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Court of Appeals
Division III
State of Washington

NO. 31391-3

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

ANTONIO L. PADILLA
Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Respondent.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR

Appellant Antonio Padilla, an injured worker, assigns error to the trial court's Finding of Fact No. 1.2, which provides:

The Board's Finding of Fact are supported by a preponderance of the evidence. The Court adopts as its Findings of Fact, and incorporates by this reference, the Board's Findings of Fact Nos. 1 through 5 of the January 24, 2011 Proposed Decision and Order adopted by the Board of Industrial Insurance Appeals as its Final Order on March 14, 2011.

CP 56. Specifically, Mr. Padilla contends that the trial court erred in adopting the Board of Industrial Insurance Appeals' Findings of Fact No. 2, 3, 4, and 5.

The Board, by and through the Industrial Appeals Judge, erred in entering Finding of Fact No. 2 in that it fails to acknowledge that on August 31, 2006, Mr. Padilla was involved in a motor vehicle accident while in the course of his employment with Roy Farms, Inc.; that while driving his truck and traveling at a speed of approximately 55 miles per hour, a tractor pulling a trailer traveling in the opposite direction blinded him with its high beams, causing Mr. Padilla to crash into the trailer; that Mr. Padilla lost consciousness and when woke up, the truck was laying over and totally destroyed; and that he was transported by ambulance to the hospital where he

was treated initially for a broken rib and complaints of pain in his neck and knees, but followed up with other medical providers.

The Board, by and through the Industrial Appeals Judge, erred in entering Finding of Fact No. 3 in that it fails to recognize that no treating provider testified to physical findings as of January 3, 2007, and there are absolutely no comparative imaging findings for the neck or knees from claim closure. Hearsay evidence admitted per ER 703 and ER 705 indicates that as of January 3, 2007, Mr. Padilla's cervical range of motion was within normal limits despite mild tenderness and his claim was closed without disability award four months after the accident. Thereafter, he did not seek treatment for neck problems until September 2009, when he sought evaluation and treatment by a chiropractor. Following his reopening application in October 2009, two separate examiners reviewed x-rays, identified reduced cervical range of motion, a loss of normal curve of the cervical spine, and subluxation at the C-4 level as part of worsening while the Department of Labor and Industries individual commissioned examiner found normal range of motion and no worsening but was without the benefit of imaging studies.

The Board, by and through the Industrial Appeals Judge, erred in entering Finding of Fact No. 4 in that Mr. Padilla's age, if relevant, should have been included in an earlier finding and is apparently only set forth herein

as a separate finding, together with Mr. Padilla's other complaints, to superficially buttress the proposed theory that Mr. Padilla's age better accounts for his obviously deteriorated cervical condition despite a preponderance of the medical evidence persuading otherwise.

The Board, by and through the Industrial Appeals Judge, erred in entering Finding of Fact No. 5 in that the preponderance of the evidence presented demonstrates that the objective worsening in Mr. Padilla's condition between January 3, 2007 and March 16, 2010 was proximately caused by the residual effects of the August 31, 2006 industrial injury rather than the unsubstantiated theory of aging alone proposed by the Department's sole commissioned examiner.

Based on the foregoing assignments of error to Findings of Fact numbered 2 through 5, Mr. Padilla contends the trial court erred in entering Conclusion of Law No. 2.2, which provides:

The Board's Conclusions of Law are correct and should be affirmed. The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 3 of the January 24, 2011 Proposed Decision and Order, adopted by the Board of Industrial Insurance Appeals as its Final Order on March 14, 2011.

CP 56. The trial courts Conclusion of Law No. 2 does not flow from corrected findings.

Finally, Mr. Padilla contends that the trial court erred in adopting the Board's Conclusions of Law No. 2, and 3. The Board, by and through the Industrial Appeals Judge, erred in entering Conclusion of Law No. 2 inasmuch as the evidence preponderates against the Board in that between January 3, 2007 and March 16, 2010, Mr. Padilla's conditions, proximately caused by the industrial injury of August 31, 2006, had objectively worsened within the meaning of RCW 51.32.160. The Board, by and through the Industrial Appeals Judge, similarly erred in entering Conclusion of Law No. 3 inasmuch as the order of the Department dated March 16, 2010 that denied the application to reopen the claim is not supported by substantial evidence, is incorrect and must be reversed.

