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Court of Appeals
Division III
State of Washington

NO. 31391-3

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

ANTONIO L. PADILLA
Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Respondent.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. The Standard of Substantial Evidence Based on Review of the Entire Record.

Mr. Padilla has challenged the trial court's findings and correctly identified the Standard of Review for this Court as determining whether substantial evidence supports the trial court's findings of fact. App. Br., at 4, 9-10. Here, the trial court incorporated *in toto* the findings of the Board of Industrial Insurance Appeals into its own findings, making it awkward in challenging the trial court's findings without referencing the Board even though this Court does not sit in the same position and is strictly reviewing the trial court's findings and conclusions - rather than those of the Board. CP 51. Mr. Padilla has not asked this Court to re-weigh the evidence as alleged by the Respondent (Resp. Br., at 1,12-14). However, Mr. Padilla does seek careful review of the entire record by this Court to determine whether "more than a mere scintilla" of evidence exists to support the findings and to determine whether the conclusions flow from those findings. The Respondent claims this Court must disregard Mr. Padilla's evidence in its review and look no further than the Department's one-time defense examiner - Paul Reiss, M.D. Resp. Br., at 7. Generally, judicial review is of the <u>entire record</u>, not select or isolated evidence. *See Norway Hill Preserv. & Protec. Assn' v. King Cy. Coun.*, 87 Wn.2d 267, 522 P.2d 674 (1976);

Lewis v. Dep't of Licensing, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006) ("The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party." [Emphasis added]). Based on review of the entire record, substantial evidence does not support the trial court's findings denying reopening of the claim.

B. Even if Substantial Evidence Exists, the Conclusions Do Not Flow from the Trial Court's Findings.

Mr. Padilla also challenged with argument the trial court's conclusions of law. App. Br., at 3-5, 9-23. Even if, after reviewing the entire record, this Court finds that substantial evidence supports the trial court's findings, it must also determine de novo whether the trial court's conclusions flow from those same findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009); *see also Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 40 P.3d 1221 (2002). Mr. Padilla submits that the trial court's conclusions (or blanket adoption of the Board's conclusions) do not naturally flow from the findings. Rather, the findings are internally inconsistent and, in fact, they conflict directly with the testimony of the sole defense witness the trial court found persuasive. Curiously, defense witness Dr. Reiss speculates about the accident and testified that the truck collision in the course of employment did not cause significant

structural trauma or damage even though he had limited information and was wholly unaware of the speed of the truck. CABR, Reiss, at 8-9, 14, 18. Mr. Padilla testified that he was driving truck for Roy Farms, Inc., on August 31, 2006 when he was blinded by the high-beam headlights of an on-coming tractor trailer and crashed into the trailer of the on-coming rig. His truck was totally destroyed and he estimates that he was traveling approximately 55 miles per hour at the time of the accident. He lost consciousness and felt dizzy. He was taken by ambulance to Yakima Regional Hospital. CABR, Padilla, at 6. But defense witness Dr. Reiss ruled out major trauma. CABR, Reiss, at 15. Mr. Padilla's collision in the course of employment need not be the sole cause of his neck condition, much less the sole cause of his worsened condition. *See City of Bremerton v. Shreeve*, 55 Wn.App. 334, 339-41, 777 P.2d 568 (1989); *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 681-83, 571 P.2d 674 (1977); WPI 155.06. According to Dr. Reiss, Mr. Padilla had normal range of motion and undoubtedly had development disk disease at his age. Dr. Reiss did not "think there's anybody over the age of 60 who doesn't have degenerative changes in their neck" based on degenerative changes on imaging, <u>which he admittedly never saw</u>. CABR, Reiss, at 20. Nonetheless, Dr. Reiss opined that no worsening occurred since claim closure. CABR, Reiss, at 13.

However, a medical opinion concerning causation (between an industrial injury and a subsequent disability) based on incomplete or inaccurate information has long been deemed insufficient to support a verdict under Washington law. *Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 150-51, 278 P.2d 666 (1955). In this case, Dr. Reiss' testimony demonstrates that he lacked full knowledge of all material facts and falls far short of substantial evidence. A careful review of the entire record can only persuade a fair-minded, rational person that Mr. Padilla established a compensable aggravation within the meaning of RCW 51.32.160.

In stark contrast to the testimony of the sole defense medical witness allegedly providing substantial evidence for its decision, the trial court's actual findings - numbered 2, 3 and 4 - provide substantial evidence of an objective worsening of Mr. Padilla's neck condition, including "reduced cervical range of motion" and x-rays demonstrating "some loss of the normal curve of the spine with a slight subluxation at C4." CABR 36. Moreover, these same findings do not support the trial court's conclusion that "[b]etween January 3, 2007, and March 16, 2010, Mr. Padilla's conditions, proximately caused by the industrial injury of August 31, 2006, had not objectively worsened within the meaning of RCW 51.32.160." CP 36, 51. The challenge to the conclusions and to the applied interpretation of the

referenced aggravation statute, RCW 51.32.160, constitutes a legal issue and dictate *de novo* standard of review. *Ruse v. Dep't of Labor & Indus.,* 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Jacobsen v. Dep't of Labor & Indus.*, 127 Wn.2d 384, 389, 110 P.3d 253 (2005).

