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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 320758

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

International Paper Company,

Respondent

v.

Anthony Bolte,

Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Introduction

In considering the arguments raised by the employer (respondent) in their brief it is important to recall that there is only one issue in this case, and that is whether Mr. Bolte suffered an industrial injury on October 1, 2008. In order for evidence to support the jury verdict it must support the determination of the verdict that Mr. Bolte did not have an industrial injury on October 1, 2008.

Evidence regarding tangential issues other than whether Mr. Bolte had an industrial injury on October 1, 2008 is irrelevant, and cannot be used to support the jury verdict. Also, as discussed in Mr. Bolte's brief already on file with the court, medical testimony must be expressed on a more probable than not basis. Therefore, for medical testimony to support the jury verdict it must be medical testimony that Mr. Bolte's condition is more probably than not unrelated to his October 1, 2008 industrial injury.

B. Mr. Bolte's Testimony Regarding Whether He Told His Supervisor He Was Going to File A Workers' Compensation Claim

The employer alleges in their brief that Mr. Bolte changed his testimony regarding whether he had a conversation with his supervisor, Mr. Mee, about whether Mr. Bolte planned on filing a claim for his October 1, 2008 injury, and that this alleged change in Mr. Bolte's testimony supports the jury verdict that Mr. Bolte did not have an industrial injury on October 1, 2008. Respondent's Brief, pg. 7-8.

The employer argues that Mr. Bolte first stated he could not recall whether he had a conversation with Mr. Mee about filing a claim, but that later Mr. Bolte changed his testimony and said he never said anything to Mr. Mee about filing a claim. The testimony cited to by the employer in support of their argument, however, does not reveal a sinister change in the testimony of Mr. Bolte at different points in time, but rather reflects the use of consistent but different words in response to two different successive questions asked by the employer's attorney during cross examination of Mr. Bolte. The variation in wording in Mr. Bolte's answers is a reflection of the variation in the wording of the questions he was responding to, which is what would be expected. The testimony cited to by the employer in this argument is as follows:

Q (By Mr. Gress): Do you recall having a conversation with Mr. Mee on that date, as to whether you were filing this current symptom as a worker's compensation claim?

A (By Mr. Bolte): No, I don't recall.

Q (By Mr. Gress): But you wouldn't doubt that you might have said I'm not filing this, or I don't know if I'm filing this at this point?

A (By Mr. Bolte): I never said anything to him about filing it.

Anthony Bolte, CP, 105-106.

In the first question Mr. Bolte was not asked whether or not a conversation with Mr. Mee took place, but instead whether he recalled having such a conversation which was implied to have happened in the question. Mr. Bolte responded that he did not recall having a conversation with Mr. Mee. In other words, he denied any recollection of the conversation implied to have occurred in the question of Mr. Gress.

Mr. Bolte's answer to the second question in which he stated he did not tell Mr. Mee that he was going to file a claim is not inconsistent with his answer to the first question. The answer to the first question only addresses the issue of recollection of a conversation because it was the recollection of a conversation that he was asked about. Consequently, there is no inconsistency between the two answers.

Further, even if there was an inconsistency it would be irrelevant to the issue in this case. This issue in this case is not whether Mr. Bolte told or did not tell his supervisor he planned or did not plan to file a claim, but

rather whether Mr. Bolte had an injury on October 1, 2008. Consequently, any testimony (consistent or inconsistent) about whether Mr. Bolte did or did not tell his supervisor about any plan to file a claim could not be used to support the jury verdict.

C. Mr. Bolte's Prior Absences

The employer asserts that the acknowledgement of Mr. Bolte that he had prior absences from work for which he had accumulated points supports the jury verdict that Mr. Bolte did not have an industrial injury on October 1, 2008. However, that testimony does not have any bearing on the question of whether an industrial injury occurred October 1, 2008. It therefore cannot support the jury verdict either.

The question in this case is not what Mr. Bolte's motive for filing the claim was, but rather whether he had an industrial injury on October 1, 2008. Just as negligence or fault is not an issue in worker's compensation claims there is no requirement that an injured worker have pure motives in filing a claim. WPI 155.05 6th.

Further, even if the motive of Mr. Bolte for filing the claim were at issue, the evidence does not support the alleged sinister motive proffered by the employer. Had Mr. Bolte's motive in filing the claim been to keep from accumulating points for absences from work then he would have

filed a claim right away rather than waiting to receive further information from Dr. Lozano prior to filing the claim. *Anthony Bolte*, pg. 23-24, 33 (CP, pg. 96-97, 106). Further, if Mr. Bolte's motive in filing the claim was to avoid having the absences result in points then why wouldn't he have simply invented an injury some time earlier than even October 1, 2008 to keep the earlier points from being on his attendance record? The facts don't line up with the employer's allegation.