The trial court's decision dated December 20 2012 that affirmed the March 14, 2011 decision of the Board (which adopted the January 24, 2011 Proposed Decision and Order) is incorrect and should be reversed, and this matter remanded with instruction to issue an order that reverses the Department order and reopens the claim due to an aggravation or worsening of Mr. Padilla's industrial related cervical condition, to determine the extent of the aggravation of the injury and the appropriate provision and adjustment of benefits, and otherwise directs the Department to take such other and further action as is appropriate under the facts and the law.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Does substantial evidence supports the trial court's findings or does the evidence produced by Mr. Padilla preponderate in favor of reopening his claim based on the worsening of his work-related injuries between January 3, 2007 and March 16, 2010?

III. STATEMENT OF THE CASE

Antonio L. Padilla was born June 4, 1944. He was 62 years old on the date of injury - not a young man. He is now 68 years old. Certified Appeal Board Record [CABR], Antonio L. Padilla (October 14, 2010), at 4. Most of his adult life, he worked as a laborer and doing farm work. He was driving truck for Roy Farms, Inc., on August 31, 2006 when he was blinded by the high-beam headlights of an on-coming tractor trailer and crashed into the trailer of the on-coming rig. His truck was totally destroyed and he estimates that he was traveling approximately 55 miles per hour at the time of the accident. He lost consciousness and felt dizzy. He was taken by ambulance to Yakima Regional Hospital. CABR, Padilla, at 6. Mr. Padilla describes his whole body hurting, but his neck and his knees the most. There is no evidence of preexisting injuries or illness.

Mr. Padilla filed a claim with the Department of Labor and Industries on September 5, 2006. CP 35. He was treated at the hospital and then at

Central Washington Occupational Medicine. CABR (Dep. upon Oral Examination of S. Daniel Seltzer, M.D.), at 11; *see also* CABR (Oral Examination of Paul Reiss, M.D.), at 7. He was last seen at Central Washington Occupational Medicine on December 6, 2006, when he had good range of motion, mild tenderness in the neck and excellent flexion and extension of the neck without any deficit of his neurologic status. CABR, Seltzer, at 24; CABR (Oral Examination of Ronald H. Warning, D.C.), at 19. Dr. Reiss did not have or review the chart note dated December 6, 2006; “The last date I have recorded is November 3, 2006.” CABR, Reiss, at 18.

He did not return to full duty work, just light duty and mostly walking. He last worked October 10, 2006. CABR, Padilla, at 7. The claim closed four months after the accident and injuries by order dated January 3, 2007. CABR, at 57; CABR, Padilla, at 8. This closure date represents the first terminal date for comparison purposes in determining whether aggravation occurred. At the time of claim closure, Mr. Padilla testified that he felt fine, was a little dizzy and his neck hurt, but they were giving him pills and he thought that would be enough. CABR, Padilla, at 8.

Mr. Padilla traveled to California to see his dying mother after the claim closed. Padilla, at 10-11. Mr. Padilla felt as though his neck worsened after claim closure but he did not seek medical attention or treatment until he

visited with chiropractor Dr. Warninger, who assisted him in filing a reopening application in October 2009. CABR, Padilla, at 8-9; CABR, Warninger, at 14. Mr. Padilla described going to Dr. Warninger for help with reopening his claim and because he thought "some massages" might help him get better. He felt bad and was in more pain than when his claim closed in 2007, but the treatment did not follow. CABR, Padilla, at 8-9. The Department initially denied his reopening application by order dated November 25, 2009 and, after protest, then a denial by appealable order dated March 16, 2010. CABR, at 35; 39-40. This date represented the second terminal date for comparison purposes in determining whether aggravation of Mr. Padilla's industrial injuries occurred.

