No. 338088-III

Superior Court No. 13-2-00132-0

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

JESUS OROZCO,

Appellant

v.

DEPARTMENT OF LABOR & INDUSTRIES

FOR THE STATE OF WASHINGTON,

Respondent

BRIEF OF APPELLANT

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III. INTRODUCTION

This appeal concerns a workers compensation claim, which invokes the Industrial Insurance Act (the Act), codified at Title 51 RCW. The Act is a self-contained system which provides detailed procedures and remedies for injured employees. *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 762, 153 P.3d 839 (2007), *Brand v. Dep't of Labor & Indus.* 139 Wn.2d 659, 668, 989 P.2d 1111 (1999). Here, Mr. Jesus Orozco contends the Board of Industrial Insurance Appeals (Board) erroneously denied his application to reopen his prior workers compensation case.

IV. FACTS and PROCEDURE

On April 25, 2006, Mr. Jesus Orozco was employed by Goodwill Industries. (CP 94) He had just finished loading a box into the back of a truck and turned to jump down to the ground from the truck bed. At that same time a co-worker pulled down a heavy overhead, metal sliding door that hit Mr. Orozco with great force on the top of the head, causing significant injuries. (CP 93-95) Because of the injuries to his face, head, neck and low back Mr. Orozco filed a workers compensation claim with the Department of Labor & Industries (Department), which was accepted. (CP 49, 122)

Benefits, including medical treatment and wage replacement were provided while he recovered from his injuries. (CP 49-54) His claim was ultimately closed on July 29, 2009. (CP 52) At that time no formal adjudication was made regarding which medical conditions the Department had and/or had not allowed nor was there any award or disability rating made. (RP 5; CP 54[1])[2]

However, after the injury, even before the Department closed his claim, Mr. Orozco began to suffer from symptoms of depression, anxiety, nearly constant pain and a lack of focus and concentration, which kept him from working. This lack of focus and concentration caused him to have a car accident.[3] He was not injured but he is now nervous to drive anywhere by himself. His wife usually drives him everywhere he needs to go. On the few occasions he tried to drive himself somewhere he got very confused and became lost. (CP 82-88, 93-99, 102) His symptoms steadily worsened as time

[1] See note of 5-28-10 in the jurisdictional history (CP 54)

[2] RP (report of proceedings) refers to the transcript of the superior court hearing of September 29, 2014.

[3] At first glance, the record seems to present Mr. Orozco's conflicting testimony about the car accident. A close reading of the colloquy reveals a misunderstanding between Mr. Orozco and the cross-examiner. Cf. (CP 96-98; 106-107) Once Mr. Orozco understood which the question he was able to answer consistently with his earlier testimony.

went on. Prior to his industrial injury in 2006, he had been an excellent provider for his family, went out with his wife and was fun to be with. He loved to play with his children and spend time with friends and family. Mr. Orozco had never before shown any symptoms or experienced any problem with depression, anxiety, chronic pain or any other mental health condition. After the injury he no longer was able to play with his daughters and rarely left the house. He was unable to be intimate with his wife and sleep was difficult. Noises raised his anxiety level to the point he would not even go to church or watch television with the sound on. When asked about his mental state, Mr. Orozco testified that he felt "desperate." had "lost all hope" and "fe[lt] like running away." He described himself as "worthless." The mental health symptoms were not present prior to the injury. (CP 86, 93-96, 98, 100-102)

On August 12, 2011, which was approximately two years after his original claim was closed Mr. Orozco filed an application to reopen his claim (also known as an aggravation application) on the basis that he was suffering from mental health conditions, directly related to his April 2006 industrial injury, which had worsened or were

in need of further proper and necessary medical treatment.[4] The Department denied his request for reopening on October 3, 2011. (CP 36, 54) Mr. Orozco appealed this decision to the Board, (CP 37-39, 55) which was granted, allowing him to present his case to an Industrial Appeals Judge, (IAJ) – a representative of the Board. (CP 55 – note at 12-21-11)

At the Board hearing, Mr. Orozco presented the testimony of one witness, Dr. Arenas, a licensed psychologist. The Department presented the testimony of two witnesses, Dr. Haynes, a licensed, Board-certified neurologist and Dr. Snodgrass, a licensed, Board-certified psychiatrist.

