

FILED

MAY 20 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31391-3-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ANTONIO L. PADILLA,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

DANA TUMENOVA
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ORIGINAL

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I. INTRODUCTION

This is a substantial evidence case arising from a workers' compensation appeal. Antonio Padilla applied to reopen his worker's compensation claim. In order to succeed at reopening a claim, a claimant must show that his or her conditions proximately caused by the industrial injury have worsened due to the injury, not due to unrelated causes. The Department of Labor and Industries (Department) denied his application based on the opinion of an orthopedic surgeon that the work injury did not cause any objective worsening of his condition. The Board of Industrial Insurance Appeals (Board) affirmed the Department's decision, and the Yakima County Superior Court affirmed the Board. Mr. Padilla failed to convince the Department, the Board, and the superior court that the industrial injury proximately caused any worsening of his condition.

Mr. Padilla now asks this Court to reweigh the evidence in order to determine whether substantial evidence supported the superior court's finding on causation. Well-established standards for substantial evidence review provide that appellate courts do not reweigh the evidence. Here, the orthopedic surgeon testified that Mr. Padilla's condition was caused by age, not the industrial injury. Ample medical testimony supports the superior court's finding on causation. This Court should affirm the superior court.

II. STATEMENT OF THE CASE

A. Dr. Reiss Testified that Mr. Padilla's Condition was Caused by Age, Not the Industrial Injury

On August 31, 2006, while Mr. Padilla was working as a truck driver for Roy Farms, Inc., his truck crashed into an oncoming vehicle. BR Padilla 5-6.¹ He was taken to the hospital by ambulance and treated for a broken rib. BR Padilla 7. Mr. Padilla returned to work in a light duty capacity after the accident. BR Padilla 7

Mr. Padilla filed a workers' compensation claim. BR 35. The Department allowed the claim and provided benefits. BR 35. On January 3, 2007, the Department closed his claim because there was no further necessary and proper treatment. BR 35; BR Reiss 9.

Mr. Padilla did not seek further medical treatment until October 2009 when he saw Ronald Warninger, a chiropractor. BR Padilla 8. Dr. Warninger testified that Mr. Padilla's cervical range of motion had worsened since claim closure, but he conceded that range of motion testing falls into "somewhat of a gray area" when it comes to classification as an objective or subjective finding. BR Warninger at 23. On October 9, 2009, Mr. Padilla applied to reopen his claim based on Dr. Warninger's findings and examination. BR Padilla 9; *see also* BR Warninger 13.

¹The certified appeal board record is cited as "BR." Witness testimony is cited by the witness's name and page number.

At the Department's request, Dr. Paul Reiss, a Board-certified orthopedic surgeon, examined Mr. Padilla. BR Reiss 6. Dr. Reiss concluded that there was no evidence of objective worsening between January 3, 2007, and March 16, 2010, because Mr. Padilla's original industrial injury was a minor trauma, basically muscular, and did not cause significant structural trauma. BR Reiss 13-14. Dr. Reiss testified that because of the lack of significant structural and neurological damage and a gap of three years in treatment, any diagnostic studies done at the time of reopening application could not be directly related to the original industrial injury. BR Reiss 13-16.

Mr. Padilla did not present at the time of his industrial injury with structural damage to his body, and his medical records following the accident did not include the immediate and dramatic symptoms that would be associated with major trauma. BR Reiss 12-15. Instead, Mr. Padilla had a minor head injury and muscular cervical strain. BR Reiss 12-14. Accordingly, as Dr. Reiss explained, the symptoms of such a minor injury would not cause the alleged aggravation to the cervical area that was the basis of Mr. Padilla's reopening application. BR Reiss 12-14.

Mr. Padilla was over 60 years old. BR Padilla 4. Dr. Reiss explained Mr. Padilla's symptoms were degenerative changes due to Mr.

Padilla's age and were unrelated to his industrial injury. BR Reiss 18, 19, 20.

Based on Dr. Reiss's examination, the Department issued an order denying Mr. Padilla's application to reopen. BR 40. The Department affirmed this order on March 16, 2010. BR 39.

On June 3, 2010, Dr. Daniel Seltzer, a Board-certified orthopedic surgeon, examined Mr. Padilla at his request. BR Seltzer 14, 21. He testified to a possible aggravation of underlying degenerative cervical spine condition, not probable. BR Seltzer 21-22.

B. The Board of Industrial Insurance Appeals and Superior Court Decided by a Preponderance of the Evidence that Mr. Padilla's Conditions Caused by His Industrial Injury Did Not Objectively Worsen

Mr. Padilla appealed the Department's decision to deny his reopening application to the Board. BR 38. After a hearing, the industrial appeals judge issued a proposed decision and order, concluding that Mr. Padilla's conditions proximately caused by his work injury of August 31, 2006 did not objectively worsen between January 3, 2007, the date of claim closure, and March 16, 2010, the date that the Department denied the reopening application. BR 41-42, 28-37.

Mr. Padilla petitioned the three-member Board for review of the proposed decision. BR 5-27. The Board denied review, thereby making the proposed decision and order the decision of the Board. BR 1-4.

