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NO. 369803

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

JANICE BRINSON-WAGNER,

Appellant

v.

KENNEWICK SCHOOL DISTRICT,

Respondent

BRIEF OF APPELLANT

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III. INTRODUCTION

This is a worker's compensation matter governed by the Industrial Insurance Act (IIA), Title 51 RCW. Ms. Janice Brinson-Wagner appeals a decision of the Benton County Superior Court, which affirmed, in part, a Board of Industrial Insurance Appeals (Board) decision that reversed a Department of Labor and Industries (Department) order which instructed the Department to authorize treatment for Ms. Brinson-Wagner's left knee, including a left total knee replacement, as treatment of an unrelated pre-existing condition that is directly retarding recovery of the accepted left ankle condition, pursuant to RCW 51.36.010, after she was injured performing her job as a para-educator for the Kennewick School District. Janice Brinson-Wagner filed a claim with the Department of Labor and Industries for an industrial injury on November 14, 2008. On July 28, 2009, the Department issued an order which allowed Ms. Brinson-Wagner's claim. On November 12, 2015, the Department issued an order which denied a left total knee replacement or arthroscopy. The appeal was heard by the Board of Industrial Insurance Appeals and on February 9, 2017, the hearings judge issued a proposed decision and order (CP 40-47). The employer petitioned the Board to review the hearings judge's ruling. On June 23, 2017, the Board issued a decision and order (CP 15-19), which both parties appealed to this Superior Court. The plaintiff's appeal was assigned Cause Number 17-2-01893-4 (CP 1); the Defendant's appeal was assigned Cause Number 17-2-01960-4. A trial date was set for the plaintiff's appeal on July 30, 2018; however, the defendant did not set a trial date for their appeal and desired their appeal to be heard prior to the plaintiff's. The

plaintiff agreed and the date of July 30, 2018, was converted to oral arguments before the honorable Carrie Runge. Judge Runge entered a decision which was mailed to both parties on August 2, 2018 (CP 334-335), and findings of fact and conclusions of law were entered and filed with the court on October 11, 2018. The following were entered into:

FINDINGS OF FACT

1. The Board undertook a Holzerland review of the Department file and the Board had jurisdiction to address whether a total knee replacement was necessary as an aid to recovery.
2. WAC 296-20-055 contains discretionary language. There was no evidence submitted that tells what the standard of review must be, given this discretionary language.
3. WAC 296-20-055 address both the Department and Self-Insured Employers, therefore, Ms. Brinson-Wagner had the ability to pursue a denial of a request for coverage of a condition that was retarding recovery.
4. The word "temporary" in WAC 296-20-055 refers to temporary in time and not in the form of treatment.
5. Ms. Brinson-Wagner's knee arthritis existed before the injury, even though it was asymptomatic.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the persons and subject matter of this timely filed appeal.
2. Ms. Brinson-Wagner is in need of further proper and necessary treatment within the meaning of RCW 51.36.010.
3. The Board was correct when it instructed the Self-Insured Employer to cover the total knee replacement as an aid to recovery. The claimant is allowed to pursue its appeal under Cause No. 17-2-01893-4. (CP 336-338)

The Employer then filed a Motion for Summary Judgment to dismiss Ms. Brinson-Wagner's appeal, indicating that it was res judicata to have a decision saying a condition is unrelated and at the same time find that it is related. (CP 340-350) Ms. Brinson-Wagner argues that the issue of whether or not the arthritis was aggravated has not been litigated and that she's entitled to her day in court.

IV. ASSIGNMENT OF ERROR

Ms. Brinson Wagner assigns error to the trial court's granting of the Employer's Motion for Summary Judgment and Dismissal with Prejudice of Ms. Brinson-Wagner's case. (CP 381-382)

V. ISSUES RELATED TO ASSIGNMENT OF ERROR

Whether there is a genuine issue of material fact that has not been adjudicated?

Whether res judicata precludes litigation of this appeal?

VI. STATEMENT OF THE CASE

Janice Brinson-Wagner is a 61-year-old single woman with some college education. She has worked as a printing press operator, for the government as a nuclear operator, as a temporary worker in a law office, as a receptionist, as a case manager, and for seven years as a para-educator for the Kennewick School District. Prior to the injury at issue, she had no injuries to her leg and had always been active.

