time the claim was closed. He failed to do so, which is fatal to establishing there was objective worsening. Absent a medical opinion, reflecting an actual comparison to Cantu's baseline condition at claim closure, there can be no finding of an aggravation.

4. PLAINTIFF DID NOT DEVELOP, OR SUFFER FROM, ANY MENTAL HEALTH OR PSYCHIATRIC CONDITIONS PROXIMATELY CAUSED OR AGGRAVATED BY THE INDUSTRIAL INJURY OR ITS SEQUELAE

Cantu failed to establish that he developed or suffered from any mental health or psychiatric conditions proximately caused by his industrial injury. Cantu carried the burden to present evidence that is

more compelling and convincing than that presented by the self-insured employer. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Dept. of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958). Such evidence must show that a condition, if it exists, is more probably than not related to the industrial injury. *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d at 636.

If Cantu does in fact have a mental health condition, and if such condition is the result of physical pain, the pain causing the mental health condition must be related to the industrial injury. Accordingly, if Cantu's low back and left leg complaints are unrelated to the industrial injury, assuming there is a mental health condition, it necessarily would be unrelated to the September 17, 2004 industrial injury.

Dr. Williams and Dr. Robinson each examined Cantu on one occasion. As the trial court judge noted, he had to "decide which of two hired experts to believe." CP, 26. Dr. Williams' worker's compensation evaluations in litigation are performed specifically for Plaintiff's attorneys. Even though a majority of Dr. Robinson's IMEs are performed at the request of the Department or self-insured employers, about ten percent come from plaintiff's attorneys. The evidence supports a finding that Dr. Robinson, and not Dr. Williams, was the more compelling

witness. Therefore, the trial court erred in deciding to believe Dr. Williams over Dr. Robinson.

On September 5, 2006, after the claim was in litigation, Dr. Williams examined Cantu at the request of Cantu's attorney. Dr. Williams opined that Cantu's major depressive disorder was related to his industrial injury. However, in reaching his diagnosis, Dr. Williams refused to consider non-clinical observations of which he was aware. In particular, Dr. Williams ignored the fact that in December of 2004, Cantu was observed at a local mall, by a staff person from Cantu's physical therapy office, walking at an "accelerated" speed compared to his "clinical slight limping" and that he lacked any physical expression of pain or discomfort.

When asked to assume such observation was true, Dr. Williams testified it was inconsistent with Cantu's presentation in the physical therapy clinic. He further testified that such an observation would indicate Cantu's added emphasis or exaggeration pertaining to the degree of dysfunction or physical disability. This non-clinical observation, made by someone familiar with Cantu's clinical presentations, provides compelling evidence that Cantu was exaggerating the true degree of his pain.

Dr. Williams chose to ignore this observation, instead relying on what Cantu told him as the basis for relating his mental health condition to the industrial injury. Ignoring compelling, relevant evidence as of the true

degree of Cantu's pain erodes the basis for Dr. Williams' diagnosis and opinion. The opinion of a doctor, when founded on erroneous factual data lacking in evidentiary support, or contradicted by substantial evidence, "cannot be said to be of sufficient probative value to establish a causal connection between the injury sustained" and the effects of such injury. *Chalmers v. Dep't of Labor & Indus.*, 72 Wn.2d 595, 601, 434 P.2d 720 (1967). Citing *Chalmers*, the Board of Industrial Insurance Appeals held that "it is settled in the law that the opinions of even the attending physician may be overcome should they not be based upon the facts and evidence adduced." *In re: Michael R. Schlappi*, Dckt. No. 88 3182 (October 18, 1989) citing *Chalmers*, 72 Wn.2d 595, 434 P.2d 720 (1967). Dr. Williams did not base his opinion upon the facts and evidence adduced. As such, his opinion is insufficient to establish a causal connection between Cantu's alleged mental health condition and the industrial injury.