Mr. Padilla then appealed to superior court. BR at 57-58. The court reviewed the Board record de novo and, after a bench trial, affirmed the Board's decision to deny Mr. Padilla's reopening application. The court issued a memorandum decision explaining its decision as follows:

The case turns on the expert evidence submitted to the Industrial Appeals Judge. Judge Johnson relied on the defense expert Dr. Reiss who provided a detailed analysis of why he believed the symptoms experienced by Mr. Padilla during the period in question were not related to the industrial traumatic injury. He clearly described that the injury would have either been traumatic or major with damage to the cervical structure or a minor injury with damage to the muscle. A major injury would have required immediate care together with follow up care. A minor injury would resolve. There being no evidence of a major injury the only conclusion left is the injury was minor. He also stated the symptoms of a minor injury would not be the source of the alleged aggravation.

Dr. Reiss attributed the symptoms of Mr. Padilla to his age, physical condition and arthritis.

Mr. Padilla offered testimony of Dr. Selzer and Dr. Warninger. Dr. Warninger made a conclusory statement of causal relationship. Dr. Selzer also made a conclusory statement of causation. Both statements were not particularly detailed or supported by reasoning. Both doctors felt additional testing would have to be done to provide a better analysis. The doctors failed to specifically establish a relationship between the current symptoms and the original injury.

CP 48-49. Accordingly, the court held that Mr. Padilla had failed to demonstrate by a preponderance of the evidence that the Board's findings were incorrect. CP 49.

The superior court entered findings of fact and conclusions of law that adopted and incorporated the Board's findings and conclusions in their entirety. *See* CP 51. The superior court found that "[a]ny objective worsening in Mr. Padilla's condition that occurred between January 3, 2007, and March 16, 2010, was not proximately caused by the residual effects of the August 31, 2006 industrial injury." CP 56 (adopting Finding of Fact 5 at BR 36). The superior court affirmed the Board order dated March 16, 2010. CP 52. Mr. Padilla now appeals. CP 1-3.

III. ISSUE

Does substantial evidence support the superior court's finding that any objective worsening in Mr. Padilla's condition between January 3, 2007, and March 16, 2010, was not caused by the industrial injury?

IV. SUMMARY OF THE ARGUMENT

At superior court, Mr. Padilla failed to prove by preponderance of the evidence that his conditions proximately caused by the industrial injury objectively worsened between the date of the closing order on January 3, 2007, and the date of the order denying his reopening application, March 16, 2010. On appeal, the appellate court decides

whether substantial evidence supports the findings made by the superior court, and whether the court's conclusions flow from the findings. Here Dr. Reiss testified that Mr. Padilla's condition was degenerative in nature and caused by his age, not the industrial injury. Although Mr. Padilla's doctor testified in a conclusory fashion that his condition was caused by his injury, this evidence is disregarded under the substantial evidence standard of review. Rather the evidence is viewed in the light most favorable to the Department and Dr. Reiss's testimony constitutes substantial evidence that any worsening in his condition was not proximately caused by the industrial injury.

Mr. Padilla also claims relief under the liberal construction rule of statutory construction. This rule applies only to issues of law, not fact. It does not apply in this case because there is no statutory construction dispute. Mr. Padilla also makes assignments of error that are unsupported by authority or lack any basis and should be disregarded by this Court.

V. STANDARD OF REVIEW

The first step in seeking review of the Department's decision to deny reopening of the claim is an appeal to the Board. RCW 51.52.060. As the appealing party, Mr. Padilla bore the burden of proof to establish that the Department's order was incorrect. *See* RCW 51.52.050. One seeking benefits under the Industrial Insurance Act "must prove his claim by

competent evidence.” *Lightle v. Dep’t of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966).

Decisions of the Board may be appealed to superior court. RCW 51.52.110. The findings and decisions of the Board are considered prima facie correct until the superior court, by a preponderance of the evidence, finds them incorrect. *Dep’t of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983). The superior court reviews the Board’s decisions de novo, but without any evidence or testimony other than that included in the Board’s record. RCW 51.52.110; *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P.2d 431 (1995).

The ordinary standard of civil review applies to this Court’s review of the trial court’s decision in a workers’ compensation appeal. RCW 51.52.140 (“Appeal shall lie from the judgment of the superior court as in other civil cases.”); see *Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Court of Appeals reviews the findings of the superior court, not the Board. See *Rogers*, 151 Wn. App. at 179-81. Here, the superior court adopted the Board’s findings as its own. CP 56.

This Court limits its review to “examination of the record to see whether substantial evidence supports the findings made after the superior court’s de novo review, and whether the court’s conclusions flow from the

findings.”” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep’t of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the fact finder. *Fox v. Dep’t of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem’l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon*, 110 Wn. App. at 485. “Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently.” *Korst*, 136 Wn. App. at 206.

VI. ARGUMENT

A. **Substantial Evidence Supports the Superior Court's Finding that Mr. Padilla's Injury Did Not Cause Any Objective Worsening of His Neck Condition**

Here, the superior court found that “[a]ny objective worsening in Mr. Padilla’s condition that occurred between January 3, 2007 and March 16, 2010 was not proximately caused by the residual effects of the August 31, 2006 industrial injury.” CP 36, 56. Substantial evidence supports this finding.

Mr. Padilla misapplies the standard of review and argues in his brief that the evidence preponderates for him. *See* App. Br. at 3, 4, 9, 11, 13, 22. However, the correct standard of review on appeal is whether the superior court’s decision is supported by substantial evidence, not the preponderance of the evidence. *See Ruse*, 138 Wn.2d at 5.

