

No. 73744-9-I

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

JAMES D. AMPHLETT,

Appellant,

v.

THE DEPARTMENT OF
LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

2015 NOV 10 PM 2:51
COURT OF APPEALS DIV I
STATE OF WASHINGTON

BRIEF OF APPELLANT

Thomas A. Thompson, WSBA #10595
WALTHER, THOMPSON, KINDRED,
COSTELLO & WINEMILLER, P.S.
3000 1st. Avenue
Seattle, WA 98121

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUE	3
IV.	BACKGROUND	3
V.	STANDARD OF REVIEW	7
VI.	ARGUMENT	8
	A. Mr. Amphlett Exceeded His Burden of Proof Because Every Medical Expert Testified that His Industrial Injury In Fact Aggravated His Adjustment Disorder	9
	B. Mr. Amphlett is Entitled to Judgment as a Matter of Law Because There is No Evidence to Refute the Causal Connection Between His Industrial Injury and his Aggravated Adjustment Disorder . .	13
VII.	ATTORNEY’S FEES	16
VIII.	CONCLUSION	17

TABLE OF AUTHORITIES

STATUTES

Title 51 RCW (the Industrial Insurance Act)	1, 7
RCW 51.12.010	7
RCW 51.52.140	7
RCW 51.52.130	17
Washington Rule of Civil Procedure 50	13, 15
Washington Rule of Civil Procedure 56	13, 15
Washington Rule of Civil Procedure 59	15

CASES

<i>Brashear v. Puget Sound Power & Light Co.</i> , 100 Wn.2d 204, 667 P.2d 78 (1983)	12
<i>Dennis v. Dep't of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987)	7, 10
<i>Harris v. Drake</i> , 116 Wn. App. 261, 65 P.3d 350 (2003)	8, 9, 13, 14, 16
<i>Ide v. Stoltenow</i> , 47 Wn.2d 847, 289 P.2d 1007 (1955)	15
<i>Longview Fibre Co. v. Weimer</i> , 95 Wn.2d 583, 628 P.2d 456 (1981)	14
<i>McIndoe v. Dep't of Labor & Indus.</i> , 144 Wn.2d 252, 26 P.2d 903 (2001)	7
<i>McClelland v. ITT Rayonier</i> , 65 Wn. App. 386, 828 P.2d 1138 (1992)	8
<i>O'Donoghue v. Riggs</i> , 73 Wn.2d 814, 440 P.2d 823 (1968)	9, 10, 11, 12

TABLE OF AUTHORITIES: CONTINUED

<i>Orcutt v. Spokane Cnty</i> , 58 Wn.2d 846, 364 P.2d 1102 (1961) . . .	10
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997)	15
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999)	7, 8
<i>Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.</i> , 92 Wn.2d 631, 600 P.2d 1015 (1979)	9, 11, 12, 13, 16
<i>Ugolini v. States Marine Lines</i> , 71 Wn.2d 404, 429 P.2d 213 (1967)	10
<i>Washburn v. City of Federal Way</i> , 169 Wn. App. 588, 283 P.3d 567 (2012)	15, 16
<i>Wendt v. Dep't of Labor & Indus.</i> , 18 Wn. App. 674, 571 P.2d 229 (1977)	12
<i>Young v. Dep't of Labor & Indus.</i> , 81 Wn. App. 123, 913 P.2d 402 (1996)	8

I. INTRODUCTION

This is an appeal under the Industrial Insurance Act, Title 51 RCW. The injured worker, James D. Amphlett, appeals from a Superior Court decision which summarily and erroneously affirmed a determination by the Board of Industrial Insurance Appeals (hereinafter “the Board”). The Board decision determined, in direct opposition to the uncontested evidence presented, that Mr. Amphlett’s injury was not a proximate cause of the aggravation of his preexisting adjustment disorder and that his mental condition was not a part of the industrial injury. After a bench trial, the King County Superior Court affirmed the Board’s decision by disregarding the uncontested evidence and stating that Mr. Amphlett’s industrial injury was not a proximate cause of the aggravation of his adjustment disorder.

Mr. Amphlett requests review of the Superior Court’s decision because Mr. Amphlett was entitled to judgment as a matter of law that his industrial injury was a proximate cause of his aggravated adjustment disorder. The Superior Court’s findings were incorrect as a matter of law in that there was a total lack of evidence to support the findings. Specifically, all of the medical experts testified that there was a causal link between Mr. Amphlett’s adjustment disorder and his industrial injury. No evidence was offered to contradict the causal link. Rather, the Superior

Court substituted its own beliefs for the medical opinion of both experts. Legal authority in the state of Washington prohibits a judge from substituting their beliefs for the uncontested opinion of medical experts. Therefore, Mr. Amphlett respectfully requests that this Court reverse the Superior Court's decision in this matter and grant Mr. Amphlett judgment as a matter of law.

