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Court of Appeals

Division III

State of Washington

NO. 33350-7

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

M.A. MORTENSON COMPANY,

Appellant,

v.

KURT FOWLER, LYDIG CONSTRUCTION, INC.
AND THE DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondents.

**BRIEF OF RESPONDENT
LYDIG CONSTRUCTION, INC.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Superior Court was correct in granting Respondent Fowler's Motion for Directed Verdict and affirming the Board of Industrial Insurance Appeal's Decision Fowler sustained an industrial injury on August 3, 2011 during the course of his employment with Mortenson when the evidence was undisputed Fowler sustained a discrete event on August 3, 2011 during his employment with Mortenson that produced an immediate and prompt result requiring medical treatment?
2. Whether the Superior Court correctly concluded Mortenson was not an aggrieved party and therefore did not have standing to pursue reopening the Lydig Claim when Mortenson failed to appeal the Department order denying Fowler's application to reopen the Lydig claim and when Fowler accepted the decision and order of the Board which affirmed the department's decision denying the reopening application against Lydig?
3. Whether the Superior Court was correct when it affirmed the May 8, 2013 Board of Industrial Insurance Appeals Decision and Order
4. Whether the Superior Court abused its discretion when it denied Mortenson's Motion for Reconsideration?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 19, 2008 Mr. Fowler sustained an industrial injury to his right knee while working for Lydig Construction. Mr. Fowler completed a Self-Insured Accident Report (SIF-2) on or about February 28, 2008 under claim SC-70449. The claim was a medical only claim and

was closed by self-insured closing order on April 30, 2008. CABR, Fowler at 100¹.

Mr. Fowler began working for Mortenson on May 17, 2010. On August 3, 2011 Mr. Fowler was working for Mortenson as a carpenter when he felt sharp and immediate pain in his right knee while bending down to install a sign. Mr. Fowler completed a SIF-2 on August 5, 2011 under Claim SF-15927. The claim was allowed by Department order dated January 6, 2012. Mortenson protested and on January 13, 2012 the Department affirmed the allowance of the claim. Mortenson filed an appeal which was received by the Board of Industrial Insurance Appeals (Board) on March 1, 2012. The Board granted the appeal on March 6, 2012.

Mr. Fowler filed an application to reopen his claim against Lydig, claim SC-70449, on May 16, 2012. The application to reopen was denied by the Department on June 1, 2012. Mr. Fowler filed a direct appeal to the Board prior to Lydig having the opportunity to obtain an IME and the appeal was granted on July 10, 2012.

In the meantime, a scheduling conference on the Mortenson claim, claim SF-15927, was held on July 9, 2012 at which time Mortenson and

¹ This brief refers to the testimony taken at the Board of Industrial Insurance Appeals which is located in the Certified Appeal Board Record (CABR), by the surname of the witness followed by the page number of the hearing or deposition transcript.

Mr. Fowler moved to consolidate the appeals for hearings. Lydig retained counsel and on August 1, 2012 another conference was held to schedule both claims for hearing before Industrial Appeals Judge Blood at which time the appeals were consolidated for hearing purposes. At that time the parties confirmed the sole issues on appeal were (1) whether Mr. Fowler sustained an industrial injury to his right knee in the course of his employment with Mortenson within the meaning of RCW 51.08.100 on August 3, 2011 and (2) whether between April 30, 2008 and June 1, 2012, Mr. Fowler suffered an objective worsening of his right knee condition, proximately caused by the February 19, 2008 industrial injury at Lydig Construction, within the meaning of RCW 51.32.160.

Due to Lydig not being able to adjudicate the reopening application prior to the Department acting, Lydig moved for a CR 35 examination with Dr. Dana Covey. Mr. Fowler agreed to attend the examination without Lydig having to file a formal motion and/or have the Board rule on the motion. Mr. Fowler was examined in a CR 35 examination on September 27, 2012.

Mortenson presented the testimony of Dr. Lance Brigham, Dr. James Schwartz, and Dr. William Dinenberg on November 27, 2012. Lydig moved to strike the testimony of Dr. Schwartz and Dr. Brigham on the grounds the testimony was cumulative, repetitive and therefore

prejudicial. Mortenson also presented the testimony of Mr. Fowler at hearing on November 28, 2012.

