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Mar 12, 2014

Court of Appeals
Division III
State of Washington

Case No. 318184

WASHINGTON COURT OF APPEALS, DIVISION III

TARGET CORPORATION,

Appellant-Defendant,

v.

PATRISIA VOWELS AND THE DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent-Plaintiffs.

APPELLANT'S REPLY BRIEF

Krishna Balasubramani, WSBA No. 33918
Lee Ann Lowe, WSBA No. 45010
Sather, Byerly & Holloway, LLP
111 SW Fifth Avenue, Suite 1200
Portland, OR 97204 - 3613
Telephone: 503-225-5858

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I. ARGUMENT

A. Reply in Support of First Assignment of Error¹

Through the Industrial Insurance Act (“Act”) the Legislature granted the Department of Labor and Industries (“Department”) original, exclusive jurisdiction over issues of compensability of workers’ compensation claims. While it is true the Act should be liberally construed, the courts must also apply a “sensible construction” that adheres to the legislative intent, but avoids unjust or absurd consequences. *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (1981) (citing *State ex rel. Thorp v. Devin*, 26 Wn.2d 333, 173 P.2d 994 (1946)). “A thing which is within the object, purpose and spirit of an enactment is as much within the act as if it were within the letter.” *Id.* (citing *In re Estates of Donnelly*, 81 Wn.2d 430, 502 P.2d 1163 (1972)). It is within the “object, purpose and spirit” of the Act that the Department has exclusive original jurisdiction to address compensability of workers’ compensation claims. To allow the Board of Industrial Insurance Appeals (“Board”) or the Superior Court to make a compensability determination

¹ Although claimant did not address her response in this order, for clarity employer is maintaining the order of its arguments as initially set out on appeal.

which has not first been addressed by the Department is not only irrational, it directly contradicts legislative intent.

On appeal, claimant argues that by not specifying whether the injury was to the right or left upper extremity, the Department's order denied generically any and every condition she had. If the Court followed this line of thought to its natural conclusion, then the Department could bar any condition, claimed or not, by virtue of a denial order issued at a time the condition was in existence. If claimant's argument is correct, any condition she had as of August 18, 2009, was rejected by the Department's denial order, and, since she has not offered evidence about any other condition, those conditions are forever barred as compensable conditions. This is an absurd result which would create a harsh, unfair situation for workers. Just as the Board and trial court's jurisdiction are limited, the Department's jurisdiction is also limited. To suggest the Department's order denied every possible condition claimant had at the time, when she submitted only a claim for her right upper extremity, goes against the law and sound policy.

This is not a case where the issues were vague at the Department level but clarified once the parties were at the Board. The Board's rules require clarifying the issues "in order to avoid unnecessary litigation." WAC 263-12-095(2); *In re Steven Fridell*, Dckt. No. 04 14032, 6-7

(August 22, 2005). At the original pre-hearing conference and hearing before the Board, claimant clarified the issues by stating that the only issue on appeal was the compensability of an occupational disease claim for her right wrist. By clarifying the issues on appeal claimant limited the Board's jurisdiction, and the jurisdiction of the superior court, to the compensability of the right wrist only.

Moreover, this is not a case where claimant was unclear about the issues at the Department level and the pre-hearing stage but clarified the issues at hearing. On the record, in order to understand the issues before the Board, the Judge asked the parties to clarify that the issue was compensability of the right wrist. Both parties agreed to this characterization of the issues before the Board.

In limiting the Board and court's jurisdiction to compensability of only the right wrist, claimant certainly has no basis to claim unfairness. Nothing prevented her from initially filing a claim for bilateral carpal tunnel syndrome, or raising the issue before the Board. However, she did not do so. It was not until after the Board awarded compensability of bilateral carpal tunnel syndrome that claimant claimed the left wrist was also a compensable condition. After all, why would she want to go back, file a claim for the left wrist, develop medical evidence, and litigate it when the Board gave it to her without requiring her to take any of these

actions? If the tables were turned and the Board had allowed a right-sided claim but denied the left, then claimant certainly would be arguing the Board lacked jurisdiction, that she had not filed a left-sided claim, and had not fully developed evidence because it was not at issue. Claimant's position is understandable because she got a bonus claim by virtue of the Board's over-reaching. However, Washington law requires that she go through the proper channels to establish compensability of her left wrist condition, which she failed to do.

Her statement that the claim filed was for a generic occupational disease of carpal tunnel is wholly inaccurate. As the jurisdictional history shows, the claim was filed for the right wrist only under claim number SD-74199, and it was brought alternatively as an injury or occupational disease. CP 47. While the Department's denial did not identify a particular body part, it was issued in response to, and referred back to, the right wrist claim, citing the claim number. CP 47. Claimant's Notice of Appeal also referenced the right wrist claim by number. Moreover, throughout her Notice of Appeal she argued she had an injury or an occupational disease consisting of "injury to her upper extremity"- using the singular, not the plural. CP 34-36. Again, this corresponds to the initial claim for the right wrist. Any doubt is resolved by the Board's Interlocutory Order, in which the relief requested is identified as

“occupational disease claim for a condition of the right wrist” and the issue as confirmed by the IAJ at hearing as “allowance of an occupational disease claim for a right wrist condition....” CP 59; 80.

