

No. 41649-2-II

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
JULY 31 PM 2:12
STATE OF WASHINGTON
BY: 

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARGARITO BRAMBILLA LOPEZ, Respondent,

v.

WASTE CONNECTIONS, INC., Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves an appeal from a Superior Court Judgment and Order that reversed, by way of a jury verdict, a Board of Industrial Insurance Appeals (Board) order that had affirmed a Department of Labor and Industries (Department) order that denied Mr. Lopez' workers' compensation claim. The issue involves whether Mr. Lopez sustained an industrial injury to his low back on May 17, 2007, in the course of employment with Waste Connections, Inc., within the meaning of RCW 51.08.100.

II. ASSIGNMENT OF ERROR

A. Assignments of Error

1. The trial court erred in entering the Judgment for Plaintiff on December 10, 2010, that reversed the Board order of July 23, 2009, and remanded the claim to the Department with directions to accept Mr. Lopez' claim for Industrial Insurance. CP¹ 140-142.
2. The trial court erred in awarding attorney fees (\$19,250.00) and costs (\$1,748.60) on December 10, 2010. CP 140-142.

¹ CP refers to Clerk's Papers, filed with the Court of Appeals.

B. Issues Pertaining to Assignments of Error

Whether Mr. Lopez injured his low back in the course of employment with Waste Connections, Inc., on May 17, 2007, within the meaning of RCW 51.08.100. (Assignments of Error 1-2.).

III. STATEMENT OF THE CASE

A. Statement of Procedure

On July 24, 2007, Mr. Lopez filed an application for benefits, under Washington workers' compensation claim number SC17521, for an injury he allegedly sustained on May 17, 2007. CABR² Exhibit #10. On June 18, 2008, the Department issued an order that denied this claim because: the worker's condition is not the result of the injury alleged, the worker's condition is not the result of an industrial injury as defined by the Industrial Insurance Laws, and the worker's condition is not an occupational disease as contemplated by section 51.08.140 RCW. CABR 53. Mr. Lopez, through his attorney, filed a timely appeal from this June 18, 2008, order to the Board of Industrial Insurance Appeals on July 10, 2008. CABR 49-52.

² CABR refers to the Certified Appeal Board Record sent under separate cover from Pierce County Superior Court.

The Board received this appeal on July 10, 2008, and granted the appeal on August 20, 2008. CABR 60-61.

Following testimony and publication of perpetuation depositions, Industrial Appeals Judge Douglas P. Franklin issued a Proposed Decision and Order on May 8, 2009. CABR 32-39. Judge Franklin concluded that Mr. Lopez did not sustain an industrial injury to his back on May 17, 2007, in the course of employment with Waste Connections, Inc., within the meaning of RCW 51.08.100, and that the order of the Department of Labor and Industries dated June 18, 2008, is correct and affirmed. CABR 39.

On July 9, 2009, Mr. Lopez, through his attorney, filed a Petition for Review from the May 8, 2009, Proposed Decision and Order. CABR 22-28. Waste Connections, Inc., through their attorney, filed a response brief on July 22, 2009. CABR 3-21. The Board considered the May 8, 2009, Proposed Decision and Order and on July 23, 2009, denied the Petition for Review. CABR 1. This order adopted the Proposed Decision and Order as the Decision and Order of the Board. *Id.*

Mr. Lopez, through his attorney, timely filed a Notice of Appeal to Pierce County Superior Court on August 13, 2009. CP 2-15.

Following a jury trial before The Honorable Rosanne Buckner, on November 16-18, 2010, the jury reached a unanimous verdict on November 18, 2010. VRP³ 107-108. The six-person jury unanimously found that the Board was not correct in finding that Mr. Lopez did not injure his back in the course of his employment with Waste Connections, Inc., on or about May 17, 2007. *Id.*

The Court entered a Judgment and Order on December 10, 2010, which reflected this jury verdict and directed the Department to accept Mr. Lopez' claim for Industrial Insurance benefits. CP 140-142. The Court also awarded Mr. Lopez' counsel attorney fees in the amount of \$19,250.00 and costs, totaling \$1,748.60. *Id.*

On January 4, 2011, Waste Connections, Inc., the self-insured employer in this matter, filed a timely appeal to the Court of Appeals, Division II. CP 2-15.