II. ASSIGNMENTS OF ERROR

1. On May 15, 2015, the Superior Court erroneously affirmed the August 5, 2013 decision of the Board denying allowance of an aggravation of Mr. Amphlett's adjustment disorder.
2. The Superior Court erred in Finding of Fact 4, by failing to find that, as a matter of law, Mr. Amphlett's adjustment disorder was aggravated by his industrial injury.
3. The Superior Court erred in Conclusion of Law 3, by failing to find that, as a matter of law, Mr. Amphlett proved that the Decision of the Board was incorrect.
4. The Superior Court erred in Conclusion of Law 4, by failing to find that, as a matter of law, Mr. Amphlett's industrial injury was a proximate cause of the aggravation of his adjustment disorder.

III. ISSUE

Whether the Superior Court erred as a matter of law in failing to find for the plaintiff, where both the plaintiff's and defendant's doctors testified that the industrial injury was a proximate cause of an aggravation of the plaintiff's adjustment disorder and no evidence was offered to contradict that testimony.

IV. BACKGROUND

James D. Amphlett sustained an industrial injury on October 15, 2010 while working for Garner Construction, Inc. Since the injury, Mr. Amphlett has undergone two surgeries and has not been able to return to work. (CP 296, Gamrath Dep. v.2 p.23/ln. 14-24).

Prior to and after the industrial injury, Mr. Amphlett received treatment from David J. Gamrath, D.O. (CP 236, Gamrath Dep. v.1 8/16-19). Subsequent to the industrial injury Timothy S. Cahn, Ph.D., examined Mr. Amphlett, at the Department's insistence, for mental conditions. (CP 176, Cahn Dep. 16/3-7). Mr. Amphlett was diagnosed with bipolar disorder and an adjustment disorder with mixed anxiety and depressed mood. (CP 242, Gamrath Dep. v.1 14/12-15).

On January 5, 2012 the Department entered an order denying responsibility for the bipolar¹ and adjustment disorder. Mr. Amphlett appealed the order to the Board, maintaining that his adjustment disorder was aggravated by his industrial injury.

Hearings were held before the Board. Mr. Amphlett called Timothy Cahn, Ph.D., to testify about his mental conditions. The Department called David Gamrath, D.O. as its only expert medical witness. Both medical experts testified that the adjustment disorder was aggravated by Mr. Amphlett's industrial injury.

Dr. Cahn, Ph.D., testified as follows:

Q: Doctor, based on your knowledge of this matter, the review of your records, the records of other physicians that you've taken into consideration, do you have an opinion, on a more probable than not basis, whether or not the industrial injury was a cause of the need for the psychological treatment that you rendered to Mr. Amphlett?

A: Yes.

Q: And what's your opinion?

Q: *It did.*

(CP 182, Cahn Depo. 22/5-14 (emphasis added)).

Dr. Gamrath, D.O., the Department's only expert witness, testified as follows:

¹ Mr. Amphlett does not contest the Department's decision with regard to bipolar disorder; only the findings regarding his adjustment disorder are at issue before this Court.

Q: But the specific industrial injury of October 15, 2010, the left shoulder, you began treating him for that after the industrial injury?

A: Yes.

Q: Did that industrial injury play a part in the mental problems that you saw him suffering from after October 15, 2010?

A: I believe it did.

Q: Was that injury a cause of the need for the treatment that you rendered from a mental standpoint and the treatment in your opinion that Dr. Cahn rendered to [Mr. Amphlett]?

A: I think it was part of that.

(CP 295, Gamrath Depo. v.2 22/12-23)

Q: So, Doctor, the issue in this matter is whether or not Mr. Amphlett's treatment was related to his industrial injury of 10/15/10. We have been through a lot of your office notes since then and talked about them. On a more probable than not basis, do you have an opinion as to whether or not the October 15, 2010 left shoulder injury and the physical residuals and the two surgeries were a cause of his need for treatment for his mental conditions after October 15, 2010?

A: They are a part of the cause.

(CP 303, Gamrath Depo. v.2 30/ 7-16)

Q: Now, you say part of the cause, because he had pre-existing, it's well-known and documented in your records, for which you treated him, correct?

A: Correct.

Q: And then subsequent to that he had an industrial injury that added on to his problems?

A: Correct.

(CP 304, Gamrath Depo. v.2 31/10-16). Dr. Gamrath and Dr. Cahn were the only experts called to testify in this matter.