On October 27, 2008, Ms. Brinson-Wagner was working with autistic children, including one who tended to flail his limbs. The child was sitting on an occupational bench, while Ms. Brinson-Wagner was standing to the child's left. The child fell backward, with the bar of the bench he was sitting on hitting Ms. Brinson-Wagner, with the child's weight hitting Ms. Brinson-Wagner on the inside of her left knee. She reached with her right arm to brace herself on a shelving unit behind her. The child and the bench landed fully on her lower leg. Ms. Brinson-Wagner initially felt pain in

her knee, but her ankle also became progressively more painful. Her doctor, Dr. Phipps, performed an OATS procedure on her left ankle, after which she had physical therapy and used a scooter for six to eight weeks. When the procedure was unsuccessful, Dr. Dunlop attempted a second OATS procedure. When that was not successful, Ms. Brinson-Wagner was presented with the option of a cartilage graft or a total ankle replacement. She chose the cartilage graft, but it was also unsuccessful, leaving a total ankle replacement as the only option. Physical therapy improved the ankle, but not the knee. Ms. Brinson-Wagner had a total ankle replacement with Dr. Faustin Stevens, following which her ankle movement has improved, although she still has some pain in the ligaments and tendons. Dr. Stevens referred her to Dr. Merrell, who tried cortisone shots into her left knee, which reduced the grinding feeling but did not help with the pain or discomfort.

Ms. Brinson-Wagner continued to work for the Employer in the attendance office at a sedentary position. She cannot sit for any length of time, but has to get up and move around. She is no longer able to walk as far as she used to prior to the injury. Before the injury, Ms. Brinson-Wagner regularly exercised, running up to two miles. Her knee pain has not returned to its pre-injury status.

VII. ARGUMENT

a. Standard of Review—Court of Appeals

Review by the Court of Appeals is governed by RCW 51.52.140. Unlike the superior court, this court does not conduct a de novo review of the Board

record. Instead, its review is limited to an examination of the trial court record to determine whether substantial evidence supports the trial court's factual findings. It then reviews, de novo, whether the trial court's conclusions of law flow from the findings. *Dep't of Labor & Indus., v. Shirley*, 171 Wn. App. 870, 878, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006 (2013). "Substantial evidence" is that which is adequate enough to persuade a rational, fair-minded person that the premise is true. *Richardson v. Dep't of Labor & Indus.*, 6 Wn. App.2d. 896, 904, 432 P.3d 841 (2018), *review denied*, 193 Wn.2d 1009 (2019).

b. Standard of Review—Benton County Superior Court

On the other hand, a party appealing a Board decision to the superior court must do so under the guidance of RCW 51.52.115, which states that a Board decision is prima facie correct and a party claiming otherwise must support their challenge by a preponderance of the evidence. *Ravsten v. Department of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). In making its decision at the conclusion of its review of the Board record below, the superior court may substitute its own findings and decision for those set forth by the Board, but *only* if the trial court determines from a fair preponderance of credible evidence that the Board's findings and decision are incorrect." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570, 572 (1999).

**c. Res Judicata does not Apply as the Issue of Aggravation of Arthritis
was not Litigated**

Summary judgment is only appropriate when the case presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Sherman v. State*, 128Wn.2d 164, 183, 905 P.2d 355 (1995). The courts view the facts in the light most favorable to the nonmoving party, and should grant summary judgment when reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-4, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1995)).

The threshold requirement of res judicata is a final judgment on the merits in the prior suit. *Id.* Once that threshold is met, res judicata requires sameness of subject matter, cause of action, people and parties, and “the quality of the persons for or against whom the claim is made.” *Rains v. State*, 100 Wash.2d 660, 663, 674 P.2d 165 (1983). *Hisle v. Todd P. Shipyards Corp.*, 93 P.3d 108, 114–15 (Wash. 2004).

While it is often said that a judgment is res judicata of every matter which could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims. It does not require such joinder. And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause

which is independent of the cause which was adjudicated. 50 C.J.S. Judgments s 668 (1947); 46 Am.Jur.2d Judgments s 404 (1969). A judgment is res judicata as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated. *Seattle-First Nat. Bank v. Kawachi*, 588 P.2d 725, 727–28 (Wash. 1978).

