

FILED

SEP 29 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 289591

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STATE OF WASHINGTON

Walla Walla School District

Respondent

vs

Cynthia O. Turner

Appellant

REPLY BRIEF OF APPELLANT

Robert D. Merriman, WSBA #10846
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I. Argument

At the outset, to the extent that the tone of the Appellant's brief was overly strident, Ms. Turner apologizes to the Court. It was not the intent to attack a respected member of the bench. What is frustrating, however, is that Judge Schacht's decision, and his characterization of the substantial evidence is diametrically opposed to the comprehensive and well reasoned decision of the Industrial Appeals Judge.

When Judge Schacht suggests that the "the bulk of the medical testimony" was against her claim, we would agree that the employer called more witnesses to testify against Ms. Turner. But the quality and the substance of their testimony does not support the assertions that the trial judge makes. For example, the surveillance video that the trial judge suggests "contradicts her claims" is the same surveillance video that the Industrial Appeals Judge found demonstrated Ms. Turner consistently favored and utilized her unaffected left upper extremity. Judge McDonald stated:

"All of the significant upper extremity movements are taken with her left arm, including smoking a cigarette, holding a bottled drink, and pushing open the door to a public bathroom...No-at-the- shoulder or above-the-shoulder use of the right arm is observed.

Exhibit No. 17, taped June 8 through 10, 1998, shows Ms. Turner walking her dogs. She primarily, but not always,

holds the leash in her left hand. When the right arm is always extended downward; when free it sometimes swings slightly on walking, but often is held immobile. She occasionally bends the right arm at the elbow, but only for a quick task. Again, no activity at or above the shoulder level is observed.” (CABR 61)

The assertion by Judge Schacht that “Embellishment and malingering are relative terms...” and that “Dr. Hamm’s testimony was most persuasive, while Dr. Early’s testimony was at best speculative.” is juxtaposed against the analysis of the Industrial Appeals Judge which found that by a “virtual consensus” of the physicians whose records and testimony were received, had proved the existence of the psychogenic pain disorder. (CABR 62) The chief hallmark of a psychogenic pain disorder is pain complaints that exceed the objective findings. (CABR 62) To suggest that embellishment and malingering are one in the same is not fair to Ms. Turner and is not supported by the substantial evidence in this case.

A review of this record for substantial evidence demonstrates that after nearly 15 years of widely varying medical diagnoses and treatment modalities, the medical and psychological consequences of Ms. Turner’s 1995 industrial injury had progressively worsened. Both parties’ witnesses agree that Ms. Turner’s condition is now fixed and stable and that she suffers from a psychogenic pain disorder. (Dordevich 42-43, 52; Hamm 31-32;

Early 23-24) A vital issue in this appeal is whether the industrial injury was the proximate cause of the pain disorder and, if so, whether this condition prevents Ms. Turner from obtaining, and even more importantly, *maintaining* gainful and meaningful employment.

In order for this court to reverse the trial court decision Ms. Turner must prove that substantial evidence in the record fails to support the trial court's findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.2d 355 (2009). A trial court need not make findings of fact on every piece of evidence in the record, only those which establish the existence or nonexistence of determinative factual matters. *Maehren v. Seattle*, 92 Wn.2d 480, 487-88, 599 P.2d 1255 (1981), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). Where findings required, they must be specific enough to permit meaningful review. *State v. Holland*, 98 Wn.2d 507, 517, 656 P.2d 1056 (1983).

The purpose behind the requirement of findings and conclusions is to insure the trial court dealt fully and properly with all the issues in the case. Additionally, those findings and conclusions insure that both the parties and the reviewing courts are fully informed as to the bases of the trial court's ultimate decision. *State v. Agee*, 89 Wn.2d 416, 421, 573 P.2d 355

(1977)(citation omitted).

CR 52(a) sets forth the standard by which a trial court's findings must comply. It requires that the trial court "find the facts *separately* and separately state its conclusions of law." (Emphasis added.) *BLACK'S LAW DICTIONARY* distinguishes a general finding from a special finding. It states in relevant part: "A special finding is a *specific* setting forth of the ultimate facts established by the evidence and are determinative of the judgment which must be given." *Id.* 632 (6th ed. 1990).

In this case the trial court's contested findings: (1) are not appropriate findings; (2) are not specific enough to permit meaningful review; and (3) are not supported by substantial evidence in the record. The Employer attempts to rectify this situation by listing what it believes is potential evidence on which the trial court may have relied in making its decision. This is speculative and does not prevent this court's de novo review of the challenged findings of fact (that are really conclusions) as well as the court's written conclusions of law. *Rogers, supra*, at 180. Without conceding or repeating the issues raised in her Appellant's Brief, Ms. Turner briefly discusses the trial court's findings of fact 2-3, 5, 7 and 9 as applied to the Employer's brief.