Dr. Arenas

Dr. Arenas is a licensed, clinical psychologist in the state of Washington. (CP 117) He is bilingual and bicultural. Spanish is his first and primary language and he participates in the American and Mexican cultures with relative ease. For 40-plus years (since 1972) Dr. Arenas has provided psychological treatment for mainly monolingual Spanish-speaking patients. (CP 118-120)

[4] See note of 8.12.11 in the jurisdictional history (CP 54)

Dr. Arenas met with Mr. Orozco on two occasions: January 7, 2012 and March 10, 2012. (RP 12; CP 120) Dr. Arenas examined all of Mr. Orozco's prior medical records from the Department file. Additionally, Dr. Arena reviewed 2010-2011 counseling records from Catholic Family Services where Mr. Orozco had sought mental health treatment. (CP 138-139; RP 12) Dr. Arenas testified that when he initially examined Mr. Orozco, there were immediate psychological areas of concern. They included: sadness, depression, nervousness, anxiety as well as a psychophysiological finding of a chronic pain condition. (CP 123) In his professional opinion, Dr. Arenas' formal mental health diagnoses of Mr. Orozco were: (1) cognitive disorder NOS; (2) anxiety disorder NOS with generalized and post-traumatic features – chronic severe; (3) pain disorder with both psychological factors and a general medical condition – chronic; and (4) depressive disorder NOS with major features – chronic severe. (RP 12; CP 134-135) Dr. Arenas testified on a more probable than not medical basis that these diagnoses were related to the industrial injury in 2006 and had continued unabated into 2012. (RP 12-13; CP 138, 142-43) He found it hard to believe that Mr. Orozco's "emotional disorders ha[d] not been considered fully [and] ha[d] not been adequately assessed" in the six

years since his industrial injury. (RP 12-13; CP 134-36) However, malingering was not a diagnosis. (CP 136-138) Dr. Arenas opined that suggestions by earlier medical examiners that perhaps malingering behavior was something to watch for was very detrimental to Mr. Orozco's receiving an accurate diagnosis of, and treatment for his mental health conditions from 2006-2012. (CP 137, 146-147) Dr. Arenas was resolute that Mr. Orozco required further workers' compensation benefits in the form of proper and necessary medical treatment of his diagnosed psychological disabilities in order to "perform full-time work of any nature." This opinion was given on a more probable than not medical basis. (CP 143-146)

Dr. Haynes

In defense of its decision to not reopen Mr. Orozco's claim the Department called Dr. Haynes, who is a licensed and board certified neurologist. (CP 163) It is not understood why he was called as a witness as he is a *physical* medical doctor and Mr. Orozco's aggravation claim dealt only with a *mental health* disability. (RP 9) Dr. Haynes, by his own admission is not qualified to diagnose mental health disorders. (CP 164, 189, 191-192) Although he saw evidence of pain behavior in Mr. Orozco, the doctor specifically did not

diagnose malingering. (CP 179) Between Dr. Haynes' first independent medical examination in 2009 to his second on September 15, 2001, Dr. Haynes noted of Mr. Orozco: "The pain was a little more extensive in 2011. . . . pain everywhere except his chest and abdomen, combination of pain numbness and tingling." Dr. Haynes testified that Mr. Orozco said, among other things: "things were getting worse, severe enough to make him vomit on occasion." (CP 181) Dr. Haynes concluded, after his 2011 independent medical examination that he did not find any *physical* conditions that required reopening of Mr. Orozco's claim. Interestingly, Dr. Haynes did note that Mr. Orozco had suffered a "*major psychological collapse*." (RP 9; CP 191) When questioned about it Dr. Haynes admitted it was "a pretty nonspecific term, but I couldn't put it together any other way." (CP 191) It was never defined.

