

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 38391-8-II
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

CHUNYK & CONLEY/QUAD C,

Respondent

v.

PATRICIA BRAY,

Appellant

REPLY BRIEF OF APPELLANT PATRICIA BRAY

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PM 4-1-09

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REPLY TO EMPLOYER'S ISSUES

Employer's Issue A: Burden of Proof.

Injured worker Ms. Bray has no dispute with the employer's statement of the burden of proof. The jury was properly instructed at Instruction 12 that the decision of the Board of Industrial Insurance Appeals was presumed to be correct, and that the employer had the burden to show that the Board's decision was incorrect. The Board of Industrial Insurance Appeals' decision itself was provided to the jury in Instruction 4. After several long paragraphs of procedural history, Instruction 4 recited the Board finding:

3. The claimant is 61 years old. She is a registered nurse with 35 years in the nursing profession. On the date of her August 25, 1977 industrial injury, she has a pre-existing right wrist Colles' fracture that was disabling.
4. During the period from April 1, 1999, through May 30, 2003, inclusive, the residual effects of the claimant's August 25, 1977 industrial injury precluded her from obtaining or performing reasonable continuous gainful employment in the competitive labor market when considered in conjunction with the claimant's age, education, work history, and pre-existing disabilities.

It is, of course, injured worker Ms. Bray's contention that the jury was incorrect when it determined there was not a fair preponderance of the

evidence to support the Board's decision that she was unable to work. The overarching question is, could the jury reasonably be expected to fairly evaluate the evidence supporting the Board of Industrial Insurance Appeals' decision if the jury was not told precisely what the industrial injuries were, and that it was not the jury's job to identify the industrial injuries.

Employer's Issue B: Objective Evidence vs. Subjective Complaints.

Employer argues that there is a lack of objective evidence of injury. This argument is flawed for two reasons -- both on the law and on the facts. First, the legal authority relied upon by counsel relates to the quality of evidence required to determine whether an L&I claim can be reopened, which requires a showing of objective evidence of injury. Reopening cases do in fact require a showing of objective evidence of worsening, proximately related to the original industrial injury. However, the case before us is not a reopening case; Ms. Bray's claim had never been closed. Her issue before the Board of Industrial Insurance Appeals was whether she was unable to be gainfully employed from March 1, 1999 through May 30, 2003 as a result of the industrial injury, which injuries had previously

been determined to be RSD and depression as aggravations of her pre-existing Colles wrist fracture. Her issue before the Mason County Superior Court jury was whether the employer could sustain its burden to convince the jury that there was inadequate evidence to support the Board's finding. The cases cited by the employer, *Cooper vs Department of Labor and Industries*, 20 Wn.2d 429, 147 P.2d 522 (1944); *Oien v. Department of Labor & Industries*, 74 Wash.App. 566, 874 P.2d 876 (1994), are reopening cases, or aggravation application cases, not time loss cases.

Furthermore, psychological conditions never require proof by "objective" evidence because there usually is no such "objective" evidence of a psychiatric condition, *Price vs. Department of Labor and Industries*, 101 Wn.2d 520, 682 P.2d 307 (1984).

RCW 51.32.090, the time loss statute, is not a model of clarity but does provide that when total disability is temporary, time loss should be paid and "as soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease." RCW 51.32.090 (3)(a). It focuses on earning ability, not the quantum of injury

or permanency of the injury.

Second, on the facts there was adequate testimony to support her inability to work as the result of her accepted conditions, RSD and depression. Ms. Bray presented such testimony from her attending orthoped Dr. Hassan, who testified that up to 2002, RSD plus depression prevented Ms. Bray from working, and in the 2002-2003 time period, depression prevented her from working. CABR, Deposition of Dr. Hassan, p. 27-p. 33, l. 1-7. Dr. Langer, Ms. Bray's psychologist with particular expertise working with RSD patients, testified that her depression would have totally prevented her from working at anything in the March 1999-May 2003 time period. CABR Deposition of Dr. Langer, p. 47, l. 7-25, p. 48, l. 1-7. Dr. Schneider deferred to Dr. Langer on the employability issue when considering both emotional and physical conditions. CABR Deposition of Dr. Schneider, p. 53, l. 18-25; p. 54, l. 1-15, p. 55 l. 1-14. Dr. Birkeland saw Ms. Bray on February 9, 1998. CABR, Deposition of Birkeland, p. 6, l. 25. This was a full year before she ceased working in March 1999. Dr. Birkeland had not seen her before she stopped working and therefore his report did not address her ability to work in 1998. Nevertheless, although he had reviewed no additional

records in the nearly 10 years since he had authored his IME report.

