NO. 92372-8

SUPREME COURT OF THE STATE OF WASHINGTON

EDERI HAGGENMILLER,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Ederi Haggenmiller identifies no ground for review under RAP 13.4 and this case presents none. His workers' compensation appeal presents routine issues related to the award of permanent partial disability for work-related hearing loss. It is well settled that medical testimony is necessary to establish the amount of permanent partial disability. *See, e.g., Kirkpatrick v. Dep't of Labor & Indus.*, 48 Wn.2d 51, 54, 48 P.2d 979 (1955). Here Haggenmiller did not present such testimony to support his current claims. The trial court correctly granted judgment as a matter of law to the Department of Labor & Industries (Department) regarding Haggenmiller's permanent partial disability award based on the uncontroverted medical evidence before it. His other claims are also without merit. This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUES

Review should not be granted, but if it were, the issues are:

1. When viewing the evidence in the light most favorable to Haggenmiller, is there a material dispute for a fact-finder to resolve when Haggenmiller presented no medical evidence to support his claims for additional permanent partial disability, tinnitus as part of total bodily impairment, a mental health condition, or a different date of manifestation?

2. Are Haggenmiller's Strategic Lawsuits Against Public Participation (anti-SLAPP) appeals moot in light of *Davis v. Cox*, 183 Wn.2d 269, 275, 351 P.3d 862 (2015), which struck down RCW 4.24.525 as unconstitutional ?

III. COUNTERSTATEMENT OF THE FACTS

A. The Department Accepted Haggenmiller's Hearing Loss Claim and Provided Treatment and Benefits

Haggenmiller worked as a finishing carpenter for approximately 30 years. CP 176, 185. He used power tools that were noisy. CP 176-77. The Department accepted his hearing loss claim as an occupational disease and provided treatment, including hearing aids. CP 68, 184.

The July 2011 acceptance order also established the date of manifestation of his hearing loss as October 9, 2009. CP 68.[1] Although Haggenmiller protested the date of manifestation order, the Department affirmed the order on October 5, 2011. CP 68. He neither protested nor appealed the October 5, 2011 order. CP 68-69. The Department subsequently issued a closing order, which found that Haggenmiller had a 10.32 percent disability for loss of hearing. CP 55. Haggenmiller ultimately appealed the closure of the claim to the Board. CP 53-54.

B. Haggenmiller's Only Medical Witness Calculated His Permanent Partial Disability for Hearing Loss and Tinnitus at Combined 24.83 Percent

At the hearings before the Board, Haggenmiller sought to show that he was entitled to additional permanent partial disability for hearing

[1] The date of manifestation is used to set the benefit schedule in effect to determine the amount of the award. RCW 51.32.180(b); WAC 296-14-350.

loss and tinnitus. CP 162-63. Haggenmiller presented testimony of his spouse, Annie Haggenmiller; himself; and Dr. David Kessler, an otolaryngologist. CP 160.

According to Haggenmiller, "[h]earing loss is really not much of a problem for [him] at the moment," and does not affect his social interactions. CP 178. Haggenmiller has also developed tinnitus (ear-ringing), however, which he believes impacts his ability to sleep, his ability to drive at the end of the day, his social interactions, and his memory. CP 179-80. According to Haggenmiller, he has experienced depression or alterations to his mood because of the tinnitus. CP 183.

Dr. Kessler examined Haggenmiller on June 5, 2012. CP 204-05, 209. Dr. Kessler testified that Haggenmiller had "bilateral sensory hearing loss," and at the time of the exam, he initially estimated a permanent partial disability of 26 percent for bilateral hearing loss. CP 209-10. However, when Dr. Kessler walked through the calculations in his testimony, he clarified that Haggenmiller had 20.83 percent hearing loss and an additional four percent impairment attributable to his reported tinnitus. CP 224-27. He relied on the "AMA Guides to Impairment" and used the Department's Hearing Impairment Calculation Worksheet. CP

222-23, 229.[2] Thus, Dr. Kessler rated the combined left and right hearing loss at 24.83 percent. CP 227. [3]Dr. Kessler was not asked to address the date of manifestation, but he said that "[a]pparently there was significant neural hearing loss in 2009." CP 210. Although Haggenmiller initially asked Dr. Kessler to address an alleged mental health condition, Dr. Kessler did not provide an opinion about any mental health condition. CP 214-15.