Dr. Snodgrass

The Department also called as a witness Dr. Lanny Snodgrass, a licensed and board certified psychiatrist. (CP 198, 202) Oddly, the Department inquired into whether Dr. Snodgrass "to some extent, climatize[d] to the culture of Mexico." He answered that part of his medical training was in Mexico and that he had "to some

extent." (CP 206). He also stated: "I'm certainly not pretending to crawl into Hispanic skin and feel everything that a Hispanic is feeling, but I feel I have more of an insight and understanding than the average person who hasn't had the experiences that I've had." (CP 207)

Dr. Snodgrass examined Mr. Orozco on two occasions: on November 30, 2007, while Mr. Orozco's claim was still open, and again on April 3, 2009 just prior to his claim closure. In 2007 Dr. Snodgrass did not find evidence of a "major psychological diagnosis" although he did note the psychosocial stressors Mr. Orozco dealt with on a daily basis as unemployment issues, self-esteem, lack of motivation, severe disability conviction, financial challenges and chronic pain syndrome. Dr. Snodgrass did not believe there was any psychiatric treatment was required at that time. (CP 209, 221-224) The diagnosis after the second examination, in 2009 determined Mr. Orozco had "no significant neuropsychological residuals stemming from the industrial injury of 4/25/06. . ." and no psychiatric condition . . ." The psychosocial stressors remained much the same as in the 2007 exam with the addition of "wife now the gainfully employed" family member, and "no sense of regaining employability." Dr. Snodgrass "did not feel he [Mr. Orozco] had a permanent partial

mental impairment" caused by his injury nor did he agree with Dr. Arenas' diagnoses. It is striking and relevant that Dr. Snodgrass admitted that "Dr. Arenas [in 2012] is seeing an individual [Mr. Orozco] that is much different than what I saw." (CP 234-236, 244)

Dr. Snodgrass admitted he did not review the sworn testimony of Mr. Orozco or Dr. Arenas although he had read the doctor's 19-page report. Additionally he admitted he had not reviewed the 2010-2011 counseling records from Catholic Family Services, an organization through which Mr. Orozco sought *mental health counseling.* (CP 247-249; RP 15) In fact, Dr. Snodgrass testified he was unable to provide a meaningful opinion of Mr. Orozco's mental health condition as of October 3, 2011 (T-2). (CP 248)

Although Dr. Snodgrass was confident of his 2009 diagnosis of Mr. Orozco, when asked if his opinion would be the same in 2011, "assuming no intervening accidents or injuries," the doctor said ". . . it would no doubt be the same. I can't say for sure . . . Really there's no way of knowing . . . I would assume that that would have been similar." (CP 251-252)

Appellate Procedure at the Board

After a full hearing, taking into consideration the testimony of the above expert witnesses, the IAJ issued a Proposed Decision and Order (PDO) on October 22, 2012, which determined the Department had properly denied Mr. Orozco's application to reopen his claim. (CP 20-34) Mr. Orozco filed a timely Petition for Review of this decision, (CP 13-15) which was again denied by the full 3-member Board on December 21, 2012. (CP 5) As a result, on the Board panel adopted the IAJ's PDO as its own Decision and Order (DO). (CP 5)

Appellate Procedure in Superior Court

Mr. Orozco, aggrieved by the Board's final order, filed a Notice of Appeal with the Benton County Superior Court. (CP 1-2) The court reviewed the administrative record developed throughout Mr. Orozco's dealings with the Department and the Board. This record is called the Certified Appeal Board Record (CABR). (CP 3-254) At this stage of the appeals process, the superior court acted in its appellate capacity, performing a de novo review of the CABR. RCW 51.52.115.[5] On September 29, 2014, after reading the administrative

[5] RCW 51.52.115 states in relevant part: "Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice

record and listening to arguments of counsel, (RP 2-40) the superior court determined the Board decision, which upheld the Department's decision to deny Mr. Orozco's application to reopen his claim, was correctly decided. (RP 41-42; CP 267-269) Findings of fact, conclusions of law and a judgment were entered in accordance with the court's oral decision. (CP 267-269) Mr. Orozco filed a timely notice of appeal with this court. (CP 270-271) Pursuant to RCW 51.52.140,[6] it is the superior court's decision Mr. Orozco asks this court to review.

V. ASSIGNMENTS OF ERROR

(1) Substantial evidence does not support what the trial court labeled finding of fact #1.4[7] which states: "On a more probable than not basis 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." (Emphasis added.)

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of appeal to the board, or in the complete record of the proceedings before the board . . ."

[6] "Appeal shall lie from the judgment of the superior court as in other civil cases."

[7] Mr. Orozco contends Finding of Fact #1.4 is actually a conclusion of law, which is reviewed under a different standard than a true finding of fact. See analysis below. (CP 268)

(2) The trial conclusions of law 2.2[8], 2.3[9] and 2.4[10] do not flow from its findings.