With respect to Mr. Fowler's appeal to the Department order denying his application to reopen, Mr. Fowler presented his own testimony in addition to the testimony of Dr. Joel Cummings. Lydig presented the testimony of Mr. Fowler at hearing and Dr. Dana Covey by deposition.

After Mr. Fowler and Mortenson rested their case, Lydig moved to dismiss Mortenson's appeal for failure to present a prima facie case and Lydig moved to dismiss Mr. Fowler's appeal to the Department order denying reopening for failure to present a prima facie case. Lydig requested the Industrial Appeals Judge rule on the motions at the time of the issuance of the Proposed Decision and Orders in these two appeals.

The Industrial Appeals Judge (IAJ) issued a single Proposed Decision and Order on March 11, 2013 which addressed both claims and dockets. The IAJ denied Lydig's motions for directed verdict, however the decision was entirely favorable for Lydig in that the IAJ concluded Fowler sustained an industrial injury on August 3, 2011 while working for Mortenson and concluded Fowler's condition, proximately caused by the February 19, 2008 industrial injury with Lydig, did not objectively worsen between April 30, 2008 and June 1, 2012. Accordingly the Department

order that allowed the Mortenson claim and the Department order denying the reopening were affirmed as correct. Mr. Fowler did not file a Petition for Review. Mortenson timely filed a Petition for Review.

On May 8, 2013 the Board issued an Order Denying Petition for Review and adopted the Proposed Decision & Order as its final Decision & Order. Fowler did not appeal.

Mortenson appealed to the Superior Court of Chelan County, and submitted a jury demand. On October 21, 2014, Mortenson filed a Motion to Remand the Claims to the Department for Issuance of a Joint Order. CP 132. It contended the Superior Court was required by WAC 296-14-420 to remand the case to the Department of Labor & Industries with direction to issue a single order regarding whether or not benefits shall be paid pursuant to the reopening of an accepted claim or allowed as a claim for a new injury and/or both. CP 134- 149. Lydig filed a response to Mortenson's motion to remand on October 22, 2014. CP 152-156.

The matter came on for trial before the Honorable T.W. Small of the Superior Court of Chelan County on October 27, 2014. Judge Small denied Mortenson's Motion to Remand. At the conclusion of Mortenson's case in chief, Fowler and Lydig moved for a directed verdict, which Judge Small granted. After the Superior Court granted Fowler's motion and concluded Fowler sustained an industrial injury on August 3, 2011

during the course of his employment with Mortenson, the Court determined Mortenson lacked standing to continue because Mortenson was not an aggrieved party with regard to the Board's decision that Fowler's condition, proximately caused by the 2008 Lydig injury, had not objectively worsened. Judge Small issued an Order and Judgment on January 9, 2015. CP 187-192. On January 15, 2015, Mortenson filed a Motion for Reconsideration. On January 26, 2015, Lydig filed a response to Mortenson's Motion for Reconsideration. CP 202-208. On February 27, 2015, Mortenson filed a reply. Judge Small subsequently denied Mortenson's Motion for Reconsideration. CP 215-220. Mortenson then filed an appeal to this Court.

B. FACTUAL HISTORY

Fowler began working for Lydig Construction in December, 2006. CABR, Fowler at 95. He continued to work for Lydig through February, 2007 and returned to Lydig again approximately one year later on February 7, 2008 at which time he was hired to work at the Lake House in Chelan. CABR, Fowler at 96. While working as a carpenter, Fowler sustained an injury to his right knee on February 19, 2008. CABR, Fowler at 10.

Following the injury Fowler first sought medical treatment from Dr. Andrew Eichler on February 21, 2008. CABR, Fowler at 96. At that

time Fowler advised Dr. Eichler that three months prior he was working in Quincy for a different employer (other than Lydig) when his knee swelled but it settled down over a period of a few days. CABR, Fowler at 98-99. Following the February 19, 2008 injury with Lydig, Fowler was referred for a MRI and evaluated by Dr. Joel Cummings on March 7, 2008. The MRI revealed degenerative findings that pre-existed the industrial injury including a possible horizontal meniscal tear.