³ VRP refers to the Verbatim Report of Proceedings transmitted to Division II on April 5, 2011.

B. Statement of Facts

1. The Alleged Injury on May 17, 2007

Mr. Lopez claims to have sustained an injury to his low back on May 17, 2007, while in the course of employment with Waste Connections, Inc., while pulling a pallet from cardboard to be recycled. 01/06/09 Tr. at 18-20⁴. He denied any prior back injuries. *Id.* at 29.

He claims that following this incident he went back to operating the loader machine until lunch, when he stepped out of the machine and could not stay standing up or sitting down. *Id.* at 20. He claimed that Poncho, his morning supervisor, witnessed this and told him to go home because he told him his back was hurting a lot and he could not walk. *Id.* at 20-22. Mr. Lopez then took about four weeks of vacation leave and returned to work for one week following his leave. *Id.* at 30-31. Only after that week back at work did he report the incident as a work injury to his site manger, Mr. Siles Ceballos. *Id.* at 31.

Mr. Solorio (Poncho) worked as the supervisor with Mr. Lopez on May 17, 2007, and testified that Mr. Lopez told him there was no accident, but that Mr. Lopez said he was not feeling well and placed his hand on his chest. *Id.* at 36.

⁴ Hearing and deposition transcripts contained in the CABR are referred to by the date of the hearing or deposition.

Mr. Solorio observed Mr. Lopez and testified that he did not observe any difficulty walking by Mr. Lopez and that they took turns getting in and out of the loader. *Id.* at 37.

Mr. Siles Ceballos testified that Mr. Lopez worked at Waste Connections as a loader/operator operating a large John Deere piece of equipment with a front bucket to move large amounts of paper material. *Id.* at 48. Mr. Ceballos indicated Mr. Lopez called in sick on May 18, 2007, and wanted to take a vacation day. *Id.* at 50-51. Mr. Lopez ultimately used up four weeks of vacation time and returned on July 9, 2007. *Id.* at 51-52. However, Mr. Ceballos testified that Mr. Lopez did not report an alleged work injury to him until July 17, 2007, after Mr. Lopez had been back at work. *Id.* at 54 and 77. He also prepared a written disciplinary notice for Mr. Lopez for failing to report the alleged injury within 24 hours of the event. *Id.* at 56. He completed the accident report on July 24, 2007, with Mr. Lopez. *Id.* at 59-62; Exhibit #10.

Mr. Ceballos also testified that Mr. Lopez told him he had a side business of construction and/or yard work, and worked out of Seattle sometimes, indoors, hanging doors or whatever. *Id.* at 61 and 80-81. Mr. Lopez does not speak or read English, but Mr. Ceballos, whose first language is Spanish, would speak in Spanish with Mr. Lopez. *Id.* at 25, and at 78-79.

2. Medical Testimony

a. Mario G. Alinea, M.D.

Of the four physicians to testify in this case before the Board, only Mario G. Alinea, M.D., family practitioner, testified on Mr. Lopez' behalf. 11/24/08 Tr. at 4-6. Dr. Alinea first examined Mr. Lopez on July 20, 2007. *Id.* at 6. Dr. Alinea does not speak Spanish. *Id.* at 7. Based on his July 20, 2007, examination Dr. Alinea diagnosed Mr. Lopez with a lumbar sprain. *Id.* at 7-8. Dr. Alinea did not recall having any medical record on Mr. Lopez dated May 25, 2007. Dr. Alinea testified that he could not distinguish whether Mr. Lopez' condition arose from lifting a garbage can full of leaves or, for example, a wooden pallet. *Id.* at 20.

b. Jocelyn V. DeVita, M.D.

