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MAY 28 2014

No. 320758

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

International Paper Company

Respondent.

v.

Anthony Bolte

Appellant,

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Yakima County Superior Court Order based on the six to zero jury verdict was correct in concluding that the claimant did not sustain an industrial injury on October 1, 2008 while in the course of his employment with International Paper Company. The Court was also correct in denying the claimant's CR50(a)(1) directed verdict motion. This Court, for the reasons enumerated below, should affirm the decision of the Superior Court.

II. STATEMENT OF THE ISSUES

Is there substantial evidence supporting the jury's six to zero verdict that claimant did not sustain an industrial injury on October 1, 2008 while in the course of his employment with International Paper Company, as defined by the Industrial Insurance Act? Was the trial court correct in denying the claimant's motion for directed verdict (motion for judgment as a matter of law)?

III. STATEMENT OF CASE

Claimant, Anthony Bolte, filed an Application for Benefits with the Department of Labor and Industries on November 10, 2008. He alleged that he sustained an industrial injury on October 1, 2008, when he felt groin pain while driving a forklift. He had previously had an inguinal hernia repair in June of 2007 performed by Dr. Lozano. (Dr. Lozano Depo. page 9). On November 6, 2008, he told Dr. Lozano that he had pain in his right groin and was concerned that he may have had a recurrent hernia. (Id. at 11-12).

Dr. Lozano did not detect a hernia at that time, and the claimant did not tell his doctor that he had alleged having sustained an injury to his right groin while steering his forklift in reverse and looking over his shoulder. (Id. at 12). Only later did Dr. Lozano learn that the claimant was alleging a new industrial injury. (Id.)

The Department of Labor and Industries allowed the claim and on appeal, the Board of Industrial Insurance Appeals affirmed claim allowance on June 17, 2010. The employer filed a Petition for Review and the Board issued an order on August 9, 2010 upholding claim allowance. The employer appealed to the Yakima County Superior Court. The claimant made a motion for directed verdict (motion for judgment as a matter of law) which was denied, and on August 28, 2013 a jury voted six to zero that the claimant did not have an industrial injury in the course of his employment on October 1, 2008 that was a proximate cause of an injury to the tissues in the area of his right inguinal hernia.

III. ARGUMENT

A. The trial court was correct in denying the claimant's directed verdict motion.

A trial court's order denying a CR 50 motion for judgment as a matter of law is reviewed de novo. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). A challenge is held to a stringent standard and admits for

the purpose of ruling on the motion the truth of the nonmoving party's evidence and all reasonable inferences drawn therefrom. Levy v. North Am. Co. for Life & Health Ins., 90 Wash.2d 846, 851, 586 P.2d 845 (1978); Zipp v. Seattle School District No. 1, 36 Wash.App. 598, 676 P.2d 538 (1984). The motion requires that all evidence be interpreted in a light most favorable to the party against whom the motion is made and most strongly against the moving party. Bennett v. Department of Labor & Indus., 95 Wash.2d 531, 534, 627 P.2d 104 (1981). The Court will not weigh the evidence but will search the entire record to find evidence which tends to support the verdict, and if there is more than a mere scintilla of evidence supporting the jury's verdict, the Court must deny the motion. Halder v. Dep't of Labor & Indus., 44 Wn.2d 537, 542, 268 P.2d 1020 (1954); Omeitt v. Dep't of Labor & Indus., 21 Wn.2d 684, 685, 152 P.2d 973 (1944).

The claimant's directed verdict motion was properly denied because the record is replete with evidence supporting the employer's position that the claimant failed to prove by a preponderance of the evidence that he sustained an industrial injury on October 1, 2008. An injury is a sudden tangible happening of a traumatic nature that produces a prompt or immediate result that occurs from without and the physical conditions that are the result of the happening. RCW 51.08.100; In re Shawn N. Leichty, BIIA Dec., 04 13785 (2005). In addition to a tangible happening and a resulting physical condition or bodily harm, the causal relationship between the physical condition and the

accident must be established by medical testimony before an industrial accident can constitute an “injury.” *In re Kenneth Heimbecker*, BIIA Docket No. 41 998 (1975).

Since the issues argued overlap, the evidence will be summarized in this section and evaluated in depth in the next section. Evidence which supports the verdict includes Dr. Lozano’s and Dr. Heap’s testimony that the claimant’s symptoms were caused by his injury in 2007 which resulted in inguinal hernia surgery, rather than any activities on October 1, 2008. Dr. Lozano testified that simply looking over a shoulder while driving would not constitute any “unusual strain” which would be expected to produce the claimant’s alleged symptoms. The claimant changed his story regarding whether he communicated to his supervisor that he was going to file a workers’ compensation claim, and admitted that he was already in the disciplinary process for absences and filing a claim prevented him from further discipline. There is more than enough evidence in the record to support the jury’s six to zero verdict finding that the claimant did not sustain an industrial injury on October 1, 2008.