Even assuming substantial evidence in support, the question becomes whether the conclusion of law - that there was no objective worsening proximately caused by the industrial injury - flows naturally from the finding of "without disability" at first closure on January 3, 2007 as compared to "the reduced cervical range of motion" and imaging studies that "did demonstrate some loss of the normal curve of the spine with a slight subluxation at C4" as found in September 2009. The trial court's findings make no mention of another proximate cause for any worsened condition. In fact, the court's findings, even if assumed true and in a light most favorable to the prevailing Department, lead only to the conclusion that the worsening is due to the industrial injury and its progressive residuals.

The Court cannot infer from these findings that the worsening is related to another accident or injury, much less from the mere increased age of Mr. Padilla in the thirty-two month interval between initial claim closure and his reopening application. The trial court did not make specific findings about Mr. Padilla's age as a contributing cause. Nor did the trial court enter

any specific finding about Mr. Padilla's condition on initial closure other than to say his "claim was closed without disability award." CP 35; 51. The trial court is bound by law to conclude that Mr. Padilla had no permanent spine impairment as of January 3, 2007 since no disability award was issued. *White v. Dep't of Labor & Indus.*, 48 Wn.2d 413, 414, 293 P.2d 764 (1956). There is no finding acknowledging a comparison of findings between the terminal dates or of the lack of comparative imaging studies from claim closure. The pertinent regulation for a cervical disability award is WAC 296-20-240. Taking that regulation into account, the trial court's finding can only mean there were no objective clinical findings present as of January 3, 2007. WAC 296-20-240(1)("No objective clinical findings are present."). In contrast, the trial court's findings verify objective worsening by reduced cervical range of motion, as well as a loss of anterior curve and subluxation at C4 substantiated by x-ray as of March 16, 2010. CP 36, 51. In the end, there are no statements reflected in the trial court's findings that support or infer that Mr. Padilla's cervical condition progressed independent of the residuals of his injury or resulted from his age. In the end, the trial court's conclusion that Mr. Padilla's conditions, proximately caused by the industrial injury of August 31, 2006, had not objectively worsened within the meaning of RCW 51.32.160, does not flow from its own findings. The trial court's

incorporation of the Board's finding numbered 5 ("Any objective worsening in Mr. Padilla's condition that occurred between January 3, 2007, and March 16, 2010, was not proximately caused by the residual effects of the August 31, 2006 industrial injury.") is not only conclusory, but insuffucient and in conflict with findings numbered 2, 3, and 4. The conclusions of law do not naturally flow from these findings.

C. In Applying the Aggravation Statute - RCW 51.32.160(1)(A), the Benefit of the Doubt Belongs to Mr. Padilla.

Mr. Padilla "has a right to all the benefits" of the Industrial Insurance Act. *Peterson v. Dep't of Labor & Indus.*, 22 Wn.2d 647, 651, 157 P.2d 298 (1945). His rights include those benefits provided by the aggravation statute. Specifically, RCW 51.32.160(1)(a) authorizes claim reopening if the injured worker establishes an objective worsening of his industrial-related condition since claim closure as explained in *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956) and its progeny. Washington law dictates that its courts liberally construe the provisions of the Industrial Insurance Act consistent with the statutory goal of reducing "to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010.

The central provision implicated here is RCW 51.32.160(1)(a). Its application, together with the legal principle of multiple proximate cause as

required in Washington, to the entire record presented requires reopening of the claim. Mr. Padilla simply asserts that substantial evidence does not support the trial court's findings and its denial of his reopening application. Further, he asserts that the testimony of the Department's defense medical expert is fatally flawed and legally deficient to sustain the trial court findings, but if substantial evidence is found, the trial court's conclusions do not naturally flow from these findings. As explained by the Supreme Court: "the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). Mr. Padilla is an injured worker, deserving of the benefit of the doubt, in light of the record presented.

II. CONCLUSION

For the foregoing reasons, and incorporating those set forth in the Appellant's Brief, substantial evidence does not support the trial court's findings and, assuming the Court finds otherwise, the conclusions do not naturally flow from those findings. Accordingly, Mr. Padilla requests that the court reverse the decision of the superior court and order the Department to

reopen claim AC 64072 and provide him the additional benefits to which he is entitled under Washington's Industrial Insurance Act, Title 51, RCW.

RESPECTFULLY SUBMITTED this 19th day of June, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

I certify that on the 19th day of June, 2013, I electronically filed this document with the following:

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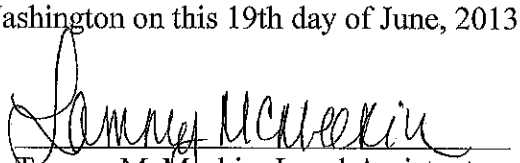

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