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DEC 06 2010

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 BRIEF

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P.S.**

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I. STATEMENT OF THE CASE

Jorge Cantu was injured in the course of employment on September 16th or 17th, 2004. Hearing Transcript (HT) pg. 7¹, lines 5-19. Prior to this industrial injury, Cantu had lived a normal life, without disability, physical difficulty, or mental problems. HT pg. 12, lines 10 to 25; pg. 38, lines 4-11. He was gainfully employed and maintained a normal home, marital and work life. HT pg. 15, lines 4-10, pg. 40, line 9 to pg. 41, line 1.

The industrial injury on September 17, 2004, resulted in a complex tear of the medial meniscus. Dr. Brent Bingham deposition, pg. 14, lines 3-14². This resulted in a need for two knee surgeries. Bingham pg. 7, lines 10-17; pg. 13, lines 4-20. Cantu's claim was closed on September 6, 2005, with a 10% impairment of the left lower extremity. Certified Appeal Board Record (CABR) pg. 72. At the time the claim was closed, he was "experiencing

¹ For the purposes of this brief the claimant sites to the Hearing Transcript (HT) which refers to the Certified appeal Board Record (CABR) Hearing Transcript for 3/9/07.

² All depositions referenced in this Brief are found in the CABR.

pain and numbness over the lateral left leg into the lateral three toes of his left foot and pain in the left knee; he was limping due to left knee pain; and he was experiencing low back pain. He was also suffering from peroneal nerve palsy on the left side.” CABR pg. 4. Cantu was not diagnosed with depression related to this industrial injury when his claim closed in 2005. HT pg. 9, lines 22-25

According to the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition (hereinafter DSM IV), there are nine markers or criteria of a Major Depressive Disorder. Dr. C. Donald Williams deposition, pg. 22, line 19 to pg. 24, line 7. Cantu was examined by two mental health professionals who employed the DSM IV: C. Donald Williams, M.D. and Douglas Robinson, M.D., both of whom employed the DSM IV in their psychiatric evaluations. Remarkably, Cantu endorsed eight of the nine criteria in each such evaluation. The DSM IV criteria for Major Depressive Disorder are as follows: 1) depressed mood most of the day, 2) diminished interest or pleasure, 3) abnormal sleep pattern,

4) fatigue or loss of energy, 5) feelings of worthlessness, 6) diminished ability to think or concentrate, 7) recurrent thoughts of death or suicide, 8) irritability and 9) significant weight gain or loss. Douglas P. Robinson deposition at pg. 34, line 20 to pg. 36, line 15. In Cantu's examination with Dr. Williams he complained of:

1. Depressed mood. Williams pg. 22, line 16;
2. Crying spells and inability to experience pleasure. Williams pg. 22, lines 5-6 ;
3. Sleeping between three and five hours per night. Williams pg. 21, lines 24-25;
4. Low energy level. Williams pg. 22, line 9;
5. Feelings of both guilt and worthlessness. Williams pg. 22, lines 16-17;
6. Poor memory and concentration. Williams pg. 22, lines 10-12;
7. Preoccupation with death—specifically suicide. Williams pg. 22, lines 13-15;

8. Yelling and screaming. Williams pg. 22,
lines 3-4;

9. Poor appetite. Williams pg. 22, line 1.

Dr. Williams did not find that Cantu met the criterion for weight loss (No.9) even though he complained of poor appetite as he also had a history of a 12 pound gain in weight. Williams pg. 22, line 2.