Without any evidentiary basis and with a complete disregard for both doctors' testimony, the Board ruled that "Mr. Amphlett's October 15, 2010 industrial injury did not cause or aggravate his bipolar disorder and adjustment disorder with mixed anxiety and depressed mood . . ." (CP 8, Finding of Fact 3). Mr. Amphlett, outraged, appealed the Board's decision to the Superior Court on the basis that the Board's ruling contradicted the uncontested medical testimony and was devoid of any factual support. (CP 320). The Superior Court, reviewing the same medical testimony, similarly disregarded the uncontested facts and affirmed the Board's decision, finding that Mr. Amphlett had not met his burden of proof that the industrial injury aggravated his adjustment disorder. (CP 335).

The Superior Court stated in its memorandum that, "It is understandable that Plaintiff's treatment providers would associate his anxiety with specific events that followed his industrial injury. But the timing alone of these events does not establish causation as to Plaintiff's mood adjustment disorder." (CP 338). In so ruling, the Superior Court ignored the uncontested medical opinions of both doctors and substituted its own opinion for that of the medical experts. A fact finder is not entitled to substitute their own opinion on medical causation when all medical experts testified to the contrary.

Mr. Amphlett appeals to this Court for reversal and judgment as a matter of law since it is uncontested that his industrial injury caused an aggravation of his adjustment disorder. The Superior court had no basis on which to disregard the undisputed and unequivocal testimony of the medical experts.

V. STANDARD OF REVIEW

It is a fundamental principal of the Industrial Insurance Act that its purpose is “reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. It is with a mind to this purpose that the courts are to review cases brought under the Industrial Insurance Act. All of the Act’s provisions should be liberally construed with all doubts resolved in favor of the injured worker. *McIndoe v. Dep’t of Labor and Indus.*, 144 Wn.2d 252, 26 P.2d 903 (2001); *Dennis v. Dep’t of Labor and Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987).

Under the Industrial Insurance Act, it is the decision of the superior court that the appellate court reviews. RCW 51.52.140 provides that an appeal “shall lie from the judgment of the superior court as in other civil cases.” The Court of Appeals reviews the Board’s record to determine whether substantial evidence supports the superior court’s findings and whether the court’s conclusions flow from those findings. *Ruse v. Dep’t of*

Labor & Indus., 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). In this case, there is no medical evidence to support the Superior Court's findings. The only issue raised is whether Mr. Amphlett is entitled to judgment as a matter of law. As such, this Court conducts a de novo review of the Superior Court's findings of fact and conclusions of law while construing all facts and inferences in favor of the non-moving party. *See id.*

VI. ARGUMENT

In an industrial insurance case before the superior court, the plaintiff bears the burden of proving by "a fair preponderance of credible evidence" that the decision of the Board is incorrect. *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). In the present case, Mr. Amphlett had the burden of producing credible evidence to show that the aggravation of his adjustment disorder was caused by his industrial injury. Mr. Amphlett is entitled to judgment as a matter of law because the evidence that his industrial injury was a cause of the aggravation of his adjustment disorder is uncontested and there is "only one reasonable view of the evidence." *Harris v. Drake* 116 Wn. App. 261, 289, 65 P.3d 350 (2003).

Specifically, Mr. Amphlett is entitled to judgment as a matter of law because both medical experts testified that his adjustment disorder was *in fact* aggravated by his industrial injury and because “[t]here was no testimony to the contrary.” *Id.*

A. Mr. Amphlett Exceeded His Burden of Proof Because Every Medical Expert Testified that His Industrial Injury In Fact Aggravated His Adjustment Disorder.

Mr. Amphlett exceeded his burden of proof by producing evidence through the testimony of medical experts that his industrial injury in fact aggravated his adjustment disorder. Therefore, the Superior Court was incorrect as a matter of law when it stated, in its memorandum, that Mr. Amphlett had “not carried his burden to establish by a preponderance of the evidence that the stress and anxiety he experienced after the industrial injury were caused or aggravated by the injury itself.” (CP 338). No legal or factual basis for this statement was provided by the Superior Court, nor does one exist.