Although the prospect of surgery was discussed on March 7, 2008 Fowler was also offered conservative treatment and he elected to wait and see how his knee was after time. Fowler did not follow-up with any additional medical treatment after March 7, 2008 and advised Lydig that he was no longer seeking treatment and the claim could be closed. The claim was closed without permanent impairment by self-insured closing order on April 30, 2008. CABR, Fowler at 99-100. At the time the claim was closed, Fowler had returned to his job of injury without restrictions. Fowler continued to work for Lydig through July, 2009, without any assistance due to his knee.

Fowler testified that after the 2008 injury with Lydig his condition resolved and he had "hardly any pain" in his knee until the August 3, 2011 injury. CABR, Fowler at 37-38. Although Fowler owned a knee brace, he never wore it between April, 2008 and August, 2011. In addition,

Fowler testified his right knee condition never required medical treatment again until after the 2011 injury with Mortenson.

Fowler first started working for Mortenson on May 17, 2010. Fowler's job with Mortenson required him to be on his feet all day walking, climbing ladders, climbing stairs, and standing. In addition, Fowler was required to lift up to 150 lbs. at times, and with assistance of another lift up to 200 lbs. CABR, Fowler at 102. Fowler was required to lift overhead consistently, and consistently carry heavy items weighing 50 lbs. or more. Fowler was able to do all of his job duties without any problems until he sustained a new industrial injury on August 3, 2011.

Fowler testified on August 3, 2011 he was working for Mortenson when he felt immediate pain in his right knee while twisting as he was installing a sign. CABR, Fowler at 105. Although Fowler had a prior injury with Lydig in 2008 to the same knee, Fowler testified the 2011 injury was more intense. CABR, Fowler at 106. Fowler immediately reported the injury to his foreman and he was asked to wait to file a claim to see if his condition resolved. After the condition did not resolve Fowler sought treatment on August 5, 2011 from Dr. Richard Lynn and filed a claim at that time. CABR, Fowler at 107.

Fowler underwent an MRI on September 3, 2011. Every medical provider that testified in this case agreed that there was no significant

change between the 2008 and 2011 MRI. Fowler continued to treat with Dr. Lynn until he came under the care of Dr. Cummings again on October 7, 2011. Fowler was then sent to an IME by Mortenson on October 20, 2011 with Dr. Schwartz. Fowler was seen in a second IME on March 19, 2012 with Dr. Dinenberg at the request of Mortenson. Both Dr. Schwartz and Dr. Dinenberg opined Fowler sustained an industrial injury with Mortenson on August 3, 2011. CABR, Schwartz at 25; CABR, Dinenberg at 26, 33-34.

Fowler testified that between August 3, 2011 and April 19, 2012 the pain in his knee never went away. CABR, Fowler at 111. Dr. Cummings ultimately performed surgery on June 12, 2012 and Fowler remained under Dr. Cummings care. At the time Fowler was examined by Dr. Dana Covey, a board certified and fellowship trained orthopedic surgeon specializing in the knee, Fowler reported he continued to remain symptomatic due to the August, 2011 injury. Dr. Covey opined Fowler sustained a minor straining injury in 2008 which resolved based upon Fowler's history and lack of documented treatment for a 3 year interval. It was not until Fowler sustained a new injury in 2011 that prompted the need for treatment and any worsening in 2011 was due solely to the 2011 injury and not the 2008 industrial injury. Dr. Covey did not believe there was any evidence of objective worsening caused by the 2008 injury and

stated Fowler would not have required treatment if not for the 2011 injury. CABR, Covey at 29-32.

III. ARGUMENT

A. Standard of Review

RCW 51.52.140 provides, “the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases.” The Court’s jurisdiction over matters arising under the Industrial Insurance Act is limited by the terms of the Act. RCW 51.04.010; RCW 51.52.110 and .115. Original jurisdiction over matters arising under the Industrial Insurance Act resides with the Department of Labor and Industries. *Lenk v. Dep’t of Labor & Indus.*, 3 Wn.App. 977, 982, 985, 478 P.2d 761 (Wash.App. Div 1 1970); *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (Wash. 1997) (“the Act provides that both the Board and the superior court serve a purely appellate function.”)

