95718-5

No. 75475-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

TERA L. HENDRICKSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent,

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

COMES NOW the Petitioner, Tera L. Hendrickson, Appellant and Plaintiff below, and hereby asks this court to accept review of the Court of Appeals' decision terminating review.

II. DECISION PRESENTED FOR REVIEW

Under RAP 13.4(b)(1), (4), Ms. Hendrickson seeks review of *Hendrickson v. Dep't of Labor & Indus.*, 2 Wn. App. 2d 343, 409 P.3d 1162 (Div. I, 2018). The Court of Appeals, Division I, filed its opinion on January 29, 2018. Reconsideration was denied March 7, 2018.

III. ISSUE

Whether the Board of Industrial Insurance Appeals erred in concluding that Ms. Hendrickson failed to make a prima facie case showing that the conditions proximately caused by her October 9, 2007 industrial injury worsened within the meaning of RCW 51.32.160 between May 10, 2012 and September 8, 2014.

IV. STATEMENT OF THE CASE

A. Procedural History

This matter originates under RCW Title 51, the Industrial Insurance Act ("Act") from an Administrative Law Review appeal from a June 8, 2015 Decision and Order of the Board of Industrial Insurance Appeals ("Board").

Ms. Hendrickson received benefits under an industrial injury claim with the Department of Labor and Industries ("Department"), which the Department closed on May 10, 2012. On September 25, 2013, Ms. Hendrickson filed an application to reopen her claim, which the Department denied. Ms. Hendrickson appealed denial to the Board. After the close of Ms. Hendrickson's presentation of her evidence, the Department filed a motion to dismiss. The Board granted the Department's motion to dismiss, concluding that Ms. Hendrickson failed to establish a prima facie case as required by RCW 51.52.050. Ms. Hendrickson appealed the Board's dismissal to superior court, which affirmed the Board. Ms. Hendrickson then appealed to the Court of Appeals, which affirmed the superior court and denied reconsideration. This petition for review follows.

B. Statement of Facts

Ms. Hendrickson suffered an injury on October 9, 2007 in the course of her employment with Staffmark LLC, Pacific. CP at 113. As a result, she had pain and irritation in her middle and lower back and pinching down her right leg. CP at 114. She sought treatment the next morning. *Id.* Ms. Hendrickson filed an industrial injury claim with the Department, which was accepted. Her symptoms persisted in the form of constant stiffness and pain from her neck to her low back, headaches, her hands and feet falling asleep. CP at 117-118. There were times that she couldn't stand due to the

severity of her symptoms. CP at 115.

Ms. Hendrickson received surgery, several rounds of physical therapy, and cortisone injections. CP at 117. She also received massage and laser treatments, as well as completed a pain clinic program prior to her claim closing on May 10, 2012. *Id.* At closure, Ms. Hendrickson was paid a permanent partial disability ("PPD") award equal to a Category 4 for dorsolumbar and lumbosacral impairment under WAC 296-20-280. She still had residual sciatic pain, numbness and nerve pain in her vaginal area and buttocks, and occasional headaches, as well as intermittent back pain that was getting better, but had not completely resolved. CP at 117.

In September 2013, Ms. Hendrickson applied to reopen her claim because she was experiencing a worsening of the symptoms of her industrial injury. CP at 120. The worsened symptoms included increased pain in her neck, mid back, and low back; numbness and tingling in her right buttocks; constant sciatic pain; headaches; hand pain and tingling; and pain shooting down her arms. *Id.* She testified her symptoms had worsened and become more constant to the point that they "basically caused me the inability to function at my normal job duties." CP at 116.

Ms. Hendrickson testified that her pain level had elevated to a six to seven out of ten in September 2014, as opposed to a two to three out of ten when her claim closed in May 2012. CP at 121. Ms. Hendrickson further

testified that she could no longer run, fish, ride a motorcycle, or perform her house chores at her previous frequency. CP at 122-124.

Deanne Corrie, Ms. Hendrickson's friend of twenty-five years, corroborated Ms. Hendrickson's increased disability. She testified that, in May and June 2012, she and Ms. Hendrickson would go to the lake and swim, picnic, and fish. CP at 127. In May 2012, Ms. Corrie did not observe anything in Ms. Hendrickson's behavior that would indicate that she was in a large amount of pain. *Id.* However, by September 2014, Ms. Corrie observed Ms. Hendrickson in significant pain. *Id.* She also observed Ms. Hendrickson was no longer able to fish, swim, or perform certain chores such as sweeping or picking up her own laundry. CP at 127-128. Patrice Thomas, Ms. Hendrickson's daughter, also corroborated her increased disability. She testified she saw Ms. Hendrickson daily in May 2012 and her condition appeared normal, she could go to the beach, take walks, grocery shop, and go for car rides. CP at 136. When Ms. Thomas saw Ms. Hendrickson in May 2014, however, she noticed Ms. Hendrickson in more pain and less able to do things like walking and shopping. CP at 137-138.

Michael Martin, M.D., a board-certified orthopedic surgeon licensed and practicing in the state of Washington, testified he has been treating Ms. Hendrickson since the mid-1990s. CP at 156-157, 163. He also

served as Ms. Hendrickson's attending physician[1] on her industrial injury claim. CP at 162. Dr. Martin saw Ms. Hendrickson on January 6, 2014, shortly after she filed her reopening application. At that time, she reported "pain all over." CP at 164. He performed a physical examination, which revealed decreased sensation in her left arm in the C6, C7, C8, and T1 dermatomes. CP at 165. He testified that those findings from his examination indicated "irritation of those particular nerves." *Id.* Dr. Martin ordered MRI scans of her cervical spine and lumbar spine, which were taken on January 17, 2014. CP at 166, 168. He compared them to scans taken prior to the closure of the claim and testified that the findings from the January 17, 2014 scans were "essentially unchanged" from those on the previous scans of her cervical spine in 2011 and her lumbar spine in 2012. CP at 166.

