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NO. 93796-6

SUPREME COURT OF THE STATE OF WASHINGTON

JESUS OROZCO,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

This is a routine substantial evidence case that does not warrant review. In rejecting Jesus Orozco's attempt to reopen his workers' compensation claim, the superior court found that Orozco's industrial injury did not cause any mental health conditions. The trial court relied on medical testimony that the injury did not cause any mental health conditions. The Court of Appeals properly pointed to this evidence to uphold the superior court's decision.

Orozco attempts to recast this case as one where the Department of Labor & Industries did not present evidence rebutting an element in a reopening case. That focus is misplaced because the Department presented evidence that the superior court could rely upon to determine that Orozco, who bore the burden of proof, did not prove all the needed elements.

Orozco argues the Court of Appeals erred in applying established law to the facts of his case. But he does not cite to any RAP 13.4 reason for this Court to grant review or give any reasons under this rule for review, and none exist. This Court should deny review.

II. ISSUE

Does substantial evidence support the superior court's finding that Orozco's mental health conditions were not proximately caused by

Orozco's 2006 industrial injury, when a medical witness testified that the industrial injury did not cause the contended mental health conditions?

III. STATEMENT OF THE CASE

A. After the Department Closed Orozco's Claim He Sought to Have the Claim Reopened

On April 25, 2006, Orozco sustained an industrial injury when a truck door hit his head. CP 93-94. Orozco did not lose consciousness, and he received only conservative medical treatment. CP 122. Orozco filed a workers' compensation claim, which the Department allowed in May 2006, and he received benefits, including time-loss compensation. CP 49. Orozco reached maximum medical improvement in July 2009, and the Department closed the claim. CP 54.[1]

In August 2011, Orozco applied to reopen the claim, contending that he had mental health conditions that had worsened after the Department closed the claim. CP 54. The Department denied Orozco's reopening application in October 2011. CP 36. Orozco then appealed that Department order to the Board of Industrial Insurance Appeals. CP 20, 55.

The parties agree that Orozco did not have a physical condition worsen after claim closure. Appellant's Br. 6 ("Mr. Orozco's aggravation

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[1] If a worker does not need further treatment and his or her condition is considered to be at maximum medical improvement (meaning it is fixed and stable), the claim may be closed. *See* RCW 51.32.055(1); WAC 296-20-01002 (definition of "proper and necessary").

claim dealt only with a mental health disability.”).[2] Orozco presented no medical evidence that his physical condition changed after the claim closed. Orozco also did not present evidence that his alleged mental health conditions arose solely after claim closure; rather, his psychologist believed that Orozco had the contended mental health conditions since his injury. CP 138. Orozco concedes this point. Pet. at 5-6, 16.

After Orozco applied to reopen his claim and the Department rejected his application, psychologist Silverio Arenas, PhD, examined Orozco on two occasions in January and March 2012. CP 54, 120. Dr. Arenas diagnosed Orozco with four conditions: cognitive disorder, anxiety disorder, pain disorder, and depressive disorder. CP 135. Dr. Arenas believed that the 2006 industrial injury caused Orozco’s conditions, and that they had been present since the injury. CP 134-35, 138, 143. Dr. Arenas concluded that the conditions had worsened between the terminal dates of July 2009 and October 2011. CP 143, 149-50.[3]

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[2] An “aggravation claim” is equivalent to a “reopening claim” in workers’ compensation parlance.

[3] To reopen a claim, an injured worker must prove worsening between two specific dates, known as “terminal dates.” *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995); *see* RCW 51.32.160(1)(a); WAC 296-14-400. The first terminal date is the date of the last previous closure or denial of a reopening application. *Grimes*, 78 Wn. App. at 561. The second terminal date is the date of the most recent closure or denial of a reopening application; practically speaking, it is the date of the order currently on appeal. *Id*. Here the first terminal date was July 29, 2009—the date Orozco’s claim was closed. CP 54. The second terminal date was October 3, 2011, because this was the date the Department rejected the reopening application. CP 54.

