

FILED

APR 30 2014

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 BRIEF

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I. INTRODUCTION

The Department of Labor and Industries (the Department) issued an order allowing Mr. Bolte's claim for benefits after he sustained a disabling workplace injury. (CP 40-41)¹ The employer, International Paper (employer), appealed that decision to the Board of Industrial Insurance Appeals (the Board). (CP 32-38, 42-43) The Board affirmed the Department order allowing the claim. (CP 3-10, 32-38) The employer then appealed that decision to the Yakima County Superior Court. (CP 1-2) Mr. Bolte made a motion for directed verdict, and the motion was denied by the superior court. (RP 127-133)² A jury found that Mr. Bolte had not suffered a compensable injury, which had the effect of reversing the Department and Board orders. (CP 223-227) Mr. Bolte files this appeal of the superior court's order on the jury verdict. (CP 223-229)

¹ The Certified Appeals Board Record (CABR) has been included in the Clerk's Papers (CP) as required. Although portions of the CABR appear numerically Bates stamped it has also been separately paginated as Clerk's Papers. For ease of reference any citation to the CABR will be referenced as designated in the CP.

² The RP includes the testimony of the witnesses, which is also part of the CP. References to the testimony of witnesses will be referred to by page number in the CP rather than the page numbers in the RP, unless specifically noted.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred when it denied Mr. Bolte's motion for a directed verdict.**
- B. The jury verdict is not supported by substantial evidence.**

III. STATEMENT OF THE CASE

Mr. Bolte is a forklift driver at International Paper. (CP 92) In June of 2007, he incurred a right inguinal hernia³ while at work. (CP 8, 33-34, 83, 93) He did not file a worker's compensation claim for his June 2007 injury. (CP 83-84) The hernia was successfully surgically repaired using the implantation of a mesh patch into the tissues at the site of the hernia. (CP 143) Mr. Bolte had a complete recovery from the surgery and was able to resume all his former activities including a return to full duty work approximately eleven (11) six weeks after his surgery. (CP 8, 34-35, 93-95, 146, 198)

On October 1, 2008, Mr. Bolte was at work, operating his forklift as he normally did each day. A few hours into his shift at International Paper, and while twisting and looking over his right shoulder in order to back up

³ An inguinal hernia is a defect in the abdominal wall located near the groin region. (CP 142)

his forklift, he suffered an injury.⁴ (CP 6, 8, 92-93) He felt a sudden sharp pain in his right groin in the same location as the prior hernia surgery. (CP 6, 8, 92-93) He left work early and sought treatment from his primary caregiver who referred him to Dr. Lozano, the general surgeon that had performed the 2007 hernia surgery. (CP 96-97, 140-142, 145, 198)⁵

Approximately one month later Dr. Lozano examined Mr. Bolte and determined there had not been a recurrence of the June 2007 hernia. (CP 145) Instead it was determined that Mr. Bolte “likely had a tear, or a groin pull, or a muscle strain” in the inguinal region, which was causing the pain. (CP 146, 149) Later Dr. Lozano agreed that neurodynia⁶ was also a possible diagnosis. (CP 149)

The right inguinal pain, which started on October 1, 2008, left Mr. Bolte unable to work at his job of injury or pursue activities of daily living including routine house and yard maintenance. (CP 95-96,101-102)

⁴ Pursuant to RCW 51.08.100, “[i]njury” is defined as a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.”

⁵ Dr. Lozano’s deposition was duplicated in the Clerk’s Papers. All references will be to the first copy of his deposition beginning on CP 135.

⁶ Neurodynia is a nerve pain disorder that is common when a mesh patch is utilized in the repair of an inguinal hernia. The mesh patch causes scar tissue, which then causes peripheral nerves to lose the ability to glide between tissues, thus causing pain. (CP 202-203)

Likewise, he was unable to participate in the recreational activities he had enjoyed prior to the injury. These included riding motorcycles and ATVs as well as bowling, basketball and golf. (CP 95-96, 112-14, 118)

Mr. Bolte filed a claim for worker's compensation benefits with the Department relating to his October 1, 2008 workplace injury. (CP 8, 99-100) The claim was allowed and benefits paid commencing May 13, 2009. (CP 8, 40-41, 59) The employer filed a protest with the Department regarding the Department's order allowing the claim. The Department affirmed its order allowing the claim. (CP 39, 59)