Dr. Martin diagnosed Ms. Hendrickson with post-laminectomy syndrome of the lumbar spine, strain/sprain, and cervical radiculopathy. CP at 166-67. He related those diagnoses to her October 9, 2007 industrial injury on a medically more probable than not basis because Ms. Hendrickson had similar symptoms for several years dating from her 2007 industrial injury. *Id.* Although there was little difference between the imaging studies, Dr. Martin stated that symptoms can worsen without any

[1] "In cases under [the Act], special consideration should be given to the opinion of the plaintiff's attending physician." *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988).

demonstrable changes on the imaging studies. CP at 169. Moreover, Dr. Martin opined that Ms. Hendrickson's worsening symptoms fit the pathology that she had on her imaging studies. CP at 170-71. Dr. Martin opined that on a medically more probable than not basis that Ms. Hendrickson's conditions proximately caused by her industrial injury of October 9, 2007, had worsened by January 6, 2014 and that, as a result, "she was more symptomatic." CP at 172, 174.

V. ARGUMENT

The Supreme Court should accept review of this matter under RAP 13.4(b)(1) because the decision of the Court of Appeals is in conflict with a decision of the Supreme Court. Specifically, it conflicts with *Wilber v. Dep't of Labor & Indus*, where the Court held that "[a] case may not be reopened if the physician's opinion is ***based solely upon*** what the workman related to him. If, on the other hand, the injured workman's complaints can be verified by the symptoms disclosed by the physician's clinical examination, all requirements of proof are met." 61 Wn.2d 439, 446, 378 P.2d 684 (1963) (emphasis added).

The Supreme Court should also accept review under RAP 13.4(B)(4) because this petition involves issues of substantial public interest. The Court has repeatedly stated that the underlying policy of the Act is to minimize suffering and economic loss for injured workers and that

"all doubts as to the meaning of the Act are to be resolved in favor of the injured worker." *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). The Court of Appeals' reading of *Wilber* in this case goes against this policy and affect substantial public interest in the protection of injured workers.

A. Standard of Review

A party aggrieved by an order of the Board may appeal to superior court. RCW 51.52.060. The superior court's review of the decision and order of the Board is *de novo* but based on the same evidence and testimony received by the Board. RCW 51.52.110. The appealing party has the burden to "establish a prima facie case for the relief sought." RCW 51.52.050. The superior court is empowered to reverse or modify the Board's decision if the court determines the Board incorrectly construed the law or found the facts. "The court may substitute its own findings and decision for the Board's if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect." *McClelland v. I.T.T. Rayonier*, 65 Wn.App 386, 390, 828 P.2d 1138 (Div. II, 1992); *See also Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146,736 P.2d 265 (1987) (holding that the appellant must "establish that the Board's findings are incorrect by a preponderance of the evidence.").

When reviewing factual issues, an appellate court only examines the record to see whether substantial evidence supports the findings made after the superior court's *de novo* review, and whether the court's conclusions of law flow from the findings. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36, 357 P.3d 625 (2015). "If, in the opinion of the reviewing court, the evidence as to a factual issue is evenly balanced, the finding of the Department [now Board of Industrial Insurance Appeals] as to that issue must stand; but, if the evidence produced by the party attacking the finding preponderates in any degree, then the finding should be set aside." *McLaren v. Dep't of Labor & Indus.*, 6 Wn.2d 164, 168, 107 P.2d 230 (1940). However, questions of law are reviewed *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

Notably, the Department made its motion to dismiss after Ms. Hendrickson's presentation of evidence and without presenting any of its own. The evidence presented by Ms. Hendrickson is not disputed by any evidence within the record. The question before this Court is, therefore, legal rather than factual. Here, the legal question to be reviewed *de novo* is whether in light of the underlying purpose and policy of the Act, Ms. Hendrickson's conditions proximately caused by her October 9, 2007 industrial injury worsened within the meaning of RCW 51.32.160 between the terminal dates of May 10, 2012 and September 8, 2014.

B. The Court of Appeals Committed Error Because its Decision Conflicts with the Supreme Court's Decision in *Wilber*.

1. The Court of Appeals Directly Conflicts with the Rule in *Wilber*.

The decision of the Court of Appeals in this case is in direct conflict with the Supreme Court's decision in the *Wilber* case. In *Wilber*, the Court ruled that a claim may be re-opened where the findings on imaging studies remains identical from the close of the claim through the time of the re-opening application in instances where the claimant's symptoms worsened and the worsening of those symptoms is consistent with the unchanged diagnostic findings. 61 Wn.2d 439. The *Wilber* court explained a claim "may not be reopened if the physician's opinion is based solely upon what the workman related to him," but that "all requirements of proof are met" if the worker's complaints "can be verified by the symptoms disclosed by the physician's clinical examination." 61 Wn.2d at 446. Accordingly, the Court of Appeals went against *Wilber* when it found against Ms. Hendrickson because she "did not produce any objective medical evidence that her industrial injury became worse." 2 Wn. App.2d at 357.

2. This Case is Closely Analogous to the Facts in *Wilber*.

Further, the facts in this case are nearly identical to those in *Wilber*. In *Wilber*, a worker sustained an industrial injury whereby he ruptured an intervertebral disc in his back. 61 Wn.2d at 441. The worker chose not to

have surgery to repair the disc and his claim was closed. *Id.* Because of his ruptured disc, the worker experienced acute flare-ups of that became increasingly frequent and incapacitating. *Id.* at 441-42. He applied to reopen his claim on the basis of aggravation, despite the fact that the objective evidence supporting his symptoms, his ruptured disc, was the same as when the claim closed. *Id.* at 440-41, 450-51. Like the claimant in *Wilber,* Ms. Hendrickson applied to reopen her claim because her increased symptoms related to her industrial injury made her unable to function. CP at 169, 116.

The worker's attending physician in *Wilber* testified on his behalf that the worker was in more pain at the time of his reopening application than he was at claim closure. 61 Wn.2d at 442. He also testified that such an increase in symptoms was consistent with the worker's injuries and that he felt that the worker's subjective complaints were "likely true from [his] knowledge of patients of a similar type." *Id.* at 443. This is almost the same as Dr. Martin testifying that Ms. Hendrickson's symptoms had worsened, that her worsening symptoms fit the pathology on her imaging studies, and that it is not unusual for such worsening to occur "***without demonstrable changes*** on the imaging studies." CP at 169-171 (emphasis added). In fact, the Department has conceded that "Dr. Martin did opine that some of Ms. Hendrickson's subjective complaints corresponded to diagnostic imaging that he had ordered." CP at 65.