Further, the evidence supports that Cantu did not develop, or suffer from, any mental health condition related to the industrial injury. Contrary to Cantu's counsel's assertions to the trial court, Cantu's presentation and statements in the evaluations of Dr. Williams and Dr. Robinson were inconsistent. In his mental status examination of Cantu, Dr. Robinson noted a lot of pain behavior. Dr. Robinson did not observe a

depressed mood. The manner in which Cantu described his suicidal thoughts and hallucinations to Dr. Robinson differed from his descriptions to Dr. Williams. Cantu described a virtual preoccupation with suicide to Dr. Williams, yet to Dr. Robinson he described periodic suicidal thoughts.

As for the alleged voices described by Cantu, to Dr. Williams he described a “potentially malevolent quality” to them, yet to Dr. Robinson he described casual, almost banal, conversations. Dr. Robinson opined that “the level of transparency” of Cantu’s efforts at accentuating and simulating his disability was quite high. Based on such, Dr. Robinson opined that Cantu did not suffer from a psychiatric condition. More specifically, Dr. Robinson opined Cantu did not develop a psychiatric condition as a result of his industrial injury and that there were no psychiatric limitations to his ability to be gainfully employed.

While there was no diagnosis of malingering in this case, a brief discussion on the matter is warranted because Cantu’s actions were consistent with those of malingering. According to Dr. Williams, where benefits are on the line malingering generally occurs more frequently. Dr. Williams further stated that a person may have an injury and malingering in the sense that they do not want to return to work or they seek benefits beyond that which they are due. When Dr. Bingham released Cantu to

return to work, Cantu wanted to be referred to another health care provider.

Dr. Williams' description of malingering is consistent with Cantu's situation and consistent with the testimony of Dr. Robinson that Cantu's complaints "arise for utilitarian purposes." Of note, Dr. Bingham opined that Cantu progressed slower than expected and was "a little difficult to get back to work." It is also notable that at Dr. You's initial evaluation in April 2006, Cantu presented with chronic pain, left lower back and left leg pain, but she noted he **presented with normal mood and affect**. These assessments are consistent with Dr. Williams' description of malingering as well as with Dr. Robinson's assessment of Cantu.

A preponderance of the evidence supports that Cantu exaggerated his pain in the hope of obtaining benefits beyond that to which he was entitled, or in the alternative to avoid going back to work. Dr. Robinson saw through Cantu's façade and correctly assessed that he was exaggerating his condition for utilitarian purposes. Dr. Bingham opined that Cantu recovered more slowly from his knee surgeries than expected and that he was difficult to get back to work. Such behavior is consistent with Dr. Williams' explanation of malingering. Cantu's efforts are further exhibited by his inconsistent descriptions to Dr. Williams and Dr. Robinson.

As the IAJ found, and the full Board confirmed, Dr. Williams' testimony failed to meet Cantu's burden of presenting evidence that was more compelling and convincing than the evidence presented by the employer. Dr. Robinson provided more compelling and convincing evidence. Further, the IAJ found, and again the full Board confirmed, that "the overwhelming medical evidence fails to establish a connection between Mr. Cantu's symptoms he contends caused him to develop a major depression and the industrial injury." BR, 50. As Cantu did not establish the requisite connection, it follows that he did not experience an aggravation of his industrial injury. Since the trial court used its determination that Cantu experienced such aggravation as the basis for discounting Dr. Robinson's testimony, the trial court erred in choosing to believe Dr. Williams over Dr. Robinson.

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E. CONCLUSION

Based on the foregoing points and authorities, the Employer respectfully requests that the Court affirm the Decision and Order of the Board of Industrial Insurance Appeals which affirmed the Department's closure of this claim with benefits as provided.

RESPECTFULLY SUBMITTED this 29th day of September, 2010.