Mr. Padilla filed an appeal with the Board of Industrial Insurance Appeals on April 22, 2010. CABR, at 38. The Board granted the appeal and designated the appeal Docket No. 10 14146. CABR, at 42; 38. The Board also assigned Industrial Appeals Judge Daniel W. Johnson to preside at and schedule hearings. CABR, at 47; 50; 51-53; 55-56. Mr. Padilla and Dr. Warninger testified at the Board on October 14, 2010. CABR. Mr. Padilla presented Dr. Seltzer's testimony by perpetuation deposition on September 13, 2010. CABR, Seltzer, at 30. The Department presented its only witness, commissioned examiner Dr. Reiss, on October 20, 2010. The

assigned Industrial Appeals Judge issued a Proposed Decision and Order on January 24, 2011. CP 30-35, CABR, at 30-36. Mr. Padilla filed a Petition for Review of the Proposed Decision and Order with the Board on January 28, 2011. CABR, at 5-15. The Board issued an Order Denying Mr. Padilla's Petition on March 14, 2011. CP at 28; CABR, at 3. Mr. Padilla filed an appeal in Yakima County Superior Court on March 17, 2011. CP 1. Briefs were filed, and the matter was set for a bench trial and argued before Judge David Elofson on October 25, 2012. CP 12; 13-16, 17-27, 51. After considering the arguments of counsel and briefing on file, and reviewing de novo the Certified Appeal Board Record, Judge Elofson issued a Memorandum Decision affirming the Board's decision on November 7, 2012. CP 48-49. Findings of Fact, Conclusions of Law and Judgment were entered on December 20, 2012 which affirmed the Board's decision and ordered that Mr. Padilla's reopening application be denied and that his claim should remain closed without the benefit of additional treatment.. CP 50-52. Notice of Appeal to this Court followed, having been filed on January 8, 2013. CP 53.

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IV. ARGUMENT

A party aggrieved by an order of the Board may appeal to the superior court. RCW 51.52.060, .115. The superior court's review of the decision and order of the Board is *de novo* but based on the same evidence and testimony received by the Board. RCW 51.52.110, .115. The appealing party has the burden "to establish a prima facie case for the relief sought." RCW 51.52.050. The superior court is empowered to reverse or modify the Board's decision if the court determines the Board incorrectly construed the law or found the facts. "The court may substitute its own findings and decision for the Board's if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect." *McClelland v. I.T.T. Rayonier*, 65 Wn.App 386, 390, 828 P.2d 1138 (1992); *See also Ravsten v. Dep't of Labor & Industries*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987) (holding that the appellant must "establish that the Board's findings are incorrect by a preponderance of the evidence.").

In *Ravsten v Dep't of Labor & Indus.*, the Washington Supreme Court plainly explained the limits of appellate review:

On appeal from the superior court, the appellate court must ascertain whether there was **substantial evidence** to support the findings of the trial court. *Groff v. Department of Labor & Indus.*, 65 Wn.2d 35, 41, 395 P.2d 633 (1964). As observed in *Goehring v. Department of Labor & Indus.*, 40 Wn.2d 701, 246 P.2d 464 (1952), quoting at page 703 from

McLaren v. Department of Labor & Indus., 6 Wn.2d 164, 168, 107 P.2d 230 (1940):

“If, in the opinion of the reviewing court, the evidence as to a factual issue is evenly balanced, the finding of the department [now board of industrial insurance appeals] as to that issue must stand; but, if the evidence produced by the party attacking the finding preponderates in any degree, then the finding should be set aside.”

108 Wn.2d at 146. Substantial evidence has long been described as “of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Grimes v. Lakeside Indus.*, 78 Wn.App. 554, 560-61, 897 P.2d 918 (1968).

The statutory authority for aggravation or reopening derives from RCW 51.32.160, which provides in pertinent part:

If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: PROVIDED, That the director may, upon application of the worker made at any time, provide proper and necessary medical and surgical services as authorized under RCW 51.36.010. The department shall promptly mail a copy of the application to the employer at the employer's last known address as shown by the records of the department.

RCW 51.32.160(1)(a). For a claim to be properly reopened in accordance with the statute, there must be a showing by a preponderance of the evidence that an aggravation occurred between the respective “terminal dates,” which involves the date of last claim closure or denial of reopening as compared to the date of the most recent final order denying a reopening application. In Mr. Padilla’s case, the first terminal date is represented by the Department’s order of January 3, 2007, which closed the claim without permanent partial disability award. The second terminal date is March 16, 2010, which is the date of the Department’s order denying the reopening application. Mr. Padilla contends that a careful review of the reopening requirements of RCW 51.32.160, and of the entire record, makes the trial court’s errors (as well as those of the Board) evident and demonstrates that the findings are incorrect, and that the evidence preponderates in favor of reopening rather than denial of benefits.