Similarly, Cantu endorsed nearly identical complaints relative to depression when he was examined by Dr. Robinson, at the request of WestFarm:

1. Emotional difficulties and complains of worries and apprehension. Robinson pg. 19, lines 17-19;

2. Changes in libido and wants to be left alone. Robinson pg. 37, line 25 to pg. 38, line 2;

3. Trouble sleeping. Robinson pg. 15, lines 24-25;

4. Tired, difficulty finishing tasks.
Robinson pg. 15, lines 16-17, pg. 16,
lines 8-11)
5. Doubts about himself, is not proud of
himself. Robinson pg. 15, lines 3-4, pg.
17, lines 10-11;
6. Forgetful and loses things. Robinson pg.
15, lines 16-17, pg. 37, lines 13-17.
7. Thoughts of suicide. Robinson pg. 15,
lines 17-20, pg. 37, lines 18-24;
8. Gets angry too fast. Robinson pg. 36,
line 23 to pg. 37, line 2;
9. Normal appetite. Robinson pg. 16, line
2.

Neither Dr. Robinson, nor Dr. Williams felt that Cantu exhibited this last criterion.

Although Dr. Robinson specifically testified that Cantu made complaints consistent with a Major Depressive Disorder, he

did not believe Cantu was genuine in his complaints and based upon his subjective belief failed to make this diagnosis. Robinson pg. 27, lines 7-9, pg. 16, lines 20-22.

II. ARGUMENT

1.Scope and Standard of review.

As an initial matter, RCW 51.52.115, WestFarm's opening salvo of authority in its brief, does not support its position, as the plain language of that statute states that it pertains to superior court review only:

Upon appeals to *the superior court* only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in *the superior court* shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has

correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal *the superior court* shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to *the superior court* hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court. RCW 51.52.115. (emphasis added)

While it is true there is one mention of “all court proceedings under or pursuant to this title” in the statute, it is incorrect to construe this phrase to extend the statute’s procedural requirements to this court as appeals beyond the superior court level are not statutorily required or contemplated, and thus such proceedings are not “under or pursuant to this title.”

Instead, as our state supreme court has uniformly stated in worker’s compensation appeals, “We review the superior court’s decision under the ordinary standard of review for civil cases. We review 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. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).” *Watson v. Dept. of Labor & Indus.*, 133 Wn.App. 903 (2006).

In its brief, WestFarm appears to argue either that a) this court sits in the same position as the Superior Court, that is, that this court is restricted to the reviewing standards outlined in RCW 51.52.115; or b) that the superior court did not follow the standards of RCW 51.52.115 and thus this court should look beyond the accepted appellate standard of review to determine, in the WestFarm’s favor, that the superior court below, notwithstanding its facially supportable decision, was incorrect because it did not

“show its work” and detail its analysis under RCW 51.52.115. Neither line of argument is supported by statute or case law.

In fact, the opposite is true. As to the first possible scenario, the position WestFarm is taking is that it essentially has a second, or perhaps third, bite of the apple, in that this court should apply the standards of RCW 51.52.115 to the Board’s Decision and Order and come up with a different set of factual and legal findings. Clearly this is not the role of this court generally, and certainly not in this case specifically. Instead, this court reviews the superior court decision for errors of law and/or factual findings that are unsupportable based upon the record. In examining WestFarm’s assignments of error, the bulk, if not all, are perceived errors as to the factual and/or credibility determinations; specifically that the trial court was incorrect in finding that: 1) the evidence supported a finding that Cantu was suffering from back pain at the time of the initial closure and that the evidence supported a finding that the back pain worsened, 2) Dr. Toomey’s explanation of the leg pain being caused by an unrelated injury

was not credible and 3) Dr. Williams' psychiatric opinions as to the existence and causation of a mental health condition was more credible than the opinion of Dr. Robinson, who is also a qualified psychiatric expert. As argued above, credibility determinations are to be made by the trier-of-fact, in this case the superior court judge.

