No. 338088-III

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

REPLY BRIEF OF APPELLANT

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II. ARGUMENT

Mr. Orozco disagrees with certain facts set forth in the Department of Labor and Industries' (Department) brief. The significant discrepancies are clarified below.

As an initial matter, Mr. Orozco could *not* disagree more with the Department's assertion: "[Mr.] Orozco's claim of relief rests on his contention that this Court should reweigh the evidence under a de novo standard . . ." (Resp. Br. at 9) This statement is not only erroneous but also exhibits a lack of candor to this court. Mr. Orozco properly sets forth the required standard of review as substantial evidence and he analyzed the facts of this case using that standard. (App. br. at 12-13) It is true Mr. Orozco pointed out the similarities between the trial court's finding of fact # 1.4 and its conclusion of law # 2.2 and invited this court to apply a de novo standard of review if warranted. (App. br. at 14-15) What Mr. Orozco was trying to express, however ineptly worded, was that the medical evidence presented to the trial court regarding the circumstances leading Mr. Orozco's filing a reopening claim withstands scrutiny under *either* the substantial evidence or de novo standards. (App. br. at 14 fn. 11, 23) For the Department to claim Mr. Orozco merely analyzed the issue based on a de novo

review of the record is patently false and amounts to a not-so-thinly disguised red herring.

There are several areas of agreement between the parties. They both agree: (1) RCW 51.32.160(1)(a) governs Mr. Orozco's reopening claim; (2) the specific terminal dates are July 29, 2009 (T1) and October 3, 2011 (T2); (3) the sole issue on appeal is whether the trial court properly determined Mr. Orozco's mental health conditions: (a) were not caused by the industrial injury in 2006 and (b) did not worsen between July 29, 2009 and October 3, 2011[1] and (4) the answer to that query depends on the testimony of three medical experts: Drs. Arenas (for Mr. Orozco) and Drs. Haynes and Snodgrass (for the Department).

The Department claims substantial evidence supports finding # 1.4 that Mr. Orozco's mental health conditions were not proximately caused by the 2006 injury and his medical condition did not worsen. Mr. Orozco vehemently disagrees.

The Department recites many facts from the testimony of Drs. Haynes and Snodgrass that it believes secures its position. However, as this court will see, some of the statements are taken out of context or only partially quoted. (Resp. br. 15 CP 132 ll. 1-

[1] *See* trial court's finding of fact # 1.4 (CP 268)

22; 17 – CP 143 ll. 8-15; CP 245 ll. 9-25) The Department claims Dr. Snodgrass testified Mr. Orozco did not have a mental health condition proximately caused by the industrial injury (Resp. br. 18) The correct fact is Dr. Snodgrass did not find evidence of a mental health condition *in 2009*, which is the last time he examined Mr. Orozco. Dr. Snodgrass could not state for certain whether Mr. Orozco had mental health conditions in 2011. (CP 248, 251-252) The Department also uses as examples statements taken directly from Judge Sheeran's Proposed Decision and Order at the Board level, which is highly improper. (Resp. br. at 15 – CP 34; 19) The Department used the same tactic in its oral argument to the trial court. (RP 18 *ll. 19-23*; 22 *ll. 2-7, 21-25*; 24 *ll. 7-25*)

Dr. Haynes was asked by the Department to examine Mr. Orozco on two occasions, once in 2009, just prior to T1 and again in 2011[2] just prior to T2. His only significant testimony was that Mr. Orozco had a "major psychological collapse" apparently at some point in time between the examinations in 2009 and 2011. Interestingly, Dr. Haynes was unable to define what he meant by the term. (CP 191) Significantly, Dr. Haynes *did not and could not* set forth a medical opinion regarding Mr. Orozco's mental health

[2] Mr. Orozco's appellant's brief contains a scrivener's error on page 7. Dr. Haynes saw Mr. Orozco a second time in 2011, not 2001.

conditions because by his own admission, Dr. Haynes is not qualified to diagnose mental health disorders. In fact he testified that he would defer *all mental health diagnoses* to mental health professionals. (CP 164, 189, 191-192) Accordingly, Dr. Haynes' testimony provided *no evidence* let alone substantial evidence regarding the two issues set forth in the disputed trial court finding # 1.4 (i.e., the proximate cause of Mr. Orozco's mental health conditions or whether the conditions had worsened between T1 and T2).

Dr. Snodgrass examined Mr. Orozco in 2007 and again in 2009. After the April 2009 examination, which was just prior to the first claim closure (T1), Dr. Snodgrass opined that Mr. Orozco had "no significant neuropsychological residuals stemming from the industrial injury of 4/25/06. . ." and *no psychiatric condition . . .*" Notably, Dr. Snodgrass did not examine Mr. Orozco at any time after 2009. For that reason Dr. Snodgrass testified he was unable to provide a meaningful opinion related to Mr. Orozco's mental health condition as of October 3, 2011 (T-2). (CP 248) Most important to Mr. Orozco's substantial evidence challenge are two testimonial exchanges during Dr. Snodgrass's deposition of August 31, 2012. First, when asked whether "you're really unable to

provide a meaningful opinion as to what [Mr. Orozco's] condition would have been on October 3, 2011 . . .?" Dr. Snodgrass answered, *"I think that's fair to say."* (CP 248) Next, 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) This same indecisive testimony was repeated on redirect examination when Dr. Snodgrass was asked the same question by the Department's attorney, on whose behalf Dr. Snodgrass was testifying. (CP 251-252)