RCW 51.32.160(1)(a) provides that a worker whose claim has been closed may reopen the claim for further benefits upon establishing an “aggravation” of the disability. Under this provision, a worker seeking to reopen his or her claim must prove the following elements: (1) medical testimony that establishes the causal relationship between the industrial injury and the subsequent disability; (2) medical testimony, some of it based upon objective symptoms, that an aggravation of the injury resulted in increased disability; (3) medical testimony that the increased

aggravation occurred between the first and second terminal dates; (4) medical testimony, some of it based upon objective symptoms which existed on or prior to the closing date, that the worker's disability on the date of the closing order was greater than the supervisor found it to be. *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); *see also Eastwood v. Dep't of Labor and Indus.*, 152 Wn. App. 652, 657-58, 219 P.3d 711 (2009).²

Mr. Padilla assigns error to the superior court's finding that any worsening that occurred was not caused by the industrial injury. App. Br. 3. Substantial evidence supports the trial court's finding here because Dr. Reiss, a Board-certified orthopedic surgeon, testified that there was no objective worsening between January 3, 2007, and March 16, 2010, caused by the injury. *See* BR Reiss 13-16.

As Dr. Reiss explained, Mr. Padilla, who is over 60 years old, has degenerative changes in his cervical spine that are unrelated to his industrial injury. BR Reiss 18-20. Dr. Reiss also explained that Mr. Padilla's injuries after his August 2006 accident were minor in nature. BR Reiss 12-15. Mr. Padilla did not present at the time of his industrial injury with structural damage to his body, and his medical records following the

² The first terminal date is the date of the last previous closure or denial of such an application. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The second terminal date is the date of the most recent closure or denial of an application to reopen a claim for aggravation. *Id.* at 561.

accident did not include the immediate and dramatic symptoms that would be associated with major trauma. BR Reiss 12-15. Instead, Mr. Padilla had a minor head injury and muscular cervical strain. BR Reiss 12-14. Accordingly, as Dr. Reiss explained, the symptoms of such a minor injury would not cause the alleged aggravation to the cervical area that was the basis of Mr. Padilla's reopening application. BR Reiss 12-14. Dr. Reiss further explained Mr. Padilla's symptoms were degenerative changes due to Mr. Padilla's age and were unrelated to his industrial injury. BR Reiss 18, 19, 20.

A fair-minded person could rely on this testimony to find that Mr. Padilla's injury was minor and had resolved. A fair-minded person could also rely on this testimony to find that Mr. Padilla's condition was caused by age, and not by the industrial injury. Accordingly, Dr. Reiss's testimony provides substantial evidence in support of the trial court's finding that any worsening was not caused by the industrial injury.

B. This Court Should Decline Mr. Padilla's Invitation to Re-Weigh the Medical Evidence Because Doing So Ignores this Court's Limited Role on Substantial Evidence Review

Mr. Padilla repeatedly asks this Court to retry this case and to reweigh the medical evidence in his favor. App. Br. at 3, 4, 9, 11, 13, 22. He argues that "the evidence preponderates in favor of reopening rather than denial of benefits" and that "a preponderance of the evidence

presented warrants reversal of the trial court's decision." App. Br. at 11, 13. He spends a significant portion of his brief explaining why, in his view, his medical witnesses are more persuasive than Dr. Reiss. *See* App. Br. 15-22.

The problem with these arguments is that they ignore the correct standard of review. This Court cannot reweigh the evidence to determine that Dr. Warninger and Dr. Seltzer provided more convincing medical testimony than Dr. Reiss. *Fox*, 154 Wn. App. at 527. On substantial evidence review, this Court does not reweigh evidence, re-balance testimony, or substitute its own judgment for that of the trial court. *Fox*, 154 Wn. App. at 527; *Korst*, 136 Wn. App. at 206; *Gagnon*, 110 Wn. App. at 485. As the courts have stated, "we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Korst*, 136 Wn. App. at 206.

The superior court considered the testimony of Dr. Warninger and Dr. Seltzer and found that each made conclusory statements on the issue of causation, an element on which Mr. Padilla had the burden. CP 49. In contrast, the superior court stated that Dr. Reiss "provided a detailed analysis of why he believed the symptoms experienced by Mr. Padilla during the period in question were not related to the industrial traumatic injury." CP 48-49.

Mr. Padilla appears to challenge Dr. Reiss's testimony based on the fact that he relied on medical records from other providers to in part form the basis of his opinion. *See* App. Br. 21, 13. Mr. Padilla provides no authority for the proposition that a medical expert cannot rely on such information, and the Court should disregard this suggestion. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider unsupported arguments). In fact, ER 703 specifically allows an expert to testify based on the "facts and data" made known to the expert. *See State v. Russell*, 125 Wn.2d 24, 74, 882 P.2d 747 (1994).

Mr. Padilla also argues that Dr. Reiss did not rely on sufficient information. App. Br. 21. But such arguments go to the weight of his testimony, and the fact-finder considered these arguments at the superior court and rejected them. *See* CP 14; BR 12.

In short, Mr. Padilla is attempting to re-litigate this case in the Court of Appeals. But this Court does not reweigh the evidence as well-established standards for substantial evidence review provide.

C. This Court Cannot Liberally Construe the Facts in Favor of Mr. Padilla

Under RCW 51.12.010, the Industrial Insurance Act "should 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.” Citing this rule, Mr. Padilla asserts that he is “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” App. Br. at 23. Mr. Padilla misapprehends this rule.