Motions for judgment as a matter of law are reviewed de novo. *Joy v. Dep’t of Labor & Indus.*, 285 P.3d 187, 189 (Wash. App. Div. 2 2012). Review is limited to those issues encompassed by the appeal to the Board, or properly included in its proceedings, and the evidence presented to the Board. RCW 51.52.115; *Shufeldt v. Dep’t of Labor & Indus.*, 57 Wn.2d 758, 760, 359 P.2d 495 (Wash. 1961); *Sepich v. Dep’t of Labor & Indus.*,

75 Wn.2d 312, 316, 450 P.2d 940 (Wash. 1969) (“The trial court is not permitted to receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board.”).

B. Burden of Proof

The burden of proof governing appeals under RCW Title 51 is governed by RCW 51.52.115. That statute provides, in pertinent part:

In all Court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same.

RCW 51.52.115. This presumption of correctness means that the Board's decision will be overturned only if:

[T]he trier of fact finds from a fair preponderance of the evidence that such findings and decision of the board are incorrect. It must be a preponderance of the credible evidence. If the trier of fact finds the evidence to be equally balanced then the findings of the board must stand.

Allison v. Dep't of Labor & Indus., 66 Wn.2d 263, 268, 401 P.2d 982 (Wash. 1965).

The plaintiff bears the burden of proving, by “a fair preponderance of credible evidence,” that the decision of the Board of Industrial Insurance Appeals is incorrect. *McClelland v. ITT Rayonier*, 65 Wn.App.

386, 390, 828 P.2d 1138 (Wash.App. Div. 2 1992). The Board's findings and decision are presumed to be correct. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (Wash. 1999). By appealing the Board's decision the plaintiff assumes the burden of producing "sufficient, substantial, facts, as distinguished from a mere scintilla of evidence" to overcome the presumption of correctness enjoyed by the Board's decision. *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 96, 286 P.2d 1038 (Wash. 1955).

While the court should liberally construe the Industrial Insurance Act in favor of "those who come within its terms, persons who claim rights thereunder should be held to *strict proof* of their right to receive benefits provided by the act." (emphasis added). *Cyr*, 47 Wn.2d at 97. The rule of 'liberal construction' does not apply to questions of fact. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (Wash. 1949). Nor does the rule "dispense with the requirement that those who claim benefits under the act must, by competent evidence, prove the facts upon which they rely" to substantiate eligibility for the benefits sought. *Ehman*, 33 Wn.2d at 595.

C. Mr. Fowler's Industrial Injury Claim with Mortenson Was Properly Allowed and Therefore the Superior Court Correctly Granted Respondent Fowler's Motion for Directed Verdict Because There is No Competent Evidence That Would Allow a Jury to Have Found for Mortenson.

A motion for a directed verdict is proper where, “there is no competent evidence or reasonable inference that will sustain a jury verdict in favor of the nonmoving party.” *Radford v. City of Hoquiam*, 54 Wn. App. 351, 355, 773 P.2d 861 (Wash. App. Div. 2 1989). The Superior Court correctly granted Respondent Fowler’s Motion for a Directed Verdict when there was no competent evidence that would sustain a jury verdict that Fowler did not sustain an industrial injury during the course of his employment with Mortenson

Mortenson alleges the directed verdict was improper because Dr. Brigham testified the MRI did not show a “new injury.” CABR, Brigham at 25. However, the Industrial Insurance Act has defined an “injury” 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.” RCW 51.08.100. The Industrial Insurance Act does not require a worker to prove an “injury” resulted in a new diagnosis or new objective findings that were not previously present and Mortenson has not submitted any legal authority suggesting otherwise. As such, the fact that the MRI did not show any new objective abnormalities does not defeat a claim for benefits.