VI. ISSUES ON APPEAL

(1) Does substantial evidence support the trial court's determination that Mr. Orozco's properly diagnosed mental health conditions were not proximately caused by his industrial injury, thus did not worsen between July 29, 2009 and October 3, 2011?

(2) Does substantial evidence support the trial court's finding of fact 1.4, which lists "malingering" as a *diagnosed* mental health condition?

VII. STANDARD OF REVIEW

In a workers' compensation case, it is the decision of the trial court this appellate court reviews, not the decision made by the Board of Industrial Insurance Appeals. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). RCW 51.52.140 provides: "Appeal shall lie from the judgment of the superior court as in other civil cases." This court's review is

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[8] "Between July 29, 2009 and October 3, 2011, Jesus Orozco's conditions proximately caused by the industrial injury did not worsen within the meaning of RCW 51.32.160." (CP 268)

[9] "The Board's December 21, 2012 order that adopted the October 22, 2012 Proposed Decision and Order is correct and affirmed." (CP 268)

[10] "The October 3, 2011 Department order that denied Mr. Orozco's application to reopen his claim, is correct and is affirmed." (CP 269)

limited to examining the record to ascertain whether substantial evidence supports the superior court's findings of fact. This court then determines whether the superior court's conclusions of law flow from its findings. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006). Substantial evidence is that quantum of evidence sufficient to persuade a rational, fair-minded person that the premise at issue is accurate. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Credibility decisions are for the trier of fact and will not be reviewed

VIII. ANALYSIS

The Act authorizes the reopening of a claim if an aggravation of a disability occurs after the claim is closed. In a nutshell, the essence of an aggravation claim is that a claimant's present medical condition is different from, and worse than it was when the prior claim was closed, which warrants further workers compensation benefits including proper and necessary medical treatment. RCW 51.32.160 governs applications to reopen a claim and provides in pertinent part:

> (1)(a) If aggravation, diminution, or termination of disability takes place, the director [of the Department] may, upon the application of the beneficiary, made within seven years from

> the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section . . .

(1) Finding of Fact # 1.4/Conclusions of Law 2.2, 2.3, & 2.4

Mr. Orozco assigns error to the trial court's finding of fact # 1.4, which states:

> On a more probable than not basis 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.

(Emphasis added.)(CP 268). As an initial matter, this so-called finding contains the same information as conclusion of law # 2.2 albeit the position of the words is different. However, the connotation is exactly the same. Mr. Orozco contends finding # 1.4 is a conclusion of law and therefore must be reviewed de novo. *Casterline v. Roberts*, 168 Wn. App. 376, 383, 284 P.3d 743 (2012).[11]

Because there are no findings of fact with which Mr. Orozco takes issue, the only standard of review that applies is de novo.

[11] If this court disagrees a substantial evidence analysis is included in this brief.

When this court reviews a trial court's decision de novo, it reviews only the facts that were in front of the trial court. It does not consider evidence outside the record. *See In re Disciplinary Proceeding Against Turco*, 137 Wn.2d 227, 245-246, 970 P.2d 731 (1999)(stating that de novo review does not mean that the court holds a new evidentiary hearing).

(2) Establishing an Aggravation Claim

As a general rule, an injured worker that seeks to reopen their *physical* medical claim under RCW 51.32.160 must establish four elements. First, the causal relationship between the injury and the subsequent disability must be established by medical testimony.[12] Next, the claimant must prove by medical testimony, some of it based upon objective symptoms that an aggravation of the injury resulted in increased disability. Third, the medical testimony must show that the increased aggravation occurred between the two terminal dates of the aggravation period. Finally, the claimant must prove by medical testimony, some of it based upon objective symptoms which existed on or prior to the closing date, that his disability on the date

[12] The term "medical testimony" simply refers to testimony given by medical experts. *Loushin v. ITT Rayonier,* 84 Wn. App. 113, 118, 924 P.2d 953 (1996).

of the closing order was greater than the Department found it was. *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657-58, 219 P.3d 711 (2009).