In Finding #2, the second sentence states: “She could have, and should have, litigated whether the injury had caused [a psychogenic pain disorder] . . . in [the 1998 attempted claim closure] proceeding.” This is a conclusion not a finding and is not supported by the doctrine of claim preclusion as the trial court determined.

Claim preclusion prevents the same parties from litigating a second lawsuit on the same claim or any other claim arising out of the same transaction or series of transactions that could have been, but wasn’t, raised in the first lawsuit. *Roberson v. Perez*, 156 Wn.2d 33, 41 [fn. 7], 123 P.3d 844 (2005) (citing *Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004)) “Res judicata bars ‘every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.’” *Black, supra* (citation omitted).

Although the same parties are involved, this case does not involve a second lawsuit. It is merely the continuation of an industrial injury claim that was initiated in 1995 and has been open since that time because Ms. Turner’s medical condition “was not yet fixed and stable.” (Ex. 19, p.8 – Finding #3) As will be seen below, the Department’s second attempt to close Ms. Turner’s industrial injury claim does not create a new lawsuit that is subject

to the doctrine of claim preclusion.

Ms. Turner argues that in the original claim closure proceeding (2000-01) she neither could have nor should have litigated whether her industrial injury was the proximate cause of a psychogenic pain disorder. Although a medical professional diagnosed a psychogenic pain disorder, it was not the cause of any sort of disability at the time of the 1999 attempted closure, and neither party argued such. The only issue in the original claim closure attempt was the shoulder injury. This court will observe that the 2001 Board decision does not discuss a psychogenic pain disorder – not in its findings of fact and not in its conclusions of law. As explained above by the *Black* court, claim preclusion does not apply under these facts because the current claim was not adjudicated in the earlier proceeding.

Secondly, finding #3, starting at “. . . the February 27, 1995 injury did not proximately cause a pain disorder associated with psychological factors or other psychiatric or mental health condition, or any associated permanent impairment[]” is a conclusion, which this court reviews de novo. Even if it were a finding, the issue is not supported by any evidence in the record.

Proximate cause is defined as “. . . a natural and continuous sequence, unbroken by any efficient intervening cause, [which] produces

injury, and without which the result would not have occurred. *BLACK'S LAW DICTIONARY* 1225 (6th ed. 1990) (citation omitted). The record reveals that Ms. Turner did not suffer from any medical or psychological problems prior to the industrial injury. (10/27/08 Tr. at 35-39, 53-57, 115-18; Hamm 11) As noted above, experts from both sides recognize that Ms. Turner now suffers from a psychogenic pain disorder. The trial court failed to provide any fact that would lead to a contrary result. A review of this record for substantial evidence shows conclusively that there is no intervening cause that could potentially have caused Ms. Turner's pain disorder.

Additionally, in its memorandum opinion the trial court erroneously determined that Ms. Turner was not suffering from a psychogenic pain disorder. It stated: "Review of the record leads this Court to the conclusion that the great weight of the medical evidence does not support a finding of a psychiatric disorder." (CP 43) Not only can this statement not be supported by the record, it contradicts the court's Finding #2 (first sentence) which states: "*Claimant had been diagnosed with a psychogenic pain disorder* well before the 2000-01 proceeding on this claim." (CP 44)

The Employer asks this court to place great weight on the testimony

of Dr. Hamm regarding Ms. Turner's psychogenic pain disorder. However, a close reading of the record reveals his testimony was confusing. Dr. Hamm initially refused to make a diagnosis of a psychogenic pain disorder. He apparently preferred the term "somatoform disorder known as a pain disorder." (Hamm 32-34) However, he admitted that experts on both sides have defined Ms. Turner's specific pain disorder as: "Pain Disorder With Both Psychological Factors and a General Medical Condition." (Hamm 31; Dordevich 43-44, 52; Early 22-25)

Dr. Early defined the "DSM IV" as the guideline that psychiatrists and other mental health providers use in diagnosing a patient. (Early 8-9) Dr. Hamm listed the DSM IV diagnostic criteria for Ms. Turner's specific pain disorder as including:

- (1) Pain in one or more sites as the focus of clinical presentation;
- (2) Pain severity warrants clinical attention;
- (3) Pain causes significant distress or impaired function;
- (4) Both psychological factors and a general medical condition are judged to have important roles in the onset, severity, exacerbation or maintenance of the pain;
- (5) Pain is not intentionally produced or feigned;
- (6) Pain is not accounted for by a mood, anxiety, or psychotic disorder and does not meet the criteria for dyspareunia.

(Hamm 33-35). These same factors were also noted by Dr. Dordevich.

(Dordevich 49-50). Drs. Hamm and Dordevich both agreed that Ms. Turner's

symptoms fit the above-described diagnosis. (Hamm 37, 45; Dordevich 43) Consequently, this record does not provide the required substantial evidence in the record to support the trial court's determination that Ms. Turner does not suffer from a psychogenic pain disorder.