Rather, when considering allowance of a claim for an industrial injury the appropriate inquiry is not whether the August 3, 2011 event was

a supervening event or an aggravation to determine whether the August 3, 2011 event can be considered an industrial injury. The focus is entirely whether the events of August 3, 2011 at Mortenson meet the statutory requirements necessary to support allowance of a claim. In the case at hand there is uncontroverted evidence Fowler suffered a qualifying injury in terms of 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.” RCW 51.08.100. There is absolutely no testimony in the record Mr. Fowler’s account of the events of August 3, 2011 is incorrect or did not happen as described. Fowler testified he was working on August 3, 2011 and while installing a sign he developed sharp pain in his knee while kneeling and twisting his body to get down on the floor so he could reach up into an area to anchor a sign to a wall. CABR, Fowler at 15. Fowler further testified he was in a downward motion twisting and squatting his legs and body to get down to the ground when he felt a burning sensation in his knee and immediately reported it to his foreman. CABR, Fowler at 15-16. Fowler promptly sought medical attention and reported the incident and therefore the August 3, 2011 incident clearly meets the statutory requirements of an industrial injury under RCW 51.08.100. The mere fact Dr. Brigham was

unable to find any “new” findings on MRI is immaterial and does not defeat a claim for benefits.

Mortenson further alleges Fowler’s preexisting condition somehow bars the claim and absolves them of responsibility for the claim.

However, this contention is simply without merit. It should be noted that the Industrial Insurance Act does not provide an exception to coverage for workers who may have prior physical or mental frailties. It is well established industrial insurance benefits are not limited to those workers in perfect health prior to their industrial injuries. *Kallos v. Department of Labor & Indus.*, 46 Wn.2d 26, 30, 278 P.2d 393 (1955). For purposes of coverage under the Industrial Insurance Act, it is sufficient to sustain an injury which aggravates a preexisting infirmity. *Harbor Plywood Corp. v. Dep’t of Labor & Indus.*, 48 Wn.2d 553, 295 P.2d 310 (Wash. 1956); *Wendt v. Dep’t of Labor & Indus.*, 18 Wn.App. 674, 571 P.2d 229 (Wash. App. Div. 2 1977); *Shea v. Dep’t of Labor & Indus.*, 12 Wn.App. 410, 529 P.2d 1131 (Wash. App. Div. 2 1974). Therefore, a claim for benefits is not defeated even if a preexisting condition contributed to the injury.

Mortenson further alleges the August 3, 2011 incident does not constitute an injury because the activity Fowler was performing at the time was not considered unreasonable or outside of an everyday activity. However, the law is clear in the state of Washington that the statutory

definition of "injury" is met when the bodily movements required by the job in the course of employment have produced a sudden and immediate injury. *Dayton v. Dep't of Labor & Indus.*, 45 Wn.2d 797, 278 P.2d 319 (Wash. 1954). Since *Dayton*, the Supreme Court further clarified that a condition precipitated by a normal bodily movement, such as bending over to pick up an object, during the course of employment constitutes an "injury" within the meaning of the Industrial Insurance Act. *Longview Fibre Co. v. Weimer*, 95 Wn.2d 583, 628 P.2d 456 (Wash. 1981). Therefore, the simple act of bending down or rising up during the course of employment is sufficient to constitute an industrial injury and the fact the activity claimant was doing at the time of the injury was reasonable does not bar allowance of the claim.

In fact, all three of Mortenson's expert witnesses agreed Fowler sustained an industrial injury on August 3, 2011. Dr. Dinenberg testified he diagnosed an aggravation of medial meniscus tear of right knee *related to the work injury of August 3, 2011* on a more probable than not basis. CABR, Dinenberg at 18 (emphasis added). Dr. Schwartz testified he agreed Fowler *did in fact sustain an industrial injury to his knee while working for Mortenson on August 3, 2011*. CABR, Schwartz at 25 (emphasis added). Lastly, Dr. Brigham also testified Fowler *had an industrial injury on August 3, 2011 with Mortenson*. CABR, Brigham at

17-18 (emphasis added). Therefore, there is absolutely no credible evidence in which a jury could reasonably rely upon to find for Mortenson and the Superior Court was correct in granting the motion for directed verdict and the Court did not abuse its discretion in granting Fowler's Motion for Judgment as a Matter of Law pursuant to CR 50.