Unhappy with the Department's decision allowing Mr. Bolte's claim, the employer filed an appeal with the Board. An industrial appeals judge issued a Proposed Decision and Order (PDO) affirming the Department order allowing the claim, and then the full Board issued an order adopting the PDO as the final Decision and Order (DO) of the Board thereby again affirming the Department's decision to allow Mr. Bolte's claim. (CP 10-11, 32-38) The Board determined that on October 1, 2008, the motion of looking back over his right shoulder while backing up the forklift injured tissues in the area where Mr. Bolte underwent his 2007 hernia repair. (Finding of Fact 3, CP 8) It further determined that the motion of looking over his shoulder "was required by his job function and was done within

the course and scope of his work for the employer.” (Finding 4; CP 8) Finally, it found that Mr. Bolte “would not have developed an injury to the right inguinal area on October 1, 2008 had he had not looked over his right shoulder while backing up his forklift. (Finding 5; CP 8)

At this point the employer appealed the Board decision to the Yakima County Superior Court where it was heard by a six-person jury. The trial was limited to a review of the Certified Appeals Board Record. (CP 1-2, 12; RP 29, 221-222) Mr. Bolte made a motion for a directed verdict,⁷ which was denied. (RP 127-130, 132)⁸ The case proceeded with the attorney’s reading the testimony transcript as is proper in an appeal to Superior Court from a decision of the Board. (RP 102-103) At the close of the evidence the case was submitted to the jury for their consideration. (RP 218-219) The jury returned a verdict reversing and remanding the Department and Board order allowing Mr. Bolte’s claim. (CP 223; RP 221-222) Mr. Bolte filed this timely appeal regarding the superior court’s entry of judgment on the jury’s verdict. (CP 228-235)

⁷ Although Mr. Bolte made a motion for a directed verdict the motion is properly called a motion for judgment as a matter of law. “Motions for directed verdict and motions for judgment notwithstanding the verdict were renamed ‘motions for judgment as a matter of law’ effective September 17, 1993.” *Guijosa v. Wal-Mart*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001)(citation omitted). For ease of reference this brief uses the term utilized at trial unless citation to legal authority states otherwise.

⁸ All references to the Record of Proceedings (RP) will be to the portion of the trial that occurred on August 28, 2013.

IV. ARGUMENT

A. The trial court erred when it denied Mr. Bolte's CR 50(a)(1) directed verdict motion.

1. Standard of Review

Regarding motions for judgment as a matter of law, CR 50(a)(1)

provides as follows:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim . . . that cannot under the controlling law be maintained without a favorable finding on that issue.

When reviewing a trial court decision regarding a CR 50(a)(1) motion for judgment as a matter of law, the appellate court applies the same standard as did the trial court. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013). Granting a motion for judgment as a matter of law is proper when, viewing the evidence in the light most favorable to the non-moving party, the court can say as a matter of law there is no substantial evidence or reasonable inference that would support a verdict in favor of the non-moving party. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004) (Citation omitted.) Substantial evidence exists if the proffered evidence is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Price v. Kitsap Transit*, 125 Wn.2d

456, 466, 886 P.2d 556 (1994). The reviewing court does not reweigh or rebalance the evidence in conducting a substantial evidence review. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009).

2. Analysis

Under the RCW 51, the Industrial Insurance Act (the Act), an injured worker is entitled to benefits under the act if an industrial injury is a proximate cause of a subsequent physical or mental condition. *Longview Fibre Co. v. Weimer*, 95, Wn.2d 583, 585-588 (1981). It is not necessary that the injury suffered in the course of employment be the result of some unusual exertion or awkward movement. *Id.*

An injured worker is also entitled to coverage under the Act if he suffers an injury which aggravates a pre-existing condition. *Id.* Nor, does the industrial injury need to be the sole cause of the resulting injury or disability to be considered the proximate cause. *Shea v. Dept. of Labor & Indus.*, 12 Wn. App. 410, 415 (1974). If an injury lights up or makes active a latent, quiescent, or weakened infirmity, the resulting disability is attributed to the injury and not to the preexisting physical condition. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 472 (1987). This is true even if an individual has suffered a prior injury that is not disabling at

the time of the second injury in question. *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 532-33, 627 P.2d 104 (1981) In the *Bennett* case the injured worker had suffered a prior low back injury which required multiple surgeries, but following which the injured worker returned to work as a carpenter without limitations despite some residual weakness. He later suffered a second low back injury and was rendered unable to return to work in any capacity. The attending physician testified that the first injury made the second injury more likely to cause the injured worker harm, but the court held that the entire disability was attributable to the second injury) Further, the principle applies even if the prior injury made the chance of subsequent injury greater. *Id.*