In contrast however, Mr. Orozco's application to reopen his claim was not for the worsening of a general *physical* medical condition. Instead, he sought reopening in order to receive treatment for a *mental health* condition, which has an important distinction from the test set forth. Germane to Mr. Orozco's application for reopening is the holding of *Price v. Dep't of Labor and Indus.*, 101 Wn.2d 520, 628 P.2d 307 (1984). The *Price* court addressed the question of whether a workers compensation claim based solely on a *psychological* disability may be awarded on the basis of expert medical testimony regarding exclusively *subjective* symptoms. *Id.* at 521. (Emphasis added). The court held that medical opinions from a psychiatric examination are primarily based on conversations with the patient, which is purely subjective information. Accordingly, the court determined that "symptoms of a psychiatric injury are necessarily subjective in nature." *Id.* at 528-529. Pursuant to *Price*, when testimony of a mental health nature is considered, the requirement of subjective evidence has replaced the

objective/subjective evidence requirement of physical health testimony.

For this court's de novo review of the trial court's conclusions (including finding # 1.4) Mr. Orozco applies the facts of his case to the elements required for reopening his claim.

As set forth above, a causal relationship between the injury and the subsequent disability must be established by medical testimony. After an exhaustive review of the entire evidence developed below, Dr. Arenas testified on a more probable than not medical basis the industrial injury was the cause of Mr. Orozco's mental health conditions. The basis for his conclusion was that he found no other issue in Mr. Orozco's life that would be a significant contributing factor. He was a happy, productive worker that financially supported his family and enjoyed their company and that of his friends prior to the injury. He had no symptoms of anxiety or depression and his body did not hurt prior to the injury. Dr. Snodgrass said the injury could not have been the reason because Mr. Orozco did not ever have a diagnosable mental health condition. A de novo review of the facts of this case reveal substantial evidence supports Dr. Arenas' medical opinion, especially when one considers the additional records he reviewed but Dr. Snodgrass did not.

Next, Mr. Orozco had to prove by subjective medical testimony that an aggravation of his industrial injury resulted in increased disability. Dr. Arenas examined Mr. Orozco on two occasions. While Dr. Arenas opined that Mr. Orozco probably exhibited signs of depression soon after the injury, Dr. Snodgrass's independent medical exam of April 3, 2009 did not even acknowledge any mental health condition existed. Most likely, as a result of Dr. Snodgrass's medical opinion Mr. Orozco's original claim was closed with no mental health disability noted. Even taking Dr. Snodgrass's medical opinion as true, Dr. Arenas, under oath and testifying on a more probable than not medical basis diagnosed mental health conditions in 2012. The Department presented no medical testimony, objective or subjective, that rebutted Dr. Arenas' diagnosis. Common sense dictates only one result. If there was no mental health diagnosis in 2009 and there *was* a mental health diagnosis in 2012, it follows that Mr. Orozco's medical condition worsened. Because Arenas' medical opinion was the only one that addressed a mental health condition in 2012, substantial evidence does not support finding # 1.4.

Third, the medical testimony had to show that the increased aggravation occurred between the two terminal dates of the

aggravation period. The parties agree the terminal dates are July 29, 2009 (T-1) and October 3, 2011 (T-2). Dr. Arenas was specifically questioned about this element. In his ultimate opinion, which was based on the records he reviewed (including records the Department witness did not review), the psychological testing he performed and his two 2012 examinations of Mr. Orozco, was that his mental health conditions had worsened between July 29, 2009 and October 3, 2011. It might initially appear that Dr. Arenas' opinion is not useful because his initial mental health examination in 2012 was made subsequent to the second terminal date, which was in 2011. However this is not a case where his opinion of Mr. Orozco's aggravated mental health condition was restricted solely to the date of the examination or the date the doctor testified. *See White v. Dep't of Labor & Indus.*, 48 Wn.2d 413, 416, 293 P.2d 766 (1956). The reasoning of *White* provides useful guidance. Mr. Orozco's appeal concerns a mental health claim. The mental health conditions with which Mr. Orozco was diagnosed did not start or stop on a date certain. Furthermore, Dr. Arenas based his medical opinion in part on records and reports generated by medical doctors called by the Department. Dr. Arenas reviewed records from 2006-2007, 2009, and 2011. And, as noted above, he was able to review 2010-2011