D. The Superior Court Correctly Concluded Mortenson did Not Have Standing to Pursue the Lydig Claim When Mortenson is Not an Aggrieved Party, Mortenson Failed to Appeal the Department Order Denying Fowler's Application to Reopen His Claim Against Lydig, and Fowler Accepted the Board's Decision Denying Reopening of the Lydig Claim

After the Superior Court granted Fowler's motion and concluded Fowler sustained an industrial injury on August 3, 2011 during the course of his employment with Mortenson, the Court determined Mortenson lacked standing to continue because Mortenson was not an aggrieved party with regard to the Board's decision that Fowler's condition, proximately caused by the 2008 Lydig injury, had not objectively worsened. CP, 185-186.

Mortenson does not have standing as it is not an aggrieved party. The Department holds original and exclusive jurisdiction to make the threshold decision on all claims for industrial insurance benefits; the Department's findings are reviewable only on appeal by an aggrieved party to the Board. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d at

169; *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 162, 34 P.2d 457 (Wash. 1934). As the entity with original jurisdiction, the Department is exclusively empowered to make the threshold decision on a worker's eligibility for particular benefits. In the case at hand, the Department issued the June 1, 2012 Department order that denied Fowler's application to reopen his claim against Lydig. CABR at 115. It cannot be overlooked that the June 1, 2012 Department order was mailed only to Lydig Construction, Kurt Fowler, and the Attending Physician and arguably the Department did not consider any other employers or parties as aggrieved. CABR at 115. Appeals to Department orders are governed by RCW 51.52.050. RCW 51.52.050(2)(a) states:

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.

The Industrial Insurance Act thus requires that a party *aggrieved* by a Department decision file an appeal exclusively to the Board. RCW 51.52.050, and RCW 51.52.060. In the case at hand, Fowler was the only party that filed an appeal to the Board of Industrial Insurance Appeals to the Department order that denied his reopening application. CABR at

112-113. After filing an appeal to the Board, Mortenson filed a Notice of Appearance as an Interested Party but failed to file an appeal or cross-appeal to the June 1, 2012 Department order. CABR at 80. Upon issuance of the Proposed Decision & Order, Mortenson filed a Petition for Review (PFR) and the Board denied review and adopted the Board's Proposed Decision & Order as the Final Decision & Order of the Board. Fowler, did not appeal the Board's decision that denied his application to reopen the claim against Lydig. Therefore the decision by the Board that Fowler's condition proximately caused by the Lydig injury did not objectively worsen between the terminal dates is final and binding.

The decision whether to appeal the Department's denial of the reopening application and the Board's denial of the reopening application against Lydig lies exclusively with Mr. Fowler as the aggrieved party and Mortenson lacks standing to pursue reopening. The Board of Industrial Insurance Appeals has held that an employer, other than the one for which the worker was working at the time of the alleged injury, is not an aggrieved party within the meaning of RCW 51.52.060. *In re Kenneth Keierleber*, BIIA Dec., 91 5087 (1993). Although prior decisions of the Board of Industrial Insurance Appeals have no precedential value, under both the "error of law" and the "erroneously interpreted or applied the law" standards, an agency's interpretation of the statute in which it has

special expertise may be entitled to deference. *Dana's Housekeeping v Department of Labor and Indus.*, 76 Wash.App. 600, 605, 886 P.2d 1147 (1995) *rev. den'd* 127 Wn.2d 1007, 898 P.2d 307 (1995). See also *Rose v. Department of Labor and Indus.*, 57 Wn.App. 751, 790 P.2d 201 (1990). A Board decision may thus be persuasive. *Romo v. Department of Labor and Indus.*, 92 Wn. App. 348, 356, 962 P.2d 844 (1988).