Claimant argues the medical records included the fact of symptoms on both sides, converting her claim into a bilateral one. Employer disagrees. The same records mentioned anticardiolipin syndrome, strokes, hypertension, and transient ischemic attacks, among other conditions. CP 225-226. If claimant’s argument is accepted, then all of these conditions were automatically at issue, and denied by the Department, simply because they appeared in the record. Rather than creating efficient adjudication, this would create bedlam and have unintended consequences of barring claims never raised. Moreover, as previously pointed out in employer’s initial brief, the existence of bilateral symptoms is one factor in determining if the right wrist condition was idiopathic or work-related. The mention of bilateral symptoms in the record is not sufficient to give the Board or the Superior Court jurisdiction over compensability of the left wrist, a condition which has never been addressed by the Department.

Compensability of the left carpal tunnel condition has never been addressed by the Department and, therefore, was not within the Board’s scope of review or the Superior Court’s jurisdiction to address. This Court must reverse the Superior Court’s decision with regard to the left wrist

condition because neither the Board nor the Superior Court had jurisdiction to address that condition. A left wrist claim was never filed by claimant or addressed by the Department. To allow the Superior Court decision to stand goes beyond the letter and spirit of the law.

B. Reply in Support of Second Assignment of Error

Substantial evidence does not support the Superior Court's finding that claimant's carpal tunnel syndrome, either right or left, arose naturally and proximately from distinct employment conditions at claimant's work.

On appeal, claimant argues she has a bilateral occupational disease that was "lit up" by her work with employer. Under *Miller v. Dep't of Labor and Indus.*, 200 Wash. 674, 682, 94 P.2d 764 (1939), the Supreme Court held that "if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition." In order for an occupational disease to be "lit up" there must be a preexisting, dormant condition. In this case, there has been no evidence presented to support a "lighting-up" theory. In fact, two lay witnesses testified claimant told them her right wrist condition had bothered her for a long time. It was not a dormant condition and the "lighting up" theory does not apply.

“In order for a claimant to recover under the terms of the workmen’s compensation act, he must establish a causal connection between an industrial injury and a subsequent physical condition with at least some degree of probability.” *Jacobson v. Dep’t of Labor and Indus.*, 37 Wn.2d 444, 450-51, 224 P.2d 338 (1950) (citing *Seattle-Tacoma Shipbuilding Co. v. Dep’t of Labor and Indus.*, 26 Wn.2d 233, 173 P.2d 786 (1946)). The causal connection must be established by the evidence presented. To prove causation in an occupational disease claim, the evidence must establish that claimant’s condition arose naturally and proximately out of her distinct employment conditions. RCW 51.08.140; *Dennis v. Dep’t of Labor and Indus.*, 109 Wn.2d 467, 481-82, 745 P.2d 1295 (1987).

In this case, based on the evidence presented, one cannot reasonably conclude claimant’s work was the natural and proximate cause of her right or left carpal tunnel syndrome. Drs. Brinkman and Blue both concluded claimant’s work activities were not the type of repetitive motion activities that cause carpal tunnel syndrome. The well-reasoned and persuasive opinions of these experts were based on medical science and expert analysis considering all potential causes. Dr. Sampson, on the other hand, blindly adopted claimant’s theory that her employment caused her condition. Not only is claimant not a medical expert, she is a biased party

who filed this claim because of monetary concerns. Dr. Sampson lacked the necessary knowledge regarding the frequency and nature of claimant's distinct employment conditions to be able to provide an independent, competent opinion regarding causation. His testimony was simply not well-reasoned or persuasive.

The substantial evidence standard requires "a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000) (internal citations omitted). A temporal nexus between claimant's work activities and the development of her condition is not sufficient, in and of itself, to establish causation. In this case the opinion of Dr. Sampson, which ignored medical science and was based solely on claimant's non-medical expert opinion, does not provide "a sufficient quantum of evidence" to establish claimant's distinct work activities were a proximate cause of her right or left carpal tunnel condition. *Id.*

Substantial evidence does not support that claimant's right or left carpal tunnel syndrome arose naturally and proximately from her distinct employment conditions. Therefore, the Court must reverse the lower court's judgment.

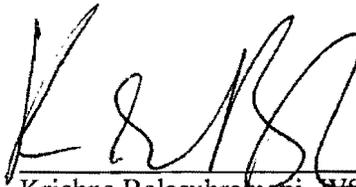
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II. CONCLUSION

For the reasons provided above and in Appellant's initial brief, the trial court erred in affirming the Board's decision allowing this claim for bilateral carpal tunnel syndrome. Appellant respectfully requests the Court of Appeals reverse the judgment and deny this claim in its entirety. Alternatively, Appellant requests the Court of Appeals reverse the judgment as to the left-sided carpal tunnel on the basis that the issue was not properly before the Board of Industrial Insurance Appeals and therefore should not have been addressed by the Board or the Superior Court.

Dated: March 12, 2014

Respectfully submitted,



Krishna Balasubramani, WSBA No. 33918

Lee Ann Lowe, WSBA No. 45010

Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed **APPELLANT'S REPLY BRIEF** via efilng to the following:

Ms. Renee S. Townsley, Clerk
Washington State Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201-1905

I further certify that on this date, I mailed a copy of the foregoing **APPELLANT'S REPLY BRIEF** via first class mail, postage prepaid, with the United States Postal Service to the following:

David Lybbert
Calbom & Schwab
PO Drawer 1429
Moses Lake, WA 98837

Anastia R. Sandstrom
Assistant Attorney General
Office of the Attorney General
State of Washington
800 Fifth Avenue., Suite 2000
Seattle, WA 98104-3188

DATED: March 12, 2014



Krishna Balasubramani, WSBA No. 33918
Of Attorneys for Appellant