In *Tollycraft Yachts Corp. v. McCoy*, the Supreme Court of Washington provided a summary overview of the claim reopening process:

Thus, under RCW 51.32.160, three requirements must be met before the Department adjusts compensation based upon a worker’s aggravation application: first, the worker’s initial claim must have been “closed”; second, there must be aggravation of the disability since the closing of the initial claim; and third, the adjustment must be sought within 7 years of the initial closing date.

Under the second requirement of the statute, the burden is on the injured worker to produce some objective medical evidence, verified by a physician, that his or her injury has worsened since the initial closure of the claim. *Gammon v. Clark Equip. Co.*, 104 Wash. 2d 613, 617, 707 P.2d 685 (1985); *Dinnis v. Department of Labor & Indus.*, 67 Wash. 2d 654, 656, 409 P.2d 477 (1965).³ The aggravation, however, need not be the result of the industrial accident itself but may be the worsening of the industrial injury through the incidents of day-to-day life. *See McDougle v. Department of Labor & Indus.*, 64 Wash. 2d 640, 393 P.2d 631 (1964) (adjustment allowed for aggravation of back injury caused by lifting feed sacks).

The administrative processing of an application to reopen under RCW 51.32.160 takes place in three stages. In the first, the injured worker files an application with the Department.⁴ In the second, the Department determines whether the application to reopen meets the requirements of the statute. *See* WAC 296-14-420(1). If it does, the worker's claim is reopened, and the process moves to the third state where an evaluation of the worker's condition is made to determine the extent of the aggravation of the injury and the appropriate adjustment of benefits.

In the second stage, the decision of the Department to reopen a claim, is not merely a "paper" act. It is, instead, a substantive decision by the Department that the injured employee has met the criteria of the statute to show aggravation. In other words, the Department has concluded there has been objective worsening of the injured worker's condition. This decision may have significant consequences. For example, when the Department is acting in its capacity as

³ The necessity of "objective" findings of a worsened condition has been relaxed in the context of psychological condition, where objective conditions are almost nonexistent. *See Price v. Department of Labor and Indus.*, 101 Wash. 2d 520, 527-29, 682 P.2d 307 (1984); *McClure v. Department of Labor & Indus.*, 61 Wash. App. 185, 187, 810 P.2d 25, *review denied*, 117 Wash. 2d 1013, 816 P.2d 1224 (1991).

⁴ If the application includes "sufficient medical verification", then compensation to the worker, in medical payments or time loss compensation, begins 14 days after the receipt of the application. WAC 296-14-400.

administrator of the state accident fund, it is precluded from challenging its own decisions to reopen claims even if it later becomes convinced that no objective worsening has taken place. *See Picich v. Department of Labor & Indus.*, 59 Wash. 2d 467, 468, 368 P.2d 176 (1962); *Collins v. Department of Labor & Indus.*, 50 Wash. 2d 194, 195, 310 P.2d 232 (1957).

122 Wn.2d 426, 432-33, 858 P.2d 503, 507 (1993).

It is important to note that no examining physician or even commissioned evaluator from the period of the first terminal date, January 3, 2007, testified in this proceeding. Besides a closing order without permanent partial disability, there is no direct evidence of Mr. Padilla's conditions or functioning except from Mr. Padilla himself. There is hearsay evidence admitted per ER 703 and 705 solely for purposes of foundation for opinions offered by the three testifying expert witnesses. With this framework in mind, Mr. Padilla submits that substantial evidence is lacking and that a preponderance of the evidence presented warrants reversal of the trial court's decision to deny his reopening application and warrants granting Mr. Padilla the additional benefits for which he applied and is entitled per RCW 51.32.160.

On August 31, 2006, Mr. Padilla was involved in a motor vehicle accident while in the course of his employment with Roy Farms, Inc. CABR, Padilla, at 5. While driving his truck and traveling at a speed of approximately 55 miles per hour, a tractor pulling a trailer traveling in the

opposite direction blinded him with its high beams, causing Mr. Padilla to crash into the trailer. *Id.*, at 6. Mr. Padilla lost consciousness. When he woke up, the truck was laying over on its side and totally destroyed. *Id.* He was transported by ambulance to the hospital where he was treated for a broken rib and complaints of pain in his neck and knees. *Id.*, at 6. He followed up with an occupational medicine clinic. No imaging studies of his neck were taken. He returned to light duty work briefly until October 10, 2006. *Id.*, at 7. He hurt when his claim closed in January 2007, but thought that with the pills he was given it “would be enough.” *Id.*, at 8. He traveled to California around the time his claim closed because his mother died. *Id.*, at 11. It is undisputed that as of January 3, 2007, the conditions proximately caused by the industrial injury of August 31, 2006, were at maximum medical improvement with no permanent partial disability.