As to the second possible line of argument, that this court should examine the mechanism by which the superior court arrived at its ultimate conclusions rather than follow its generally applicable standard of review, this assertion is likewise unsupported by statute and case law. However, if such an argument is found to merit discussion, the problem for WestFarm is that courts have regularly held that such a presumption of correctness, contemplated in RCW 51.52.115, is only applicable in the narrow circumstance where the evidence is equally balanced. To know whether the evidence is equally balanced requires that the evidence be examined, weighed and considered. If, after considering the evidence, the trier-of-fact finds the evidence to be completely

equal, then the Board's findings should stand. *See Groff v. Dep't of Labor & Indus.*, 65 Wn. 2d 35, 395 P. 2d 633 (1964).

The presumption of correctness is nothing more than a tie breaking mechanism if the evidence from both sides is equally balanced and does not preponderate one way or the other. It is also important to understand that the presumption of correctness only applies to the ultimate findings of fact and conclusions of law of the Board. *Gaines v. Dept. of Labor & Indus.*, 1 Wn.App. 547, 550-552, 463 P. 2d 269 (1969) It does not apply to evidentiary or argumentative/subordinate findings of the Board. *Id.* For example, evidentiary rulings, findings as to the credibility of a witness, or statements as to the manner in which a witness testified are not to be given the presumption of correctness. *Id.* at 552. To give such subordinate findings the presumption of correctness would "derogate from the ability of the claimant to obtain a de novo review of the evidence. . . ." on appeal. *Id.* at 551.

In the order on review it is clear the trial court weighed the evidence independently and made its findings based upon its view

of the credibility of the witnesses. There is no evidence that the trial court made the prerequisite determination that the evidence was evenly balanced so as to invoke the required presumption of correctness. The superior court, after conducting a *de novo* review correctly entered conclusions of law and findings of fact indicating it found substantial evidence to support a reversal of the Board's order. In *Gaines v. Dept. of Labor & Indus.*, 1 Wn.App. 547 463 P. 2d 269 (1969) it was held: "Unlike the appellate rule of review in which findings must be accepted if supported by substantial evidence, the trier of fact, be it court or jury, is at liberty to disregard board findings and decision if, notwithstanding the presence of other substantial evidence is more persuasive. See, *Scott Paper Co. v. Department of Labor & Indus.*, *Supra*; *Allison v. Department of Labor & Indus.*, 66 Wash. 2d 263, 401 P. 2d 982 (1965); *Groff v. Department of Labor & Indus.*, 65 Wash. 2d 35, 395 O, 2d 633 (1964)." The rule outlined in *Gaines* is dispositive of this case. There is, in fact, substantial evidence in the record to

support the superior court's findings of fact. This should be the end of the appellate court's inquiry.

2. The Superior Court's findings that Cantu's low back pain, left leg numbness and pain, and peroneal nerve palsy were caused or aggravated by the industrial injury of September 17, 2004 is supported by substantial evidence in the record.

At his hearing before the Board of Industrial Insurance Appeals, Cantu testified that following his September 17, 2004, injury, that in addition to the knee pain, he was experiencing numbness in his left leg and foot and a cramp-like pain extending upwards to his buttocks and that this pain was present at the time of claim closure. HT pg. 9, lines 4-14. In rendering its decision following the hearing, the Board found, in Finding of Fact No. 4, that, at the time the claim was closed on September 6, 2005, Cantu was "experiencing pain and numbness over the lateral left leg into the lateral three toes of this left foot and pain in the left knee, he was limping due to the left knee pain; and he was experiencing low back pain. He was also suffering from peroneal nerve palsy on the left side." CABR pg. 4.

As the superior court stated in its decision, unchallenged findings of fact made by the Board of Industrial Insurance Appeals are treated as verities on appeal. Court's Decision pg. 2³; CP 23-27; *See also Willoughby v. Dep't of Labor & Indus.* 147 Wn.2d 725, 733 n. 6, 57 P.3d 611 (2001). The parties do not dispute the facts surrounding the September 17, 2004, injury to Cantu's left knee, or the fact that his knee problems, proximately caused by the industrial injury, had reached maximum medical improvement as of September 6, 2005, which resulted in a 10% impairment of the left lower extremity. Cantu claimed his low back pain worsened substantially after September 6, 2005. HT pg. 11, lines 2-14.