The attending physician in *Wilber* repeatedly testified that there was no change in the worker's objective symptoms. 61 Wn.2d at 450 (the doctor testified that he "couldn't find any further objective signs" and agreed that "there is no significant difference in the objective symptoms"). However, he nonetheless stated that there was a worsening of the condition because the increase in reported symptoms was consistent with the worker's injuries. *Id.* at 443. Similarly, Dr. Martin opined, based on both Ms. Hendrickson's subjective complaints and the objective diagnostic findings, that, Ms. Hendrickson's symptoms were worse on a medically more probable than not basis ***while also agreeing that there was no significant change*** in the MRI findings. CP at 169-170 (Emphasis added). Again, similar to the physician in *Wilber* he explained this discrepancy as ***it is not unusual*** for such worsening to occur "***without demonstrable changes*** on the imaging studies." CP at 169-171 (emphasis added).

As was the physician who testified on behalf of the worker in *Wilbur*, Dr. Martin was the attending physician under the subject claim. *Wilbur*, 61 Wn.2d at 441; CP at 162. As attending physician, Dr. Martin's opinions are entitled to special consideration. *Hamilton*, 111 Wn.2d 569. Despite the lack of change in the objective findings, the Court held that the worker met his burden of proof to show aggravation. 61 Wn.2d. at 446, 449.

Because the instant facts are so clearly analogous to those in *Wilber*, it was clear error for the Court of Appeals to find differently in this case.

3. *Wilber* is consistent with a Trend in the Courts to Not Require Objective Findings of Conditions that Worsen Without Them.

Further, the rule in *Wilber* is consistent with a trend in the courts to not require objective evidence of worsening on reopening applications for conditions that do not typically yield objective findings. *See e.g. Price v. Dep't of Labor & Indus.*, 101 Wn.2d 520, 682 P.2d 307 (1984); *Felipe v. Dep't of Labor & Indus.*, 195 Wn. App. 908, 381 P.3d 205 (Div. I, 2016); *Lee v. Dep't of Labor & Indus.*, 54 Wn. App. 1057 (Div. III, 1989); *In re Charles Lewis,* BIIA Dec. 07 16483 (2008). Because, Dr. Martin testified it is not unusual for conditions like Ms. Hendrickson's to worsen without a change in the diagnostic findings, the facts of this case fit that trend.

C. RCW 51.32.160 Contains No Requirement that Aggravation be Shown by "Objective" Evidence.

The Court of Appeals affirmed the superior court because it held that Ms. Hendrickson "did not produce any objective medical evidence that her industrial injury became worse after the Department closed the claim in May 2012." *Hendrickson*, 2 Wn. App.2d at 357-358. However, the Act does not contain an objective evidence requirement to establish aggravation of an industrially-related condition. Further, the purpose behind the judicial creation of any such requirement is not frustrated by the Facts in this matter.

Objective findings are those within the independent knowledge of the doctor, because they are perceptible to persons other than a patient. *Hinds v. Johnson*, 55 Wn.2d 325, 347 P. 2d 828 (1959).[2] Subjective findings are those perceived only by the senses and feelings of a patient. *Hinds*, 55 Wn.2d 325. The statutory authority to reopen a closed claim for aggravation is governed by RCW 51.32.160. It provides:

> If aggravation, diminution, or termination of disability takes place, the director 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 provided for the same, or in a proper case terminate the payment: PROVIDED, That the director may, upon application of the worker made at any time, provided proper and necessary medical and surgical services as authorized under RCW 51.36.010. The department shall promptly mail a copy of the application to the employer at the employer's last known address as shown by the records of the department.

RCW 51.32.160(1)(a). The statute contains no requirement for "objective" evidence of worsening. Any such requirement is purely a creature of judicial creation. *Wilber*, 61 Wn.2d at 446.

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[2] *Hinds*, also stands for the proposition that it is less necessary for a treating physician, such as Dr. Martin, to base his testimony upon objective or clinical findings than a physician's who sees a person for the sole purpose of testifying at trial because "a patient seeking treatment knows that he serves his own best interest by telling the truth in order that his doctor may arrive at a correct diagnosis of his ailment," resulting in a "high warranty of truth-fulness." 55 Wn.2d at 327.

The Supreme Court explained the purpose and reasoning behind the judicial creation of the objective evidence requirement in *Kresoya v. Dep't of Labor & Indus.*:

> The rule that an expert medical witness may not base his opinion upon subjective symptoms alone is designed to protect the industrial insurance fund against unfounded claims of aggravation. If such claims could be established by the testimony of a physician who based his opinion ***entirely upon*** what the claimant told him, it would open the door to fraudulent claims, as well as those mistakenly made in good faith. A claimant might honestly believe his subsequent condition arose out of his original injury, but this is a medical question and an opinion thereon must be derived from sources other than the claimant's statement.

40 Wn.2d 40, 45, 240 P.2d 257 (1952) (emphasis added). The purpose behind the judicially-created objective evidence requirement is not frustrated in this case because Ms. Hendrickson's reopening application is not predicated solely upon her subjective symptoms. Indeed, the Court in *Kresoya* stated that the protective rule that a physician may not rely solely upon a worker's subjective symptoms "must not be applied to situations where there is a combination of subjective and objective symptoms, which an expert may be able to tie together." 40 Wn.2d at 45. Such is the case here. Dr. Martin testified based on his review of all medical records and his long-time treatment of Ms. Hendrickson. He made clear that his opinion that Ms. Hendrickson's condition had worsened since May 10, 2012 was not only because she was having worsening symptoms, but that those symptoms fit

with the pathology of her injury based upon her imaging studies. CP at 171. Because Dr. Martin is not relying solely upon Ms. Hendrickson's report of her symptoms, the purpose behind requiring objective findings is not frustrated. Accordingly, the courts' requirement for objective evidence of worsening need not apply here. This is especially so because the facts of this case are closely analogous to those in *Wilber*.

