100655-1

COURT OF APPEALS

DIVISION II

STATE OF WASHINGTON

ALFREDO SUAREZ, *Appellant*

v.

MASCO CORPORATION, TOPBUILD, *Respondent*

RESPONSE TO APPELLANT'S PETITION FOR REVIEW TO THE SUPREME COURT OF WASHINGTON

James L. Gress, WSBA #25731
Brad G. Garber, WSBA # 23108
GRESS CLARK, YOUNG & SCHOEPPER
8705 SW Nimbus Ave, Suite 240
Beaverton, OR 97008
Of Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Petitioner (Claimant) appeals an Opinion of the Court of Appeals, Division II, filed on January 19, 2022, affirming the suspension of workers' compensation claim benefits by the Superior Court, which affirmed suspension of benefits by the Board of Industrial Insurance Appeals (Board).

II. RESPONSE TO ASSIGNMENT OF ERROR

Claimant asserts that the Board, Superior Court, and the Court of Appeals did not balance interests of the parties in affirming suspension of benefits. Aside from the fact that there is no proof in support of this bald and unsupported assertion, substantial evidence supports the unanimous conclusions of all prior tribunals.

III. STATEMENT OF THE CASE

Respondent (Employer) accepts and adopts by reference, verbatim, the Facts set out in the Court of Appeals published opinion dated January 19, 2022. (App. A, pp. 2-10).

IV. SUMMARY OF ARGUMENT

Substantial evidence supports the Superior Court's affirmation of the Board's order suspending benefits, as further affirmed by the Court of Appeals. Perhaps more importantly, Claimant raises no basis under RAP 13.4(b) for this Court to accept review of this matter. Review should not be granted, and all relief sought by Petitioner should be denied.

V. ARGUMENT

Pursuant to RAP 13.3(a), this Court exercises discretion in reviewing decisions terminating review. The conditions governing acceptance of review are set out in RAP 13.4(b), as follows:

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

In this case, Claimant has failed to establish that any of the criteria set forth in RAP 13.4(b) are satisfied and compel review of the Court of Appeals decision of January 19, 2022, and review should be summarily denied.

The standard of this Court's review of the Superior Court's Order of October 22, 2021, is found in RCW 51.52.140. Pursuant to that statute, the appellate courts only review "'whether substantial evidence supports the trial court's factual findings and then review, *de novo*, whether the trial court's conclusions of law flow from the findings.'" *See Rogers v. Dep't of Labor & Indus.*, 151 Wn.App. 174, 179, 210 P.3d 355 (2009) (quoting *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006). "Substantial evidence" is evidence "sufficient to persuade a rational fair-minded person that the finding is true." *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012); *Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301, 310, 289 P.3d 727 (2012). This Court does not substitute its "judgment for that of the trial court," "weigh the evidence or the credibility of witnesses," or apply a new burden of persuasion. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980); *Rogers*, 151 Wn. App. at 180-81. This Court, as the Court of Appeals, reviews 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).

It is Claimant's repeated assertion that all tribunals involved in the litigation of this matter did not balance the interests of the parties in affirming a Department of Labor & Industries order suspending Claimant's benefits after failing to attend a medical examination at the direction of his legal counsel. That assertion assumes that no one paid attention to the evidence, and it essentially invites this Court to reexamine the evidence that was presented to the Board, the Superior Court, and the Court of Appeals. This assumes quite a bit and is unsupported by even a scintilla of evidence. Ultimately, it is not within this Court's purview to revisit the evidence.

RCW 51.32.110(1) provides, in part, "As required by RCW 51.36.070, any worker entitled to receive any benefits or claiming such under this title shall, if requested by the Department or self-insurer, submit himself or herself for medical examination, at a place reasonably convenient for the worker." RCW 51.32.110(2) continues, in part, "If the worker refuses to submit to medical examination, or obstructs the same, or, if any injured worker shall persist in unsanitary or injurious practices which tend to imperil or retard his or her recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to his or her recovery or refuse or obstruct evaluation or examination for the purpose of vocational rehabilitation or does not cooperate in reasonable efforts at such rehabilitation, the Department or the self-insurer upon approval by the Department, with notice to the worker may suspend any further action on any claim of such worker so long as such refusal, obstruction, noncooperation, or practice continues and reduce, suspend, or deny any compensation for such period...." Suspension is not allowed if the injured worker can show "good cause" for refusing to submit to, or obstruct any scheduled examination, evaluation, treatment or practice. In the case at bar, Claimant has not shown good cause for failing to attend the IME scheduled with Dr. Lynch in

May 2015. His only reason for not attending is that his attorney felt that the IME was scheduled too soon (within a 4-month period) from the preceding examination.

Generally, decisions of the Board of Industrial Insurance Appeals are nonbinding but considered persuasive authority for the Court. *See O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005). *See, also, Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991) ("While the Board's interpretation of the Act is not binding upon this Court, it is entitled to great deference.").

The Board's Decision and Order, in *In re Bob Edwards*, BIIA Dec., 90 6072 (1992) is instructive. In that case, the claimant complained that it was neither fair nor reasonable for him to attend an independent examination scheduled by the Department of Labor & Industries. He argued that the Department and employer already had medical documentation from previous examinations that address the issue at hand and that an additional examination was unnecessary. Additionally, he claimed that the examination was expected to result in a report that would be unfavorable to his position and would, therefore, "stack the deck" in the employer's favor. These were the reasons for his failure to attend the scheduled independent medical examination.