The rule of liberal construction “does not apply to questions of fact but to matters concerning the construction of the statute.” *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945).

Here, there is no issue of statutory construction and no ambiguity with regard to the applicable law. Rather, Mr. Padilla appears to argue that the facts should be liberally construed in his favor. This is a misapplication of the rule of liberal construction, and the Court should not apply the rule in this way.

D. The Court Should Disregard Unsupported and Baseless Assignments of Error

Mr. Padilla makes additional assignments of error that are baseless. He assigns error to the superior court’s non-inclusion of the following factual information about the industrial injury in its findings: that he was involved in a motor vehicle accident; his truck’s speed at the time of the

accident; that “a tractor pulling a trailer traveling in the opposite direction blinded him with its high beams, causing Mr. Padilla to crash into the trailer”; the truck’s condition after the accident; his loss of consciousness after the accident; his trip by ambulance to the hospital; and that he “was treated initially for a broken rib and complaints of pain in his neck and knees, but followed up with other medical providers.” App. Br. at 1-2.

Mr. Padilla provides no citation to authority and no argument in support of the contention that there were additional determinative issues that should have findings about them. The Court should disregard his assignment because it is unsupported. *See In Re Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998). In any event, the trial court is required to make findings only on determinative issues. *See Maehren v. City of Seattle*, 92 Wn.2d 480, 487-88, 599 P.2d 1255 (1979) (“Only those findings which establish the existence or non-existence of determinative factual matters need be made.”); *City of Tacoma v. Fiberchem, Inc.*, 44 Wn. App. 538, 541, 722 P.2d 1357 (1986) (“The trial court is not obligated to make findings of fact on every contention of the parties.”).

The superior court’s findings about the industrial injury were on the material facts. The superior court found he was in a motor vehicle accident and found that following his injury he was treated for a broken

rib and complaints of pain in his neck and knees. CP 56 (adopting Finding of Fact 2 at BR 36).

Even if a purportedly omitted finding was on a determinative issue, the absence of a finding is a finding against a party with the burden of proof. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001).

Mr. Padilla also assigns error to the superior court's finding regarding his condition when his claim closed. App. Br. at 2. He appears to contest what his condition was at the first terminal date, the date of closure of his claim. App. Br. at 2. The terminal dates are used for comparison purposes to establish worsening. *See Phillips*, 49 Wn.2d at 197. The superior court found that "Mr. Padilla's claim was closed without disability award" and "[t]hereafter he did not seek treatment for neck problems until September 2009, when he went to a chiropractor." CP 56 (adopting Finding of Fact 3 at BR 36). Mr. Padilla assigns error to this finding, asserting that it failed to recognize that "no treating provider testified to physical findings as of January 3, 2007" and that there are "no comparative imaging findings for the neck or knees from claim closure." App. Br. at 2; *see also* App. Br. at 13.

Presumably, Mr. Padilla assigns error in order to contest what his condition was at the first terminal date. However, this was his burden of

proof to show. RCW 51.52.050; RCW 51.52.115; *Phillips*, 49 Wn.2d at 197; *Eastwood*, 152 Wn. App. at 658. It was his burden to show that his condition was worse at the second terminal date than the first terminal date. *Phillips*, 49 Wn.2d at 197. He cannot now complain as to the sufficiency of the evidence in this regard as it was his burden to show it in the first place.

In any event, ER 703 allows experts to base their opinions on the facts and data in the record. *See State v. Russell*, 125 Wn.2d at 74. The witnesses properly based their opinions on the medical records regarding the first terminal date. *See* BR Reiss 9-10, 13-15; BR Warningner 19-21, BR Seltzer 13-17, 24. It is notable that all three witnesses relied on the facts and data from the medical records. Mr. Padilla provides no authority in support of the proposition that one party can rely on expert testimony under ER 703, but the other party cannot, and such an unsupported suggestion should be rejected. *See Cowiche Canyon*, 118 Wn.2d at 809.

Finally, Mr. Padilla assigns error to the superior court's finding about his age. App. Br. at 2. Mr. Padilla testified that his date of birth was June 4, 1944. BR Padilla at 4. A fact he admits in his brief. *See* App. Br. at 5. Substantial evidence supports the trial court's finding that he was 66 by March 16, 2010. Mr. Padilla apparently questions the relevancy of his age. *See* App. Br. at 2. Not only did he not object to the testimony on

this basis, the medical testimony was that his condition was degenerative and caused by his age. *See* BR Padilla at 4; BR Reiss at 19-20. It was entirely appropriate for the superior court to make a finding about his age.

Related to his assignment, Padilla also argues that the preponderance of the evidence does not support the theory that Mr. Padilla's age caused his cervical condition. *See* App. Br. at 3. As already explained above, the standard of review is not preponderance of the evidence but rather the substantial evidence standard and substantial evidence supports that his industrial injury did not cause any worsening in his condition, rather age caused his condition.

VII. CONCLUSION

For the foregoing reasons, the Department requests that this Court affirm the superior court judgment.

RESPECTFULLY SUBMITTED this 16 day of May, 2013.