In order to support entitlement to benefits under the Industrial Insurance Act, the causal connection between the worker’s condition and his industrial injury must be established by medical testimony. *Sacred Heart Med. Ctr. v. Dep’t of Labor & Indus.*, 92 Wn.2d 631, 636, 600 P.2d 1015 (1979). As the courts have stated in personal injury cases, which carry the same burden of proof, “medical testimony must be relied upon to

establish the causal relationship” between the situation and the claimed disability resulting from it. *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). The medical testimony regarding that causal relationship must be clear enough that the jury determination does not have to “resort to speculation or conjecture.” *Id.*

Courts have repeatedly held that medical testimony is insufficient to prove causation if it “does not go beyond the expression of an opinion that the physical disability ‘might have’ or ‘possibly did’ result from the hypothesized cause.” *Id.* In order to prove causation, “the medical testimony must at least be sufficiently definite to establish that the act complained of ‘probably’ or ‘more likely than not’ caused the subsequent disability.” *Id.* Sufficient testimony has been found where medical experts testified as follows:

- 1) that “more probably than not, the osteoarthritis in [the injured’s] wrists was made symptomatic and disabling by 38 years of repetitive tin snipping [the claimed industrial injury].” *Dennis*, 109 Wn.2d at 477.
- 2) that improper treatment “must have had an adverse effect on [the injured’s] condition,” and that “He would have probably less chance of returning to good health and work in view of this.” *Ugolini v. States Marine Lines*, 71 Wn.2d 404, 407, 429 P.2d 213 (1967).
- 3) that “it was very probable that there was brain damage.” as a result of an injury. *Orcutt v. Spokane Cnty*, 58 Wn.2d 846, 854, 364 P.2d 1102 (1961).

Courts have even gone so far as to find sufficient testimony where the medical testimony did not include any of the preferred terms. In *Sacred Heart* the court found sufficient medical testimony where the medical expert simply testified that “there is generally a greater probability that a person in the petitioner’s employment will contract hepatitis than there is that someone in another employment will do so.” 92 Wn.2d at 637. Any statement by a medical expert that causation is more likely than not is sufficient to meet the plaintiff’s burden.

In this case, Mr. Amphlett has more than met his burden through the testimony of two doctors who stated unequivocally that his industrial injury caused the aggravation of his adjustment disorder. When asked about the industrial injury, Dr. Cahn testified on behalf of Mr. Amphlett that “it did” cause “the need for the psychological treatment that [he] rendered to Mr. Amphlett.” Dr. Gamrath, who was called *on behalf of the Department*, repeatedly testified that Mr. Amphlett’s adjustment disorder was caused “in part” by his industrial injury. These statements are definite assertions of causation and in no way require the fact finder to “resort to speculation or conjecture.” *O’Donoghue*, 73 Wn.2d at 814. Therefore, it is legally incorrect to say that Mr. Amphlett did not meet his burden of proof on the issue of causation.

Dr. Gamrath's use of the words "in part" have no impact on this case. Under the Industrial Insurance Act, the industrial injury need only be *a* proximate cause of the condition for which compensation is sought. *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 683-84, 571 P.2d 229 (1977). The industrial injury does not need to be the sole proximate cause or even a significant proximate cause. *Id.*; *see also Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 667 P.2d 78 (1983).

Furthermore, Dr. Gamrath's testimony was not just that his industrial injury was a part of his adjustment disorder but he also testified that, although Mr. Amphlett had preexisting conditions, his industrial injury "added on to his problems." Dr. Gamrath's full testimony clearly asserts that Mr. Amphlett's industrial injury was the cause, not just a part of, the aggravation of his adjustment disorder. Therefore, the testimony of both doctors goes well beyond the "probably" standard established by *O'Donoghue*. 73 Wn.2d at 814; *see also Sacred Heart Med. Ctr.*, 92 Wn.2d 631.

Not only did Mr. Amphlett exceed the burden of proof required to show a causal connection between his industrial injury and the aggravation of his adjustment disorder, but there is no evidence to the contrary. Therefore, Mr. Amphlett is entitled to judgment as a matter of law.

B. Mr. Amphlett is Entitled to Judgment as a Matter of Law Because There is No Evidence to Refute the Causal Connection Between His Industrial Injury and His Aggravated Adjustment Disorder.

As stated above, the causal connection between the worker's condition and his employment must be established by medical testimony. *Sacred Heart Med. Ctr.*, 92 Wn.2d at 636. Mr. Amphlett is entitled to judgment as a matter of law because the only medical testimony in this case, and therefore the only evidence relevant to the issue of causation, proves that the industrial injury was a cause of the aggravation of his adjustment disorder.

Washington Rule of Civil Procedure 50(a)(1) states that judgment as a matter of law is appropriate where "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party . . ." Rule 56(c) adopts similar language for summary judgment stating that judgment as a matter of law is appropriate where "there is no genuine issue as to any material fact."