D. Dr. Lozano's Testimony

1. Dr. Lozano's Testimony Regarding Backing up the Forklift

The employer also argues there are portions of Dr. Lozano's testimony about the backing up of the forklift which supports the jury verdict holding that Mr. Bolte did not have an industrial injury on October 1, 2008. However, as will be outlined below, this testimony does not support the jury verdict either.

The employer argues that Dr. Lozano testified, "simply looking over your shoulder while backing up a car or forklift was not an 'unusual strain' which by itself would cause claimant's complaints." Respondent's Brief, pg. 6. The relevant testimony of Dr. Lozano referred to is as follows:

Q (Mr. Gress): And if there is neurodynia that results from a specific incident or event sometime after the hernia repair, what is the type of mechanism of injury that you see associated with that?

A (Dr. Lozano): You know, if there was an inciting event towards that, you know, there's some unusual stretch or unusual trauma to the area that potentially could do that. If there's a change in the configuration of the anatomy, you know, potentially that could do it. I think every case would be different in my view of that.

Q: Would you anticipate simply looking over your shoulder to essentially – for example, back up your car back up the forklift, is that an unusual strain such as you're discussing?

A: If it was the only time, if it was the only incident or if that was the only action occurring and not occurring, or there were other strains to the system before that that it's hard to say that that by itself would cause the strain.

RP Vol. 2, pg. 111. This testimony does not support the jury verdict for several reasons. First, the testimony only indicates that the action described in the hypothetical question of the employer's attorney would not be the "sole" cause of the strain. *Id.* This does not support the jury verdict because it does not remove the industrial injury as a cause since an industrial injury need not be the sole cause of a condition in order to be a proximate cause of a condition. Shea v. Dept. of Labor & Indus. 12, Wn. App. 410, 415 (1974).

Second, this testimony of Dr. Lozano does not support the jury verdict because the answer of Dr. Lozano is based on an inaccurate hypothetical. The hypothetical question inaccurately describes what is

required physically to back up the forklift. Driving the forklift in reverse also required “twisting in his [Mr. Bolte’s] seat,” which would mean twisting in the torso and abdomen area. (CP, 199, 202, 209, 212) Medical opinion testimony based on an inaccurate hypothetical is without probative value, and therefore cannot support the jury verdict. Sayler v. Dept. of Labor & Indus., 69 Wn.2d 893, 896 (1996).

Third, this testimony of Dr. Lozano does not support the jury verdict because Dr. Lozano’s answer is prefaced on the assumption that it was a single/isolated instance of Mr. Bolte turning his head/neck. However, as noted above more than simply twisting Mr. Bolte’s head/neck was required to back up the forklift, and it was not a single isolated instance. Rather, Mr. Bolte had been working for a couple hours on several lines of product already at the time of the injury. (CP, pg. 93) So, he would have been doing that same type of twisting maneuver multiple times just that day. *Id.* Further, he would have been doing that type of twisting in his waist/abdomen repeatedly each day for many days prior to October 1, 2008 as well while driving forklift at work since driving a forklift was his primary job duty. (CP, pg. T2).

2. Dr. Lozano’s Testimony About the Nerve Block

The employer also argues that Dr. Lozano's testimony about the nerve block supports the jury verdict. They argue that Dr. Lozano testified that Mr. Bolte "does not have neurodynia, a rare diagnosis of nerve pain following a hernia surgery, because claimant received a nerve block on November 11, 2009 which would have alleviated the claimant's symptoms and instead exacerbated them." Respondent's Brief, pg. 6. This argument is unpersuasive for two reasons.

The first is that the testimony of Dr. Lozano is not accurately described by the employer in their argument. Dr. Lozano actually testified that the results of the injection were "in-determinant." (CP, pg. 181) This testimony does not support the jury verdict since it is not testimony that on a more probable than not basis that Mr. Bolte did not have a condition proximately caused by his October 1, 2008 industrial injury.

Second, the testimony only addresses the diagnosis of neurodynia and not the question of whether there was an industrial injury on October 1, 2008. Consequently, it is not supportive of the jury verdict.

E. Dr. Heap's Testimony

The employer argues that Dr. Heap's testimony also supports the jury verdict that there was no industrial injury on October 1, 2008. It is important to recall that Dr. Heap was called to testify on behalf of Mr.