While his neck still hurt, Mr. Padilla testified that he had hoped the medications would help and allow him to return to work. He did not return to work because his pain increased and his function decreased. Of course, his subjective complaints of pain alone are not enough. Mr. Padilla has the burden and must present objective evidence to support his complaints of worsened conditions, increased pain, and loss of function. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 897 P.2d 431 (1995); *In re John Anderson*, BIIA

Dec., 91 6315 (1992). He did so through the testimony of chiropractor Dr. Warninger and orthopedic specialist Dr. Seltzer.

Following claim closure, Mr. Padilla testified that his industrial injuries or neck became worse, but he did not seek treatment until October 2009 when he contacted chiropractor, Dr. Warninger. CABR, Padilla, at 8, 10. When asked why he sought out Dr. Warninger, Mr. Padilla said: "I thought that he needed to give me some massages so that I could get better, so that's why I went." CABR, Padilla, at 8. When asked how he was feeling he responded: "I felt bad, but the doctor never gave me any treatment." His neck was in pain and the pain was more than in 2007. He asked for Dr. Warninger's assistance in filing a reopening application so that he could get treatment. *Id.*, at 8-9.

Dr. Warninger testified that he took a history of injury, reviewed prior records, took x-ray imaging studies, and thoroughly examined the injured worker before opining that Mr. Padilla's industrial related condition objectively worsened in the three years since claim closure on a more probable than not basis. CABR, Warninger, at 19. When asked about noteworthy parts of his examination that assisted him in completing the reopening application, Dr. Warninger noted:

Yes. On -- you know, I did some cervical tests on him, and that helps us just ascertain to what extent we have a problem.

It was mostly on the right side, and that's where we picked up the right lateral flexion restriction. But also, the distraction sign was positive bilateral, and that's a test where you lift the head -- you put pressure against the skull, lift the head to see if there's relief. And in this case he said there was relief bilateral.

Another test we perform was the foraminal compression sign, and that's where you put a pressure just the opposite, an axial load on the head, right and left, and he was positive on the right side. Should depressor sign is a sign where we actually flex the head laterally, both directions, to see which side is symptomatic, or radiates pain, and again it was on the right side.

And to conclude it, what I think is -- to me, it's a little bit more objective yet, is the Derefield cervical sign, in which we have him turn his head, and check to see if it's drawing a leg up one way or another, which would mean that we've got a contracture going on, and that was positive on the right. So from what we could gather that this individual has a problem enough to at least take a picture of -- go further with it, and find out what's causing this.

Id., at 16-18.

Dr. Warninger testified that a fairly routine cervical set of x-rays were taken: "We took a three-view set, which is a nasium view for the upper cervical, and a lower cervical view, and a lateral view." He described the findings as follows:

The lateral project -- you know, and I have to say I don't have these X-rays for review, they were shipped out to one of the reviewers and never brought back, but on my notes here, he has a fairly severe forward head projection. That simply means that the front portion of his cervical spine is way ahead of the lower section, it doesn't have the normal curve.

So we put a measurement on that. His is as extreme as you get, a 5.0, and I know that number doesn't mean a lot, but a 2.5 is a normal curve neck, and a 5 is a straight one, and everything in-between is a partial. And he had the extreme, a 5.0. So in other words, no curve, and forward head projected, significant in the fact that that's usually caused by something; injury or it would have to be an awful bad habit to cause that, but there was no degenerative disk disease noted on that view.

Id., at 17-18. He went on to explain that there were subluxations present in his cervical spine:

C-1, C-2, C-3. Very likely at C-5, whereas the stress vertebra -- you know, I would add that we would really need perhaps a further study to determine at what extent. This is a fairly large individual, not the easiest to get good films on, so you might want to go to a CT or an MRI, but first of all is to get the claim open so we can go that far, but that's as far as we went with the X-ray.

Id., at 18.

He was asked if he had the opportunity to compare or contact the prior physician's office about his circumstances at the time of claim closure, and testified:

Yes, we -- you know, this dates back a little ways, and I honestly don't remember if it was myself or my assistant, we always call the prior office. We want to find out what the diagnosis was, and the rating at time of closure, so we know what diagnosis we're treating here. We have to reopen a similar diagnosis, and we want to find out if that person has that diagnosis, and so in the regard, we did contact them.