D. The Organization of the Department's Categories of Permanent Impairment Show Adoption of the Reasoning in *Wilber*.

The organization of the Department's categories of dorsolumbar and lumbosacral impairment contemplate *Wilber*. One way that the Department determines if a worsening has occurred for purposes of RCW 51.32.160 is to examine whether an injured worker's condition proximately caused by her industrial injury has worsened according to the categories of permanent partial impairment corresponding to that condition. See *Picich v. Dep't of Labor & Indus.*, 59 Wn.2d 467, 467, 368 P.2d 176, 176 (1962)("By reopening the claim and making the increased award, the department itself decided that respondent's condition had changed in the interval."). In fact, the Court of Appeals in this case refers to the written opinion of a non-testifying expert that adjudicating Ms. Hendrickson's reopening application

required that she be worse than the Category 4 dorsolumbar and lumbosacral impairment that she was awarded at claim closure.[3]

The categories of impairment are defined in the WAC. The categories are listed in order of increasing impairment with the higher categories including the impairments in the lower categories unless otherwise specified. WAC 269-20-220(1)(g). A person need not exhibit all or even most of the features listed in a category for it to correctly describe their level of impairment.[4] The categories of permanent low back impairments are defined in WAC 296-20-280, which includes:

> (1) No objective clinical findings. **Subjective complaints and/or sensory losses may be present or absen**t.
> (2) Mild low back impairment, with mild intermittent objective clinical findings of such impairment but no significant X-ray findings and no significant objective motor loss. **Subjective complaints and/or sensory losses may be present.**
> (3) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment but without significant X-ray findings or significant objective motor loss.
> This and subsequent categories include: **The presence or absence of reflex and/or sensory losses; the presence or absence of pain locally and/or radiating into an extremity or extremities**; the presence or absence of a laminectomy or discectomy with normally expected residuals.
> (4) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment, with mild but significant X-ray findings and with

[3] The Court of Appeals did not, however, state such a requirement applied.
[4] A category selection is made by comparing the condition of the injured worker with the conditions described in the categories and selecting the most appropriate category. WPI 155.08 6th.

> mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group. This and subsequent categories include the presence or absence of a surgical fusion with normally expected residuals.
> (5) Moderate low back impairment, with moderate continuous or marked intermittent objective clinical findings of such impairment, with moderate X-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.

(emphasis added).

The emphasized portions show that categories three and higher may or may not include the presence subjective complaints of pain. This makes clear that the categories contemplated a worsening of a worker's condition by the increasing of subjective pain symptoms without any other change in objective findings. Accordingly, without a change in one's diagnostic studies, one could have a Category 4 impairment with little to no pain complaints, then after worsening have a Category 5 impairment with significant pain complaints. This is perfectly in line with the testimony of Ms. Hendrickson and Dr. Martin. CP at 121, 172, 174.

One definition of "worse" is "more unfavorable, difficult, unpleasant, or painful." Merriam-Webster Online Dictionary. 2018. www.merriam-webster.com/dictionary/worse (5 Apr. 2018). The meaning of words used in the categories, "unless the text or context clearly indicates the contrary," is the meaning attached to the words in normal usage. WAC 296-20-200(3). Something that becomes more painful is worse by

definition. That common-sense definition is consistent with the fact that the wording of the categories of low back impairments contemplates an increase in category based on an increase in pain complaints.

E. The Court of Appeals Committed Error when it Affirmed the Superior Court because Ms. Hendrickson Established a Prima Facie Case of Aggravation under RCW 51.32.160.

The Court of Appeals erred in affirming the superior court because it was not proper to grant the Department's motion to dismiss where Ms. Hendrickson presented evidence of her right to relief under RCW 51.32.160. The Department made its motion to dismiss under CR 41 (b)(3). CP at 46. Dismissal under CR 41(b)(3) is only proper "if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff." *Willis v. Simpson Inv. Co.*, 79 Wn. App. 405, 410, 902 P.2d 1263 (Div. II, 1995) (citing *Baldwin v. City of Seattle,* 55 Wn. App. 241, 247, 776 P.2d 1377 (Div. I, 1989)).

Here, dismissal was improper because the evidence in the record supports a finding that Ms. Hendrickson had a right to relief under RCW 51.32.160. A case may be reopened if the "injured workman's complaints can be verified by the symptoms disclosed by the physician's clinical examination, all requirements of proof are met." *Wilber*, 61 Wn.2d at 446. Ms. Hendrickson's reopening application was supported by Dr. Martin's medical testimony that the conditions caused by her industrial injury had

worsened and that that worsening was verified by objective examination findings. CP at 171. That testimony is sufficient under *Willis* to show evidence, or reasonable inferences therefrom, that support Ms. Hendrickson's right to relief. 79 Wn. App. at 410.

F. The Underlying Policy of the Industrial Insurance Act Dictates that Ms. Hendrickson's Presentation of Undisputed Medical Testimony Satisfies RCW 51.32.160.

The Industrial Insurance Act was established to protect and benefit injured workers. RCW 51.04.010 declares "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault." Similarly, RCW 51.12.010 provides that the Industrial Insurance Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment," a rule that has been repeatedly stated by our Supreme Court. *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 257, 26 P.3d 903 (2001) (citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1995)); *Clauson*, 130 Wn.2d at 584 ("All doubts as to the meaning of the Act are to be resolved in favor of the injured worker").

The guiding principle in applying the Act is that it is to be liberally construed for the purpose of providing compensation to all covered employees injured in their employment. *Dennis v. Dep't of Labor & Indus.*,

109 Wn.2d 467, 470, 745 P.2d 1295 (1987). The Supreme Court has further mandated that "any doubt as to the meaning of the workers' compensation law be resolved in favor of the worker." *Clauson,* 130 Wn.2d at 586.

Ms. Hendrickson is the injured worker. Liberal construction dictates that the question of whether Dr. Martin's undisputed medical opinion satisfies the requirements of RCW 51.32.160 be resolved in favor of Ms. Hendrickson. To construe *Wilbur* to require a change in objective would be to interpret it against injured workers – contra to the underlying policy of the Act. Further, to use such a construction against a worker, as here, whose condition can worsen "without demonstrable changes on the imaging studies," is to go both against the medical evidence and the Act's policy to deprive that worker of the benefits to which he or she is entitled.