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APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: ANTONIO L. PADILLA) DOCKET NO. 10 14146
2)
3 CLAIM NO. AC-64072) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE: Daniel W. Johnson

5 APPEARANCES:

6 Claimant, Antonio L. Padilla, by
7 Bothwell & Hamill, PLLC, per
8 Timothy S. Hamill

9 Employer, Roy Farms, Inc., by
10 Washington State Farm Bureau,
11 None

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Dale E. Becker, Assistant

15 The claimant, Antonio L. Padilla, filed an appeal with the Board of Industrial Insurance
16 Appeals on April 22, 2010, from an order of the Department of Labor and Industries dated
17 March 16, 2010. In this order, the Department denied an application to reopen the claim. The
18 Department order is **AFFIRMED**.

19 **PROCEDURAL AND EVIDENTIARY MATTERS**

20 On June 1, 2010, and on October 14, 2010, the parties agreed to include the Jurisdictional
21 History in the Board's record. That history, as amended, establishes the Board's jurisdiction in this
22 appeal.

23 The September 13, 2010 perpetuation deposition of S. Daniel Seltzer, M.D., is published and
24 becomes part of the record. The hearsay objection at page 24 is sustained, but the testimony is
25 allowed under ER 703.

26 **RELIEF REQUESTED**

27 Mr. Padilla is seeking the reopening of his claim. He contends that his conditions,
28 proximately caused by the August 31, 2006 industrial injury, became aggravated or worsened
29 between January 3, 2007, and March 16, 2010.
30
31

1 On cross-examination Dr. Warningner did not obtain all of the prior records from Dr. Cohen's
2 office. He did not see any the prior x-rays or scans. His x-ray findings were compromised to some
3 extent on the lateral view, but came through enough to make a measurement.

4 **S. Daniel Seltzer, M.D.**

5 Dr. Seltzer is an orthopedic surgeon who examined Mr. Padilla on June 3, 2010, regarding
6 the effects of the August 31, 2006 industrial injury. The history revealed that following the head-on
7 collision in his tractor-trailer Mr. Padilla sustained injuries to his neck and head. He was taken to
8 the hospital and told he had rib injuries. He was treated and released. Thereafter, he received
9 treatment from Central Washington Occupational Medicine from September 2006 to January 2007,
10 when his claim was closed. He continued to experience neck pain and pain in both shoulders.
11 Since 2007 Mr. Padilla has not been able to work because of severe pain.

12 Imaging studies taken by the chiropractor in September 2009, were limited and blurry in
13 appearance. However, the studies did show straightening, or loss of the normal curve, and slight
14 subluxation at C4. The accident report indicated the claimant sustained a neck injury and rib injury.
15 He was seen on September 5, 2006, by Dr. Cohen for a "cervical lumbar strain and left lower leg
16 abrasions." Seltzer Dep. at 15. Follow-up examinations in September, October, and November
17 indicated there were continued symptoms with improvement. The patient was maintained on full
18 activities and stretching. A closing report on December 6, 2006, by Dr. Cohen indicated Mr. Padilla
19 was at maximum medical improvement. He rated the cervical spine at Category 1.

20 On orthopedic examination Dr. Seltzer noted there was symmetric decreased range of
21 motion of the cervical spine. Mr. Padilla had tenderness in the sternocleidomastoid muscles
22 bilaterally. There was intrinsic tightness in both the left and right shoulder musculature, but there
23 were no symptoms of internal derangement. Sensory examination of the upper extremities was
24 normal and reflexes were symmetrical. The upper back was normal. Dr. Seltzer had x-rays from
25 Warningner Clinic and interpreted those as having a bit of subluxation at C4. That indicates one of
26 the vertebral bodies had slipped forward a couple of millimeters. Seltzer Dep. at 21.

27 Dr. Seltzer diagnosed a cervical sprain/strain and possible cervical subluxation or
28 aggravation of underlying degenerative cervical spine conditions. Dr. Seltzer explains that he only
29 diagnosed a possible cervical subluxation and aggravation of underlying degenerative spine
30 conditions because the quality of x-ray images were not sufficient to render a diagnosis on a
31 more-probable-than-not basis. Seltzer Dep. at 22. However, Dr. Seltzer does say that the findings
32

1 on x-rays are sufficient to indicate a worsening of claimant's cervical condition on a probable-than-
2 not basis. He explained that the x-rays demonstrate a deterioration of the condition from the claim
3 closure since there was no prior record of subluxation. Dr. Seltzer also said the physical findings
4 charted on December 6, 2006 indicated there was good range of motion. Comparing those to his
5 examination he felt the cervical range of motion had since diminished. Seltzer Dep. at 24.

6 **Paul Reiss, M.D.**

7
8 Dr. Reiss is an orthopedic surgeon who examined Mr. Padilla on November 16, 2009. At
9 that time the claimant's chief complaints were upper back pain, right elbow pain, and bilateral knee
10 pain. 10/14/10 Tr. at 7. The history reveals a motor vehicle accident in August 2006 followed by
11 treatment with Dr. Cohen. The treatment was stopped in January 2007 because the claimant went
12 to California for family reasons. When Mr. Padilla returned in February the claim was closed.
13 Mr. Padilla sought treatment in September 2009, because of ongoing knee and neck pain. He had
14 not received any interim treatment.