Third, the trial court's finding #5 states: "A substantial preponderance of the evidence shows that claimant's pain complaints, and the associated limitations she claims, are greatly exaggerated and largely not genuine." This is a conclusion, not a finding and the trial court supplied no indication of what evidence upon it relied.

The record reveals that Dr. Early discussed the subjective measure of physical pain complaints as expressed by the patient versus that observed by the examiner. (Early 56-57) He testified that pain complaints, by definition cannot be measured. (Early 61) He stated that ". . . there is no physician who can say what somebody's level of pain complaints ought to be because we're all individuals, and some people are very stoic and some people are not." (Early 65) He testified that pain behavior is not completely explained on the basis of objective findings because there is no medical test that can identify soft tissue or nerve injury as a source of pain. (Early 61-62) Regarding Dr. Hamm's testimony, Dr. Early explained that an examiner

would opine that a claimant is exhibiting “inappropriate” or “marked” pain behavior during a physical examination and not during a one-on-one personal interview because the physical examination requires physical activity and a sit-down interview does not. (Early 61) Hamm agreed this explanation could have been true of the forensic examination performed on Ms. Turner in which he participated. (Hamm 14-15)

Ms. Turner is aware of only two places in this more than 500-page record whereby doubt is cast on her pain complaints. First, she attended a pain clinic in 1998, three years after her industrial injury. A forensic examiner at the pain clinic that had examined Ms. Turner on one occasion opined¹ that her pain complaints may be exaggerated. (Dordevich 15) Secondly, Dr. Hamm found Ms. Turner exhibited “dramatic pain behavior.” (Hamm 12-15) Ms. Turner asserts this is not the substantial evidence in the record rule required to overturn the Board decision. Most telling, no expert has ever found that Ms. Turner was malingering, one of the necessary DSM IV factors (#5) set forth above. (Dordevich 46-49, 56-57; Hamm 30-32, 44-45; Early 10-19)

Finally, the trial court made two different rulings regarding Ms.

¹ This diagnosis was made one decade prior to the Department’s current claim closure action.

Turner's inability to work on a full-time basis as a result of her industrial injury. At issue in this action is both her Temporary Total Disability (TTD), which took place from December 29, 2006 through January 17, 2008 (Finding #7) and her Permanent Total Disability (PTD), which covers the period from January 18, 2008 forward (Finding #9).

Regarding Ms. Turner's TTD, the court's finding #7 states: "A substantial preponderance of the evidence demonstrates . . . that claimant was not precluded from performing or obtaining reasonably continuous gainful employment as a proximate cause of the [industrial] injury and its residuals." Similarly, finding #9 repeats this statement with regard to Ms. Turner's PTD. Once again these are conclusions, which this court reviews de novo.

In order to prevail on the factual issue of employability, Ms. Turner must provide evidence that overcomes the presumption of the correctness of the trial court's decision. The record must provide evidence that she was disqualified from jobs generally available in her labor market after consideration was given to her strengths, weaknesses, age, education, training, experience as well as her physical capabilities resulting from the industrial injury – in other words, the whole person. *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 295, 499 P.2d 255 (1972).

Frankly, this record contains a battle of vocational experts. However, in comparing the medical testimony provided by Dr. Early and the vocational expert, Mr. Garza, to the medical testimony of Dr. Hamm and the vocational expert, Mr. Renz, substantial evidence in the record clearly supports the Board decision that Ms. Turner's psychogenic pain disorder precluded her from obtaining and maintaining any type of employment for which she was qualified. The vast difference between the two vocational experts is that Mr. Garza addressed the issue of the psychogenic pain disorder whereas Mr. Renz did not. This distinction is vital to the resolution of the court's conclusion that Ms. Turner was not a totally disabled worker from December 29, 2006 to the present.

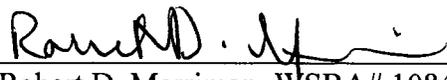
The Board decision meticulously dissects the testimony of both vocational experts and includes citations to the Board hearing. The trial court's findings and/or memorandum decision provide no facts on which it based its decision. Accordingly, this court must conduct a de novo review of the evidence. Ms. Turner asserts that substantial evidence will demonstrate that the trial court erred when it concluded that Ms. Turner was not totally disabled during the relevant periods.

II. CONCLUSION

On appeal to the superior court the Board decision is prima facie correct. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). RCW 51.52.115. The 33-page Board decision is well written and contains dozens of citations to the evidence contained in the more than 500-page record. In contrast, this trial court decision contains very few actual findings of fact and no citations to the record that would permit meaningful review. Moreover, it failed to discover or document that this record provides undisputed testimony that Ms. Turner suffers from a specific pain disorder, which is compensable under Title 51. Because the trial court decision fails to provide proper evidence that contradicts the Board decision this court must review the court's "findings" de novo. The same is true of the court's written conclusions of law. In doing so, Ms. Turner maintains that substantial evidence will not support the trial court's ultimate decision.

DATED this 18 day of September, 2010.

Respectfully submitted,
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By 
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