PRATT, DAY & STRATTON,
PLLC

By Eric R. Leonard #39317
Gibby M. Stratton, #15423
Eric R. Leonard, #39317
Attorneys for Appellant
WestFarm Foods

APPENDIX A

FRATT, DAY & STRATTON
MAR 29 2010
COPY RECEIVED

FILED
MAR 25 2010

KIM M. EATON, YAKIMA COUNTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA**

Jorge Cantu

Plaintiff,

No. 07-2-04319-4

vs.

Department of Labor and industries and
Westfarm Foods

Defendants.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
JUDGMENT**

Clerk's Action Required

I. Judgment Summary

1. Judgment Creditor	Jorge Cantu
2. Judgment Debtor	Westfarm Foods
3. Attorney Fees	\$5,520.00
4. Costs	\$5,483.45
5. Principle Judgment Amount (Attorney Fees & Costs)	\$11,003.45
6. Attorney fees and costs shall bear interest at 12% per annum	
7. Attorney for Judgment Creditor	Darrell K. Smart
8. Attorney for Judgment Debtor	Gibby Stratton

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT

SMART, CONNELL, CHILDERS & VERHULP, P.S.
501 N. 2nd Street, PO BOX 228
YAKIMA, WA 98907
(509) 573-3333/FAX (509) 576-0833

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2
3 THIS MATTER having come on for Trial on December 9, 2009 before the above-
4 entitled Court, the Plaintiff, Jorge Cantu appearing through its attorneys Smart, Connell,
5 Childers & Verhulp, P.S., per Darrell K. Smart, and the Defendant, Westfarm Foods appearing
6 through his attorneys, Pratt, Day & Stratton, PLLC., per Gibby Stratton, and the Court having
7 considered the Certified Appeals Board Record filed with the Superior Court by the Board of
8 Industrial Insurance Appeals, and having reviewed the materials and briefing filed in the
9 Superior Court by the parties and having heard oral argument, the Court makes the following:

10
11 **I. FINDINGS OF FACT**

- 12 1. This court has jurisdiction to hear this timely filed appeal from the Board of Industrial
13 Insurance Appeals, Docket No. 06 12847, involving claim W 703136 and the industrial
14 injury dated September 17, 2004;
15 2. Mr. Cantu's condition proximately related to his industrial injury dated September 17,
16 2004 did objectively worsen and become aggravated between September 6, 2005 and
17 March 1, 2006;
18 3. Mr. Cantu did develop and suffers from a depressive disorder and a pain disorder with
19 both psychological factors and general medical condition proximately related to his
20 industrial injury dated September 17, 2004;
21 4. As of March 1, 2006, Mr. Cantu was in need of proper and necessary medical
22 treatment proximately related to the industrial injury dated September 17, 2004.

23 **II. CONCLUSIONS OF LAW**

- 24 1. The court has jurisdiction over the persons and subject matter of this timely
25 filed appeal;
26 2. The Order of the Department of Labor & Industries dated March 1, 2006 is
27 incorrect and is reversed;
28 3. The Decision and Order of the Board of Industrial Insurance Appeals dated November
29 19, 2007 is incorrect and is reversed;
30 4. Between the dates of September 6, 2005 and March 1, 2006, Mr. Cantu's condition
proximately related to the industrial injury dated September 17, 2004 did objectively
worsen and become aggravated within the meaning of RCW 51.32.160;

- 1 5. ~~As of March 1, 2006, Mr. Cantu did require further proper and necessary~~
2 medical treatment proximately related to the industrial injury dated September
3 17, 2004 within the meaning of RCW 51.36.010;
- 4 6. Mr. Cantu did develop and suffers from a depressive disorder and a pain
5 disorder with both psychological factors and general medical condition
6 proximately related to an industrial injury within the contemplation of RCW
7 51.08.100;
- 8 7. This matter is reversed and remanded with directions to the Department of
9 Labor and Industries to issue an order consistent with these Findings of Fact
10 and Conclusions of Law;
- 11 8. The self-insured employer, Westfarm Foods is responsible for payment of Mr.
12 Cantu's attorney fees and costs pursuant the Cost Bill and Declaration of
13 Counsel filed herein in the amount of \$11,003.45. This sum is payable to Mr.
14 Cantu's attorneys, Smart, Connell, Childers & Verhulp, P.S.