Bolte. His testimony cannot be considered in connection with the question of whether Mr. Bolte's motion for a directed verdict should have been granted. Further, even if it is determined that the trial court was correct in denying the motion for a directed verdict, Dr. Heap's testimony does not support the jury verdict as outlined in Mr. Bolte's brief on file in this court, and for the reasons that follow.

1. Prior Hernia Repair

The employer cites to testimony by Dr. Heap about Mr. Bolte's prior hernia repair as being supportive of the jury verdict. They argue that Dr. Heap "determined that the condition [inguinal neurodynia] was proximately caused by the 2007 hernia repair rather than any alleged industrial event on October 1, 2008." Respondent's Brief, pg. 6. The portion of Dr. Heap's testimony cited to by the employer in support of this argument does not support the jury verdict because it is a citation to a portion of the testimony taken out of the context of Dr. Heap's testimony in its entirety and in particular in regards to the interplay between the June 2007 hernia repair and the October 1, 2008 industrial injury.

Dr. Heap did not testify that the June 2007 hernia repair was the sole cause of the neurodynia he diagnosed Mr. Bolte as having. Rather he testified that the neurodynia was "due to stretching of the neural

components of the fibrous tissue over his mesh patch. This is related to the work incident of October 1, 2008.” (CP, pg. 216) (emphasis added) In reference to the pre-existing hernia repair Dr. Heap explained that it “represented the anatomical basis for the development of the symptoms ascribed to the current work injury; however, the current condition of inguinal neurodynia was caused by the work incident of October 1, 2008.” (CP, pg. 216-217) (emphasis added) Dr. Heap clearly testified that the October 1, 2008 injury was the cause of the neurodynia. The prior hernia repair was simply a condition being acted upon.

As discussed in more detail in Respondent’s Brief already on file with the court, if an industrial injury acts upon a pre-existing condition that is non-disabling, which is the case with Mr. Bolte's prior hernia, and results in disability or injury the pre-existing condition is felt to be a condition upon which the industrial injury acted, but the industrial injury is held to be the cause of the condition. Bennett v. Dept. of Labor & Indus. 95 Wn. 2d 531, 532-33 (1981); Appellants Brief, pg. 7-8.

2. Eventual Development of Neurodynia

The employer also cites to testimony of Dr. Heap that Mr. Bolte would have developed his inguinal neurodynia at some point in the future regardless of the October 1, 2008 injury. Respondent’s Brief, pg. 6.

Similarly, they point to testimony of Dr. Heap about an individual with a bad back that will inevitably hurt their low back being an analogous situation. *Id.* pg. 7. However, this testimony does not support the jury verdict either because it has nothing to do with the actual issue in this case, which is whether or not Mr. Bolte had an industrial injury on October 1, 2008. If a golfer hits a drive on a golf course surrounded by houses, and slices the ball so that it is traveling towards the window of a house and will certainly hit and break the window of the house, but just before the golf ball hits the window a child in the yard of the house throws a baseball at the window and breaks the window the baseball would be the cause of the broken window rather than the golf ball even though the golf ball would have certainly broken the window had the baseball not done so. Likewise in this case, even if it could be established without dispute that Mr. Bolte would have developed inguinal neurodynia at some point after October 1, 2008 even if he had not had an injury on October 1, 2008, that would not have any relevance to the question of whether Mr. Bolte had an injury on October 1, 2008, and likewise would not take away the causal connection between the October 1, 2008 industrial injury and Mr. Bolte's development of inguinal neurodynia as a result of the October 1, 2008 injury.

Additionally, as discussed in the Appellant's Brief, it is immaterial if a pre-existing condition of an injured worker would have eventually resulted in some sort of disability even without an industrial injury. Harbor Plywood Corp. v. Dept. of Labor & Indus., 48 Wn. 2d 53 (1956). Such a pre-existing condition is "not deemed the cause of the injury, but merely a condition upon which the real cause [the industrial injury] operated." *Bennett*, pg. 531-33.

F. Attorney Fees & Expenses

Mr. Bolte requests attorney fees and costs in this matter pursuant to RCW 51.52.130 and RAP 18.1.

G. Conclusion

The employer failed to make a prima facie case that Mr. Bolte did not suffer an industrial injury on October 1, 2008. Therefore the trial court should have dismissed the employer's case by granting Mr. Bolte's motion for a directed verdict. Additionally, the jury verdict in this case was not supported by substantial evidence and therefore should be set aside. An order should be issued affirming the decision of the Board of Industrial Insurance Appeals, which allowed Mr. Bolte's claim.

DATED this 1st day of July, 2014

A handwritten signature in black ink, appearing to read "Michael V. Connell", written over a horizontal line.

Michael V. Connell, WSBA #28978
Attorney for Appellant Mr. Bolte