It is also immaterial whether a preexisting condition might possibly have resulted in eventual disability, even without the industrial injury. *Harbor Plywood Corp. v. Dep't of Labor & Indus.*, 48 Wn.2d 53 (1956). The theory on which this principle is founded is that a worker's "prior physical condition is not deemed the *cause* of the injury, but merely a condition upon which the real cause operated." *Bennett* at 531, 532-33.

The proximate between an industrial injury and the resulting condition (or in the case at bar the lack of proximate cause between the industrial injury and Mr. Bolte's condition) must be established by medical testimony, and

that medical testimony must be expressed on a more probable than not basis.⁹ *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d; *Stampas v. Dept. of Labor & Indus.*, 38 Wn.2d 48, 50-51 (1951) *Id.*

These interrelated principles of law are vital to the resolution of Mr. Bolte's case since he had suffered a prior injury in the same area he was injured on October 1, 2008, and the employer seems to rely heavily on the fact that one of the medical professionals opined the neurodynia condition would have occurred at some point in time even without the twisting movement of October 1, 2008.

The Board's findings and conclusions are presumed correct upon appeal to the superior court, and the party challenging the Board's decision has the burden of proof to show by a preponderance of the evidence that the Board's findings were incorrect in order to prevail on appeal to superior court. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (citation omitted).

The first question before this court is whether the trial court's refusal to grant Mr. Bolte's motion for a directed verdict was proper. Mr. Bolte

⁹ The only exception to the requirement of there being medical testimony establishing causation is in situations in which the injury is so traumatic "that it produces an immediate or prompt result apparent to one without medical training. . . ." *Hiram E. Jackson, Jr. v. Dept. of Labor & Industries*, 54 Wn.2d 643 (1959) .

maintains it was not because even viewing the evidence in the light most favorable to the employer, there is no substantial evidence nor reasonable inference that would support a verdict in favor of the employer because there was no medical opinion expressed on a more probable than not basis to support the conclusion that the industrial injury was not a proximate cause of Mr. Bolte's condition.

The only medical expert called by the employer in this case was Dr. Lozano. Dr. Lozano, never expressed an opinion on a "more probable than not" basis regarding the question of causation. As a result the employer failed to satisfy the legal standard for causation (or lack of causation) in an industrial insurance case and did not present evidence sufficient to establish a prima facie case. The result being that the employer did not present legally sufficient evidence regarding the questions of causal relationship, and a reasonable jury could not have found for the employer regarding that issue.

Dr. Lozano was asked about the question of causal relationship between Mr. Bolte's October 1, 2008 injury and Mr. Bolte's condition on two occasions, but he never expressed an opinion based on the requisite more

probable than not basis. He was first asked about the issue a proximate cause in the following exchange:

Q: In April 2009, in the conversation with my office [the employer's attorney's office] did you have an opportunity at that time to express an opinion as to whether or not injury would have likely occurred while driving forklift in reverse?

A: Yes.

Q: And what did you indicated that time?

A: I said that I could not have one way or another say for certain that this was or was not related to driving a forklift, or industrial injury actually -- driving forklift in reverse.

Q: Did you express an opinion at that time that the likelihood of someone sustaining an injury to the growing possibly looking over their shoulder while backing up a forklift?

A: At that time I felt that isolated would -- was more than likely not sole cause of a groin pull.

(CP 147) The first portion of the above testimony does not provide any opinion either way regarding the question of causation, but rather contains testimony from Dr. Lozano stating that he could not form an opinion one way or the other.

The second portion, at best, impliedly states that Dr. Lozano believes the industrial injury was in fact actually one of the causes of Mr. Bolte's condition. By stating that the October 1, 2008 industrial injury was more than likely not the sole cause of Mr. Bolte's condition Dr. Lozano impliedly testified that the industrial injury was a cause of the Mr. Bolte's condition. This testimony would therefore support the decision of the Department and the Board to allow Mr. Bolte's claim since the industrial injury need not be the sole cause of the condition. *Shea*, at 415.