15 III. JUDGMENT

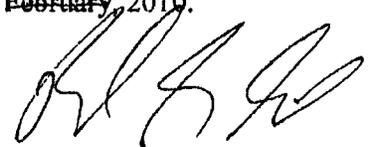
16 This court, having entered its Findings of Fact and Conclusions of Law in favor of the
17 injured worker and the Plaintiff, Mr. Jorge Cantu, and this matter having been fully
18 adjudicated herein, THEREFORE HEREBY ENTERS THE FOLLOWING JUDGMENT:
19

- 20 1. The Superior Court of the State of Washington for Yakima County has jurisdiction
21 over the parties and subject matter in this timely filed appeal.
- 22 2. The Department Order dated March 1, 2006 is reversed.
- 23 3. The Decision and Order of the Board of Industrial Insurance Appeals dated
24 November 19, 2007 is reversed.
- 25 4. The Plaintiff is awarded and the Defendant Westfarm Foods is ordered to pay attorney
26 fees and costs in the amount of \$11,003.45 to Mr. Cantu's attorneys, Smart,
27 Connell, Childers & Verhulp, P.S.
- 28 5. The Plaintiff is awarded interest from the date of entry of this judgment as provided by
29 RCW 4.56.110;
- 30 6. This matter is reversed and remanded with directions to the Department of Labor

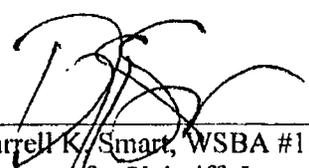
1 and Industries to issue an order which:

- 2 a. Reopens Mr. Cantu's industrial injury claim consistent with the Court's
3 finding that Mr. Cantu's condition objectively worsened and became
4 aggravated between the dates of September 6, 2005 and March 1, 2006;
5 b. Accepts responsibility for Mr. Cantu's depressive disorder and pain
6 disorder with both psychological factors and a general medical condition as
7 conditions proximately related to his industrial injury dated September 17,
8 2004;
9 c. Provides further proper and necessary medical treatment for conditions
10 proximately related to the industrial injury dated September 17, 2004; and
11 to
12 d. Provide further benefits consistent with the law and the facts of this case.

13 DONE IN OPEN COURT this 19 day of ^{MARCH} ~~February~~, 2010.

14
15 
16
17 Judge Blaine G. Gibson

18 Presented by:
19 SMART, CONNELL, CHILDERS & VERHULP, P.S.

20
21 
22 By _____
23 Darrell K. Smart, WSBA #15500
24 Attorney for Plaintiff, Jorge Cantu

25 Copy received, Notice of Presentment waived:

26
27
28 By Signed via fax - see attached fax signature page
29 GIBBY STRATTON, WSBA # 15423 
30 Attorney for Defendant, Westfarm Foods

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT

-4

SMART, CONNELL, CHILDERS & VERHULP, P.S.
501 N. 2nd Street, PO BOX 228
YAKIMA, WA 98907
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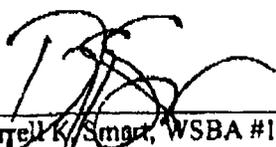
and Industries to issue an order which:

- a. Reopens Mr. Cantu's industrial injury claim consistent with the Court's finding that Mr. Cantu's condition objectively worsened and became aggravated between the dates of September 6, 2005 and March 1, 2006;
- b. Accepts responsibility for Mr. Cantu's depressive disorder and pain disorder with both psychological factors and a general medical condition as conditions proximately related to his industrial injury dated September 17, 2004;
- c. Provides further proper and necessary medical treatment for conditions proximately related to the industrial injury dated September 17, 2004; and to
- d. Provide further benefits consistent with the law and the facts of this case.

DONE IN OPEN COURT this _____ day of February, 2010.