B. The Department's Expert Found That the Industrial Injury Did Not Cause Any Mental Health Condition

Dr. Lanny Snodgrass is a board-certified psychiatrist with expertise in diagnosing and treating mental disorders for injured workers. CP 202, 207-08. He examined Orozco in 2007 and 2009. CP 209. Dr. Snodgrass noticed inconsistencies in the 2009 exam, including an excessive grimace when sitting down but no grimace when standing up, CP 231, and unreliable reporting of memory. CP 239. On a standardized memory-retention test, Orozco scored five out of 15, but this would mean that he was a "severely brain-damaged patient" according to the testing metric. CP 222-23. In reference to his 2007 examination, Dr. Snodgrass stated that Orozco "did not have a psychiatric condition that was causally related to the current injury on a more-probable-than-not basis." CP 223. Dr. Snodgrass noted the presence of Orozco's "very fixed disability conviction," CP 226, and noted that at least three doctors had suggested Orozco was malingering. CP 217-19. When asked about Orozco's condition as of 2009, Dr. Snodgrass did not believe that the 2006 industrial injury caused any psychiatric condition. CP 235-36.

Dr. Snodgrass was asked whether he could testify about Orozco's condition in 2011 when he had not seen him since 2009, and he responded that his opinions would be similar in 2011, if the "variables" did not

change, but he could not say for sure. CP 251-52. Dr. Arenas's testimony confirmed that nothing had changed in Orozco's situation, and Orozco did not put on medical evidence that his physical condition changed during the applicable period. Appellant's Br. 6; CP 143 (Dr. Arenas stated that nothing in Orozco's life had changed). Dr. Snodgrass also evaluated Dr. Arenas's 2012 report and testified that he did not agree with Dr. Arenas's 2012 evaluation. CP 236-40. Dr. Snodgrass's opinions were offered on a more probable than not basis. CP 211, 223, 235-36.

C. The Board and Superior Court Found the Industrial Injury Did Not Cause Orozco's Mental Health Conditions, and the Court of Appeals Affirmed

The Board found that the industrial injury did not cause any mental health condition. CP 5, 34. Orozco appealed the Board decision to superior court.

The superior court also found that Orozco's 2006 work injury did not cause the alleged mental health conditions and that the mental health conditions had not worsened after claim closure. CP 268. The court found that "the mental health conditions described as: cognitive disorder; anxiety disorder; pain disorder with both psychological factors and a general medical condition; depressive disorder; and malingering were not proximately caused by the industrial injury and did not worsen between

July 29, 2009, and October 3, 2011." CP 268. Orozco appealed to the Court of Appeals.

The Court of Appeals held that substantial evidence supported the superior court's finding that the industrial injury did not cause any mental health condition. *Orozco v. Dep't of Labor & Indus.*, No. 33808-8-III, slip op. at 11 (Wash. Ct. App. Sept 22, 2016) (unpublished). The court found the lack of proximate cause dispositive, and so it did not consider whether there was worsening of any mental health conditions. *Id.*, Slip op. at 9. The Court of Appeals noted that Orozco's arguments asked the court to find his witness more credible than the Department's witness, which it would not do on substantial evidence review. Slip op. at 10-11.

Orozco now petitions for review.

IV. ARGUMENT

A. No Reason Exists Under RAP 13.4 to Grant Review

Orozco cites no reason under RAP 13.4 to support review and none exists. He generally claims that courts need to get decisions in workers' compensation claims correct because incorrect decisions provide unnecessary litigation and "deleterious" effects on injured workers. Pet. at 11, 18-19. But the desirability of having correct decisions is present in all workers' compensation cases, indeed in all cases, and is not unique to Orozco's case, nor presents a reason for review.

Orozco casts this case as an incorrect application of the elements of a reopening case to the facts of his case. Pet. at 9, 12, 15-18. He is wrong about this, but additionally such a claim of ordinary error is not a basis for review under RAP 13.4(b). At heart, Orozco presented a routine substantial evidence case at the Court of Appeals, which the Court of Appeals decided correctly, and this Court need not revisit.