15 The medical records from Dr. Cohen indicated that on September 5, 2006, Mr. Padilla had
16 multiple complaints and was diagnosed with a cervical strain. The neck was described as supple,
17 with excellent range of motion and no tenderness. He had good flexibility. There was a normal
18 neurologic exam. The patient was released to full duty on September 11, 2006, and normal motion
19 was again documented on that date. On October 20, 2006, the patient reported ongoing neck and
20 lower back pain. The doctor felt the patient would be stable in two weeks. On November 3, 2006,
21 Dr. Cohen noted the patient could continue regular work. On November 22, 2006, a physician's
22 assistant recommended closure in two weeks.

23 At the time of his November 16, 2009 physical examination Dr. Reiss found that Mr. Padilla
24 did not appear healthy. The claimant had somewhat of a flat affect. His gait was broad-based, but
25 not antalgic. There was a deformity of the knees, worse on the right. There was significant
26 discoloration in both lower legs, which was consistent with chronic venous changes, and there was
27 visible swelling of the right knee. The knee examination showed crepitation with some limitation of
28 motion. The cervical spine had good range of motion. There was some pain with movement of the
29 neck, but no paresthesia on lateral bending or rotation. The neurological examination was normal.

30 Dr. Reiss diagnosed a cervical strain related to the current claim that was fixed and stable.
31 Mr. Padilla also had osteoarthritis in both knees and chronic venous changes that were unrelated to
32 the claim. Dr. Reiss found there was no objective worsening between January 2007 and

1 March 2010. He noted the patient was seen for an acute injury in the emergency room and then
2 was examined by three different providers within a very short period of time charting a normal
3 neurologic examination and full range of motion. He did not feel under the circumstances there was
4 a major trauma in the first instance that involved structural damage or major ligamentous instability.
5 The history of the injury and treatment thereafter ruled out the presence of any major trauma.
6 Thus, he did not think there was a worsening of the condition. Furthermore, Dr. Reiss explained
7 there was a gap of three years with no treatment. There is nothing on the diagnostic studies that
8 would be directly related to the accident.

9 DECISION

10 This is an aggravation case which requires Mr. Padilla to prove that his condition,
11 proximately caused by the residual effects of the August 31, 2006 industrial injury objectively
12 worsened between the time the Department closed his claim on January 3, 2007, and the date they
13 denied his reopening application on March 16, 2010. To that end Mr. Padilla submits the testimony
14 of Dr. Warninger and Dr. Seltzer who both felt there was objective worsening based upon a
15 comparison of range of motion findings after the second terminal date, with findings that were
16 charted before the first terminal date. Both of Mr. Padilla's experts also noted there was a loss of
17 the normal curve with a slight subluxation present at C4 as shown in x-rays taken in
18 September 2009. They opined that since there were no positive x-ray findings before the closing
19 date, the later x-rays are indicative of objective worsening.¹ The claimant's expert opinions are
20 directly at odds with that of Dr. Reiss who said at the time of his examination in November 2009
21 Mr. Padilla had good range of motion of the cervical spine. He also felt that given the history
22 following the August 31, 2006 industrial injury there is no indication the ongoing symptoms are
23 directly related to that event.

24 Under the circumstances, Dr. Reiss' opinion is more convincing. The basis of
25 Drs. Warninger and Seltzer's opinions on worsening is somewhat thin in that both rely primarily on
26 range of motion findings that are arguably objective in nature, and findings from a 2009 x-ray that
27 was blurry and of limited quality. However, even if we accept the underlying premise that in 2009
28 there were reduced cervical range of motion and positive x-ray findings, the question still remains
29 whether any such changes were proximately caused by the residual effects of the August 2006
30 industrial injury. Dr. Reiss is the only expert to meaningfully address that critical issue. He points
31

32 ¹None of the medical experts identified any x-ray films, radiologist reports, or summary of findings from any studies taken prior to the claim closure for comparison purposes.

1 out that the history in the records immediately following the industrial injury show that after the
2 industrial injury Mr. Padilla treated at a clinic on five occasions over the course of three months, and
3 then his claim was closed. There were no significant findings that might suggest there was any
4 serious structural damage or ligamentous instability of the neck that could lead to ongoing problems
5 years later. After the claim was closed, there was nearly a three year gap in treatment, as
6 Mr. Padilla did not seek medical attention until September 2009. The real question raised by this
7 history is whether any worsening that might exist under these circumstances can reasonably be
8 attributed to the August 2006 industrial injury. Drs. Warninger and Seltzer did not squarely address
9 that question. Neither of those experts were asked to explain how they made the connection, or to
10 describe how any of the findings prior to closure in early 2007 were indicative of the presence of a
11 long-standing, progressive, or lingering neck problem that would relate to the symptoms Mr. Padilla
12 was experiencing when he applied for reopening in late 2009. On the other hand, Dr. Reiss not
13 only considered the lack of any evidence of significant injury before the closing date, but also
14 pointed out that Mr. Padilla's age was a factor in the presence of any degenerative changes.² In
15 addition to neck symptoms the claimant also complained of upper back pain, right elbow pain,
16 bilateral knee pain, and had chronic venous changes in the legs. Without more, one is hard-
17 pressed to make a connection between symptoms that he reported in 2009-2010, and the residual
18 effects of the August 2006 industrial injury.