Dr. Lozano was next asked about the question of causal relationship on page 150 of the CP. There he was asked whether he would anticipate "simply looking over your shoulder to essentially, for example back your car up or back up a forklift" would be the type of unusual stretch or trauma that would cause neurodynia to develop subsequent to hernia repair. Dr. Lozano replied that, "if that 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, then it's hard to say that that by itself would cause the strain." (*Id.*; *RP*, Volume 2, pg. 111.¹⁰)

¹⁰ Citation to the VROP is provided because part of this section of Dr. Lozano's testimony in the CP was stamped over by the bates stamp number and is therefore not readable in the CP.

Once again, Dr. Lozano, only stated that given the facts in the hypothetical it would be hard for him to say that that action alone would cause the strain. However, again this testimony does not cut off the causal connection between the industrial injury and Mr. Bolte's condition, but merely states that there could potentially be some other cause in addition to the industrial injury.

Further, Dr. Lozano qualified his answer by stating that he is presupposing an isolated single instance of looking over the shoulder to drive backwards. *Id.* However, at the time of injury Mr. Bolte had already been working for a couple hours and was in the process of unloading several lines when the injury occurred. (CP 93) This would mean that he had been driving backwards more than simply a single time, but rather on multiple occasions in the process of unloading the lines.

Additionally, the hypothetical question posed simply described looking over the shoulder, but Mr. Bolte was doing more than simply looking over his shoulder at the time of injury, but rather was twisting as well. (CP 199) Expert opinion given in response to a hypothetical question is without probative value if it is based upon the existence of conditions or facts not included in the question or established by the evidence and not

necessarily inferable therefrom.” *Sayler v. Dept. of Labor & Indus.*, 69 Wn.2d 893, 896 (1996).

3. Summary

As outlined above, Dr. Lozano never offered an opinion on a more probable than not basis that Mr. Bolte’s October 1, 2008 industrial injury was not a proximate cause of Mr. Bolte’s condition. In order for the employer to present a prima fascia case it would have had to present medical testimony expressed on a more probable than not medical basis that the industrial injury was not a proximate cause of Mr. Bolte’s condition. Because the employer failed to present a prima fascia case a reasonable jury could not have found for the employer regarding the only issue in this case, which is proximate cause. As a result, Mr. Bolte’s CR 50(a)(1) motion should have been granted by the superior court.

B. The jury verdict is not supported by substantial evidence.

1. Standard of Review

A jury verdict is reviewed for substantial evidence, taking all inferences in favor of the verdict. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 782, (2013) (citations omitted). Substantial evidence exists if it is sufficient to

persuade a fair-minded, rational person of the truth of the declared premise. *Guijosa v. Wal-Mart*, 144 Wn.2d (citation omitted).

2. Analysis

The next question for this court's consideration is whether the jury's verdict is supported by substantial evidence. Mr. Bolte maintains the evidence presented supports the decisions of the Department and the Board, which held Mr. Bolte sustained a compensable industrial injury while in the course of his employment with International Paper.

As outlined above, the testimony of Dr. Lozano did not provide any medical opinion on a more probable than not basis regarding the issue of proximate cause. However, the testimony of Dr. Heap, who testified on behalf of Mr. Bolte did provide an opinion regarding causation that was expressed on a more probable than not basis.

Dr. Heap, is board certified in general surgery. (CP 195) He performed an independent medical examination (IME) of Mr. Bolte at the request of the employer. Dr. Heap testified about the details of his review of Mr. Bolte's medical records as well as Mr. Bolte's IME that took place on January 13, 2009. (CP 196-197) Dr. Heap testified that he felt Mr. Bolte had "inguinal neurodynia secondary to mesh implantation at the time of

his hernia repair in June of '07," but that it was the October 1, 2008 injury which caused the stretching of the neural components of the fibrous tissues" of the mesh patch. (CP 201-202)

He also testified about the opinions he had provided to the claims representative of the employer about Mr. Bolte's condition, and what the cause of the condition was in a February 10, 2009 letter he wrote to the claims representative responding to some questions from the claims representative. (CP 215-216) In the letter from the claims representative Dr. Heap was asked what condition he felt was due to the October 1, 2008 work injury of Mr. Bolte. (*Id.*) Dr. Heap responded that Mr. Bolte "has inguinal neurodynia due to stretching of the neural components the fibrous tissue over his mesh patch. This is related to the work incident October 1, 2008. (CP 216) He continued by explaining that " the pre-existing hernia repair may have contributed to the current condition. The previous hernia repair 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 216-217) He testified that that the opinions you expressed above were offered on a more probable than not medical basis. (CP 217). As outlined above the industrial injury does not need to be the sole cause of a condition to be considered a proximate cause, and the

aggravation or lighting up of a previously non-disabling condition constitutes an industrial injury.