In the current proceeding, there still exists a genuine issue of material fact as well as an issue that does not deal with the same subject matter. In the current appeal, the matter of whether or not the plaintiff's industrial injury lit up or aggravated her pre-existing knee arthritis, which if found to have done so, would be an allowed condition under the claim. In the conclusions of law, specifically numbers 2 and 3, they concluded that Ms. Brinson-Wagner was entitled to further proper and necessary medical treatment. Additionally, it found that the Board was correct when it instructed the Self-Insured Employer to cover the total knee replacement as an aid to recovery. "The claimant is allowed to pursue its appeal under Cause No. 17-2-01893-4." Judgment point 2 states "The Decision & Order of the Board of Industrial Insurance Appeals dated June 23, 2017 is correct as it relates to the determination that the Self-Insured Employer must for the total knee replacement;".

There is nothing contained in the Findings of Fact, Conclusions of Law, or the Judgment which make a determination as to whether or not the pre-existing left knee arthritis was lit up or aggravated by the industrial injury. That issue is still ripe for judgment and is wholly separate from the treatment of the

issue. The Conclusion of Law specifically preserved the plaintiff's right to pursue its original appeal which was supposed to have gone to a jury trial on July 30, 2018. As such, not allowing Ms. Brinson-Wagner to pursue this appeal would preclude her from exercising her appeal rights under the industrial insurance act.

At Superior Court, it was argued that because the Findings of Fact included WAC 296-20-055, that it automatically precludes pursuing the injured worker's appeal because the issue of an unrelated issue has already been litigated. However, the references in the Findings of Fact simply indicate why the Employer's arguments lacked merit. Finding of Fact 2 is used to find that there is no standard of review to discuss the discretionary language in that WAC. Finding of Fact 3 referred to the WAC to indicate that Ms. Brinson-Wagner had a right to pursue coverage of a condition which was retarding recovery. Finally, Finding of Fact 4 discusses the word "temporary" as it relates to treatment. None of these Findings indicate that Ms. Brinson-Wagner's pre-existing knee arthritis was unrelated or that she was unable to pursue her appeal under her filed appeal. Had Ms. Brinson-Wagner had the opportunity to argue the issue of whether her pre-existing arthritis was aggravated by her industrial injury, there would have been a Finding of Fact or Conclusion of Law which would have stated so. In this instance, that was not done, the issue was not litigated previously and a final decision about this issue has not been made. The Superior Court only heard oral arguments regarding the Employer's cross appeal and issued a judgment to memorialize the findings and conclusions,

the court never heard the issue on appeal in the injured worker's case. As such, it is improper to grant the Employer's Motion for Summary Judgment.

VIII. ATTORNEY FEES

If successful in her appeal, Ms. Brinson-Wagner requests she be awarded attorney fees. Such an award in IIA appeals is controlled by RCW 51.52.130, which provides in relevant part:

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, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

RCW 51.52.130. This statute ensures legal representation for injured workers and also corresponds with the Industrial Insurance Act's purpose of ensuring compensation for employees who suffer industrial injuries. *Dep't of Labor & Indus. v. Cascadian Bldg. Maint., Ltd.*, 185 Wn. App. 643, 653, 342 P.3d 1185 (2015). The statute also encompasses fees in both the superior and appellate courts when both courts review the matter. *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 363–64, 115 P.3d 1031 (2005). By its terms, the statute allows the court to determine an award of attorney fees if the court reverses the BIIA's order and grants an award to the disabled worker. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 257, 177 P.3d 180, 186 (2008). If the trial court decision is reversed or modified and additional relief is granted Ms. Brinson-Wagner, she asks that her reasonable attorney fees on appeal be awarded by this court.

IX. CONCLUSION

Based on the foregoing arguments and citations to authority, Ms. Brinson-Wagner respectfully requests this court reverse the trial court's decision that granted the Employer's summary judgment motion and allow her to pursue her appeal at the Superior Court level.

Respectfully submitted this 19th day of December, 2019.



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NO. 369803

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

JANICE BRINSON-WAGNER,

Appellant,

vs.

KENNEWICK SCHOOL DISTRICT,

Respondent.

**DECLARATION OF
SERVICE**

STATE OF WASHINGTON)

County of Benton)

) ss.

I, Mary Cochenour, do hereby certify that I am an employee of Smart Law Offices, PS, attorneys for the Appellant. That I am a citizen of the United States and competent to be a witness herein. That on the 19th day of December, 2019, I sent, via United States Mail at Kennewick, Washington, first class postage prepaid addressed, or as noted below, as follows:

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Brief of Appellant in the above entitled case.


Mary Cochenour, Legal Assistant to
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