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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 336212

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

JOEL GONZALEZ-PRUNEDA

Respondent

v.

VALLEY FRUIT CO, LLC,

Appellant

BRIEF OF RESPONDENT

Michael v. Connell
WSBA No. 28978
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I. INTRODUCTION

This appeal concerns a worker's compensation claim under the Industrial Insurance Act (Act), which is statutorily governed by Title 51 RCW. The Act provides the exclusive remedy for workers that have been injured during the course of their employment. RCW 51.04.010; *Rothwell v. Nine Mile Falls School District*, 149 Wn. App. 771, 777, 238 P.3d 502, *review denied*, 169 Wn.2d 1017, 238 P.3d 502 (2009).

II. ASSIGNMENT OF ERROR

In its Appellant's brief, Valley Fruit Co., LLC (employer) assigns error to the Yakima County Superior Court's reversal of the March 13, 2014 Board of Industrial Insurance Appeals (Board) determination that Mr. Gonzalez-Pruneda did not suffer an industrial injury on September 5, 2012. (App. Br. at 1) However the employer neglected to assign error to any of the trial court's findings of fact, making them verities on appeal.

III. FACTS

On September 5, 2012, Mr. Gonzales worked for the employer driving a forklift. (CP 717; finding of fact 2.1) Because he had previously injured his right shoulder he had learned to adapt, steering

exclusively with his left arm. (CP 717; finding of fact 2.2) For some reason not explained in the record, the pace of the work was faster than normal on September 5, 2012, and Mr. Gonzalez worked quickly to keep up. Suddenly Mr. Gonzalez heard a pop in his left shoulder and began to feel severe pain in that shoulder. (CP 717; finding of fact 2.3) Mr. Gonzalez properly reported his left shoulder injury to his supervisor, Mr. Reyes. (CP 714-715) Mr. Gonzalez later filed a claim for benefits with the Department of Labor and Industries (Department), which was accepted and benefits paid. (CP 717) The employer appealed the January 7, 2013 Department order to the Board of Industrial Insurance Appeals (Board) which, on March 13, 2014, reversed the Department order. (CP 717) As a result, Mr. Gonzalez's worker's compensation benefits were taken away. He appropriately appealed the Board order to the Yakima County Superior Court where a trial de novo was held. (CP 1-4) At the conclusion of the trial, the court reversed the Board order, determining Mr. Gonzalez's left shoulder injury had indeed occurred on September 5, 2012 during the course of his employment with Valley Fruit Co., LLC. (CP 717; finding of fact 2.4) The employer filed a notice of appeal with this court.

IV. ARGUMENT

A. Standard of review

The Court of Appeals reviews a trial court's decision on an industrial insurance appeal for “substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court.” *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002) (footnote omitted). It then reviews, de novo, whether the trial court’s conclusions of law flow from the findings. *Watson v. Dep’t of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006) Substantial evidence is that quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Credibility determinations are for the trier of fact and are not subject to review by the appellate court. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)(emphasis added)

B. Analysis

As noted above, the employer raises only one issue on appeal – that the trial erroneously reversed the March 13, 2014 Board decision. As it admits over and over in its brief, the only_ reason the

employer alleges that the trial court's decision created reversible error is that they allege that Mr. Gonzalez was not a credible witness, so substantial evidence does not support the trial court's decision to reverse the Board order. In fact, the employer states on two occasions that Mr. Gonzalez lied under oath. (App. Br. at 17, 25) Twice the employer commented that Mr. Gonzalez was untruthful. (App br. at 22-23) The employer also wrote, "Mr. Gonzalez provided a deceitful medical history." (App br. at 24)

As this court recognizes, the issue of witness credibility is well settled in the law of this state. The determination regarding witness believability is a decision made solely by the trier of fact. *Morse, supra* at 574 (jury finds defendant not guilty of negligence, on appeal, the court of appeals improperly substituted its judgment of lay witness credibility for that of the jury); *Benedict v. Dep't of Labor & Indus.*, 63 Wn.2d 12, 16, 385 P.2d 380, 383 (1963) (experts were well-qualified in their field yet substantially disagreed in their testimony – trial court decision affirmed as appellate court had no authority to substitute its judgment for trial court).

Here, the trial court was the fact-finder and it distinctly exercised its discretion when, after examining the Certified Appeals

Board Record (CABR), which included the widely divergent testimony of several well-qualified medical experts, the briefing filed by the parties as well as oral arguments of counsel, it determined Mr. Gonzales was a credible witness. (CP 715, 717) This decision is not reviewable on appeal.

Mr. Gonzalez also contends the same result will apply under a different examination of the law. Here, the trial court issued not only a Memorandum Opinion but written Findings of Fact, Conclusions of Law and a Judgment (CP 714-719) However, the employer failed to assign error to any of the findings. These unchallenged findings are treated as verities on appeal. As such, this court's review is limited to determining whether the unchallenged findings support the court's conclusions of law. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

A review of the record will demonstrate that substantial evidence supports the court's four findings of fact which in turn substantiates its three conclusions of law. The trial court memorandum opinion found Mr. Gonzalez a credible witness and believed his testimony regarding how the injury occurred, how it was immediately reported to his supervisor and how he had never

purposely sought medical treatment from Dr. Vickers (his primary care physician) for his left shoulder until September 18, 2012, nearly two weeks after the industrial injury. (CP 714-715)

Finally, this court should consider the mandate of RAP 10.3(g), which states in relevant part:

. . . A separate assignment of error for each finding of a fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Applying the facts of this case to well-settled case law and the rules of appellate procedure Mr. Gonzalez asserts this court should determine the trial court's unchallenged findings of fact offer substantial evidence to support its conclusions of law such that the trial court decision should be affirmed.

V. ATTORNEY FEES

If Mr. Gonzalez prevails in this appeal he requests attorney fees pursuant to RAP 18.1, RCW 51.52.130¹ and *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose behind the statutory attorney fees award is to ensure adequate representation for the injured worker who is forced to defend an appeal in order to obtain the compensation rightfully due and owing on their worker's compensation claim. *Id.* at 667-70.

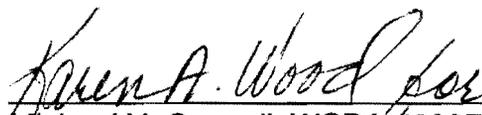
VI. CONCLUSION

Based upon the above facts, rules and case law, Mr. Gonzales respectfully requests this court affirm the trial court decision and award him attorney fees. The employer's brief expresses allegations about the facts, several of them crossing the

¹ The relevant portion of RCW 51.52.130(1) provides: "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

line of respectful advocacy, it believes will persuade this court to reverse the trial court decision. And perhaps this court would disagree with the trial court's discretionary ruling. Nevertheless, this court is required to abide by the laws and rules of this state, which require the employer to assign error to any finding of fact with which it disagrees in order to have it reviewed. It did not do so. Nor may this court disturb a discretionary credibility decision. Consequently, this court must regard the trial court's findings as accurate and determine whether the unchallenged conclusions flow from those unchallenged findings.

Respectfully submitted this 18th day of February, 2016

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