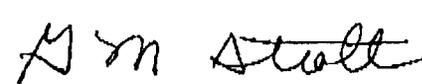
Judge Blaine G. Gibson

Presented by:
SMART, CONNELL, CHILDERS & VERHULP, P.S.

By 

Darrell K. Smart, WSBA #15500
Attorney for Plaintiff, Jorge Cantu

Copy received, Notice of Presentment waived:

By 

GIBBY STRATTON, WSBA # 15423
Attorney for Defendant, Westfarm Foods

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT

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APPENDIX B

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PRATT, DAY & STRATTON
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

JORGE L. CANTU,)	
)	
Plaintiff,)	NO. 07-2-04319-4
)	
vs.)	COURT'S DECISION
)	
DEPARTMENT OF LABOR AND)	
INDUSTRIES and WESTFARM FOODS,)	
)	
Defendants.)	

This matter came before the Court for a trial de novo as a result of an appeal from a decision of the Board of Industrial Insurance Appeals.

Mr. Cantu injured his left knee in an industrial accident that occurred September 17, 2004. He had two knee surgeries before his claim was closed September 6, 2005. He later sought to reopen his claim on the basis of a worsening or aggravation of his injuries and because of a claim that he developed psychological problems as a result of the knee injury.

ISSUES

1. Was Mr. Cantu's low back pain, left leg numbness and pain, and peroneal nerve pain caused or aggravated by the industrial injury of September 17, 2004?
2. During the period between September 6, 2005, and March 2, 2006, did Mr. Cantu develop a depressive disorder, single episode severe with psychotic

1 features and/or a pain disorder associated with both psychological factors and a
2 general medical condition, or any other psychiatric condition either caused by or
3 aggravated by the industrial injury or its consequences?

4 3. Did Mr. Cantu's condition, proximately caused by the industrial injury of
5 September 17, 2004, objectively worsened between September 6, 2005 and March 1,
6 2006?

7 DISCUSSION

8 Unchallenged findings of fact made by the Board of Industrial Insurance Appeals
9 are treated as verities on appeal. The parties do not dispute the facts surrounding the
10 September 17, 2004, injury to Mr. Cantu's left knee, or the fact that his knee problems,
11 proximately caused by the industrial injury, had reached maximum medical
12 improvement as of September 6, 2005, which resulted in a 10% impairment of the left
13 lower extremity.

14 The Board of Industrial Insurance Appeals also found, in Finding of Fact #4,
15 that, at the time the claim was closed on September 6, 2005, Mr. Cantu was

16 "experiencing pain and numbness over the lateral left leg into the lateral
17 three toes of his left foot and pain in the left knee, he was limping due to
18 the left knee pain; and he was experiencing low back pain. He was also
suffering from peroneal nerve palsy on the left side."

19 Mr. Cantu claims his low back pain worsened substantially after September 6,
20 2005, and that the pain in his low back, either by itself or in conjunction with the pain
21 from his knee injury, caused him to develop a major depressive disorder, rendering in
22 unable to work.

23 There is a factual dispute as to whether Mr. Cantu's low back pain, if any, was
24 causally related to his industrial injury. The defense argues that the back injury
25 resulted from yard work Mr. Cantu did on September 20, 2005. Dr. Harrington, the

1 treating physician, initially opined that the yard work did cause the back injury.
2 However, Dr. Harrington expressed that opinion before he knew about the full extent
3 of the knee injury Mr. Cantu had suffered and the limp that he had been experiencing
4 because of the knee injury. After he received that information, Dr. Harrington was of
5 the opinion that the limp, which was caused by the knee injury, caused the low back
6 pain by creating a biomechanical instability that put unusual stresses on the low back.
7 Dr. Harrington noted moderate to severe muscle spasms, tenderness, muscle
8 swelling, and muscle tension in Mr. Cantu's low back. Dr. Harrington's initial causation
9 opinion is understandable because he did not have all of the facts. As he described it,
10 it took a while before Mr. Cantu "opened up" to him and fully describe the history of his
11 injury.