Id. He went on to acknowledge having had the opportunity to review a chart note from the Central Washington Occupational Medicine, specifically Betty Cohen, M.D., dated December 6, 2006, and by way of summary noted:

Well, I would think, objectively, the range of motion that is listed for this chart -- Dr. Cohen's chart lists that his range of motion was actually fairly normal, and that alone was worsening substantially. And the fact that, you know, even subjectively he was feeling better at that time; at least somewhat better. She does note pain in here, but not near to the extent that -- when we examined.

Id. at 20-21.

When asked about treatment recommendations more than a year later, Dr. Warninger said that "if nothing else has been done" he still would recommend treatment for Mr. Padilla, for his industrial injury condition:

Yes. I would. If this claim was open the way that it should have been, in my opinion, yes, we would go for further imaging. We would at least get a CT scan, possibly an MRI, and determine if -- whether or not this is really a chiropractic case, first of all, or could we have disk fragments because of the injury. And obviously, we call it if it's a green light for us; we would pursue with a treatment plan, and then we would re-examine. You know, are we increasing the range of motion, are we doing what we were setting out to do, or do we need to reevaluate it again, and refer this individual.

CABR, Warninger, at 23. An assumption is made that the thickness of Mr. Padilla's neck somehow compromised or devalued the x-rays taken by Mr. Warninger. However, Dr. Warninger testified that the thickness of Mr. Padilla's neck did not, in any way, undermine his opinion on worsening.

Id. at 26.

Independent Medical Examiner Dr. Seltzer also reviewed prior records and x-rays, performed a thorough exam and supported Mr. Padilla's reopening efforts as made clear by the following exchange:

Q. Now, Doctor, from your chart review, interview of the claimant and medical examination, are you able to formulate an opinion as to whether or not there are findings to indicate that there was a worsening of Mr. Padilla's industrially-related condition, the cervical condition, between January 3, 2007, when his claim was closed, and the Department's denial of reopening dated March 16, 2010?

A. Yes, sir. The findings on the x-rays are sufficient to raise the probability to 51 percent or greater that there has been a deterioration of his condition, because those films are done in 2009 and would indicate that there likely has been a worsening of the claimant's condition.

Q. And how so?

A. Simply because there is no recordation of a subluxation being noted on Claimant's x-rays before that and the suspicion is certainly more probably than not that something has happened to indicate that the claimant's condition has deteriorated by that subluxation.

CABR, Seltzer, at 23. Dr. Seltzer considered and compared the findings from a December 6, 2006 chart note of Dr. Cohen which reflected good range of motion to 80 degrees on the right and to 75 degrees on the left with some mild tenderness in the neck with described excellent flexion and extension

of the neck without any deficit to his neurological status. Dr. Seltzer described the difference by noting the diminished range of motion he found on examination, which “was repeated in triplicate, it was consistent, and again the findings on the claimant’s x-ray as done by Dr. Warninger would be supportive that there was a worsening of his condition.” *Id.* at 24.

When asked to concede on cross examination that Mr. Padilla’s limited range of motion was due to pain complaints, Dr. Seltzer explained:

Yes, sir. As well as to some extent the stiffness of his tissues, so I considered that in my report. And usually if I feel that a claimant is attempting to influence my appreciation or my measurements, I will put that in. So I accepted the measurements as being valid in this case.

CABR, Seltzer, at 26.

Fifty years ago, in *Pend Oreille Mines & Metals Co. v. Dep’t of Labor & Indus.*, the Washington Supreme Court determined that “[t]enderness and sprain are objective symptoms which can be disclosed by a doctor’s examination.” 63 Wn.2d 170, 174, 385 P.2d 856 (1963). WAC 296-20-220 defines objective findings as follows: “Objective physical and clinical findings are those findings on examination which are independent of voluntary action and can be seen, felt, or consistently measured by examiners.” As of March 16, 2010, Mr. Padilla’s conditions, proximately caused by his industrial injury of August 31, 2006, objectively worsened as

evidence by decreased range of motion, measured in triplicate, and by objective findings of loss of lordotic cervical curve and subluxation shown by x-ray studies, per the testimony of Drs. Seltzer and Warninger.