Consistent with the Board's significant decision, our courts have also defined an aggrieved party "as one whose personal right or pecuniary interests have been affected." *State v Taylor*, 150 Wn.2d 599, 608, 890 P.3d 605 (Wash. 2003). However, a person is not entitled to an appeal by "the mere fact that a person is hurt in his feelings, wounded in his affections, or subjected inconvenience, annoyance, discomfort, or even expense by a decree." *Elterich v. Arndt*, 175 Wash 562, 564 27 P.2d 1102 (Wash 1933). Similarly, RAP 3.1 indicates, "only an aggrieved party may seek review by the appellate court."

Mortenson alleges the parties waived the arguments of standing when they agreed to consolidate the cases and develop one record for both cases. However, the mere fact a case is consolidated for hearing as a means of judicial efficiency or as a cost savings measure does not in and of itself give a party standing and Mortenson has not cited to any authority for its proposition. Further, RAP 3.3 allows for cases to be tried together

if consolidation would save time and expense and provide for a fair review of the case. RAP 3.3(b) further allows for the Court of Appeals to separate the cases for purpose of review. This further supports Lydig's argument that the mere fact the cases were tried together for purposes of judicial economy does not dictate Mortenson has standing to seek review of the Board's denial of Fowler's reopening application when Mortenson never appealed the Department order that denied Fowler's application to reopen the Lydig claim.

Mortenson further alleges it is an aggrieved party because it is paying for Mr. Fowler's benefits. Mortenson never filed a motion for stay of benefits while their appeal was pending and therefore was required by law to pay for all reasonable proper and necessary medical treatment and time loss compensation benefits Fowler is entitled to as a result of the August 3, 2011 industrial injury. Mortenson's payment of benefits does not give Mortenson standing to the Lydig claim and Mortenson has not cited any legal authority for their position. The fact of the matter is Mr. Fowler sustained an industrial injury during the course of his employment with Mortenson and any entitlement to benefits under the Mortenson claim is an independent determination made by the Department of Labor & Industries. Fowler's entitlement to benefits under the Mortenson claim does not rise or fall on whether or not the Lydig claim is reopened,

therefore Mortenson's argument it is aggrieved is without merit. If Mortenson believes the August 3, 2011 industrial injury is not a proximate cause for the need for ongoing treatment and benefits then Mortenson has the right to seek denial of benefits and claim closure at the Department. The status of the Lydig claim has absolutely no bearing on what benefits Mr. Fowler may or may not be entitled to under the Mortenson claim.

Mortenson admits an event can be both a new injury and an aggravation of an old injury. There is no Washington case law requiring the trier of fact to find either an aggravation or a new industrial injury. The administrative rules governing the Department of Labor and Industries provide a framework for administering such claim, but do not require the Department to choose one employer over the other as the solely responsible employer. A worker may have more than one claim open at any given time. Therefore, Mortenson's argument is without merit and the trial court did not abuse its discretion in concluding Mortenson did not have standing.

E. The Superior Court Correctly Affirmed the May 8, 2013 Board of Industrial Insurance Appeals Decision and Order

The Superior Court correctly affirmed the May 8, 2013 Board Decision & Order because a preponderance of credible evidence in the record shows Fowler sustained an industrial injury in the course of his

employment on August 3, 2011 while working for Mortenson and further shows Fowler's condition, proximately caused by the Lydig injury, did not objectively worsen between the terminal dates. Based upon the evidence contained in the Certified Appeal Board Record there was but only one conclusion in which the trial court could reach, Mr. Fowler sustained an industrial injury on August 3, 2011 while in the course of his employment with Mortenson.

Mortenson argues it was legally incorrect for the Superior Court to grant Fowler and Lydig's Motion for a Directed Verdict. For Mortenson to try and force an injured worker to reopen a prior claim is ridiculous and not supported by the law. It is Fowler's right to benefits, and Fowler's decision which claim to pursue benefits under. The decision which claim to pursue has significant financial ramification to Mr. Fowler. Under the Industrial Insurance Act a worker may be entitled to either temporary total disability benefits or loss of earning power benefits. These benefits are usually calculated based upon the worker's wages at the time of injury. RCW 51.08.178. Generally, a worker's wage increases over time. In addition, workers who experience an anatomic or functional loss after maximum medical improvement may be entitled to an award for permanent partial disability (PPD) and the schedule of benefits in RCW 51.32.080 changes every year based on the consumer price index. For

