

FILED

NOV 16 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 33350-7-III

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

M.A. MORTENSON COMPANY,

Appellant,

v.

KURT FOWLER, LYDIG CONSTRUCTION, INC. AND THE
DEPARTMENT OF LABOR AND INSUTRIES OF THE STATE OF
WASHINGTON,

Respondents.

REPLY BRIEF OF APPELLANT

Ryan S. Miller, WSBA# 40026
Thomas G. Hall & Associates
P.O. Box 33990
Seattle, WA 98133
Ph: (206) 622-1107
Fax: (206) 546-9613
rmiller@thall.com

Attorney for Appellant

TABLE OF CONTENTS

I. ARGUMENT1

 A. There Was Competent Evidence, Or A Reasonable Inference, That Would Have Sustained A Jury Verdict In Favor Of Mortenson, Therefore It Was Improper For The Superior Court To Take Away Mortenson’s Right To A Jury And Grant Mr. Fowler’s Motion For A Directed Verdict.....1

 B. It Was Error For The Court To Find As A Matter Of Law That Mortenson Was Not An Aggrieved Party And Therefore Did Not Have Standing To Appeal A Denial Of A Reopening With Lydig When Both Claims Had Been Inextricably Consolidated For All Purposes, The Parties Waived The Argument Of Standing, And Mortenson Has To Pay For The Injury Lydig Caused.....5

II. CONCLUSION6

TABLE OF AUTHORITIES

Cases

Dobbins v. Commonwealth Aluminum Corp.,
54 Wn.App. 788 (1989)..... 2

Elterich v. Arndt,
175 Wash 562, 27 P.2d 1102 (1933) 5

Jackson v. Department of Labor & Indus.,
54 Wn.2d 643 (1959)..... 3

Lybbert v. Grant County,
141 Wn.2d 29, 1 P.3d 1124 (2000)..... 6

Ramey v. Knorr,
130 Wn. App. 672, 124 P.3d 314 (2005)..... 4

State v. Taylor,
150 Wn.2d 599, 80 P.3d 605 (2003)..... 5

Statutes

RCW 51.08.100 3

I. ARGUMENT

A. **There Was Competent Evidence, Or A Reasonable Inference, That Would Have Sustained A Jury Verdict In Favor Of Mortenson, Therefore It Was Improper For The Superior Court To Take Away Mortenson's Right To A Jury And Grant Mr. Fowler's Motion For A Directed Verdict.**

Lydig asserts on Pages 12 through 13 of its Brief that there was “no competent evidence that would sustain a jury verdict that Fowler did not sustain an industrial injury during the course of his employment with Mortenson.” Not true. Again, one of the issues on appeal was whether or not Mr. Fowler sustained a new industrial injury at Mortenson. Dr. Brigham, a competent, board-certified orthopedic surgeon was asked the following question on recross-examination: “And the pain was brought on because he had a new injury on August 3rd, 2011, correct?” **Dr. Brigham answered, “No. There was no new injury. The MRI doesn't show a new injury.”** B.R. Brigham 25 (emphasis added). Dr. Brigham not only renders an opinion indicating no new injury when directly asked but then goes on to state in the next sentence one of the reasons why he doesn't believe there was a new injury (i.e. nothing on MRI). Moreover, Dr. Brigham indicated that the mechanism of the alleged injury claim with Mortenson, would not have caused the abnormality that was seen in the MRI (the imaging study that shows the pathology complained of). B.R.

Brigham 9. Ultimately, it cannot seriously be argued that Dr. Brigham's testimony isn't competent or that a reasonable inference didn't exist that could have sustained a favorable verdict for Mortenson. Therefore, the Superior Court erred in granting Mr. Fowler's Motion for a Directed Verdict.

As to Lydig's assertions on Page 13 of its Brief regarding the definition of an injury under the Industrial Insurance Act, Mortenson has presented evidence to refute Mr. Fowler's claim that an industrial injury ever occurred while working for Mortenson. "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." What is the traumatic nature, if any, that Mr. Fowler sustained under his claim with Mortenson? What is the result of Mr. Fowler's alleged happening at Mortenson under the claim? What physical conditions resulted from Mr. Fowler's alleged injury with Mortenson? These are questions that must be answered. As to causation between an injury and employment, medical testimony is required. *See Dobbins v. Commonwealth Aluminum Corp.*, 54 Wn.App. 788 (1989); *Jackson v. Department of Labor & Indus.*, 54 Wn.2d 643 (1959). That is, in order to prove an industrial injury and have a claim allowed, medical testimony or

a medical opinion is required (unlike what Lydig implies in its Brief on Pages 13-14). Here, Dr. Brigham's testimony alone refutes the causation prong of the definition of an industrial injury under RCW 51.08.100. That is, based upon Dr. Brigham's testimony, Mr. Fowler did not meet the statutory requirements for an industrial injury and therefore Mr. Fowler's claim should not have been allowed (based on Dr. Brigham's testimony alone). Ultimately, Lydig's arguments on this point are misleading and misplaced.

