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Court of Appeals
Division III
State of Washington

NO. 34068-6-III

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

OLGA KOZUBENKO,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

The Department of Labor & Industries has provided workers' compensation benefits to Olga Kozubenko for a thrombosis condition arising out of her industrial injury. She seeks coverage for another condition, but offers no medical testimony in support of her request. Industrial insurance case law requires medical testimony to support coverage of a condition. Because she failed to provide such testimony, this Court should affirm the trial court's denial of her request to add the additional condition to her workers' compensation claim.

II. ISSUE PRESENTED

The superior court concluded that that Ms. Kozubenko presented insufficient evidence to show that her work injury caused unspecified cerebrovascular disease, represented by ICD-9 code 437.9. Is this conclusion correct where both medical experts diagnosed her with a disease represented by ICD-9 code 437.6, and no medical experts testified that she has a diagnosis of unspecified cerebrovascular disease?

III. STATEMENT OF THE CASE

A. **Prior Decisions and Appeals Established That Kozubenko's 2008 Work Injury Caused Thrombosis (a Blood Clot) in Her Right Sinus but Did Not Cause a Stroke or Hemiplegia**

In January 2008, a box of bedding fell from a shelf and struck Kozubenko in the head, injuring her while she was at work. *See* BR 859.¹ She filed a workers' compensation claim, which the Department allowed. *Id.*

In a separate, previous appeal, the Board of Industrial Insurance Appeals determined that Kozubenko suffered a sinus thrombosis as a result of her industrial injury, in addition to her previously-accepted conditions of concussion and neck strain. BR 859; BR 12/17/13 at 6; BR Sayres 26. In lay terms, the thrombosis was a blood clot. *See* BR 650-51. This form of sinus thrombosis is considered a "cerebrovascular" disease. *See* BR Sayres 28-29. During the appeal, Kozubenko's attending physician, William Sayres, M.D., testified in support of the thrombosis diagnosis and stated that it was his opinion that the thrombosis was related to Kozubenko's industrial injury. *See* BR 845, 851.

¹ The record of the Board of Industrial Insurance Appeals is referred to as "BR" followed by the witness name, if applicable, and page number. Exhibits are referred to as "BR Ex."

In a later appeal, the Department determined that Kozubenko's work injury did not cause either a stroke or hemiplegia (partial or full paralysis on one side of the body) as a result of her industrial injury. BR 26; BR 268; BR Ex 1; BR Sayres 26-27. Kozubenko appealed that determination to the Board, which affirmed, and then to superior court. *See* BR Ex 1. In 2014, the superior court issued a final order affirming that Kozubenko's work injury did not cause a stroke or hemiplegia. BR 26; BR Ex 1; BR Sayres 26-27.

B. Kozubenko's Attending Physician Testified That the Correct Diagnostic Code for Kozubenko's Thrombosis Is ICD-9 Code 437.6

Like many medical providers and insurers, the Department uses "ICD codes" to identify accepted conditions and to receive and pay bills for covered care. BR Jeg 38-39; *see also* WAC 296-20-01002 (an accepted condition must be identified with an ICD diagnosis code); WAC 296-20-025(3)(c) (a report of injury at work must include an ICD diagnosis code); WAC 296-20-125(3) (bills submitted to Department must include ICD codes). ICD is short for "International Classification of Diseases," and represents a numerical system of classifying diseases and disorders, often used for reimbursement in both private and public healthcare

systems.² At the time of the order and appeal in this matter, the Department used the ICD-9 classification system.³

Kozubenko's attending physician, Dr. Sayres, believes that her thrombosis condition is best represented by ICD-9 code 437.6, "Nonpyogenic thrombosis of intracranial venous sinus," where nonpyogenic means that the condition is not infection-related. *See* BR Sayres 27-29, 34. Although the Department initially assigned ICD-9 code 325 to the thrombosis condition, that code was incorrect as it referred to "phlebitis and thrombophlebitis of intracranial venous sinuses," a swelling-related condition, rather than to the actual thrombosis (blood clot), from which Kozubenko suffered. *See* BR Jeg 23, 26, 28-29. After Kozubenko inquired about the use of the incorrect code, the Department verified that ICD-9 code 437.6 code was the applicable code for the diagnosed thrombosis condition and corrected the assigned code. BR Jeg 23; BR Howell 7-8.

²ICD Information Sheet <http://www.who.int/classifications/icd/factsheet/en/> (last visited October 17, 2016).

³ *See* <http://www.lni.wa.gov/ICD10> (conversion to ICD-10 effective October 1, 2015) (last visited October 17, 2016).

C. Kozubenko Requested That the Department Add a Second ICD-9 Code, 437.9, to Her Claim and the Department Found No Medical Evidence to Support Adding the Code

When the Department corrected the ICD-9 code relating to her thrombosis, Kozubenko asked the Department to add a second ICD-9 code to her claim. *See* BR Ex 14. She requested that the Department add ICD-9 code 437.9, “Unspecified Cerebrovascular Disease,” i.e., a cerebrovascular disease not specified by any other code. *See* BR Ex 14. That code had been used in Kozubenko’s medical records during a period when she was refusing imaging studies and before her exact diagnosis had been confirmed. BR Ponomarenko 12/15/14 at 8.