Jocelyn DeVita, M.D., specializes in family practice and urgent care. 01/22/09 Tr. at 6. She first examined Mr. Lopez on May 25, 2007, although her colleague, Dr. Stromberg, had seen Mr. Lopez on May 19, 2007. *Id.* at 7-8. It is the standard procedure in her clinic to identify where a patient was injured, primarily because if it is a work-related injury they have to register the visit or open an L&I claim. *Id.* at 7. Dr. DeVita testified that when she saw Mr. Lopez, there was no known injury of any kind. *Id.* at 9.

Dr. DeVita also noted that Mr. Lopez reported similar low back problems in Mexico ten years earlier and had three injections in the lower back in Mexico. *Id.* at 10-11. Dr. DeVita provided further detail of the May 25, 2007, visit and noted that Mr. Lopez first saw Gabrielle Smith, LPN, at the clinic where he complained of right leg pain with no known injury. *Id.* at 11-12. She also noted Mr. Lopez stated he worked in construction, and works machinery in outside construction. *Id.* at 13-14.

Dr. DeVita noted that a translator was present that day. *Id.* at 12. Dr. DeVita also testified that she speaks Spanish, and if there are Spanish speaking patients they are directed to her because she speaks Spanish. *Id.* at 12, and 20. Following the examination, she diagnosed Mr. Lopez with lumbosacral degenerative disc disease. *Id.* at 14. She did not express any opinion relating the diagnosed condition to a workplace injury because he never stated this occurred at work or had any relation to his work. *Id.* at 14-15. Her opinion was on a more probable than not basis. *Id.* at 15.

c. Dean S. Ricketts, M.D.

Dean S. Ricketts, M.D., is a board certified orthopedic surgeon that examined Mr. Lopez on May 16, 2008, in an independent medical examination. 01/23/09 Tr. at 6 and 8. He had the benefit of reviewing records from Drs. DeVita, Khan, Said, and Alinea. *Id.* at 11. He also had a Spanish interpreter present during the examination. *Id.* at 11.

Dr. Ricketts also took a history from Mr. Lopez of a prior low back injury in Mexico, and a history of injections for that injury. *Id.* at 12. Dr. Ricketts diagnosed Mr. Lopez with degenerative disc disease at L3-4, and L4-5, as well as a herniated disc at L4-5 on the right, with some degree of radiculopathy. *Id.* at 18. He opined that these diagnoses were not related to his work activities. *Id.* at 18. He also diagnosed early degenerative joint disease of the right hip, not industrially related. *Id.* at 18.

Dr. Ricketts explained that his opinion that the conditions were not related to an alleged May 17, 2007, injury was based solely on review of the records, starting with a May 19, 2007, medical report. *Id.* at 20. He elaborated that it is generally true in the medical profession that the earliest dated records are the most accurate. *Id.* at 20. This included the May 25, 2007, medical note where Mr. Lopez stated that there was no known injury. *Id.* at 25. Dr. Ricketts felt Mr. Lopez' history did not appear credible. *Id.* at 41.

d. Michael D. Barnard, M.D.

Michael D. Barnard, M.D., is a board certified orthopedic surgeon that examined Mr. Lopez on October 2, 2007, in an independent medical examination. 02/18/09 Tr. at 6 and 9. He first examined Mr. Lopez and prepared a report based on minimal records provided to him by the claims examiner. *Id.* at 11.

Based on those initial records, Dr. Barnard dictated a report. Due to a foul-up in the system, that report was sent out as a final report, although Dr. Barnard indicated it should not have gone out. *Id.* at 12. However, after he completed the rest of the examinations at the clinic that day, he had an opportunity to review additional medical records brought in by Mr. Lopez and his daughter. *Id.* at 11-12. Those additional records led him to a completely different conclusion, based upon findings that he had in the record. *Id.* at 12.