Inexplicably, without citation to the record, the Department remarks, "Dr. Snodgrass testified that [in 2009 Mr.] Orozco did not have a mental health condition proximately caused by the industrial injury." It then takes an enormous leap and concludes, "This provides substantial evidence to support the finding that [Mr.] Orozco did not have a mental health condition proximately caused by the industrial injury." (Resp. Br. at 18) This is incorrect. Because Dr. Snodgrass, by his own admission had no knowledge and no medical opinion of Mr. Orozco's mental health conditions as

of October 3, 2011, the sworn testimony Dr. Snodgrass provided offered *no evidence*, let alone substantial evidence, Mr. Orozco's mental health conditions were not proximately caused by the 2006 industrial injury and did not worsen between T1 and T2. Surprisingly, the Department actually argues since there was no mental health diagnosis in 2009 (T1) then there was nothing to worsen in 2011 (T2). (Resp. br. at 10) This defies common sense. If there was no mental health diagnosis in 2009 and there were several in 2011 the reasonable medical conclusion is that Mr. Orozco's mental health conditions worsened over that two year period of time.

Dr. Arenas is the mental health professional that had most recently (twice in 2012) examined Mr. Orozco. Dr. Arenas wrote a 19-page detailed report outlining his medical opinion regarding Mr. Orozco's mental health conditions. Additionally, Dr. Arenas clearly and unequivocally testified on a more probable than not medical basis that Mr. Orozco was suffering from 4 mental health conditions. On the same more probable than not medical basis Dr. Arenas also testified that Mr. Orozco began to show signs of the mental health conditions soon after the 2006 industrial injury and attributed the current worsening mental health conditions directly to

the 2006 industrial injury. (CP 134-135, 138, 142-143) While the Board and the trial court may not have found Dr. Arenas's opinions and lack of specificity completely satisfactory the fact remains Dr. Arenas is the only mental health professional that testified on a more probable than not medical basis that Mr. Orozco's four mental health conditions were caused directly by the effects of the industrial injury and its sequelae (inability to work, provide for his family, feelings of worthlessness and hopelessness) and that the symptoms had worsened between T1 and T2.

Dr. Arenas's medical testimony was not rebutted by any Department witness. This is why the trial court erred when it determined Mr. Orozco's mental health conditions were not proximately caused by the industrial injury and did not worsen between the two terminal dates. There was no medical evidence presented that contradicted Dr. Arena's professional mental health diagnoses. Accordingly, *no* medical evidence let alone substantial evidence supports the trial court's finding of fact # 1.4.

Finally, in its explanation of why substantial evidence supports the superior court's decision that the 2006 industrial injury did not worsen between the two terminal dates the Respondent's

brief cites several times to the Board's Proposed Decision and Order (PDO). (Resp. Br. at 19-20) This is inappropriate for two reasons. First, the Board decision is not the subject of this appeal. Second, the Department is repeating potentially reversible error committed by the trial court during its oral decision on September 29, 2014. The trial court began its oral decision by stating, "*After having reviewed* the transcripts of the hearing and *the [PDO] in this instance of [Judge Sheeran*] . . . it's [the] Court's decision that there is a substantial evidentiary support *for the board's decision.*" (RP 41) The court then states ". . . while the initial decision [the PDO] is not binding, *some of the points are well taken* . . ." It was highly inappropriate and extremely prejudicial for the trial court to consider and then *rely* on the factual findings and narrative found in the Board's PDO. The superior court review of Mr. Orozco appeal from an adverse Board decision is *de novo* and there is strong evidence it was not performed in that manner in Mr. Orozco's appeal.

III. CONCLUSION

The Department asks this court to find credible Dr. Haynes' opinion that Mr. Orozco was not truthful about his level of pain or that his behavior was "more dramatic than most. Even if it does the

facts are simply not relevant because Dr. Haynes's testimony has nothing to do with the issues on appeal, which are: does substantial evidence support the trial court's determination that "[o]n 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; [and] depressive disorder[3] were not proximately caused by the industrial injury and did not worsen between July 29, 2009 and October 3, 2011." (CP 268)

Dr. Snodgrass is a well-qualified psychiatrist so his medical opinion is important to the resolution of this appeal. He was very confident that Mr. Orozco did not have a mental health disorder at the time he was last examined by Dr. Snodgrass in 2009. Yet his testimony was tremendously indecisive regarding his opinion with reasonable medical certainty whether Mr. Orozco was suffering from mental health conditions on October 3, 2011 (T2).

Dr. Arenas's medical opinions regarding Mr. Orozco's mental health conditions and their cause on October 3, 2011 went

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[3] Mr. Orozco does not list "malingering" as a mental health reason for two reasons. First, there is no mental health diagnosis called "malingering" and second, the Department appears to have abandoned the issue in its brief. *See* Respondent's Br. at 14.

unrebutted by any Department witness. As a result, *no evidence* let alone substantial evidence supports the trial court's finding of fact # 1.4.

Respectfully submitted this 14th day of April, 2016

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CERTIFICATE OF SERVICE

I certify that on the 14th day of April, 2016, I caused a true and correct copy of this Reply Brief of Appellant to be served on the following individuals in the manner indicated below:

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