VI. CONCLUSION

For the foregoing reasons, Ms. Hendrickson respectfully requests the Court accept review of the Court of Appeals' January 29, 2018 decision.

Dated this 6th day of April, 2018.

Respectfully submitted,
Vail, Cross and Associates

By: _____
Ryan A. Johnson, WSBA# 48243
Attorney for Petitioner

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 6th day of April, 2018, the document to which this certificate is attached, Appellant's Petition for Review, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel and Appellant as follows:

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DATED this 6th day of April, 2018.

Lynn M. Venegas

LYNN M. VENEGAS, Secretary

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TERA L. HENDRICKSON, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 75475-1-I PUBLISHED OPINION FILED: January 29, 2018

SCHINDLER, J. — Under the Industrial Insurance Act, Title 51 RCW, an injured worker can file an application to reopen a claim to obtain additional medical treatment for aggravation of the injury.[1] Established case law requires the worker to present some objective medical evidence that the injury has worsened since the closure of the claim. In 2007, Tera Hendrickson suffered a mid- and low-back injury while working as a truck driver. In 2012, the Washington State Department of Labor and Industries closed the claim with a permanent partial disability award for a category 4 permanent dorso-lumbar and/or lumbosacral impairment. In September 2013, Hendrickson filed an application to reopen her claim. Substantial evidence supports finding Hendrickson did not present objective medical evidence that the injury worsened since the department closed the

[1] RCW 51.32.160.

claim. We affirm the superior court decision upholding dismissal of the application to reopen.

FACTS

Tera Hendrickson worked for Staffmark LLC-Pacific as a truck driver. On October 9, 2007, Hendrickson "heard and felt a pop" in her middle and lower back when she stepped out of a truck at work. On October 19, Hendrickson filed a claim for disability benefits. The Washington State Department of Labor and Industries (Department) allowed the claim and paid benefits. Hendrickson underwent back surgery and received several rounds of physical therapy, cortisone injections, and laser treatments.

Hendrickson continued to have "pain in her head, neck, mid-back, and low back, as well as sciatic pain . . . and numbness." When Hendrickson saw orthopedic spine surgeon Dr. Michael Martin on April 16, 2012, she reported "ongoing pain all over." Dr. Martin diagnosed Hendrickson with "postlaminectomy syndrome lumbar spine, sprain-strain, and cervical radiculopathy."

On May 10, 2012, the Department closed her claim with a permanent partial disability award for "category 4 permanent dorso-lumbar and/or lumbosacral impairments."[2]

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[2] WAC 296-20-280(4) defines a category 4 permanent dorso-lumbar and lumbosacral impairment as follows:

> Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment, with mild but significant X-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.

Hendrickson moved to Hawaii and in May 2013, enrolled in school to complete her bachelor's degree. In July 2013, Hendrickson moved back to Washington and started working for Freight Northwest, driving a truck with flatbed trailers.

On September 25, 2013, Hendrickson filed an application to reopen her industrial injury claim. Hendrickson saw Dr. Martin on January 6, 2014. Hendrickson "was again complaining of pain . . . 'all over.' " Dr. Martin examined Hendrickson and ordered "repeat [MRI[3]] scans of her cervical and lumbar spine[ ]." The 2014 MRI scans were "essentially unchanged from the scans performed previously in the cervical spine in 2011 and the lumbar spine in 2012."

On February 12, 2014, the Department denied the application to reopen the claim. The "Notice of Decision" states, "The medical record shows the conditions caused by the injury have not worsened since the final claim closure." Hendrickson filed a motion for reconsideration. The Department issued a Notice of Decision affirming denial of the application to reopen.

Hendrickson appealed the decision to the Washington State Board of Industrial Insurance Appeals (Board). An industrial appeals judge (IAJ) held a hearing. Hendrickson, her daughter, and a friend of Hendrickson's testified. Hendrickson submitted the deposition testimony of Dr. Martin. The IAJ admitted the deposition testimony into evidence.

Dr. Martin testified that when he saw Hendrickson on January 6, 2014, he performed a "review of symptoms" and a physical examination. The review of symptoms was "unremarkable." The physical examination showed "[m]otor strength was normal in the upper and lower extremities" but "[s]ensation was decreased in the

[3] Magnetic resonance imaging.

C6[4] dermatome on the left, the C7 dermatome on the left, the C8 and T1[5] dermatomes also on the left." Dr. Martin ordered repeat MRI scans.

Dr. Martin compared the results of the January 17, 2014 MRI scans with the 2011 and 2012 MRI scans. Dr. Martin testified that "the problems indicated by the MRI" are "considered objective." Dr. Martin testified the MRI results were "essentially unchanged." Dr. Martin testified the January 2014 MRI showed "multilevel cervical spine disk and facet degeneration" that was "similar when compared" to the August 18, 2011 MRI.

> Q What, if anything, did you learn from those [2014] scans?
> A They were essentially unchanged from the scans performed previously in the cervical spine in 2011 and the lumbar spine in 2012.

Dr. Martin said Hendrickson "had similar symptoms for several years dating from [the] injury of 2007." Dr. Martin testified on "a medically more-probable-than-not basis," Hendrickson was "feeling worse."

> Q . . . In this case, on a medically more-probable-than-not basis, do you believe that Ms. Hendrickson's symptoms are worse?
> A Yes, she is feeling worse.

Dr. Martin stated, "I cannot disagree" with the conclusion of independent medical examiner Dr. James Kopp that there was " 'nothing on the physical examination or in the MRI studies that would indicate criteria that would qualify for objective evidence of reopening.' " Dr. Kopp concluded, in pertinent part:

> "The reopening application indicates we need to determine that she is worse than a Category 4, which apparently has been awarded for her dorsolumbar and lumbosacral impairment. There is nothing on the physical examination that would suggest worse than a Category 4. . . . While we sympathize that the claimant has ongoing discomfort, she is

[4] Cervical vertebra 6.