CABR Deposition of Birkeland, p. 9, l. 8-17; p. 23, l. 1-8. Dr. Birkeland testified in deposition in 2007 that he had seen nothing in his 1998 exam which would have prevented Ms. Bray from working after 1998. CABR Deposition of Dr. Birkeland, p. 18, l. 4-8.

Only Dr. Friedman testified that, despite Ms. Bray's significant psychological symptoms and suicidal ideation, she was able to work as a nurse even though he did not know what her job duties were. CABR Deposition of Dr. Friedman p. 58, l. 1-9.

Employer's Issue C: The judge kept out testimony about how accepted conditions of depression and RSD affected Ms. Bray's non-work life.

The employer argues in his brief at p. 14 that evidence of Ms. Bray's non-work life did come in, citing to the proceedings CABR June 14, 2007, p. 54-57. These three pages of testimony centered entirely on Ms. Bray's psychological treatment and psychological providers. It did not in any way illuminate how this industrial injury affected her functionality or home life.

Furthermore, the employer made a great deal of use of the one piece of testimony that did relate to Ms. Bray's non-work life: attending psychologist Dr. Langer's testimony about the fact that Ms. Bray took a cruise five years after the industrial injury, three years after she ceased working, and 2 months after her treatment ended with Dr. Langer in 2002, and was able to enjoy herself. She reported to Dr. Langer that she had been on a cruise with her young daughter Raven,

to help her feel better, but she said that she had not been able to be as active as she thought she could be, but she didn't regret having gone. She and Raven, her daughter, apparently had a good time and Ms. Bray said that they had a nice time, and that Alaska where they went was wonderful, and that she actually experienced what she described as a sanctified moment when they were on a glacier in Alaska. And, again, we're looking for ways in which she might experience joy or positive emotions, and so it was very good that she had this kind of experience. As Ms. Bray put it, she thought that the treatment had brought her from what she described as hysterical misery to common unhappiness, and that she was more relaxed with being depressed. She indicated that she had taken her feeling of suicide underground and was no longer talking about that, and that she was not sure that she could get any better, but that she had improved insight into her conditions.

CABR June 14, 2007, testimony of Dr. Langer, p. 42, l. 1-19.

By contrast, Ms. Bray was not permitted to testify about all the pleasurable activities which the injury caused her to give up. Certainly, if

one contends one cannot work, but still goes kayaking or mountain climbing, this is relevant to one's ability to work. By preventing the injured worker from detailing her limitations in her non-work life, the court prevented her from providing probative and relevant information by which the jury could have better evaluated her ability to work.

Employer's Issue D: Instruction No. 8, Instruction on accepted conditions.

When this case was litigated to the Board of Industrial Insurance Appeals, the Board judge had the advantage of receiving a stipulation by counsel that the accepted conditions resulting from her industrial injury in this case were reflex sympathetic dystrophy (RSD) and depression and aggravation to Ms. Bray's pre-existing Colles' wrist fracture. The reason counsel stipulated to this is that there had been prior litigation in this claim: the administrative law judge took judicial notice in his Proposed Decision and Order of the previous appeal. CABR p. 73, Proposed Decision and Order, p. 4. "Judicial Notice is taken of the findings of fact set out in In Re Patricia Bray, Dckt. No. 01 16119 (Feb. 14, 2003)" in which the employer litigated the issue of whether it should be responsible for payment of psychological treatment for Ms. Bray's depression. The

employer lost, resulting in a Board order directing the employer to accept depression as an aggravation of Ms. Bray's industrial injury pay for that treatment as part of the industrial injury. That treatment was with Dr. Langer in 2002. Second, the issue of whether Ms. Bray had RSD as a result of her industrial injury had also been decided by the Department some years before, and was *res judicata*. As a consequence both counsel stipulated to the Board in the proceedings below in this claim at CABR, Proceedings of June 14, 2007, p. 71:

That for the purposes of this appeal the employer will not contest the prior L&I rulings wherein the claim was allowed for the aggravation for the preexisting colage (phonetic) fracture and for The right extremity reflex sympathetic dystrophy condition, and the depressive conditions for which claimant sought and received treatment was proximately caused in part by her industrial injury of 8/25/1997 and resultant CRPS. Also we agree to stipulate that CPRS is the same as reflex sympathetic dystrophy.