Once a doctor confirms a diagnosis, the most specific, applicable ICD diagnosis code is used. *See* BR Sayres 29. Dr. Sayres explained, “[doctors] always code to the highest specificity.” BR Sayres 29. According to Dr. Sayres, for the general “unspecified” code to apply to Kozubenko, it would have to represent another condition that did not fit under a more specific diagnostic code, such as atherosclerosis, which Kozubenko does not have. BR Sayres 42-43. Here, according to Dr. Sayres, her condition fit under the more specific diagnosis of ICD-9 code 437.6. BR Sayres 27-29, 34.

The Department issued an order denying addition of ICD-9 code 437.9 because Kozubenko's condition was already covered by ICD-9 code 437.6 and there was no medical evidence that her injury caused a different, unspecified cerebrovascular disease. BR Ex 14; *see also* BR 12/17/13 at 7; BR Ex 1.

D. Both Testifying Medical Experts Agreed That Kozubenko's Injury Caused Sinus Thrombosis (ICD-9 Code 437.6) but Did Not Cause Unspecified Cerebrovascular Disease

Kozubenko appealed the Department's order denying the addition of ICD-9 code 437.9 to the Board. At the Board, Kozubenko presented the testimony of two treating providers, Dr. Sayres and Advanced Registered Nurse Practitioner (ARNP) Tatiana Ponomarenko. BR Sayres; BR Ponomarenko 9/5/14 and 12/15/14. She also presented testimony of the Department's claims manager, Heidi Jeg; claims unit supervisor Cherell Fisher, who was involved in correcting the ICD-9 code assigned; and nurse consultant Monica Howell, who had advised the Department on the applicable ICD-9 code after Kozubenko's first inquiry. BR Jeg; BR Fisher; BR Howell.

Dr. Sayres confirmed the Department's conclusion that ICD-9 code 437.6, nonpyogenic thrombosis of intracranial venous sinus, correctly represented Kozubenko's thrombosis condition.

BR Sayres 27-29, 34-36. He further testified that ICD-9 code 437.9 was not appropriate in Kozubenko's claim. BR Sayres 32, 34-36.

Likewise, Ponomarenko agreed that nonpyogenic intracranial thrombosis was the correct diagnosis of Kozubenko's condition.

BR Ponomarenko 9/5/14 at 71; 12/15/14 at 8. Ponomarenko explained that the prior use of the "unspecified" ICD-9 code 437.9 was before the more precise diagnosis of the thrombosis. BR Ponomarenko 12/15/14 at 8, 27.

She agreed with Dr. Sayres that ICD-9 code 437.6 is an exact description of the condition, while code 437.9 is instead a general description of disease that does not fit under a specific description. BR Ponomarenko 9/5/14 at 51; 12/15/14 at 27. Ponomarenko would not opine on whether Kozubenko had a condition described under the "unspecified" code of 437.9 that related to Kozubenko's industrial injury. *See, e.g.,*

BR Ponomarenko 9/5/14 at 51-52, 72, 75. Ponomarenko testified twice, at Kozubenko's request, but still was unwilling to give an opinion on whether Kozubenko suffered from an "Unspecified Cerebrovascular Disease" resulting from the industrial injury. *See, e.g.,* BR Ponomarenko 12/15/14 at 32.

E. The Board Affirmed the Department's Denial of ICD-9 Code 437.9 "Unspecified Cerebrovascular Disease" and the Superior Court Affirmed

After Kozubenko presented her case, the Board determined that there was insufficient evidence that Kozubenko's injury caused an unspecified cerebrovascular disease, and it therefore affirmed the Department order denying addition of the ICD-9 code 437.9. BR 3, 25-31. Kozubenko appealed the Board's decision to the superior court, which affirmed the Board on de novo review. CP 23-26.

The superior court adopted the Board's findings that Kozubenko's industrial injury proximately caused concussion, cervical strain, and sinus thrombosis; that this thrombosis condition is a cerebrovascular disease; and that her industrial injury did not proximately cause stroke or hemiplegia. CP 24. Additionally, the superior court also entered a finding that there was insufficient evidence to show that Kozubenko had a condition of unspecified cerebrovascular disease, represented by ICD-9 code 437.9, proximately caused by her industrial injury. CP 25.

IV. STANDARD OF REVIEW

In an industrial insurance appeal, this Court reviews whether substantial evidence supports the findings of the superior court and whether the court's conclusions of law flow from those findings. *Ruse v.*

Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).⁴ Because Kozubenko does not assign error to the superior court's findings, these findings are verities on appeal. *See Nelson v. Dep't of Labor & Indus.*, 175 Wn. App. 718, 723, 308 P.3d 686 (2013).

This Court interprets findings of fact that are conclusions of law as conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013). Here, the superior court's finding that Kozubenko presented insufficient evidence to show that her industrial injury caused unspecified cerebrovascular disease, represented by ICD-9 code 437.9, is actually a conclusion of law. Thus, this Court's review is limited to determining whether the trial court's conclusions flow from the unchallenged findings. *Ruse*, 138 Wn.2d at 5.