[5] Thoracic vertebra 1.

> functional and is working as a truck driver, and there is nothing on the physical examination or in the MRI studies that would indicate criteria that would qualify for objective evidence of reopening."

When asked what evidence "supports reopening of the claim," Dr. Martin testified, "I believe that she subjectively feels worse." Dr. Martin testified that in his opinion, the "conditions related to the October of 2007 industrial injury have worsened . . . [s]ubjectively." Dr. Martin conceded that there were "no objective findings of worsening" and that his opinion was based on her "subjective complaints of . . . pain."

> Q There are no objective findings of worsening in this case, are there, Doctor?
> A No.
> Q They're all based on subjective complaints of essentially pain that she is experiencing?
> A Yes.

At the conclusion of the evidence presented by Hendrickson, the Department filed a motion to dismiss the appeal to reopen the claim. The Department argued Hendrickson did not present any objective medical evidence that her condition had worsened. Hendrickson argued her subjective complaints of increased pain were "supported by the objective evidence of the MRI."

The IAJ granted the motion to dismiss the appeal. The IAJ found Hendrickson did not present any "objective evidence of worsening." The IAJ issued a "Proposed Decision and Order." The June 8, 2015 Proposed Decision and Order states, in pertinent part:

> Michael Martin, M.D., testified that he is an orthopedic surgeon, certified in his field. He has been Tera Hendrickson's treating physician since the mid-1990s. . . .
>
> When seen in April 2012, Ms. Hendrickson complained that she had ongoing pain all over. When seen in January 2014, she again complained that she had pain all over. . . . Dr. Martin ordered scans of her cervical and lumbar spine. They were essentially unchanged from the

> scans of her cervical spine in 2011 and lumbar spine in 2012. Some of her symptoms fit with the findings on those imaging studies.
>
> Ms. Hendrickson's diagnoses were postlaminectomy syndrome lumbar spine, strain/sprain, and cervical radiculopathy, related to her October 9, 2007 industrial injury. She had similar symptoms for several years dating from that injury of 2007.
>
> Comparing Ms. Hendrickson's cervical MRIs of August 2011 and January 2014, Dr. Martin doesn't see much difference. [Hendrickson] had increased subjective complaints in January 2014, but it isn't unusual for symptoms to worsen without any demonstrable change on imaging studies. Her worsening symptoms fit the pathology on her imaging studies. By January 2014, her diagnoses were unchanged, but she was more symptomatic. Dr. Martin agrees that there is nothing on examination suggesting an impairment worse than the Category 4 previously awarded for Ms. Hendrickson's dorsolumbar and lumbosacral impairment. But he believes that subjectively she feels worse. There are no objective findings of worsening in this case.

The IAJ rejected Hendrickson's argument that Dr. Martin's testimony supported finding "there is no way to objectively measure the progression of her injury-related condition." The IAJ found Dr. Martin "never said that. In fact, he compared MRIs" and found no "objective progression of her condition."

> Medical testimony is required to show that there actually was a worsening or aggravation between the terminal dates. Lewis v ITT Continental Baking [Co.], 93 Wn.2d 1[, 603 P.2d 1262] (1979). It must be based at least in part on objective medical findings. Dinnis v. Department of Labor & Indus., 67 Wn.2d 654[, 409 P.2d 477 (1965)]. The exception is when there is no way to objectively measure the progression of a condition. In re Charles Lewis, [No.] 07 16483 [(Wash. Bd. of Indus. Appeals Oct. 10, 2008)]. Claimant suggests that Dr. Martin established that there is no way to objectively measure the progression of her injury-related condition. But Dr. Martin never said that. In fact, he compared MRIs to see if there was any objective progression of her condition, and he could find none. . . . We are left with nothing contrary to his conclusion that there are no objective findings of worsening in this case.

Hendrickson filed a petition for review of the Proposed Decision and Order with the Board. The Board adopted the Proposed Decision and Order as the "Decision and

Order of the Board" and denied the appeal. Hendrickson filed an appeal in superior court.

The superior court affirmed the decision of the Board. The court found Hendrickson "did not prove objective evidence of worsening of the conditions proximately caused by the October 9, 2007 industrial injury between May 10, 2012, and September 8, 2014" and affirmed the Department's denial of her application to reopen the industrial injury claim.

ANALYSIS

Hendrickson contends substantial evidence does not support the finding that she did not prove objective worsening of her condition and the superior court erred in affirming the decision to dismiss the application to reopen her industrial injury claim.

The Industrial Insurance Act (IIA), Title 51 RCW, governs judicial review of the decision to deny the application to reopen the industrial injury claim. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 179, 210 P.3d 355 (2009). In an appeal to superior court, the Board's decision is prima facie correct. RCW 51.52.115. The superior court acts in an appellate capacity and reviews the decision of the Board de novo solely on the evidence and testimony presented to the Board. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).

The Board decision is prima facie correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; Spivey v. City of Bellevue, 187 Wn.2d 716, 729, 389 P.3d 504 (2017); Ruse, 138 Wn.2d at 5. The party challenging the decision must prove by a preponderance of the evidence "a prima facie case for the relief sought in such appeal." RCW 51.52.050(2)(a); Ruse, 138 Wn.2d at 5; Dep't of Labor & Indus.

v. Rowley, 185 Wn.2d 186, 206, 378 P.3d 139 (2016). The superior court may substitute its own findings and decision if it finds from a " 'fair preponderance of credible evidence' " that the Board findings and decision were incorrect. Ruse, 138 Wn.2d at 5[6] (quoting McClelland v. ITT Rayonier, Inc., 65 Wn. App. 386, 390, 828 P.2d 1138 (1992)).

Our review of the superior court decision is governed by RCW 51.52.140. RCW 51.52.140 states that an "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." The statutory scheme results in a different role for this court than is typical for appeals from administrative decisions. Rogers, 151 Wn. App. at 180. Rather than sitting in the same position as the superior court, under the IIA, we review only " '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.' " Rogers, 151 Wn. App. at 180 (quoting Watson v. Dep't of Labor & Indus., 133 Wn. App. 903, 909, 138 P.3d 177 (2006)); Ruse, 138 Wn.2d at 5. 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). We do not substitute our "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; Cantu, 168 Wn. App. at 22. We review 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).