B. Orozco's Arguments Lack Merit

Substantial evidence supports the superior court's finding that the industrial injury did not cause any claimed mental health conditions. To reopen a claim, a worker must prove that a condition proximately caused by the injury has worsened during the time period since the claim last closed. *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); RCW 51.32.160. An injured worker proves worsening between the two "terminal dates." The first terminal date is the date of the last previous closure or denial of a reopening application. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The second terminal date is the date of the most recent closure or denial of a reopening application. *Id*. In a reopening case, the worker must prove the following elements with medical testimony:

> (1) That a causal relationship exists between the injury and subsequent disability;

(2) That an aggravation of the industrial injury caused increased disability or a need for treatment;
(3) That the aggravation occurred between the first and second terminal dates; and
(4) That the disability was greater on the second terminal date than on the first terminal date.

See Phillips, 49 Wn.2d at 197.

Orozco frames this case as a challenge to the fourth element, which would require the Department to rebut Orozco's claim that his condition had worsened as of the second terminal date. Pet. at 17. But the case is not about whether Orozco's condition worsened at this date. Rather it is about Orozco's failure to prove the first element, namely whether he had a condition proximately caused by the industrial injury.

Orozco appears to argue that because Dr. Snodgrass did not examine him at the time of the second terminal date that he may not render an opinion about whether the industrial injury caused his claimed mental health conditions. *Id*. This would only be true if Orozco had claimed a new medical condition that arose *after* the claim closed originally. This is because a worker can show worsening if he or she presents evidence that a new industrially-related condition arose after the claim closed. *Knowles v. Dep't of Labor & Indus.*, 28 Wn.2d 970, 972, 184 P.2d 591 (1947).

But, as Orozco admits, Dr. Arenas did not make a diagnosis that Orozco had a new mental health condition that arose *after* the claim

closed. Pet.. at 5-6, 16. Instead, he opined that all of Orozco's mental health conditions had been present since the original injury. *Id.* In other words, Orozco's claim was for a condition that he claims existed at the time of the first terminal date.

Thus, the question is whether those claimed conditions from the time of initial injury in 2006 were proximately caused by the industrial injury. On substantial evidence review, the court views the evidence in the light most favorable to the prevailing party at the Board, here the Department. *Henry Indus., Inc. v. Dep't of Labor & Indus.*, 195 Wn. App. 593, 600, 381 P.3d 172 (2016). Dr. Snodgrass testified that Orozco had no mental health conditions related to the industrial injury based on his examinations in 2007 and 2009 and his review of Dr. Arenas's 2012 report. CP 223, 235-40. Dr. Snodgrass did not need to examine Orozco in 2011 at the time of the second terminal date to determine that Orozco's industrial injury did not cause any mental health conditions because Orozco does not allege that he had a new mental health condition that arose after claim closure.

Dr. Snodgrass's testimony about no causation provides substantial evidence that supports the superior court's finding that the industrial injury did not cause any mental health condition. The Court of Appeals correctly

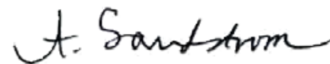
decided that substantial evidence supported the findings, and this case presents no reason for review.

V. CONCLUSION

This case involves the routine determination of whether testimony by one doctor that the industrial injury did not cause any mental health condition supports a superior court finding of no causation. Orozco presents no reason for review, and the Department asks the Court to deny review.

RESPECTFULLY SUBMITTED this 22nd day of November 2016.

ROBERT FERGUSON
Attorney General



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SUPREME COURT OF THE STATE OF WASHINGTON

JESUS OROZCO, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the below date, she caused to be served the DEPARTMENT'S ANSWER TO PETITION FOR REVIEW and this CERTIFICATE OF SERVICE in the below-described manner:

Via E-mail Filing:

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DATED this 22nd day of November, 2016.

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