records from Catholic Family Services where Mr. Orozco sought mental health counseling. All this information went into his final medical opinion that Mr. Orozco's mental health condition worsened during the aggravation period. The only other mental health doctor whose testimony is relevant is Dr. Snodgrass. This is because while he did examine Mr. Orozco twice, only the April 4, 2009 examination and diagnosis is pertinent to discussion of this element because it occurred so close to the T-1 date. However, Dr. Snodgrass did not ever re-examine Mr. Orozco after 2009 nor did he review subsequent records. As a result he did not have an opinion of Mr. Orozco's mental health condition as of T-2. Dr. Haynes did two neurological examinations of Mr. Orozco, one in 2009, just prior to claim closing (T-1) and then again in 2015. As set forth above, Dr. Haynes' opinion was based on objective evidence of a physical nature. He did not, nor was he qualified to make a mental health diagnosis. Under these facts, substantial evidence from Dr. Arenas' medical testimony proves Mr. Orozco's mental health condition had worsened between July 29, 2009 (T-1) and October 3, 2011 (T-2).

Finally, Mr. Orozco had to prove by medical testimony, some of it based upon subjective symptoms that existed on or prior to the closing date, that his disability on the date of the closing order was

greater than the Department found it was. He did so. The same analysis set forth above applies to this element as well. In April 2009 we have a report from Dr. Haynes whose diagnosis is disregarded as irrelevant. But Dr. Snodgrass examined Mr. Orozco the same day as Dr. Haynes. So, we are left with two experts opinions: Dr. Arenas' and Dr. Snodgrass's. No matter which expert the trial court chose to believe in its de novo review, it is clear Mr. Orozco presented substantial evidence that his mental health conditions were worse on the date the Department closed his claim and that no medical testimony supports a contrary result. If Dr. Snodgrass's testimony is correct then Mr. Orozco had no mental health condition on or before 2009 and apparently none prior to 2011 because he did not examine Mr. Orozco after 2009 nor did he review any further medical records. By his own admission he was unable to provide a meaningful opinion of Mr. Orozco's mental health condition as of October 3, 2011 leaving Dr. Arenas' medical opinion unrebutted. Mr. Orozco's mental health disability on the date of the closing order was greater than the Department found it was. The Department's decision to deny Mr. Orozco's reopening claim is not supported by substantial evidence.

The trial court was required to analyze the entire CABR prior to making its decision. Mr. Orozco had a very high burden to meet

in order to successfully reopen his case, that of providing substantial medical evidence of each element by a preponderance of the evidence. As set forth in the facts and analysis above, substantial evidence does support each required element for reopening. The trial court, without making any findings on any fact in the record, erred in finding Mr. Orozco did not meet that heavy burden by a preponderance of the evidence.

(3) Malingering

As noted above, Finding of Fact # 1.4 includes "malingering" as one of the mental health conditions with which Mr. Orozco was diagnosed. While it is true the Department's witnesses discussed malingering there was no formal diagnosis of such. (CP 221, 223-224, 228-229, 237). No evidence, let alone substantial evidence supports the trial court's inclusion of a malingering diagnosis in finding # 1.4. The superior court's inclusion of malingering as a mental health diagnosis relating to proximate cause and worsening was erroneous.

IX. CONCLUSION

Because there are no disputed findings of fact, Mr. Orozco asks this court to review finding of fact 1.4 as a conclusion of law

applying a de novo review of the facts in this record. If this court determines it will review finding 1.4 for substantial evidence then he respectfully requests, based on the above facts, citations and legal arguments that substantial evidence does not support the decision of the trial court that affirmed the Board order denying his application to reopen his industrial injury claim. He maintains Dr. Arenas' subjective medical testimony regarding the mental health conditions from which he, thus his family, suffers satisfies the required elements that permit the reopening of an industrial injury claim on a more probable than not basis thus, the trial court's conclusions do not flow from the appropriate findings.

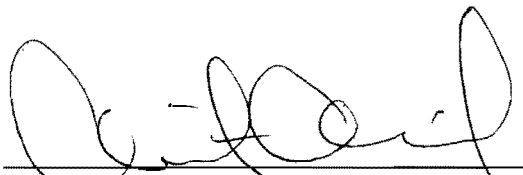
X. ATTORNEY FEES

If successful in his appeal, Mr. Orozco requests attorney fees pursuant to RAP 18.1, RCW 51.52.130[13] and *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance

[13] The relevant portion of RCW 51.52.130(1) provides: "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 ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose behind the statutory attorney fees award is to ensure adequate representation for the injured worker who is forced to appeal from Department rulings in order to obtain compensation due on their claim. *Id.* at 667-70.

Respectfully submitted this 21st day of January, 2016



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