industrial injuries, the applicable schedule of benefits is determined by the date of injury. Therefore, the later in time Mortenson claim most likely results in a higher wage rate and higher PPD award to Mr. Fowler. Thus, the reason the choice to file to reopen a claim versus file a new injury lies exclusively with the injured worker. If the Court found in favor of Mortenson and concluded Mortenson had standing to seek reopening of the Lydig claim after Fowler refused to appeal the Board's decision denying the reopening would result in irreparable damages to Mr. Fowler and would be contrary to the central tenet of the Industrial Insurance Act wherein "any doubts and ambiguities in the language of the Industrial Insurance Act must be resolved in favor of the injured worker." RCW 51.12.010.

In the case at hand Fowler decided to pursue allowance solely against Mortenson and accepted the Board's determination that his condition, proximately caused by the Lydig injury, did not objectively worsen. It is contrary to the intent of the Industrial Insurance Act to allow Mortenson to force a worker to accept benefits under a prior claim. Fowler's own testimony makes it clear that although he had a prior injury in 2008 with Lydig, he received relatively little treatment and his knee completely resolved. Fowler continued to work in a physically demanding

job for over 3 years until he had a new and discrete injury at Mortenson which resulted in an immediate and prompt result requiring treatment.

F. The Superior Court did Not Abuse its Discretion When it Denied Mortenson's Motion for Reconsideration

Mortenson moved for reconsideration pursuant to Civil Rule 59(a)(1); (7); and (8), of the Order and Judgment dated January 9, 2015 and filed on January 12, 2015 and requested the Court vacate its decision and grant a new trial. In order for this Court to grant Mortenson's motion, Mortenson has to show: (1) irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; (2) that there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law; or (3) Error in law occurring at the trial and objected to at the time by the party making the application. CR 59(a)(1), (7), and (8).

A trial court's decision to grant or deny a Motion for Reconsideration is reviewed pursuant to an abuse of discretion standard. *Drake v. Smersch*, 122 Wn.App. 147, 151, 89 P.3d 726 (2004). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Id.* Mortenson alleges the trial court abused its discretion because there was an issue of fact whether Fowler sustained

an industrial injury while working for Mortenson and further alleges it was manifestly unreasonably and untenable for the trial court to find Mortenson did not have standing in the Lydig claim. As discussed above, the fact Dr. Brigham opined the MRI did not show any new objective abnormalities does not defeat a claim for benefits. Rather, when considering allowance of a claim for an industrial injury the appropriate inquiry is whether a qualifying event occurred and there is absolutely no dispute with the facts of the case and the facts of this particular case clearly fall within the statutory definition of an industrial injury.

Mortenson's claim that it is aggrieved because Mortenson "will ultimately have to pay for the expense the injury that Lydig caused" is simply without merit. The determination of what benefits Mr. Fowler is entitled to is based upon proximate cause and there is nothing in the law that requires another claim be open in order for an employer to deny benefits to a worker.

When the Superior Court denied Mortenson's motion for reconsideration, it specifically took note of the undisputed testimony and that the Board, in reaching its decision, noted "without exception, each and every medical expert who testified opined that Mr. Fowler suffered a medical condition as a result either a symptomatic aggravation of his pre-existing right knee meniscus tear, and/or flexion contracture of his knee."

CP 217, CABR 31. Therefore there is no legally sufficient evidentiary basis for a reasonable jury to conclude Fowler did not sustain an industrial injury while working for Mortenson and the trial court's decision was not an abuse of discretion or manifestly unreasonable.

IV. CONCLUSION

In conclusion, the employer respectfully requests this Court deny Mortenson's request to remand the case back to the trial court with direction to present the case to a jury. Lydig respectfully request this Court affirm the trial court's May 14, 2015 Order Denying Plaintiff's Motion for Reconsideration and affirm the trial court's January 9, 2015 Order and Judgment (filed on January 12, 2015) in favor of the Respondents/Defendants, Kurt Fowler, Lydig Construction, Inc., and the Department of Labor and Industries.

RESPECTFULLY SUBMITTED THIS 8 day of September, 2015



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