Haggenmiller offered no other medical witness, and the Department's medical witness did not testify to a greater level of impairment or provide an opinion on any mental health condition. CP 243-327.

C. The Board Provided Additional Impairment to Haggenmiller Based on Dr. Kessler's Testimony

Following the hearings at the Board, the industrial appeals judge issued a proposed order to reverse and remand the Department's order with instructions to the Department to pay additional permanent partial disability benefits. CP 43-51. Relying on Dr. Kessler's testimony, the industrial appeals judge reversed the Department order and awarded Haggenmiller a 24.83 percent permanent partial disability award,

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[2] Linda Cocchiarella & Gunnar B.J. Andersson, eds., *American Medical Association Guides to Evaluation of Permanent Impairment* 246 (5th ed. 2001) ("*AMA Guides to Impairment*").

[3] In workers' compensation parlance, when a doctor opines on the level of impairment, the doctor "rates" the condition.

including four percent for the tinnitus. CP 50-51. The industrial appeals judge also concluded that Haggenmiller failed to make a prima facie case to show that the October 9, 2009 date of manifestation was incorrect and that the bilateral hearing loss and tinnitus caused a mental health condition. BR 50.

Haggenmiller petitioned the Board for review. BR 3-26. The Department did not seek review of the industrial appeal judge's finding that Haggenmiller is entitled to a permanent partial disability award for bilateral hearing loss and tinnitus equal to 24.83 percent. The Board adopted the proposed decision and order as the final order. CP 2.

D. The Superior Court Granted Judgment as Matter of Law to the Department and Denied the Multiple Motions Haggenmiller Filed After the Entry of Judgment

Haggenmiller appealed to Jefferson County Superior Court. CP 1. The Department moved for judgment as a matter of law, asserting that with the additional permanent partial disability awarded by the Board, Haggenmiller could get no further relief based on the issues on appeal and the evidence presented. BR 345-65; *see generally* RP I.[4] The superior court granted the Department's motion and affirmed the Board order. CP 580-84. The court concluded that "based upon the evidence in the record which the jury would consider, [the court did not] see how a jury could

[4] The September 13, 2013, and December 13, 2013 Reports of Proceedings filed in this matter will be referred to as "RP I" and "RP II" respectively.

make any decision but to affirm the [Board's] order of March 5, 2013," because there was no evidence showing a higher permanent partial disability award of 24.83 percent, no evidence concerning total bodily impairment, no evidence from any expert regarding any mental health condition, and the only evidence presented supported a date of manifestation of October 9, 2009. CP 581. Haggenmiller appealed to the Court of Appeals on October 15, 2013.

Between October 28, 2013, and January 8, 2014, Haggenmiller filed multiple motions in the superior court alleging a raft of procedural irregularities. CP 520-42, 576-79, 599, 651, 673-74, 721-23, 737-55. After the Department began to move to strike Haggenmiller's redundant filings, Haggenmiller alleged that the Department's responses to his motions violated the anti-SLAPP statute, RCW 4.24.525. CP 737-55. The court denied all of Haggenmiller's motions. CP 570-71, 669-70, 672, 863-65. Haggenmiller appealed these orders to the Court of Appeals as well, and they were consolidated.

E. The Court of Appeals Concluded That Haggenmiller Could Receive No Further Award of Benefits Under the Evidence Presented

At the Court of Appeals, Haggenmiller sought additional permanent partial disability for his hearing loss and tinnitus greater than 24.83 percent and a separate award for a related mental health condition;

a later date of manifestation (June 5, 2012, rather than October 9, 2009); a finding that the Department's responses to post-judgment motions violated the anti-SLAPP statute; and fees and costs.

In an unpublished decision, the Court of Appeals found that as a matter of law there was no greater award than 24.83 percent or a separate award for mental health supported by the evidence, that the October 9, 2009 date of manifestation was established by a final and binding order—and even if considered was supported by the medical evidence, that his anti-SLAPP claims were moot because the statute is unconstitutional, and that he was not entitled to any further relief for his post-judgment motions or any fees, costs, or CR 11 sanctions. *Haggenmiller v. Dep't of Labor & Indus.*, No. 45478-5-II, 45645-1-II, 45778-1-II, at 2 (July 7, 2015) ("slip. op."). Haggenmiller moved for reconsideration and that was also denied.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Haggenmiller cites no reasons under RAP 13.4 for this Court to take review, and none exists because the Court of Appeals merely applied the well-established principle that medical testimony is necessary to establish a prima facie case for additional permanent partial disability. *See Kirkpatrick*, 48 Wn.2d at 54; *see also Jackson v. Dep't of Labor & Indus.*,