There being no controversy as to the existence of the lower extremity conditions as of September 6, 2005, nor any evidence to rebut Cantu's testimony that, from his perspective, the symptoms worsened after September 6, 2005, the factual dispute at the superior court review boiled down to whether Cantu's lower extremity conditions were causally related to his industrial injury; and if so,

³ The trial courts decision is attached as Appendix A.

whether or not they had objectively worsened between the relevant time frame of September 6, 2005, and March 6, 2006. WestFarm's asserted that the back injury resulted from yard work Cantu did on September 20, 2005. It offered testimony from Cantu as well as a document signed by him attesting to the same. HT pg. 24, line 11 to pg. 27, line 10.

Cantu's contention was that while he did make statements and signed a document purporting to support WestFarm's contention, he was simply attempting to communicate that the more intense back pain that he experienced after September 5, 2005, was new and not present previously. HT pg. 32, line 26 to pg. 33, line 24. In an attempt to chronicle the prior several weeks, he offered the yard work episode as a possible cause. HT pg. 25, lines 14-24. Cantu is not a medical expert.

Dr. Duane Harrington, D.C., Cantu's treating provider, initially opined that the yard work did cause the back injury. However, he expressed that opinion before he knew about the full extent of the knee injury Cantu had suffered and the limp that he had

been experiencing because of the knee injury. Upon learning that information, Dr. Harrington was of the opinion that the industrially-related limp caused the low back pain by creating a biomechanical instability that put unusual stresses on the low back. Dr. Duane Harrington, D.C. deposition pg. 14, lines 9-16. Dr. Harrington noted moderate to severe muscle spasms, tenderness, muscle swelling, and muscle tension in Cantu's low back. Harrington pg. 16, lines 3-10. The superior court found Dr. Harrington's initial causation opinion "understandable because he did not have all of the facts. As he described it, it took awhile before Cantu 'opened up' to him and fully described the history of his injury." Court's Decision, pg.3, CP 23-27.

The superior court went on to describe its trouble with the argument put forth by WestFarm, which surrounded the incongruity of the Board's Finding of Fact No. 4. The inconsistency in WestFarm's logic, as noted by the superior court was that Cantu was experiencing low back pain as of September 6, 2005, and yet WestFarm was asserting that the back pain was caused by a yard

work incident 14 days later, on September 20th. Court's Decision pg. 3, CP 23-27.

The superior court found that WestFarm offered no explanation as to the cause of that back pain present on September 6, 2005, and instead had argued that Cantu denied having any back pain as of the date the claim was closed, which it again noted ignored the Board's Finding of Fact No. 4, which was uncontested. *Id.*

Turning then to Cantu's contention, the superior court agreed that the only reasonable explanation for the back pain is that it was caused by the limp, which placed unusual stresses on Cantu's low back and over time became worse, ultimately developing the objective symptoms described by Dr. Harrington such as moderate to severe muscle spasms. *Id.*

Finally, the superior court discussed Dr. Toomey's testimony and his opinion that the left leg numbness, pain and nerve palsy were not related to the knee injury but instead were related to a stab wound Cantu received in 1989. However, as the superior court found, "Dr. Toomey offered no explanation for why the stab wound would not

have been causing Cantu any significant symptoms prior to the date of the knee injury. Here again, the only reasonable explanation for the peroneal nerve problem is that it was related to the knee injury.”
Id. at pg. 4.

The superior court’s determination carefully discussed the evidentiary record, analyzed it, and rendered a reasonable and thus legally correct determination that Cantu’s lower extremity conditions were related to the industrial injury, and that the substantial weight of the evidence established a clear and unequivocal worsening of the claimant’s industrially related physical condition between September 6, 2005, and March 1, 2006. It is irrelevant on appeal to the Court of Appeals that there was substantial evidence to support the Board’s findings. The superior court acting in its role as the trier-of-fact reviewed the evidence and determined that it preponderated in favor of Cantu.