Consequently, the only medical opinion regarding causal relationship in this case that was expressed on a more probable than not standard was that of Dr. Heap, and his opinion was that Mr. Bolte's condition was proximately caused by the October 1, 2008 injury. Since the only legally sufficient medical opinion regarding proximate cause is that of Dr. Heap, which was in favor of Mr. Bolte, there is no substantial evidence to support the jury's verdict in favor of the employer, and the verdict should be set aside.

Further, even if the jury chose to disbelieve Dr. Heap, the result would be that neither medical expert's opinion was legally sufficient to meet the substantial evidence test. The result would be that the Board decision would control since the evidence would be evenly balanced. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 43, 395 P.2d 633 (1964). (The prima facie presumption of correctness of the Board's findings controls the superior court's disposition when evidence is evenly balanced and fact finder is unable to make a determination on the facts presented.)

V. Conclusion

Taking into account all of the evidence presented by the employer in this matter there was no legally sufficient evidentiary basis for a reasonable jury to find in favor of the employer on the question the proximate cause because the employer did not present medical testimony expressed on a more probable than not basis to establish that Mr. Bolte's condition was not proximately caused by his October 1, 2008 injury. Therefore, Mr. Bolte's motion for a directed verdict under CR 50(a)(1) should have been granted by the trial court in superior court.

In addition, when all of the evidence presented by both the employer and Mr. Bolte is taken into consideration there is not substantial evidence to support the jury's verdict, and therefore the verdict should be set aside. The only medical evidence expressed on a more probable than not basis regarding the question of causation was that of Dr. Heap, and his opinion was that Mr. Bolte did have a condition proximately caused by his October 1, 2008 injury. Consequently, the only reasonable decision a jury could have come to was to affirm the decision of the Board and the Department allowing Mr. Bolte's claim. The jury's verdict reversing the Board's decision should therefore be set aside since there was not

substantial evidence to support the verdict.

DATED this 28 day of April, 2014

A handwritten signature in black ink, consisting of a long, sweeping horizontal stroke with a small loop at the end, positioned above the printed name.

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

NO. 320758-8-III

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

ANTHONY BOLTE,)
)
 Appellant)
)
 vs.)
)
 INTERNATIONAL)
 PAPER COMPANY,)
 Respondent.)
 _____)

**CERTIFICATE OF
SERVICE**

STATE OF WASHINGTON)
) ss.
 County of Yakima)

I, Alicia Rodriguez, do hereby certify that I am an employee of Michael V. Connell, attorney for the Appellant. That I am a citizen of the United States and competent to be a witness herein. That on the 28th day of April, 2014, I sent, via United States Mail at Yakima, Washington, first class postage prepaid addressed as follow:

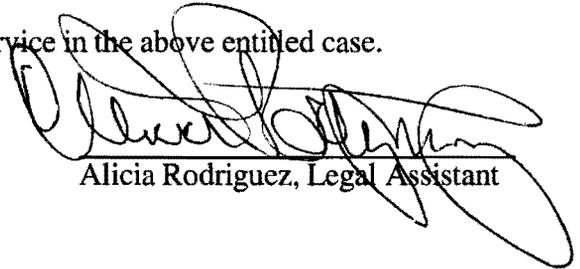
Court of Appeals, Division III
Clerk's Office
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Anastasia Sandstrom, AAG
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PO Box 40108
Seattle, WA 98104

James L. Gress (*Via Fax and Regular Mail*)
9020 S.W Washington Square Rd., Suite 560
Portland, OR 97223

In an envelope containing the true and correct copy of the following documents:

Brief of Appellant and Certificate of Service in the above entitled case.



Alicia Rodriguez, Legal Assistant