Dr. Barnard also had a Spanish interpreter present during the examination of Mr. Lopez. *Id.* at 14. Mr. Lopez initially stated he never had prior back problems, and then told Dr. Barnard about a history or prior back problems in Mexico. *Id.* at 15. Dr. Barnard diagnosed a herniated nucleus pulposus at L4-5 in Mr. Lopez. *Id.* at 19. Based on Mr. Lopez' statement that he had told his provider he had an injury at work, he felt this condition was work related. *Id.* at 20. However, when he reviewed records that stated there was no mention of an injury at work, he changed his opinion that the condition was not work related. *Id.* at 19-20. He placed particular significance on Dr. DeVita's May 25, 2007, report of no known injury to reach this conclusion. *Id.* at 22-23.

IV. ARGUMENT

A. Standard of Review

Under Washington law, the Board's decision is prima facie correct and the burden of proof is on the party attacking that decision. *Ruse v. Department of Labor & Industries*, 138 Wn.2d 1, 5 (1999); *see also* RCW 51.52.115. On review, the trier of fact, in this case a jury, may substitute its own decision only if it finds by a preponderance of the evidence that the Board's findings were incorrect. *See Ruse*, 138 Wn.2d at 5.

When reviewing a superior court decision resulting from an appeal from the Board, review is limited to an "examination of 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." *See Ruse*, 138 Wn.2d at 5-6; *Bennet v. Department of Labor & Industries*, 95 Wn.2d 531, 534 (1981).

This Court's review of whether the trial court's conclusions of law flow from the findings is also de novo. *Watson v. Department of Labor & Industries*, 133 Wn.App. 903, 909 (2006) (citing *Ruse*, 138 Wn.2d at 5). However, this court does not reweigh or rebalance the competing testimony and inferences, or apply anew the burden of persuasion, for doing that would abridge the right to a trial by jury. *Harrison Memorial Hospital v. Gagnon*, 110 Wn.App. 475, 485 (2002).

Review of the evidence is made in the light most favorable to the party that prevailed before the jury. *See Bennett*, 95 Wn.2d at 534. Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Harrison Memorial Hospital v. Gagnon*, 110 Wn.App. 475, 485 (2002).

This court does not review credibility determinations on appeal. *In re Marriage of Rideout*, 150 Wn.2d 337, 350 (2003).

B. Failure to Make a Prima Facie Case

Mr. Lopez alleges he sustained an injury to his back on May 17, 2007, while moving a pallet at work. The relevant law defining an injury in the scope of Industrial Insurance is RCW 51.08.100, which states, “injury” means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without and such physical condition as result therefrom. Further, such an injury must occur while the employee is acting in the course of employment. RCW 51.08.013.

In order to prevail, Mr. Lopez needed to make a prima facie case on his appeal to the Board of Industrial Insurance Appeals.

The Court has defined a prima facie case, in the area of negligence, as “one where the evidence is sufficient to justify, but not compel, an inference of liability, or in other words, evidence to be weighed, but not necessarily to be accepted, by a jury or other trier of fact.” *McCoy v. Courtney*, 25 Wn.2d 956, 962 (1946). Although negligence is not relevant here, this does establish the standard of a prima facie case.

Further, the Court has held that the law requires that a causal relationship between the incident and the physical condition must be established by medical testimony. *Jackson v. Department of Labor and Industries*, 54 Wn.2d 643 (1959). The *Jackson* court referred to their earlier decision in *Stampas v. Department of Labor and Industries*, 38 Wn.2d 48, 51 (1951), where they said, “medical testimony that there is a *possibility* of a causal relation is not sufficient to establish causation. It must be made to appear that the injury *probably* caused the disability.”