However, if a fact finder had not been aware of those two binding prior rulings, it would certainly permit many more issues to be injected into the case. That is precisely what occurred here before the jury. The judge's failure to give Instruction 8 on Ms. Bray's accepted conditions would certainly permit a fact finder to speculate about whether it was being called upon to decide whether RSD or depression were even related to the injury. That proximate cause issue was certainly argued by the

employer, and continues to be argued in this appeal.

In his brief, as in his presentation at trial, employer's counsel aptly demonstrates several times over how confusion results when the fact finder looks at causation rather than being directed that RSD and depression were accepted conditions. This tribunal can reasonably infer from the bullet points argued by counsel here, as before the jury, that causation became an issue.

Employer's counsel argues in his brief at p. 1, "The evidence was overwhelming that her depression arose from years of problems unrelated to simply dropping a binder on her wrist in 1997." Counsel goes on to itemize prior psychiatric contacts to this tribunal (without any factual attribution to the record) as he did to the jury: that the worker's parents had mental illness; that she had been affected by the breakup of her marriage over 20 years before, and the breakup of her relationship with her partner the year before and had undergone counseling for both life issues; that her mental condition was unrelated to her industrial injury which flew flatly in the face of the stipulation about RSD and depression being accepted as aggravations. Employer's counsel's bullet points suggest that the fact finder could reasonably believe it had to decide

whether it was preexisting depression or injury related depression which prevented Ms. Bray from working. That invitation, however, would derail the jury from its task. It doesn't matter that Ms. Bray had experienced depression before the industrial injury for several reasons: first, because the parties had previously litigated the issue of whether her pre-existing depression was aggravated by the industrial injury; this issue had been resolved, and the condition accepted as an aggravation of the industrial injury, in previous litigation. The causal connection between the industrial injury and her depression simply was not supposed to be on the table in this particular appeal, and the jury should have been made aware of that. The aggravation of the depression by the industrial injury was *res judicata*.

Second, pre-existing conditions which are lightened up by industrial injuries are legitimate conditions which must be treated and upon which time loss and other benefits can be based, *McDonagh vs Department of Labor and Industries*, 68 Wn.App. 749, 845 P.2d 1030 (1993). Finally, the industrial injury need not be the only proximate cause, but may be one of several proximate causes, of a condition or

disability, *Wendt vs Department of Labor and Industries*, 18 Wn.App. 674, 571 P.2d 229 (1977).

Employer's counsel argues in his brief, as he did before the jury, such bullet points as Dr. Birkeland: "aggravation of hitting cast was 25% responsible for the ongoing RSD." Employer's counsel argues that they did not try to insert proximate cause into the case. Examination of counsel's bullet points, which were presented to the jury, tell a different tale: Dr. Birkeland: industrial injury was "minimal, just a minor contusing injury" (cited at employer's brief, p. 7, citing CABR, April 24, 2007 at p. 15); mild aggravation (employer's brief, p. 8 citing CABR, April 24, 2007 at p. 37) "aggravation of hitting cast was 25% responsible for the ongoing RSD (employer's brief, p. 8, citing CABR, April 24, 2007 at p. 15), long term pain pertains to the softball injury not the on the job aggravation (at employer's brief, p. 8, citing CABR, April 24, 2007 at p. 16).

This cuts against the jury's understanding that once RSD was accepted, it was accepted. The only way to clearly make that point was for the trial judge to tell the jury what was known by the BIIA judge: that

the relation of RSD and of depression to the industrial injury were *res judicata*, to relieve the claimant from having to relitigate those issues.

We are not presented with the issue of causation of the RSD because that issue was *res judicata* due to prior L&I rulings. We are not presented with the issue of whether Ms. Bray's depression was aggravated by the charts striking her wrist, because that issue too had been previously litigated at the BIIA. The jury, however, had no such clear lines: the judge refused to instruct them that those two conditions had been accepted and were the law of the case. Therefore, it is entirely reasonable to conclude that the jury may have thought part of its job in analyzing whether there was substantial evidence to support the BIIA decision, was to determine whether there was sufficient evidence that Ms. Bray had RSD, whether there was sufficient evidence to find that RSD was connected to the industrial injury, or whether her depression was connected to the industrial injury.