3. The Superior Court's finding that Cantu developed a depressive disorder and/or a pain disorder associated with both psychological factors and a general medical condition, which was caused by or aggravated by the industrial injury or its after effects is supported by substantial evidence in the record.

In addition to the worsening of the physical conditions related to the industrial injury, the superior court also found that Cantu developed one or more mental health disorders as a result of his industrial condition which had an onset after the original terminal date, or had gotten worse between the first terminal date and the second. Here again, the superior court's finding is supported by substantial evidence in the record. Analytically speaking, the record as to the presence or absence of the related psychological conditions is straightforward: Dr. C. Donald Williams, a board-certified psychiatrist who evaluated Cantu at the request of his attorney testified on behalf of Cantu; Dr. Douglas P. Robinson, also a board-certified psychiatrist who evaluated Cantu at the request WestFarm testified on WestFarm's behalf. Simply put, it was Dr. Williams' opinion that Cantu suffered from major depressive disorder and a

pain disorder associated with both psychological factors and a general medical condition that were related to the industrial injury, Dr. Robinson's opinion was that he did not. Given these two divergent opinions, it was the superior court's role as the finder of fact, to scrutinize each expert's opinion and resolve the conflict one way or the other, unless, as described *infra*, the superior court found the evidence to be equally balanced, in which case the presumption of correctness requirement would require an affirming of the Board's findings of fact and conclusions of law.

In conducting this analysis, the superior court noted that its task was to decide which of the two hired experts to believe and that both were arguably biased. Court's Decision pg. 4, CP 23-27. However, the court detailed its reasoning for distinguishing between the two opinions. It noted that Dr. Robinson's opinion appeared to be primarily based on the fact that he simply does not believe Cantu. *Id.*

However, as noted in Cantu's trial brief, in order to adhere to this opinion, one must query how Cantu knew the criteria for a Major Depressive Disorder as outlined by the DSM IV which he endorsed

in both of his evaluations. Dr. Robinson's opinion is essentially that Cantu is making these endorsements up in order to obtain financial gain. Robinson pg. 25, lines 8-20. However, there is no evidence in the record to explain how Cantu would have acquired an understanding of the DSM IV such that he would be able to deceive or mislead trained medical experts. His attending physician, Dr. You endorsed that Cantu seemed depressed, and in fact, she treated him for this condition. Although, not a psychiatrist, she stated her belief that the depression and anxiety were aggravated by this industrial injury. Dr. Jean You deposition pg. 36, line 23 to pg 37, line 4. Cantu is a fairly simple person without a sophisticated background to support Dr. Robinson's hypothesis concerning Cantu's ability to consistently repeat the appropriate findings for depression. Dr. Robinson seemed to be concerned that Cantu was "eager to discuss" his auditory hallucinations. Robinson pg. 20, lines 20-22. What Dr. Robinson failed to grasp is that Cantu is trying to reopen his claim because he knows that he needs help. Significantly, Cantu did not discuss these problems when he first complained of depression to Dr.

You. However, it is obvious that he could not hide this problem and that he had to discuss this in order to get help. Ironically, Cantu's willingness to discuss his problems because he knew that he needed help was the basis for Dr. Robinson's disbelief. Based on this argument and the superior court's previous finding that Cantu actually had experienced an aggravation of his physical condition with a worsening of his back pain and the onset of objective symptoms, it appeared to the superior court that Cantu was telling the truth when he told Dr. Robinson about the pain he was experiencing. The superior court went on to find that because Dr. Robinson was incorrect in his failure to believe Cantu's description of his pain, Dr. Robinson may also have been incorrect with regard to his perception of Cantu's overall credibility and thus discounted the testimony of Dr. Robinson. Court's Decision, pg. 4, CP 23-27.