19 FINDINGS OF FACT

- 20 1. On September 5, 2006, the claimant, Antonio L. Padilla, filed an
21 Application for Benefits with the Department of Labor and Industries
22 alleging that he incurred an industrial injury on August 31, 2006, while in
23 the course of employment with Roy Farms, Inc. The claim was allowed
24 and benefits were paid. On January 3, 2007, the Department issued an
25 order that closed the claim. On October 9, 2009, the claimant filed an
26 Application to Reopen the claim. On November 25, 2009, the
27 Department issued an order that denied the reopening application. On
28 January 11, 2010, the claimant filed a Protest and Request for
29 Reconsideration of the November 25, 2009 order. On March 16 2010,
30 the Department affirmed the November 25, 2009 order. On April 22,
31 2009, the claimant filed a Notice of Appeal of the March 16, 2010 order.
32 On April 30, 2010, the Board issued an Order Granting Appeal assigning
Docket No. 10 14146. Further proceedings were held.

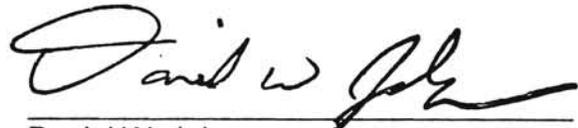
² Mr. Padilla is 66 years old. 10/14/10 Tr. at 4.

- 1 2. On August 31, 2006, the claimant was involved in a motor vehicle
2 accident while in the course of his employment with Roy Farms, Inc.
3 Following the injury he was treated for a broken rib and complaints of
4 pain in his neck and knees.
5
6 3. As of January 3, 2007, Mr. Padilla's claim was closed without disability
7 award. Thereafter, he did not seek treatment for neck problems until
8 September 2009, when he went to a chiropractor. Following his
9 reopening application in October 2009, examiners identified mixed
10 clinical findings, some of which indicated that he had reduced cervical
11 range of motion. X-rays taken in September 2009 were of limited quality
12 and were blurry in appearance, but did demonstrate some loss of the
13 normal curve of the spine with a slight subluxation at C4.
14
15 4. By March 16, 2010, Mr. Padilla was 66 years old. In addition to neck
16 complaints he also suffered from pain in both shoulders, pain in the right
17 elbow, and bilateral knee pain.
18
19 5. Any objective worsening in Mr. Padilla's condition that occurred between
20 January 3, 2007, and March 16, 2010, was not proximately caused by
21 the residual effects of the August 31, 2006 industrial injury.

22 **CONCLUSIONS OF LAW**

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the
24 parties to and the subject matter of this appeal.
25
26 2. Between January 3, 2007, and March 16, 2010, Mr. Padilla's conditions,
27 proximately caused by the industrial injury of August 31, 2006, had not
28 objectively worsened within the meaning of RCW 51.32.160.
29
30 3. The March 16, 2010 order that denied the application to reopen the
31 claim was correct and is **AFFIRMED**.
32

DATED: JAN 24 2011



Daniel W. Johnson
Industrial Appeals Judge
Board of Industrial Insurance Appeals

RTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

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1616 S 14TH ST
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BOTHWELL & HAMILL PLLC
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YAKIMA, WA 98907-2730

CA1

ROY FARMS INC
401 WALTERS RD
MOXEE CITY, WA 98936

EM1

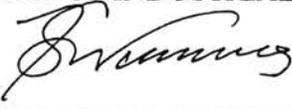
ROY FARMS INC
WASHINGTON STATE FARM BUREAU
PO BOX 8690
LACEY, WA 98509

ELR1

DALE E BECKER, AAG
OFFICE OF THE ATTORNEY GENERAL
1433 LAKESIDE CT #102
YAKIMA, WA 98902

AG1

Dated at Olympia, Washington 1/24/2011
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: 

J. SCOTT TIMMONS
Executive Secretary

In re: ANTONIO L PADILLA
Docket No. 10 14146

APPENDIX B

FILED

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KINEATON
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

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

ANTONIO PADILLA,

Plaintiff,

vs.

NO. 11-2-00936-9

MEMORANDUM DECISION

DEPARTMENT OF LABOR AND INDUSTRIES,

Defendant.

This case is an appeal to the Superior Court of a Decision and Order of the Board of Industrial Insurance Appeals.

Mr. Padilla bears the burden of proving by a preponderance of the evidence that the decision of the lower tribunal was incorrect.

Mr. Padilla suffered an industrial injury on August 31, 2006. The issue before the court was whether Mr. Padilla established an aggravation of his industrial injury during the period January 3, 2007 and March 6, 2010.

The case turns on the expert evidence submitted to the Industrial Appeals Judge. Judge Johnson relied on the defense expert Dr. Reiss who provided a detailed analysis of why he believed the symptoms experienced by Mr. Padilla during the period

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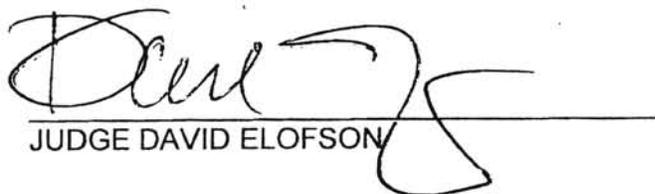
1 in question were not related to the industrial traumatic injury. He clearly described that
2 the injury would have either been traumatic or major with damage to the cervical
3 structure or a minor injury with damage to the muscle. A major injury would have
4 required immediate care together with follow up care. A minor injury would resolve.
5 There being no evidence of a major injury the only conclusion left is the injury was
6 minor. He also stated the symptoms of a minor injury would not be the source of the
7 alleged aggravation.