Employer's counsel argues "counsel never stipulated, and could not do so, that earlier factual determinations at that time and for those earlier periods became the law of the case going forward for all time periods." This is not the issue. We are not contending that counsel

stipulated Ms. Bray was able to work. Rather, we are asking that counsel be bound by the stipulation made at the BIIA, and the law of the case, that depression and RSD were aggravated by her industrial injury and were accepted conditions. The employer should not have been permitted to effectively relitigate those issues because the judge failed to take those issues off the table by adopting Instruction 8.

The employer also argues that the worker did not seek out vocational services. There is a complete absence of evidence in this entire record that the employer provided vocational assessment, or vocational proof of Ms. Bray's ability to perform her job duties. Had there been such evidence, it is reasonable to assume the employer would have put on that evidence in its case in chief. This court may reasonably infer that employer had no such evidence, or perhaps that the vocational evidence in the employer's possession was in fact in support of Ms. Bray. The obligation to provide vocational services is squarely upon the self-insured employer, and not on the worker. RCW 51.32.095(1).

Employer's Issue E: Instruction #5 which incorrectly stated the standard for eligibility for time loss.

This instruction is incorrect in that it contains an element which does not appear in the law: “she failed to look for work from April 1999 to May 2003.” As noted above at Issue B, RCW 51.32.090, the time loss statute, focuses on lack of earning capacity as the basis for payment of time loss. It does not expressly contain any language by which one can import the requirement that the worker “look for a job” for the time period in questions. Employer’s counsel cites no caselaw to support this contention, because there is none. It is simply not an element of time loss in the worker’s compensation system.

Employer’s Issue F: CR 59 as an appeal mechanism.

Claimant Ms. Bray concedes no motion for a directed verdict was made. The CR 59 motion was filed and argued to give the court an opportunity to cure this injustice. The jury made a decision without knowing that they were prevented from weighing whether Ms. Bray’s RSD and depression were caused by or aggravated by the industrial injury, leaving them to focus solely on whether those two conditions prevented her from being employable from March 1990-May 2003. In his brief, as at trial, the employer argues that Ms. Bray’s failure to look for work after March 1999 is significant. It is not significant, relevant or

a legal element of whether a worker is eligible for time loss. Introducing the concept of fault by the worker for failing "to look for work from April 1999-May 2003" is simply not supported by any case or statute. If the worker is unable to work due to the effects of the industrial injury, the worker is entitled to time loss. The worker does not lose that eligibility for time loss because she fail to make three job contacts per week, like unemployment; or if she "fails to mitigate" by continuing to try to work despite firings and inability to perform.

CONCLUSION

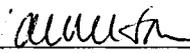
A review of the record, and the arguments of the employer, support the inference that Ms. Bray did not receive a fair review from this jury. There was more than substantial evidence to support the Board's decision. The jury was hampered in its task by the judge's failure to provide Instruction 8, by permitting Instruction 5 which contained an incorrect statement of the law, and in failing to permit the jury to hear how the industrial injury impacted Ms. Bray's non-work life. The verdict was not supported by substantial evidence.

The jury verdict and resulting judgment should be set aside and the Board order reinstated. In the alternative, the matter should be

remanded for a new trial. Attorney fees should be awarded to the claimant.

Dated: April 1, 2009.

Respectfully submitted,



Laurel Smith (WSBA #6370)
Attorney for Appellant Patricia Bray

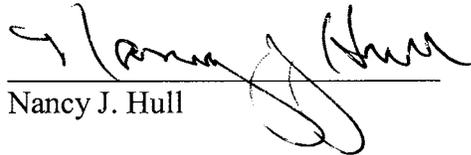
CERTIFICATE OF MAILING

On April 1, 2009, at Rochester, Washington, I deposited in the United States mail properly addressed, postage prepaid envelopes, containing this Reply Brief of Appellant Bray, directed to:

1. **Original** to Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, Washington 98402-4454
2. Copy to attorney for Chunyk & Conley/Quad C, D. Jeffrey Burnham, 925 Fourth Avenue, Suite 2300, Seattle, WA 98104.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct.

Dated: April 1, 2009, at Rochester, Washington.


Nancy J. Hull

09 APR -2 PM 2:00
STATE OF WASHINGTON
BY _____
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DIVISION II