Dr. Williams, on the other hand, testified that Cantu had a major depressive disorder causally related to the industrial injury, and that he had a pain disorder also causally related to the industrial injury. Williams pg. 36, line 15 to pg. 38, line 12. The superior court

found that his testimony was supported by the testimony by the lay witnesses who described the changes in Cantu's behavior and personality since the time of his injury. Court's Decision pg. 4, CP 23-27. Therefore, the superior court, as the trier of fact, found Dr. Williams to be more persuasive and more likely than not to be correct. Based on this analysis, the superior court adopted the findings of Dr. Williams into its decision.

4. Cantu Should Be Awarded Attorney Fees Pursuant to RAP 18 & RCW 51.52.130.

RCW 51.52.130 provides that if an injured worker appeals a decision of the Board of Industrial Insurance Appeals to the Superior Court or any Appellate Court, and the Board's decision is reversed or modified the worker is entitled to an award for attorney fees and costs for services before the Court. Cantu hereby requests that attorney fees and costs be awarded him should he prevail in this appeal.

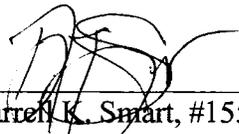
III. CONCLUSION

Based upon the foregoing argument and legal citation, the Cantu respectfully requests 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 Mr. Cantu's industrial injury claim and provide him with the proper and necessary medical treatment proximately related to this industrial injury.

RESPECTFULLY SUBMITTED this 3rd day of ~~November~~ ^{December},
2010.

SMART, CONNELL, CHILDERS & VERHULP, P.S.

By:



Darren K. Smart, #15500
Attorneys for Respondent

APPENDIX A

1 features and/or a pain disorder associated with both psychological factors and a
2 general medical condition, or any other psychiatric condition either caused by or
3 aggravated by the industrial injury or its consequences?

4 3. Did Mr. Cantu's condition, proximately caused by the industrial injury of
5 September 17, 2004, objectively worsened between September 6, 2005 and March 1,
6 2006?

7 DISCUSSION

8 Unchallenged findings of fact made by the Board of Industrial Insurance Appeals
9 are treated as verities on appeal. The parties do not dispute the facts surrounding the
10 September 17, 2004, injury to Mr. Cantu's left knee, or the fact that his knee problems,
11 proximately caused by the industrial injury, had reached maximum medical
12 improvement as of September 6, 2005, which resulted in a 10% impairment of the left
13 lower extremity.

14 The Board of Industrial Insurance Appeals also found, in Finding of Fact #4,
15 that, at the time the claim was closed on September 6, 2005, Mr. Cantu was

16 "experiencing pain and numbness over the lateral left leg into the lateral
17 three toes of his left foot and pain in the left knee, he was limping due to
18 the left knee pain; and he was experiencing low back pain. He was also
suffering from peroneal nerve palsy on the left side."

19 Mr. Cantu claims his low back pain worsened substantially after September 6,
20 2005, and that the pain in his low back, either by itself or in conjunction with the pain
21 from his knee injury, caused him to develop a major depressive disorder, rendering in
22 unable to work.

23 There is a factual dispute as to whether Mr. Cantu's low back pain, if any, was
24 causally related to his industrial injury. The defense argues that the back injury
25 resulted from yard work Mr. Cantu did on September 20, 2005. Dr. Harrington, the

1 treating physician, initially opined that the yard work did cause the back injury.

2 However, Dr. Harrington expressed that opinion before he knew about the full extent
3 of the knee injury Mr. Cantu had suffered and the limp that he had been experiencing
4 because of the knee injury. After he received that information, Dr. Harrington was of
5 the opinion that the limp, which was caused by the knee injury, caused the low back
6 pain by creating a biomechanical instability that put unusual stresses on the low back.
7 Dr. Harrington noted moderate to severe muscle spasms, tenderness, muscle
8 swelling, and muscle tension in Mr. Cantu's low back. Dr. Harrington's initial causation
9 opinion is understandable because he did not have all of the facts. As he described it,
10 it took a while before Mr. Cantu "opened up" to him and fully describe the history of his
11 injury.