On Page 15 of Lydig's Brief, Lydig misstates Mortenson's assertions. Mortenson is not arguing that pre-existing conditions bar a new claim. Rather, Mortenson is simply asserting that there is no new injury and the symptoms that Mr. Fowler reports were likely caused by his work at Lydig. For example, if worker A suffers from debilitating migraines and goes to work and at work worker B says a quiet "hello," and that greeting makes worker A subjectively feel more pain for a moment, that event may not automatically be an industrial injury. Rather, Worker A may simply have experienced a temporary spike in a symptom but that spike in a symptom may not alone rise to the level of an industrial injury as defined by RCW 51.08.100. Here, Mortenson is arguing that Mr. Fowler may

simply have experienced a spike in symptoms but that alone does not rise to the level of an industrial injury.

Lydig asserts that “. . . all three of Mortenson’s witnesses agreed Fowler sustained an industrial injury on August 3, 2011.” While it is true that all three witnesses did testify to an industrial injury, Dr. Brigham did unambiguously specifically state at the end of his testimony that there was no new injury. *See* B.R. Brigham 25. It is unknown whether the hypothetical offered to Dr. Brigham earlier was worded in such a way that generated a different answer or whether Dr. Brigham, through the process of the deposition changed his mind at a later point. Regardless, it does not matter, because Dr. Brigham did indeed clearly testify that there was no new injury and when considering a motion for a directed verdict, facts must be considered most favorable to the non-moving party. *See Ramey v. Knorr*, 130 Wn. App. 672, 675-676, 124 P.3d 314 (2005). Here, the facts most favorable to the non-moving (i.e. Mortenson) appear on Page 25 of Dr. Brigham’s testimony, and considering those facts, it was improper to take away Mortenson’s right to a jury trial.

B. It Was Error For The Court To Find As A Matter Of Law That Mortenson Was Not An Aggrieved Party And Therefore Did Not Have Standing To Appeal A Denial Of A Reopening With Lydig When Both Claims Had Been Inextricably Consolidated For All Purposes, The Parties Waived The Argument Of Standing, And Mortenson Has To Pay For The Injury Lydig Caused.

Lydig, in its Brief, improperly cites *Elterich v. Arndt*, 175 Wash 562, 564, 27 P.2d 1102 (1933) ostensibly in support of its argument that Mortenson isn't an aggrieved party. *Elterich* is not on point in that Mortenson is not alleging that it was aggrieved because its feelings were hurt, but rather Mortenson is aggrieved because it has to pay for Lydig's damage to Mr. Fowler's body, a situation that absolutely confers standing. See e.g. *State v. Taylor*, 150 Wn.2d 599, 608, 80 P.3d 605 (2003). Therefore, Lydig's arguments on this point should be disregarded.

As to the procedural posture of the case, by the parties agreeing to consolidate both appeals into one litigation, and by allowing the evidence and the Board's decision to be inextricably merged into one record, the parties have conferred standing upon Mortenson to appeal the Lydig claim. Put simply, the parties have waived the defense of standing at this late stage of litigation. See e.g. *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000).

Lydig, on Page 21 of its Brief, attempts to argue that a Motion to Stay would somehow change the fact that Mortenson was an aggrieved

party. This argument is without merit, because a Motion to Stay only acts to delay the payment of benefits; it doesn't stop liability for those benefits forever. Here, Mortenson has been made liable for the injury (or at the very least part of the injury) that Lydig has caused to Mr. Fowler, and therefore Mortenson is an aggrieved party.

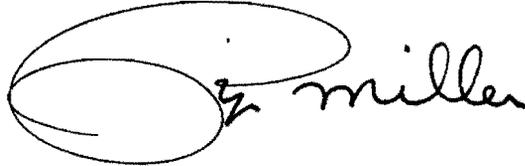
Despite Lydig's assertions on Pages 21-22 of its Brief, Mortenson is an aggrieved party and should have standing to challenge the Lydig claim. At the very least, or in the alternative, Mortenson should be given an opportunity, under these unique circumstances, to present its case to a jury on the theory that both Lydig and Mortenson are responsible for the Claimant's benefits and each Employer should have to share in the costs of Mr. Fowler's benefits.

II. CONCLUSION

The bottom line is that the Superior Court's granting of a Directed Verdict, thereby depriving Mortenson of its right to a jury trial, was improper because, considering the facts in the light most favorable to Mortenson, Mortenson had a legally sufficient evidentiary basis, through the testimony of Dr. Brigham, for a reasonably jury to have found for Mortenson. Therefore, Mortenson respectfully requests that this matter be

remanded back to the Superior Court so that Mortenson can have a jury properly decide its case.

RESPECTFULLY SUBMITTED this 11 day of November,
2015.

A handwritten signature in black ink, appearing to read "R. Miller", with a large, loopy flourish on the left side.

RYAN S. MILLER, WSBA# 40026
Thomas Hall & Associates
P.O. Box 33990
Seattle, WA 98133
Ph: (206) 622-1107
Fax: (206) 546-9613
rmiller@thall.com
Attorney for Appellant, M.A.
Mortenson Company