In contrast to the detailed exams and testimony of Drs. Seltzer and Warninger, Dr. Reiss' exam is cursory and conclusory. His testimony, in fact, is based largely on his assumptions about the findings of other physicians and without critical knowledge concerning even the mechanism of injury and, admittedly, without the benefit of imaging studies. Dr. Reiss assumes the original trauma was "minor" and Mr. Padilla should have gotten "better in a few weeks." CABR, Reiss, at 14-15. However, he did not know how fast the truck was traveling when it hit the trailer and admitted having reviewed NO imaging studies. CABR, Reiss, at 18, 20. For comparative purposes, he relates to earlier hearsay evidence but fails to reference or note Mr. Padilla's last visit with Dr. Cohen on December 6, 2006, much less recognize the subsequent diminished range of motion found by Drs. Warninger and Seltzer. In the end, the Department's commissioned examiner found normal range of motion and no worsening in the three years since closure. CABR, Reiss, at 15-16. Dr. Reiss testified that he "didn't think anything on diagnostic studies now could be directly related to the accident, anything." *Id.*, at 16.

However, he never saw or reviewed any diagnostic or imaging studies. *Id.*, at 18. Based on this record, the Court should not affirm the trial court's denial of benefits on reopening to a deserving injured worker based on this quantum and quality of evidence from a commissioned defense examiner. Dr. Reiss' suppositions do not equate substantial evidence. A preponderance of the evidence in this record demonstrates that between January 3, 2007 and March 16, 2010, Mr. Padilla no longer had good cervical range of motion and the objective x-rays taken by Dr. Warningner and reviewed by Dr. Seltzer (not Dr. Reiss) demonstrated cervical subluxation related by these two examiners to the industrial injury and its residuals.

Finally, the remedial nature of the Industrial Insurance Act must be kept in mind "and the beneficial purpose should be liberally construed in favor of the beneficiaries." *Wilber v. Dep't of Labor & Industries*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963). In *Cowlitz Stud Co. v. Clevenger*, the Washington Supreme Court framed the context for analysis of claims and issues under the Industrial Insurance Act [IIA] as follows:

The IIA is the product of a compromise between employers and workers. Under the IIA, employers accepted limited liability for claims that might not have been compensable under the common law. *Dennis v. Dep't of Labor & Indus.*, 109 Wash. 2d 467, 469, 745 P.2d 1295 (1987). In exchange, workers forfeited common law remedies. *Id.* This compromise is reflected in RCW 51.04.010, which states that "sure and certain relief for workers, injured in their work, and

their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy.” In furtherance of this policy, the IIA is to “be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010; *see also Cockle v. Dep’t of Labor & Indus.*, 142 Wash 2d 801, 811, 16 P.3d 583 (2001) (“[W]here reasonable minds can differ over what Title 51 RCW provisions mean . . . the benefit of doubt belongs to the injured worker.”).

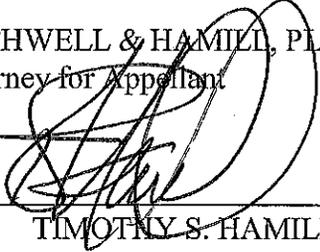
157 Wn.2d 569, 572-73, 141 P.3rd 1 (2006). The trial court erred in failing to recognize the remedial nature of the Industrial Insurance Act and the rule of liberal construction. While Mr. Padilla believes that fair and reasonable minds can not differ on the worsening and disabling effects from the industrial injury. He is a deserving injured worker entitled to the benefit of the doubt when construing the Industrial Insurance Act to the evidence presented in his specific claim and his request for additional benefits commensurate with the evidence and with Washington law.

V. CONCLUSION

For the foregoing reasons, Mr. Padilla requests that the court reverse the decision of the superior court and order the Department to reopen claim AC 64072 and provide this deserving injured worker the additional benefits to which he is entitled under Washington’s Industrial Insurance Act, Title 51, RCW.

Respectfully submitted this 25th day of March, 2013.

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Attorney for Appellant

By: 
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

I certify that I have electronically filed this document with the following:

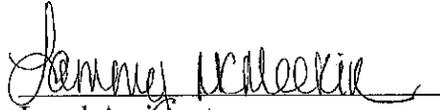
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Signed at Yakima, Washington on this 25th day of March, 2013.


Legal Assistant
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