Similarly, in the case at bar, Claimant's counsel admits that his client "did not have a reasonable expectation of receiving a fair and independent medical evaluation with Dr. Joseph Lynch." (Claimant's Petition at 14). This was part of the reason Claimant's counsel advised him to not attend the IME. The other part was that Claimant's counsel simply felt that there were too many examinations, too close together. CBR at 229. In *Edwards,* the Board did not consider these excuses persuasive. Neither did the Court of Appeals in this case.

As noted in *Olympia Brewing Co. v. Dep't Labor & Indus.,* 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds, Windust v. Dep't of Labor & Indus.*,52 Wn.2d 33, 323

P.2d 241 (1958), an injured worker who fails to attend a scheduled independent medical examination bears the burden of showing, by a preponderance of evidence, that he or she had good cause for not submitting to the examination. It is not up to the Department or self-insured employer to show "good cause" for scheduling the examination.

The reason for the scheduling of the IME by Dr. Lynch was that there was competing medical information regarding the cause of Claimant's right shoulder condition. Claimant was examined by Dr. Fossier, an orthopedic surgeon, who opined that Claimant's right shoulder condition was "causally related to the industrial injury on a more-probable-than-not basis." CBR at 318. A subsequent orthopedic surgeon, Dr. Thompson, examined Claimant and reported that Claimant's "frozen shoulder" (adhesive capsulitis) was not related to his industrial injury. Claimant was subsequently examined by Dr. Rosenbaum, a neurosurgeon, who reported that he would need to defer to orthopedic assessment of Claimant's right shoulder condition. CABR 326-27. Thus, to overcome the conflict between orthopedic assessments, the IME was scheduled with orthopedic surgeon Dr. Lynch.

RCW 51.36.070(1)(a) provides, in part, as follows: "Whenever the Department or self-insurer deems it necessary in order to (i) make a decision regarding claim allowance or reopening, (ii) resolve a new medical issue, an appeal, or case progress, or (iii) evaluate the worker's permanent disability or work restriction, a worker shall submit to examination by a physician or physicians selected by the Department, with the rendition of a report to the person ordering the examination, the attending physician, and the injured worker."

Simply, in this case, the self-insurer deemed it necessary to obtain additional information to resolve an ambiguity in the medical evidence that would affect new condition claim allowance and case processing progress. It was acting well within the law to arrange for Dr. Lynch's

orthopedic assessment; Claimant, for no good cause, and on the advice of his legal counsel, decided to ignore the law.

VI. CONCLUSION

For the reasons discussed above and in the decision of the Court of Appeals, the Superior Court's decision should be affirmed, and all relief requested by Claimant denied.

This document contains 1,947 words, excluding the parts of the document exempted from the word count by RAP 18.17.

James L. Gress, WSBA #25731
Brad G. Garber, WSBA # 23108
GRESS CLARK, YOUNG & SCHOEPPER
8705 SW Nimbus Ave, Suite 240
Beaverton, OR 97008
Of Attorneys for Respondent

CERTIFICATE OF MAILING

I hereby certify that I caused to be served the foregoing **Respondent's Petition for Review to the Supreme Court of Washington** on the following individuals on March 24, 2022, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

Steven L. Busick
Law Office of Steven L. Busick, PLLC
PO Box 1385
Vancouver, WA 98660

Tom McGirk
Office of the Attorney General of Washington - L&I Division
PO Box 40121
Olympia, WA 98504-0121

Clark County Superior Court
County Clerk
1200 Franklin St
Vancouver, WA 98660-5000

And deposited in the post office at Beaverton, Oregon, on said date.

I further certify that I filed the original of the foregoing with:

Gress, Clark, Young & Schoepper
8705 SW Nimbus Avenue, Suite #240
Beaverton, OR 97008

Byrne, Derek, Clerk/Administrator
909 A Street, Suite 200
Tacoma, WA 98402

by e-filing it on: March 24, 2022.

GRESS, CLARK, YOUNG & SCHOEPPER

JAMES L. GRESS, WSBA #25731
BRAD G. GARBER, WSBA #23108
Of Attorneys for Respondent

Gress, Clark, Young & Schoepper
8705 SW Nimbus Avenue, Suite #240
Beaverton, OR 97008

GRESS, CLARK, YOUNG & SCHOEPPER

March 25, 2022 - 9:13 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	55377-5
Appellate Court Case Title:	Alfredo Suarez, Appellant v. Masco Corporation et al., Respondents
Superior Court Case Number:	19-2-02768-5

The following documents have been uploaded:

- 553775_Answer_Reply_to_Motion_20220325091225D2996991_7339.pdf
  This File Contains:
  Answer/Reply to Motion - Response
  The Original File Name was 20220325090533266.pdf

A copy of the uploaded files will be sent to:

- anastasia.sandstrom@atg.wa.gov
- ashleys@busicklaw.com
- judyg@atg.wa.gov
- sbusick@busicklaw.com

Comments:

Sender Name: Jennifer DeOgny - Email: jennifer@gressandclarklaw.com
Filing on Behalf of: James L Gress - Email: jim@gressandclarklaw.com (Alternate Email:)

Address:
8705 SW Nimbus Avenue, Suite 240
Beaverton, OR, 97008
Phone: (971) 285-3525

Note: The Filing Id is 20220325091225D2996991