54 Wn.2d 643, 648, 343 P.2d 1033 (1959); *Page v. Dep't of Labor & Indus.*, 52 Wn.2d 706, 709, 328 P.2d 663 (1958).

Haggenmiller makes three claims in support of his request for review by this Court: 1) that the interpretation of WAC 296-20-220(1)(o)—the regulation that allows a percentage of total bodily impairment for unspecified disability, such as tinnitus—should be decided by a jury rather than as a matter of law; (2) that the trial court should have allowed him to reargue his case through CR 59 or CR 60; and, (3) that the Court of Appeals erred by dismissing his anti-SLAPP claims. Pet. 1-3, 17. None of these claims warrant review by this Court.

In any case, Haggenmiller essentially reargues his claims for additional permanent partial disability, including his claim that a different methodology should be used to calculate impairment related to his tinnitus, but he did not have medical testimony to support a higher permanent partial disability and such medical testimony is a necessary element to prove greater impairment. *See Kirkpatrick*, 48 Wn.2d at 54; *see Wissink v. Dep't of Labor & Indus.*, 40 Wn.2d 672, 676, 245 P.2d 1006 (1952).

A. Review Need Not Be Granted To Consider the Well-Settled Principle That Medical Testimony is Necessary to Establish a Prima Facie Case for Additional Permanent Partial Disability

At the superior court, Haggenmiller failed to prove his central claim that he is entitled to an increased permanent partial disability award above what the Board order provided. The superior court properly granted judgment as a matter of law because Haggenmiller presented no medical testimony to support his claim for increased benefits. CP 580-84; *see* BR 34-40; *see generally* RP I. In fact, the Board adopted Haggenmiller's own expert's assessment of disability. CP 50-51. Likewise, the Court of Appeals properly concluded that no further relief could be awarded under the evidence presented. Slip. op. at 10, 11, 12-13.[5] Medical testimony is necessary to establish the amount of permanent partial disability. *See e.g., Kirkpatrick*, 48 Wn.2d at 54. Here, Haggenmiller provided no medical testimony that would support a higher permanent partial disability than the 24.83 percent permanent partial disability award, including four percent for the tinnitus, provided by the Board order. Accordingly, he has no

[5] The Court of Appeals inadvertently referred to the motion at the trial court as a motion for summary judgment rather than a motion for judgment as a matter of law. Slip. op. at 4. It is inconsequential that the Court of Appeals' opinion cited to the summary judgment standards instead of the judgment as a matter of law standards. "The standard on a motion for judgment as a matter of law mirrors that of summary judgment." *Sheikh v. Choe*, 156 Wn.2d 441, 447 128 P.3d 574 (2006) (citations omitted). Like summary judgment motions, the appellate courts review motions for judgment as a matter of law de novo. *See Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 285 P.3d 187 (2012). The Court of Appeals applied the de novo standard of review to all the issues before it. Slip op. 7-8, 10, 11, 12. It also correctly "review[ed] the superior court's order, not the Board's order," and merely referred to the Board decision because the Board's decision was adopted wholesale by the superior court when it granted judgment as a matter of law. Slip op. at 7; CP 477-494; *contra* Pet. 6.

argument to challenge the trial court's decision and presents no issue of review for this Court.[6]

B. Review is Not Warranted To Address Haggenmiller's Post-Judgment Motions, Which Relate Back To His Workers' Compensation Claim For Additional Permanent Partial Disability

Haggenmiller filed a panoply of post-judgment motions in superior court seeking to displace the Board's March 8, 2013 order. Haggenmiller asks this Court to grant review to reconsider his October 28, 2013, October 31, 2013, and December 3, 2013 motions. Pet. 2, 13, 17. The Court of Appeals correctly consolidated the appeals to the orders denying these motions with Haggenmiller's underlying appeal of the order granting judgment as a matter of law. Haggenmiller presents scant argument why review should be granted for these motions.