[6] Internal quotation marks omitted.

In granting a motion to dismiss under CR 41(b)(3), the court may weigh the evidence and make a factual determination that the plaintiff has failed to come forth with credible evidence of a prima facie case, or the court may view the evidence in the light most favorable to the plaintiff and rule as a matter of law that the plaintiff has failed to establish a prima facie case. In re Dependency of Schermer, 161 Wn.2d 927, 939, 169 P.3d 452 (2007); Rufin v. City of Seattle, 199 Wn. App. 348, 357, 398 P.3d 1237 (2017). Where the superior court enters findings, appellate review is limited to whether substantial evidence supports the findings and whether the findings support the conclusions of law. Schermer, 161 Wn.2d at 939-40.

After the Department makes a final determination and closes an industrial injury claim, the worker has up to seven years to file an application to reopen the claim for additional medical treatment or compensation for aggravation of the industrial injury. RCW 51.32.160(1)(a); Tollycraft Yachts Corp. v. McCoy, 122 Wn.2d 426, 432, 858 P.2d 503 (1993); Cantu, 168 Wn. App. at 19. RCW 51.32.160(1)(a) provides, in pertinent part:

> If aggravation . . . of disability takes place, the director 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 provided for the same, or in a proper case terminate the payment.

Established case law requires the worker to present medical testimony of a causal connection based on "some objective medical evidence" that the injury "has

worsened since the initial closure of the claim."[7] Tollycraft Yachts, 122 Wn.2d at 432;[8] Phillips v. Dep't of Labor & Indus., 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); Lewis, 93 Wn.2d at 3 ("Medical evidence—based at least in part on objective symptoms—must show that an aggravation of the industrial injury resulted in increased disability."); Dinnis, 67 Wn.2d at 656 ("In an aggravation case, the burden of proving a claimed disability to be greater on the last terminal date than on the first terminal date is upon the claimant; and to prevail he must produce medical evidence to that effect based, at least in part, upon objective findings of a physician."); Page v. Dep't of Labor & Indus., 52 Wn.2d 706, 709, 328 P.2d 663 (1958) (the extent of the disability at any relevant date must be determined by medical testimony and some objective evidence); Moses v. Dep't of Labor & Indus., 44 Wn.2d 511, 517, 268 P.2d 665 (1954) (To "establish a claim for an increase in an award as a result of the aggravation of a prior industrial injury, the burden is on the claimant to produce medical evidence, some of it based on objective findings, to prove that there has been an aggravation of the injury which resulted in increased disability."); Kresoya v. Dep't of Labor & Indus., 40 Wn.2d 40, 44, 240 P.2d 257 (1952)[9] ("[W]hether the condition of an injured workman had become aggravated since his claim had been closed . . . [can] be established only by medical testimony, and . . . a claim for aggravation is not sustained by such testimony if it is based upon subjective symptoms alone."); Felipe v. Dep't of Labor & Indus., 195 Wn. App. 908, 914,

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[7] The requirement that the worker provide objective medical evidence does not apply "if the symptoms of a condition are exclusively subjective in nature." Felipe v. Dep't of Labor & Indus., 195 Wn. App. 908, 918, 381 P.3d 205 (2016); Price v. Dep't of Labor & Indus., 101 Wn.2d 520, 528, 682 P.2d 307 (1984) (objective medical evidence is not required in workers' compensation cases involving psychiatric disability because symptoms of psychiatric injury are necessarily subjective in nature). On appeal, Hendrickson does not argue that this exception applies.

[8] Emphasis omitted.

[9] Emphasis in original.

381 P.3d 205 (2016) ("case law requires the worker to support a request to reopen with some objective medical evidence").

The Supreme Court defines "objective symptoms" as "those within the independent knowledge of the doctor, because they are perceptible to persons other than a patient." Hinds v. Johnson, 55 Wn.2d 325, 327, 347 P.2d 828 (1959)); see also Felipe, 195 Wn. App. at 915. By contrast, "subjective symptoms" are "those perceived only by the senses and feelings of a patient. The doctor must be told of them because he cannot himself perceive them." Hinds, 55 Wn.2d at 327; see also Felipe, 195 Wn. App. at 915.[10]

In Kresoya, the Washington Supreme Court notes, "A claimant might honestly believe his subsequent condition arose out of his original injury, but this is a medical question and an opinion thereon must be derived from sources other than the claimant's statement." Kresoya, 40 Wn.2d at 45. But the medical expert "may be able to tie together" subjective and objective symptoms. Kresoya, 40 Wn.2d at 45. The physician "has a right to make proper use of [history from the claimant] in connection with objective findings which he as an expert may make by an examination, the making of tests, the use of X-ray pictures and other proper data." Kresoya, 40 Wn.2d at 45-46.

[10] WAC 296-20-220(1)(i) defines "objective physical or clinical findings" as "those findings on examination which are independent of voluntary action and can be seen, felt, or consistently measured by examiners." WAC 296-20-220(1)(j) defines "subjective complaints or symptoms" as "those perceived only by the senses and feelings of the person being examined which cannot be independently proved or established."

Hendrickson argues substantial evidence does not support finding she "did not prove objective evidence of worsening" of her industrial injury between May 10, 2012 and September 8, 2014.[11] Finding of fact 1.6 states:

> Ms. Hendrickson did not prove objective evidence of worsening of the conditions proximately caused by the October 9, 2007 industrial injury between May 10, 2012, and September 8, 2014.

Hendrickson claims subjective complaints verified by a doctor establishes a prima facie case to reopen an industrial injury claim. Hendrickson asserts that as in Wilber v. Department of Labor & Industries, 61 Wn.2d 439, 378 P.2d 684 (1963), the testimony of Dr. Martin established a prima facie case to reopen her claim because her subjective complaints were supported by the MRI scans. Hendrickson concedes the MRI scans taken before the claim closed in 2012 and the MRI scans in 2014 do not show any change. Hendrickson argues Wilber holds that "a claim could be re-opened where objective evidence was identical at the close of the claim as it was at the re-opening application." We disagree.