Washington courts have interpreted rules 50 and 56 to mean that judgment as a matter of law is appropriate "when only one view of the evidence is reasonable." *Harris*, 116 Wn. App. at 289. In *Harris* the only medical evidence was provided by Dr. Finkleman and Dr. Nacht. Both doctors testified that the accident caused the injury to the plaintiff and that

the damages were reasonably related to the accident. *Id.* The court held that a directed verdict was appropriate because “[t]here was no testimony to the contrary, and thus only one reasonable view of the evidence.” *Id.*

In *Longview Fibre Co. v. Weimer*, 95 Wn.2d 583, 628 P.2d 456 (1981), the Supreme Court of Washington reversed the superior court and granted the claimant judgment as a matter of law based on facts similar to those in this case. In *Longview Fibre Co.* there were only two medical experts who testified. Dr. McGregor testified that “yes” he felt the industrial injury “aggravated” the plaintiff’s underlying condition. *Id.* at 588. Dr. Laurnen, when asked about the causal link, stated “I would say it was related to [the industrial injury], yes.” *Id.* at 589. No evidence to the contrary was introduced. *Id.* Based on the unrefuted medical testimony, the Supreme Court ruled that “the claimant is covered as a matter of law.” *Id.*

In this case, both doctors testified that Mr. Amphlett’s industrial injury aggravated his adjustment disorder. Dr. Cahn testified that the industrial injury “did” cause the aggravation of his industrial injury. Dr. Gamrath, when asked about the causal link, stated “yes” his adjustment disorder was “in part caused by the industrial injury.” Just like in *Longview*, no evidence to the contrary was introduced. Therefore, the aggravation of Mr. Amphlett’s adjustment disorder should be allowed as a

matter of law and Mr. Amphlett was entitled to judgment as a matter of law.

The Department may attempt to argue that, even where the testimony of medical experts is not refuted, a fact finder is entitled to disregard that testimony as not credible. Such a rule, however, would completely nullify Washington Rules of Civil Procedure 50 (Judgment as a Matter of Law), 56 (Summary Judgment), and 59 (New Trial). Each of these rules refers to a standard of adequacy to which a fact finder's decisions must conform.

In *Ide v. Stoltenow*, 47 Wn.2d 847, 289 P.2d 1007 (1955), the court upheld an order granting a new trial by rejecting the notion that fact finders can disregard undisputed testimony.

We recognize that it can be said that the jury could have disbelieved all of the plaintiff's experts and also disbelieved or disagreed with the conclusion of the defendants' expert whose testimony we have quoted. The difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was no contradiction or dispute.

Id. at 851; *see also Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997) (rejecting a jury's verdict on damages where the verdict was contrary to the evidence); *Washburn v. City of Federal Way*, 169 Wn.

App. 588, 283 P.3d 567 (2012). To deny judgment as a matter of law where testimony is uncontested is to deny that summary judgment, judgment as a matter of law, or a new trial can ever be granted.

In this case, the Superior Court had no basis to disregard the medical testimony of both experts. When it stated that “the timing alone of these events does not establish causation as to Plaintiff’s mood adjustment disorder,” the Superior Court Judge was disregarding the testimony of both medical experts and substituting its own opinion about medical causation. In accordance with *Ide*, fact finding such as this should not be upheld.

The only way the Superior Court could have found against Mr. Amphlett on the issue of causation was if there was medical testimony to support its findings. *Sacred Heart Med. Ctr.*, 92 Wn.2d at 636. No such testimony was referenced by the Superior Court nor does it exist. Based on the uncontested testimony, there is “only one reasonable view of the evidence” in this case; that Mr. Amphlett’s industrial injury was a proximate cause of the aggravation of his adjustment disorder. *Harris*, 116 Wn. App. at 289.

VII. ATTORNEY’S FEES

In addition to the above relief, Mr. Amphlett respectfully requests that reasonable attorney’s fees be granted in accordance with RCW

51.52.130. RCW 51.52.130 provides for an award of attorney's fees to a worker who prevails on an appeal that grants relief.

VIII. CONCLUSION

The fact that Mr. Amphlett's adjustment disorder was aggravated by his industrial injury was clearly and definitively testified to by the medical experts who testified for both Mr. Amphlett and the Department. No evidence to the contrary was presented. Based on this uncontested testimony and the foregoing authorities, James D. Amphlett respectfully requests that this Court reverse the Superior Court's decision and hold that, as a matter of law, the aggravation of Mr. Amphlett's adjustment disorder was caused by, and therefore a part of, his industrial injury.

RESPECTFULLY SUBMITTED this 9th day of November, 2015.

A handwritten signature in black ink, appearing to read 'T. A. Thompson', is written over a horizontal line.

Thomas A. Thompson, WSBA #10595
WALTHER, THOMPSON, KINDRED,
COSTELLO & WINEMILLER, P.S.
3000 1st. Avenue
Seattle, WA 98121