The only medical witness on Mr. Lopez’ behalf, Dr. Alinea, failed to provide an opinion that meets this standard. No question was asked whether Dr. Alinea related the diagnosed condition to the alleged injury on a more probable than not basis. In the absence of an answer from Dr. Alinea on this point, Mr. Lopez did not make a prima facie case. Thus, at the conclusion of the hearing, Waste Connections, Inc., motioned, pursuant to CR41(b)(3), to dismiss the appeal.

On direct examination on November 24, 2008, Dr. Alinea was never asked to provide an opinion on causation. On cross-examination, Dr. Alinea was asked he if could distinguish findings, such as he identified in Mr. Lopez, as arising from lifting a garbage can full of leaves or a wooden pallet, and he said he could not. On re-direct examination, Dr. Alinea stated that with regard to the treatment plan, or plan of care, he relies on what his patients tell him. He also stated that if Mr. Lopez reported pulling a pallet and feeling a sharp pain, it would be consistent with a sudden sharp pain. This is not a positive statement of causation, especially in light of the fact that Dr. Alinea could not distinguish the findings in Mr. Lopez if he stated he lifted a garbage can full of leaves.

In other words, Dr. Alinea was only speaking to possibilities. The law requires more from a medical witness. That is why the *Stampas* court raised the bar to the level of probability. Having failed to reach this point, Mr. Lopez did not make a prima facie case. As a matter of law, the rejection of this claim should be affirmed.

C. “No Known Injury”

Although Mr. Lopez ultimately opted to claim an injury, the initial facts do not support any injury at Waste Connections, Inc., on or around May 17, 2007. Starting with the lay testimony, Mr. Lopez described difficulty working on May 17, 2007, after he moved the pallet.

As he testified on January 6, 2009, at the time of the alleged injury on May 17, 2007, he subsequently could not work, walk, or sit. However, his own supervisor, Mr. Solorio, who testified at the request of Mr. Lopez, clearly contradicted this assertion. Mr. Solorio stated he ate with Mr. Lopez, and that he did not have any problems walking or working in his position on May 17, 2007. Rather, Mr. Lopez asked to go home, as he was not feeling well, and pointed to his chest. Mr. Lopez did not report an injury within 24 hours, as required, and in fact his manager, Mr. Ceballos, wrote him up for a disciplinary action as a result of this violation.

Turning to the medical testimony, the most striking evidence comes from Jocelyn DeVita, M.D. Dr. DeVita examined Mr. Lopez on May 25, 2007, and noted that there was “no known injury,” as reported by Mr. Lopez. Further, Dr. DeVita testified that she speaks Spanish, and is the person the clinic sends Spanish-speaking patients to see because of her language skills. Dr. Ricketts testified that it is generally true in the medical profession that the earliest dated records are the most accurate. In this case, the earliest records came from Dr. DeVita and Dr. Stromberg.

The jury was instructed, in Court’s Instruction Number 11, that they should give special consideration to testimony given by an attending physician. VRP at 80, CABR 85-101. This is pattern instruction 155.13.01.

It also states a long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician. *Hamilton v. Department of Labor and Industries*, 111 Wn.2d 569, 571 (1988), citing *Chalmers v. Department of Labor and Industries*, 72 Wn.2d 595, 599 (1967): "It is settled in this state that, in this type of case, special consideration should be given to the opinion of the attending physician."

Dr. DeVita examined Mr. Lopez as an attending physician and her opinion clearly stated that, on a more probable than not basis, she did not relate the diagnosed conditions to a work related injury because Mr. Lopez never stated this occurred at work or had any relation to his work. As an attending physician, her opinion warrants special consideration. This becomes the main element and one of three opinions that demonstrate that the substantial evidence does not support the findings of the jury.

D. Substantial Evidence Does Not Support a Claim

Should this court be inclined to review Dr. Alinea's discourse on possibilities of a mechanism of injury as a substitute for a medical opinion, on a more probable than not basis, that Mr. Lopez' condition was the result of the alleged incident, and be inclined to look past the lay evidence from Mr. Solorio, there remains a plethora of substantial evidence that Mr. Lopez' condition is not the result of an industrial injury.