RAP 7.2 provides that the trial court only has authority to act in an appealed case as provided in the rule. RAP 7.2(e) allows only post-judgment motions as allowed by the civil rules in this context. Here,

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[6] Likewise, any argument about the date of manifestation is without merit. The principle that res judicata applies in workers' compensation appeals is well-established. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 669, 175 P.3d 1117 (2008). The unappealed October 5, 2011 order affirmed the July 27, 2011 order, which allowed Haggenmiller's claim for bilateral hearing loss due to occupational noise exposure and established the date of manifestation of October 9, 2009. CP 68-69. Haggenmiller's appeal in this case was limited to the December 8, 2011 order. CP 53. Here, even if the October 5, 2011 order was not res judicata, no medical evidence supports Haggenmiller's assertion that he had additional occupational exposure after October 2009.

Haggenmiller did not file any post-judgment motion that complied with the civil rules.

The superior court entered the order granting judgment as a matter of law on September 30, 2015. Haggenmiller appealed the September 30, 2013 order to the Court of Appeals on October 15, 2013. CP 576-79, 599.

Thirteen days later, on October 28, 2013, Haggenmiller filed a "Motion for Order to Show Cause RE: Vacate Judgment/Order" ex parte and the court denied it. CP 520-42, 565. This is apparently the CR 60(b)(4) motion that he seeks to have this Court review. Pet. 3.[7] The issues raised by his requested "Order to Show Cause" were subsumed in the de novo review of the underlying appeal. On October 31, 2013, Haggenmiller also filed a "Motion for Reconsideration Order Vacating Judgement (sic) Denied." CP 567-68, 572-74. While it is couched as a motion to reconsider the October 28, 2013 order, at its essence, it is an untimely motion for reconsideration of the underlying judgment as a matter of law order. It was denied on November 4, 2013. CP 570. There is no authority under RAP 7.2(e) and CR 59 to file a late motion for reconsideration. Accordingly, the Court of Appeals properly consolidated the October 28, 2013 order and November

[7] Haggenmiller's allegations of fraud are based on his disagreement with the factual and legal argument of the assigned assistant attorney general (*see* CP 522-26), not of the type of fraud that effects the outcome of trial contemplated by CR 60(b)(4). *See e.g., Lingren v. Lingren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990).

4, 2013 orders as part of Haggenmiller's appeal to the Board's March 8, 2013 order. *Contra* Pet. 11-12.

Haggenmiller also seeks review of the orders denying his December 3, 2013 motions for default judgment and sanctions. Pet. 13. There is no authority under RAP 7.2(e) and CR 55 to seek an order of default after judgment has been entered. The Department responded appropriately to these motions and the superior court appropriately denied them all. No reason exists for review on these decisions.

C. Review is Not Warranted to Address Haggenmiller's Anti-SLAPP Claims Because His Claims Are Moot Under This Court's Decision in *Davis v. Cox*

Haggenmiller also filed two anti-SLAPP motions at the trial court, alleging that the Department's responses to his post-judgment motions violated RCW 4.24.525. CP 737-55. The court denied Haggenmiller's anti-SLAPP motions. CP 863-65. Haggenmiller appealed this order to Court of Appeals as well.

Even if these anti-SLAPP appeals are separate from Haggenmiller's underlying industrial insurance appeal, the Court of Appeals correctly concluded that they are now moot since this Court's decision in *Davis* has invalidated the anti-SLAPP statute. Slip op. at 13. This Court concluded that "RCW 4.24.525 violates the right of trial by jury under article I, section 21 of the Washington Constitution and is

invalid." *Davis v. Cox*, 183 Wn.2d at 275. Haggenmiller tries to recast his January 13, 2014 filing as a cause of action for sanctions under RCW 4.84.185, but there is no doubt Haggenmiller sought to avail himself of the anti-SLAPP provision in RCW 4.24.525. CP 737-55. This Court struck down RCW 4.24.525 in its entirety and there is nothing remaining to address on this question. *Davis*, 182 Wn.2d at 294-95.

The Court of Appeals addressed all of Haggenmiller's claims and applied the correct standards of review. This routine industrial insurance appeal does not warrant further consideration.

V. CONCLUSION

Haggenmiller has cited no reason under RAP 13.4 for this Court to take review. None exists as this case presents commonplace workers' compensation issues involving the sufficiency of medical testimony and a claim reliant on a statute that has been declared unconstitutional. This Court should deny review.

RESPECTFULLY SUBMITTED this 10th day of December, 2015.

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Good Afternoon,

Attached for filing with the Court please find the Department's Answer to Petition for Review.

Thank you,

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