B. The jury verdict is supported by substantial evidence.

Appellate Court review of the Superior Court’s decision is limited to the examination of the record to determine whether substantial evidence supports the lower court’s findings and whether the court’s conclusions flow from those findings. *Young v. Dep’t of Labor & Indus.*, 81 Wn. App. 123, 128, 913

P.2d 402 (1996). "Substantial evidence supports a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true." *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012). The evidence is reviewed in the record in the light most favorable to the prevailing party. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

Claimant cites *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 395 P.2d 633 (1964) for the proposition that at Superior Court, the presumption of correctness of the Board's finding only controls when the evidence is evenly balanced and the fact finder is unable to make a determination of the facts presented. However, in that case, the court noted that the Superior Court made no attempt at an independent appraisal of the evidence, and the Board, "contrary to its usual custom, made no extensive analysis of the evidence in the lengthy record." *Id.* at 38, 37. The case at bar is not one in which the fact finder was unable to make a determination of the facts presented, nor is it one where the evidence is evenly balanced. To the contrary, the record is replete with substantial evidence which fully supports the jury's six to zero verdict.

The medical experts agreed that the minor action of claimant looking over his shoulder while driving a forklift was insufficient to cause an injury to claimant; however, the medical testimony indicated that the claimant's symptoms were due to the 2007 hernia repair and were, therefore, unrelated to

the alleged injury on October 1, 2008. Dr. Lozano performed claimant's surgery in 2007 and testified that if claimant had neurodynia, an inciting event such as an unusual stretch or unusual trauma would occur. (Dr. Lozano Depo. page 17.) He said that simply looking over your shoulder while backing up a car or forklift was not an "unusual strain" which by itself would cause claimant's complaints. (Id. at 18). He went on to state that the claimant did not tell him that he had sustained an injury to his groin on October 1, 2008, and that upon learning this information, he diagnosed a strained or pulled muscle. Id. at 12-13. He testified that the claimant does not have neurodynia, a rare diagnosis of nerve pain following a hernia surgery, because claimant received a nerve block on November 11, 2009 which would have alleviated the claimant's symptoms and instead exacerbated them. (Id. at 18-20).

Dr. Heap examined claimant on January 13, 2009 and he believed that the claimant did have neurodynia. (Dr. Heap Depo. page 7, 12). He determined that the condition was proximately caused by the 2007 hernia repair rather than any alleged industrial event on October 1, 2008. (Id. at 21-22, 25). He indicated that if the claimant has neurodynia, it would have developed at some point regardless of the activity on October 1, 2008. (Id. at 23). He stated that based on what the claimant said, he had pain triggered by driving a forklift on October 1, 2008. (Id. at 23). He agreed that a full and accurate history is important in providing medical opinions regarding causation. (Id. 25). He stated that despite obtaining a full history from the claimant at the evaluation,

the claimant failed to inform him that he had been participating in golfing, bowling, playing basketball and driving motorcycles prior to October 1, 2008. (Id. at 24, Hearing Transcript at page 20-22).

Dr. Heap compared the claimant's situation to an individual with a "bad back," that bends over at work to tie his shoe and is immobilized with pain. (Id. at 29). He indicated that the individual may be at work, but it would be difficult to say that he had an industrial injury just because the pain happened at work since the individual had a bad back from another cause. (Id.) Again, Dr. Heap believed the claimant should reinstitute a claim for the original injury which resulted in the hernia surgery in June of 2007, and he determined that the condition was proximately caused by the 2007 hernia repair rather than any alleged industrial event on October 1, 2008. (Id. 21-22, 25).

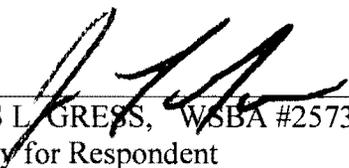
International Paper uses a point system to institute progressive discipline for excessive absences from work. (Hearing Transcript pages 11-13). The claimant testified that he told his supervisor that he was in pain on October 18, 2008, but wanted to keep working for a few more hours so that he would not accrue points for another absence, as he was already in the disciplinary stage due to his absences from work. (Hearing Transcript pages 32-33). He indicated that he could not recall whether or not he told his supervisor that he was going to file a worker's compensation claim. (Id. at 33). He then changed his story and testified under oath that he never said anything to his

supervisor about filing a claim. (Id. at 33). He admitted that if he had not filed a workers' compensation claim, he would have been disciplined for absences from work over the several months prior to his filing the claim on November 10, 2008. (Id. at 35). The claimant's testimony calls into question his credibility, and shows that he had other motives for filing a claim.

V. CONCLUSION

The jury heard and weighed all of the testimony, and came to a six to zero verdict finding that the claimant did not sustain an industrial injury on October 1, 2008. Based on the discussion above, there was clearly substantial evidence to support the jury's verdict. For the reasons stated above, respondent requests this Court affirm the Order and Judgment of the Yakima County Superior Court. The Superior Court was correct in denying the claimant's motion for a directed verdict and the jury verdict is supported by substantial evidence.

Respectfully submitted this 27th day of May, 2014.



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**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**

ANTHONY P. BOLTE,)
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Appellant,)
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v.)
)
INTERNATIONAL PAPER,)
)
Respondent.)
_____)

No.: 320758-8-III
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing Respondent's Brief on the following individuals on May 27, 2014, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

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6 And deposited in the post office at Portland, Oregon on said date.

7 I further certify that I filed the original of the foregoing with:

8 Clerk's Office
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14 by mailing it by Federal Express on: May 27, 2014.

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