First, and foremost, Dr. DeVita testified there was no known injury reported by Mr. Lopez, and had there been, she would have filed a worker's compensation claim. Her opinion, as that of his attending physician, should be afforded special consideration. Second, Dr. Ricketts also noted inconsistencies in Mr. Lopez' statements and relied strongly on the initial opinion from Dr. DeVita as being more accurate. He formed an opinion, after review of the records, that Mr. Lopez did not sustain an industrial injury. Finally, Dr. Barnard attempted to give Mr. Lopez the benefit of the doubt, and only upon further review of Dr. DeVita's record did he, for the same reasons as Dr. Ricketts, reach the conclusion that Mr. Lopez did not sustain an industrial injury in the course of employment.

Quite simply, Drs. DeVita, Ricketts, and Barnard all reached the same opinion. The jury ignored this evidence and found for Mr. Lopez. However, the standard of review for this court requires an "examination of 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." *See Ruse v. Department of Labor & Industries*, 138 Wn.2d 1, 5-6 (1999); *Bennet v. Department of Labor & Industries*, 95 Wn.2d 531, 534 (1981). An examination of this record clearly shows that the conclusion of law that Mr. Lopez sustained an industrial injury does not flow from the evidence.

There is substantial evidence to the contrary. There are the inconsistencies in Mr. Lopez' statements of symptoms on May 17, 2007, and Mr. Solorio's contradictory observations. Mr. Ceballos testified that he first learned of the injury on July 17, 2007, after Mr. Lopez returned to work for a week, and had he known of any injury earlier, he would have taken action to initiate a claim. Despite what Mr. Lopez asserted, Mr. Ceballos is a native Spanish speaker and he had no difficulty in understanding Mr. Lopez.

Finally, substantial medical evidence supports that there was not an industrial injury. If Dr. Alinea's weak testimony forms a medical opinion of proximate causation, this is surely broken by the substantial and well-reasoned opinions from Drs. DeVita, Ricketts, and Barnard.

The record does not contain substantial evidence, lay or expert, to support the conclusion of December 10, 2010, that directed the Department of Labor and Industries to accept Mr. Lopez' claim for Industrial Insurance benefits.

E. Attorney Fees

A worker is entitled to attorney fees where a court sustains his right to relief in an employer's appeal. *Young v. Department of Labor & Industries*, 81 Wn.App. 123, 132 (1996); RCW 51.52.130. Thus, upon a reversal of the superior court Judgment of December 10, 2010, attorney fees are not payable.

V. CONCLUSION

Because of the foregoing reasons, Waste Connections, Inc. respectfully seeks a reversal of the December 10, 2010 Judgment for Plaintiff, a reversal of the fee and cost award, and a determination that affirms the final order, dated July 23, 2009, of the Board of Industrial Insurance Appeals that Mr. Lopez did not sustain an industrial injury to his back on May 17, 2007, in the course of employment with Waste Connections, Inc., within the meaning of RCW 51.08.100.

DATED this 31st day of May 2011.

Respectfully submitted,



Robert M. Arim
Attorney for Appellant
WSBA #27868

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARGARITO BRAMBILA LOPEZ,)	No. 41649-2-II
)	
Respondent,)	
v.)	CERTIFICATE OF SERVICE
)	
WASTE CONNECTIONS, INC.)	
)	
<u>Appellant.</u>)	

I certify that I caused a true and accurate copy of the foregoing BRIEF OF APPELLANT, to be served on the following parties in the manner indicated below on May 31, 2011:

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ESIS, Inc.

VIA E-MAIL

Waste Connections, Inc.

DATED this 31 day of May, 2011.

THE LAW OFFICE OF ROBERT M. ARIM, PLLC



Robert M. Arim, WSBA No. 27868
Attorney for Appellant,
Waste Connections, Inc.