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SEP 13 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289371

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

JORGE CANTU,

Respondent.

v.

DEPARTMENT OF LABOR AND INDUSTRIES AND
WESTFARM FOODS,

Appellants

RESPONDENT'S SUPPLEMENTAL RESPONSE BRIEF

**Smart, Connell, Childers & Verhulp,
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I. INTRODUCTION

This supplemental brief is in response to WestFarm's supplemental brief dealing with two limited issues: the standard applied to the board's decision and order, specifically the board's finding of fact numbers 4 and 5, by the trial court; and the required elements to prove worsening of an accepted physical condition and a mental health condition under *Price v. Dep't. of Labor & Indus.* 101 Wn.2d 620, 682 P.2d 307 (1984).

II. ARGUMENT

1. The trial court's analysis applied to the Board's findings of fact numbers 4 and 5 were correct.

In its brief, WestFarm urges the Court to essentially "flip" the reasoning of the trial court when viewing the Board's findings of fact number 4 and 5. In other words, WestFarm would like to place the burden to both substantiate finding of fact number 4 (that Cantu was experiencing leg and back pain at the time of claim closure) and refute finding of fact number 5 (that these conditions were not related to the industrial injury) on Cantu.

However, Cantu, as the party aggrieved by the Board's decision, is required only to present evidence to support a reversal of the findings of fact he disagrees with. *Hanquet v. Labor & Indus.*, 75 Wn. App. 657, 662, 879 P.2d 326 (1994).

Assuming he can do so, the burden shifts to the non-aggrieved party, in this case the Employer, to present evidence sufficient to overcome the evidence presented by the aggrieved party, OR to present sufficient evidence to support a reversal of a different finding of fact, that when reversed, requires the order on appeal to be affirmed.

Ironically, the legal analysis complained of by WestFarm in its second issue, urging the Court to reverse the trial court's finding that the mental health conditions alleged by Cantu are related to his industrial injury. Specifically, WestFarm is arguing, albeit in the alternative, that even if there is a mental health condition present (akin to conceding "main" issue), it cannot be related to the industrial injury because the physical conditions complained of are

not related to the industrial injury (akin to attacking the “secondary” issue).

The trial court did not err. It held all parties to the correct burden of proof, a burden which was predicated on which party was attacking a particular finding of fact, not whether or not the party attacking that finding was “aggrieved” or not. When applying that standard, the trial court felt that Cantu’s evidence substantially supported a worsening of the back and leg condition and thus a reversal of finding of fact 5, and at the same time felt that the WestFarm’s evidence did not substantially support the reversal of the Board’s finding of fact 4.

2. Worsening.

WestFarm’s argument as to the evidence presented by Cantu actually opens two fronts of attack: the first is that the evidence contained in the record does not contain the required comparative data to allow Cantu’s medical expert, Dr. W. Duane Harrington, to show an objective worsening of the industrially-related physical conditions; and the second is that Cantu’s mental

health medical expert, Dr. C. Donald Williams, did not provide any comparative evidence to support his opinion that Cantu's mental health condition worsened between the two terminal dates under *Price v. Dep't of Labor & Indus.* This brief will address each argument separately.

a. Physical Worsening.

In an attempt to synthesize the decades of board and court decisions on the evidentiary requirements of RCW 51.32.160 the board has stated:

Nothing in the law requires that the first terminal date findings actually be in evidence. ...We do not know of any authority which requires that the findings on either terminal date be actually admitted into evidence. Rather, all that is required is that there be medical testimony, some of it based upon objective findings, that a worsening of the claimant's condition has occurred between the terminal dates and that such worsening is causally related to the industrial injury. *In re Theodore R. Meamber*, Docket No. 87 3675 (1989)

See also Knowles v. Dep't of Labor & Indus., 28 Wn.2d 970 (1947); *Kresoya v. Dep't of Labor & Indus.*, 40 Wn.2d 40 (1952); *Wilbur v. Dep't of Labor & Indus.*, 61 Wn.2d 439 (1963); *Tollycraft Yachts v. McCoy*, 122 Wn.2d 426 (1993).

In this case, Cantu presented expert medical testimony in the form of Dr. W. Duane Harrington, D.C., who opined on a more medically probable than not basis that Cantu's condition had worsened between the two terminal dates. Part of this opinion was based on the objective findings he made during his examination, part of it was based on his understanding of the history and progression of Cantu's symptoms, and part was based on Dr. Harrington's understanding of the status of the industrially-related condition at the time of the initial claim closure. This is the data relied upon by Cantu's medical witness and is wholly within the accepted foundation for such an opinion as described in the board and court decisions above.

The Employer has already made a lengthy argument in its opening brief on the sufficiency of the medical evidence. The evidence has not changed, nor has the legal sufficiency of the trial court's decision.

b. Psychiatric Worsening.

To begin with, Cantu concedes that affirming the trial court's decision as to the worsening of Cantu's industrially-related physical conditions was a condition precedent to the trial court holding that the mental health condition that developed after the initial closing date was related to the industrial injury. However, Dr. Williams, Cantu's expert psychiatric witness, provided the requisite testimony to support the trial court's decision that the mental health conditions diagnosed by Dr. Williams were related to the industrial injury and that these conditions were present as of the time he examined Cantu and, based on his review of the medical records available, these conditions were not present at the time of claim closure, which is all that is necessary to meet the standard set out by the statute to demonstrate worsening.

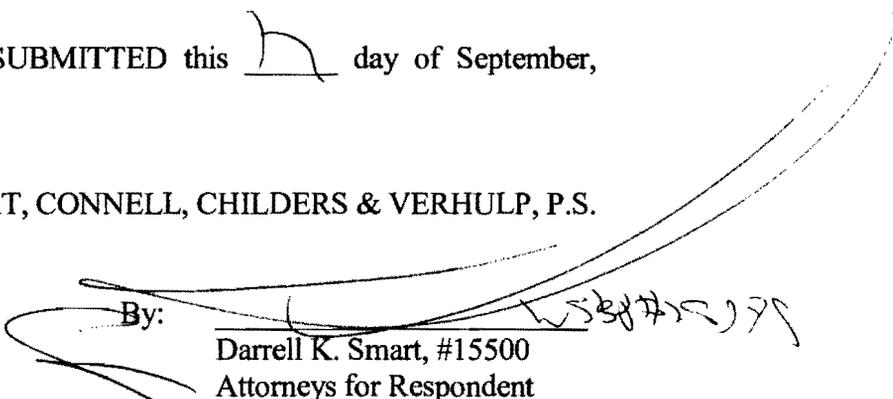
Again, the Employer has previously made this argument in its opening brief, and the evidence has not changed since that time. The evidence supporting the trial court's decision is substantial, and the decision should not be disturbed on appeal.

III. CONCLUSION

Based upon the foregoing argument and legal citation, Cantu continues to respectfully request that this court affirm the December 15, 2009, Yakima County Superior Court Decision and that this matter be remanded to the Department of Labor and Industries with instructions to reverse the Department Orders dated March 1, 2006, and February 6, 2006, and to reopen Cantu's industrial injury claim and provide him with the proper and necessary medical treatment proximately related to this industrial injury.

RESPECTFULLY SUBMITTED this h day of September, 2011.

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