8 Dr. Reiss attributed the symptoms of Mr. Padilla to his age, physical condition
9 and arthritis.

10 Mr. Padilla offered testimony from Dr. Selzer and Dr. Warningner. Dr. Warningner
11 made a conclusory statement of causal relationship. Dr. Selzer also made a conclusory
12 statement of causation. Both statements were not particularly detailed or supported by
13 reasoning. Both doctors felt additional testing would have to be done to provide a better
14 analysis. The doctors failed to specifically establish a relationship between the current
15 symptoms and the original injury.
16

17 The burden is on the claimant to demonstrate by a fair preponderance of credible
18 evidence that the Board's findings and decisions are incorrect. After a careful review of
19 the record in this case, this Court does not find that the claimant has met that burden.
20 The decision of the Board of Industrial Appeals is affirmed.
21

22 DATED this 7th day of November 2012.

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JUDGE DAVID ELOFSON

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APPENDIX C

12-9-05156-3

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KIM EATON
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STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT

ANTONIO PADILLA,
Plaintiff,

v.
DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,
Defendant.

NO. 11-2-00936-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT
Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

- 1. Judgment Creditor: State of Washington Department of Labor and Industries
- 2. Judgment Debtor: Antonio Padilla
- 3. Principal Amount of Judgment: - 0 -
- 4. Interest to Date of Judgment: - 0 -
- 5. Statutory Attorney Fees: \$200.00
- 6. Costs: -0-
- 7. Other Recovery Amounts: -0-
- 8. Principal Judgment Amount shall bear interest at 0% per annum.
- 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.
- 10. Attorney for Judgment Creditor: Dale E. Becker
- 11. Attorney for Judgment Debtor: Timothy S. Hamill

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

1 This matter came on regularly before the Honorable David Elofson, in open court on October
2 25, 2012. The Plaintiff, Antonio Padilla, appeared by his counsel, Timothy S. Hamill; and the
3 Defendant, Department of Labor and Industries (Department), appeared by its counsel, Robert
4 M. McKenna, Attorney General, per Dale E. Becker, Assistant Attorney General. The Court
5 reviewed the records and files herein including the Certified Appeal Board Record, and briefs
6 submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the
7 Court makes the following:

8 **I. FINDINGS OF FACT**

9 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on October 14
10 and 20, 2010 and one deposition was taken, on September 13, 2010.

11 Thereafter, an Industrial Appeals Judge issued a Proposed Decision and Order on
12 January 24, 2011, from which Plaintiff filed a timely Petition for Review on March 2,
13 2011. On March 14, 2011, the Board having considered the Plaintiff's Petition for
14 Review, issued an Order Denying Petition for Review as its Final Order.

15 Plaintiff thereupon timely appealed the Board's March 14, 2011 order to this Court.

16 1.2 The Board's Findings of Fact are supported by a preponderance of the evidence. The
17 Court adopts as its Findings of Fact, and incorporates by this reference, the Board's
18 Findings of Facts Nos. 1 through 5 of the January 24, 2011 Proposed Decision and
19 Order adopted by the Board of Industrial Insurance Appeals as its Final Order on
20 March 14, 2011.

21 Based upon the foregoing Findings of Fact, the Court now makes the following:

22 **II. CONCLUSIONS OF LAW**

23 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

24 2.2 The Board's Conclusions of Law are correct and should be affirmed. The Court adopts
25 as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions
26 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.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters
judgment as follows:

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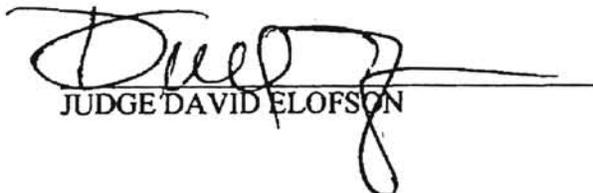
III. JUDGMENT

3.1 The March 14, 2011 Board of Industrial Insurance Appeals Order Denying Petition for Review which affirmed the Department of Labor and Industries' March 16, 2010 order, is hereby affirmed.

3.2 The Defendant is awarded, and the Plaintiff is ordered to pay, a statutory attorney fee of \$200.00.

3.3 The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

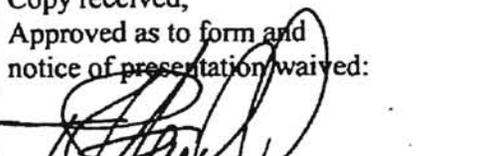
DATED this 20 day of Dec, 2012.


JUDGE DAVID ELOFSON

Presented by:
ROBERT M. MCKENNA
Attorney General


DALE E. BECKER, WSBA #21274
Assistant Attorney General

Copy received,
Approved as to form and
notice of presentation waived:


TIMOTHY S. HAMILL, WSBA #24643
Attorney for Plaintiff

No. 313913

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

ANTONIO PADILLA,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR &
INDUSTRIES,

Respondent.

DECLARATION OF
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, caused to be served the Brief of Respondent with Appendix A - C and this Declaration of Mailing to counsel for all parties on the record and to the Court by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Renee Townsley
Court Administrator/Clerk
Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201-1987

Timothy Hamill
Bothwell & Hamill PLLC
PO Box 2730
Yakima, WA 98907-2730

DATED this 16th day of May, 2013.



SHANA PACARRO-MÜLLER
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(206) 464-5808