12 The main problem with the defense argument is that it ignores the Board's
13 Finding of Fact #4, which notes that Mr. Cantu was experiencing low back pain as of
14 September 6, 2005. That back pain could not have been caused by the yard work
15 incident which occurred on September 20, 2005

16 My analysis of the testimony may very well have been different had it not been
17 for the undisputed finding that Mr. Cantu had been experiencing low back pain as of
18 the date his claim was closed. The defense offers no explanation for the cause of that
19 back pain. Instead, the defense argues that Mr. Cantu denied having any back pain
20 as of the date the claim was closed. However, I must assume he was experiencing
21 back pain, because that is what the Board found. The only reasonable explanation for
22 the back pain is that it was caused by the limp, which placed unusual stresses on Mr.
23 Cantu's low back. Over time, the back pain became worse. Apparently, the pain was
24 minor as of the date the claim was closed, but it continued to worsen until he
25

1 developed the objective symptoms described by Dr. Harrington: moderate to severe
2 muscle spasms, tension etc.

3 Dr. Toomey expressed the opinion that the left leg numbness, pain, and nerve
4 palsy were not related to the knee injury but instead were related to a stab wound Mr.
5 Cantu received in 1989. However, Dr. Toomey offered no explanation for why the stab
6 wound would not have been causing Mr. Cantu any significant symptoms prior to the
7 date of the knee injury. Here again, the only reasonable explanation for the peroneal
8 nerve problem is that it was related to the knee injury.

9 With regard to the mental health claim, I have to decide which of two hired
10 experts to believe. Arguably, both are biased. However, there are reasons to
11 distinguish between the two. Dr. Robinson's opinion appears to be primarily based on
12 the fact that he simply does not believe Mr. Cantu. Given my previous finding that Mr.
13 Cantu actually has experienced an aggravation of his condition, with a worsening of
14 his back pain and the onset of objective symptoms, it appears to me that Mr. Cantu
15 was telling the truth when he told Dr. Robinson about the pain he was experiencing.
16 Since Dr. Robinson was incorrect in his failure to believe Mr. Cantu's description of his
17 pain, I assume Dr. Robinson may have also been incorrect with regard to his
18 perception of Mr. Cantu's overall credibility.

19 Dr. Williams testified that Mr. Cantu had a major depressive disorder causally
20 related to the industrial injury, and that he had a pain disorder also causally related to
21 the industrial injury. His testimony was supported by the testimony by the lay
22 witnesses who describe the changes in Mr. Cantu's behavior and personality since the
23 time of his injury. Therefore, I find Dr. Williams to be more persuasive, and more likely
24 than not, to be correct.

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FINDINGS

I find that the plaintiff has proven the following by a preponderance of the evidence:

1. Mr. Cantu's low back pain, left leg numbness and pain, and peroneal nerve palsy were caused or aggravated by the industrial injury of September 17, 2004.
2. During the period of September 6, 2005, through March 1, 2006, Mr. Cantu did develop a depressive disorder and/or a pain disorder associated with both psychological factors and a general medical condition, either caused by or aggravated by the industrial injury or its after effects.
3. Mr. Cantu's condition, proximately caused by the industrial injury of September 17, 2004, did objectively worsen between September 6, 2005, and March 1, 2006.

CONCLUSION

The decision of the Board of Industrial Insurance Appeals affirming the Department's decision not to reopen Mr. Cantu's claim is reversed. Mr. Cantu's claim must be reopened so he can receive appropriate treatment. The issues of time loss and impairment shall be determined by the Department in a manner not inconsistent with this decision.

DATED this 15 day of December, 2009.



JUDGE BLAINE G. GIBSON
Superior Court Judge