In Wilber, the undisputed medical evidence established Wilber's "fifth intervertebral disc ruptured." Wilber, 61 Wn.2d at 441. During periods of an acute attack, Wilber was "totally disabled" but during periods of remission, "he is able to get about." Wilber, 61 Wn.2d at 441. Doctors advised surgery to repair the ruptured disc. Because of conflicting medical opinions about success, Wilber did not undergo surgery for the ruptured disc. Wilber, 61 Wn.2d at 441. The Department closed the claim. Wilber, 61 Wn.2d at 440. Approximately eight months later, Wilber filed an application

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[11] Hendrickson also argues the doctrine of liberal construction of the IIA resolves any factual conflict in her favor. The doctrine of liberal construction of the IIA "does not apply to questions of fact." Dep't of Labor & Indus. v. Ramos, 191 Wn. App. 36, 39 n.1, 361 P.3d 165 (2015); see Raum v. City of Bellevue, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012); Ehman v. Dep't of Labor & Indus., 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

to reopen the claim. Wilber, 61 Wn.2d at 440. Wilbur's doctor testified that the "acute attacks had increased to the point where [Wilber] was practically immobilized and that the intervals when free of pain were less frequent." Wilber, 61 Wn.2d at 441. The doctor testified "unequivocally" that unless the ruptured disc was surgically corrected, it "would become progressively worse, and he advised surgery." Wilber, 61 Wn.2d at 442. Wilber's doctor also "expressed the unqualified opinion that, in periods of acute attack, a person suffering from the same affliction would be totally disabled," and Wilber's acute attacks were now more frequent and disabling. Wilber, 61 Wn.2d at 443, 441. The examining physician for the Department testified the "left Achilles reflex was decreased" and "is a significant finding in case of ruptured intervertebral discs," and Wilber's complaints of pain were "substantially objective." Wilber, 61 Wn.2d at 443.

The Department and the Board denied the application to reopen the claim. Wilber, 61 Wn.2d at 440. The superior court set aside a jury verdict in favor of Wilber. Wilber, 61 Wn.2d at 440. The Supreme Court reversed. The court held as a general rule, "[a] case may not be reopened if the physician's opinion is based solely upon what the workman related to him." Wilber, 61 Wn.2d at 446. But "[i]f, on the other hand, the injured workman's complaints can be verified by the symptoms disclosed by the physician's clinical examination, all requirements of proof are met." Wilber, 61 Wn.2d at 446. The court concluded Wilber's complaints of increased pain were supported by clinical examination that established increased disability from an unrepaired ruptured disc. Wilber, 61 Wn.2d at 446, 449.

> There is not a great deal of controversy respecting the facts. The application to reopen was provoked by a flare-up or acute symptoms which totally incapacitated appellant from any gainful employment. Indeed, the testimony of the physicians employed by the department for

> the purpose of testifying, was that the history of cases of ruptured intervertebral discs was one of acute exacerbation and remission, and that the symptoms complained of by the appellant were those customarily disclosed in the treatment of cases of unrepaired ruptured intervertebral discs. The department's own physician witnesses testified that there was a lessening of the Achilles reflex in the left foot and that this was a classic symptom of a ruptured disc. It would be impossible to find a case in which the complaints of the injured workman were more completely confirmed by clinical examination than that disclosed by the present record.

Wilber, 61 Wn.2d at 449.

Here, unlike in Wilber, Hendrickson's subjective complaints of increased pain are not supported by any objective medical findings that her condition changed after the Department closed her claim. Dr. Martin's undisputed testimony establishes her symptoms remained the same and there was no change in the MRI scans taken before the claim was closed and after Hendrickson filed her application to reopen. Dr. Martin testified that Hendrickson's subjective symptoms "fit with the findings on the MRI scan." Dr. Martin said subjective symptoms "can worsen without any demonstrable changes on the imaging studies," but "[t]hey don't always." Dr. Martin testified that when he saw Hendrickson on April 16, 2012, just before the claim was closed, Hendrickson reported she was still "having ongoing pain all over." Dr. Martin stated that when he saw Hendrickson again on January 6, 2014, after she filed her application to reopen the claim, she was "again complaining of pain, quote, 'all over.' " Although Dr. Martin testified that on a more probable than not basis she "subjectively feels worse," Dr. Martin testified unequivocally that there were "no objective findings of worsening."[12]

Because Hendrickson did not produce any objective medical evidence that her industrial injury became worse after the Department closed the claim in May 2012,

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[12] The record also does not support Hendrickson's argument that as in Wilber, she is "incapacitated." The record shows that in August 2014, Hendrickson took "another trucking position" working as the "night supervisor dispatch" and worked occasionally as a truck driver.

substantial evidence supports the superior court finding and the decision to dismiss her application to reopen the claim. We affirm the decision of the superior court.

WE CONCUR:

Woodrow, Becky

From: Woodrow, Becky
Sent: Thursday, March 15, 2018 7:42 AM
To: 'Andrea@2arrows.net'; 'randyf@co.adams.wa.us'; 'f.chamberlain@co.island.wa.us'; 'gverhoef@spokanecounty.org'
Subject: 94054-1 - State of Washington v. Justin Dean Vanhollebeke
Attachments: 94054-1 Opinion.pdf

Importance: High

Counsel:

An opinion was filed today in *Supreme Court No. 94054-1- State of Washington v. Justin Dean Vanhollebeke* A copy of the opinion is attached to this e-mail.
In accordance with Rule of Appellate Procedure 14.4, claims for costs by the prevailing party must be served and filed in this office within 10 days after the filing of this opinion, or claims for costs will be deemed waived. NOTE: The per page amount that may be allowed for briefs and original documents, pursuant to RAP 14.3(a)(3), is $2.00 per page. If this is an indigent review, please note the limitations on recovery of costs pursuant to RAP 14.3(c).
If this Court's opinion awarded reasonable attorneys fees for this review, an affidavit, pursuant to RAP 18.1(d), should be filed with this Court within 10 days after the opinion was filed.

This will be the only copy you will receive; a hard copy will not follow by mail. If you have difficulty opening or viewing the attachment, please contact me.

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