12 The main problem with the defense argument is that it ignores the Board's
13 Finding of Fact #4, which notes that Mr. Cantu was experiencing low back pain as of
14 September 6, 2005. That back pain could not have been caused by the yard work
15 incident which occurred on September 20, 2005

16 My analysis of the testimony may very well have been different had it not been
17 for the undisputed finding that Mr. Cantu had been experiencing low back pain as of
18 the date his claim was closed. The defense offers no explanation for the cause of that
19 back pain. Instead, the defense argues that Mr. Cantu denied having any back pain
20 as of the date the claim was closed. However, I must assume he was experiencing
21 back pain, because that is what the Board found. The only reasonable explanation for
22 the back pain is that it was caused by the limp, which placed unusual stresses on Mr.
23 Cantu's low back. Over time, the back pain became worse. Apparently, the pain was
24 minor as of the date the claim was closed, but it continued to worsen until he
25

1 developed the objective symptoms described by Dr. Harrington: moderate to severe
2 muscle spasms, tension etc.

3 Dr. Toomey expressed the opinion that the left leg numbness, pain, and nerve
4 palsy were not related to the knee injury but instead were related to a stab wound Mr.
5 Cantu received in 1989. However, Dr. Toomey offered no explanation for why the stab
6 wound would not have been causing Mr. Cantu any significant symptoms prior to the
7 date of the knee injury. Here again, the only reasonable explanation for the peroneal
8 nerve problem is that it was related to the knee injury.

9 With regard to the mental health claim, I have to decide which of two hired
10 experts to believe. Arguably, both are biased. However, there are reasons to
11 distinguish between the two. Dr. Robinson's opinion appears to be primarily based on
12 the fact that he simply does not believe Mr. Cantu. Given my previous finding that Mr.
13 Cantu actually has experienced an aggravation of his condition, with a worsening of
14 his back pain and the onset of objective symptoms, it appears to me that Mr. Cantu
15 was telling the truth when he told Dr. Robinson about the pain he was experiencing.
16 Since Dr. Robinson was incorrect in his failure to believe Mr. Cantu's description of his
17 pain, I assume Dr. Robinson may have also been incorrect with regard to his
18 perception of Mr. Cantu's overall credibility.

19 Dr. Williams testified that Mr. Cantu had a major depressive disorder causally
20 related to the industrial injury, and that he had a pain disorder also causally related to
21 the industrial injury. His testimony was supported by the testimony by the lay
22 witnesses who describe the changes in Mr. Cantu's behavior and personality since the
23 time of his injury. Therefore, I find Dr. Williams to be more persuasive, and more likely
24 than not, to be correct.

1 **FINDINGS**

2 I find that the plaintiff has proven the following by a preponderance of the
3 evidence:

4 1. Mr. Cantu's low back pain, left leg numbness and pain, and peroneal
5 nerve palsy were caused or aggravated by the industrial injury of September 17, 2004.

6 2. During the period of September 6, 2005, through March 1, 2006, Mr.
7 Cantu did develop a depressive disorder and/or a pain disorder associated with both
8 psychological factors and a general medical condition, either caused by or aggravated
9 by the industrial injury or its after effects.

10 3. Mr. Cantu's condition, proximately caused by the industrial injury of
11 September 17, 2004, did objectively worsen between September 6, 2005, and March
12 1, 2006.

13 **CONCLUSION**

14 The decision of the Board of Industrial Insurance Appeals affirming the
15 Department's decision not to reopen Mr. Cantu's claim is reversed. Mr. Cantu's claim
16 must be reopened so he can receive appropriate treatment. The issues of time loss
17 and impairment shall be determined by the Department in a manner not inconsistent
18 with this decision.

19
20
21 DATED this 15 day of December, 2009.

22 

23 _____
24 JUDGE BLAINE G. GIBSON
25 Superior Court Judge