V. ARGUMENT

As the superior court correctly determined, Kozubenko failed to meet her burden to establish that her industrial injury caused an unspecified cerebrovascular disease. *See Saylor v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966) (burden on claimant to show by the testimony of medical experts that she has a condition caused by the industrial injury). For a condition or disability to be compensable

⁴ The Washington Administrative Procedure Act, RCW 34.05, does not apply to workers' compensation cases under RCW Title 51. RCW 34.05.030(2)(a), (b); *see Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009).

under the Industrial Insurance Act, the industrial injury must be a proximate cause of the condition or disability. *See Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 684, 571 P.2d 229 (1977). By long-established precedent, Kozubenko could only meet that burden by presenting competent medical testimony on causation. *See Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987); *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979); *Page v. Dep't of Labor & Indus.*, 52 Wn.2d 706, 708-09, 328 P.2d 663 (1958).

Kozubenko presented insufficient medical evidence that her work injury caused unspecified cerebrovascular disease because both medical experts, her own treating providers, testified that her condition was a *specified* type of cerebrovascular disease: nonpyogenic thrombosis of intracranial venous sinus, which has a diagnosis code of ICD-9 code 437.6. Both experts also agreed that because she had this specific condition, not an “unspecified cerebrovascular disease,” ICD-9 code 437.9 was not the correct diagnostic code. Therefore, the superior court correctly concluded that Kozubenko presented insufficient evidence to support her claim.

A. Kozubenko Presented Medical Witnesses, but Both Opined That ICD-9 Code 437.6 Accurately Described Her Condition While a General, Less Specific Code Did Not

The testimony of both medical experts supported the superior court's conclusion. Dr. Sayres testified unequivocally: "I believe that the 437.6 [code], which is nonpyogenic thrombosis of intracranial venous sinus, is a correct diagnosis." BR Sayres 27. Dr. Sayres explained that the code was the most specific, accurate code applicable to Kozubenko's condition, and that the most specific diagnosis or code is always used over a general or non-specific code. BR Sayres 29. Ponomarenko agreed on both points: that nonpyogenic thrombosis of intracranial venous sinus was an accurate diagnosis of Kozubenko's condition and that the specific diagnosis controls over a general or unspecified diagnosis.

Ponomarenko 9/5/15 at 51-52, 71; 12/15/14 at 8, 27. There is no dispute either that a correct code has been assigned to Kozubenko's thrombosis (ICD-9 code 437.6) or that it is inappropriate to use a general code when such a specific code is available.

B. No Testimony Claimed That Kozubenko Had "Unspecified Cerebrovascular Disease"

In contrast to the universal agreement by both her treating providers that the ICD-9 code 437.6 accurately described Kozubenko's condition, no witness testified that ICD-9 code 437.9 described a condition

Kozubenko had as a result of her industrial injury. Again without demur, Dr. Sayres testified specifically that he “do[es] not agree with [a] diagnosis . . . cerebrovascular disease, ICD code 437.9.” BR Sayres 32. While Kozubenko implies that Ponomarenko agreed with the ICD-9 code 437.9, Ponomarenko in fact was not willing to opine that Kozubenko had an “unspecified cerebrovascular disease.” *See* Br. Appellant at 5; BR Ponomarenko 9/5/14 at 51-52, 72; 12/15/14 at 8, 32. Kozubenko refers to asking Ponomarenko to read dictation regarding a non-testifying doctor, but even in that testimony Ponomarenko observed that the other doctor only noted “prior medical history” and said she could not speak to his records or agree as to a diagnosis under ICD-9 code 437.9. Br. Appellant at 5; BR Ponomarenko 9/5/14 at 58-59. In short, no witness provided any opinion asserting that Kozubenko has “unspecified cerebrovascular disease,” much less that any such disease was related to her claim.

As it was Kozubenko’s burden to provide testimony supporting the existence of her alleged “unspecified cerebrovascular condition” and its relation to her industrial injury, the absence of any such testimony is definitive. There is no evidence of an unspecified cerebrovascular condition, and thus the superior court’s determination is correct.

VI. CONCLUSION

The only medical evidence that Kozubenko presented to support her appeal came to the opposite conclusion of the one she wanted, denying rather than confirming that she had an unspecified cerebrovascular disorder proximately caused by her industrial injury. The Department, the Board, and the superior court were all correct in concluding that no medical evidence supported the addition of ICD-9 code 437.9, unspecified cerebrovascular disease, to Kozubenko's claim.

RESPECTFULLY SUBMITTED this 10th day of November, 2016.

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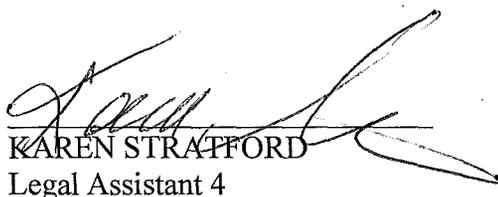
DECLARATION OF
MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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DATED this 10th day of November, 2016.


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