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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.

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

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I. INTRODUCTION

This matter is a workers' compensation case subject to the Industrial Insurance Act, Title 51.

On 2/19/08, while working for Lydig Construction, Inc. (Lydig), Mr. Kurt Fowler was carrying a 3/4 inch x 4 x 10 sheet of plywood that weighed between 60-90 pounds down a slope that was really muddy. The footing was very unsteady and uneven and consequently Mr. Fowler slipped, tripped, twisted and fell. As a result of the fall, Mr. Fowler filed a workers' compensation claim with the Department of Labor and Industries (Department) for a right knee injury with Lydig (Claim SC-70449, Lydig claim). The Lydig claim was allowed, administered, and closed, even though the right knee pain may not have resolved.

In August of 2011, while working for another employer by the name of M.A. Mortenson (Mortenson), Mr. Fowler knelt down and he experienced right knee pain. Mr. Fowler filed another workers' compensation claim with Mortenson on 8/22/11 for his right knee (Claim SF-15927, Mortenson claim). Mr. Fowler also filed an aggravation application with the Department to reopen his Lydig claim (i.e. the SC-70449 claim).

The Department subsequently issued orders that 1) denied the reopening under the Lydig claim and 2) allowed the claim under the

Mortenson claim. Mr. Fowler appealed the Department's order (that denied the reopening of the Lydig claim) to the Board of Industrial Insurance Appeals (Board). Mortenson appealed the Department's claim allowance order to the Board.

Both Mr. Fowler's appeal and Mortenson's appeal were consolidated by agreement of the parties into one single proceeding at the Board. Despite the industrial appeals judge's concern that the orders should technically have been issued by the Department in one order pursuant to WAC 296-14-420(1), the parties did not object and litigated the two orders concurrently, in one action, with one indivisible record.

The Board ultimately adopted the position, in its final order, that the Department was correct in determining that the Lydig claim should not have been reopened and that the Mortenson claim should be allowed. Mortenson timely appealed the Board's final determination to superior court.

While the matter was at superior court and after the presentation of Mortenson's case, Mr. Fowler made a motion for judgment as a matter of law arguing that there were no facts in dispute regarding whether or not an injury occurred at Mortenson. Despite Dr. Lance Brigham's opinion that no new injury occurred at Mortenson, the trial court judge found that there were not material facts in dispute and granted Mr. Fowler's motion

in favor of Mr. Fowler. At that point, Lydig moved to dismiss the action arguing that Mortenson did not have standing under the Lydig claim, even though the two appeals were inextricably intertwined. The trial court granted Lydig's motion to dismiss and ultimately affirmed the Board's affirmance of the Department's orders.

Mortenson timely filed a motion for reconsideration arguing that it was improper to grant judgment as a matter of law when there was an issue of fact for the jury to decide (i.e. whether an injury occurred a Mortenson) and that Mortenson had standing via the doctrines of waiver and invited error. The trial court denied Mortenson's Motion for Reconsideration. Mortenson then appealed to this Court.

II. ASSIGNMENTS OF ERRORS

1. The superior court erred when it granted Respondent Fowler's Motion for Judgment as a Matter of Law;
2. The superior court erred when it determined as a matter of law that Appellant did not have standing to pursue reopening of the Lydig claim;
3. The superior court erred when it affirmed the May 8, 2013 Board of Industrial Insurance Appeals Decision and Order and consequently awarded attorney fees;
4. The superior court erred when it denied Appellant's Motion for Reconsideration.

III. STATEMENT OF ISSUES

1. Whether the Court erred when it granted Respondent Fowler's motion for judgment as a matter of law when there was a legally

sufficient evidentiary basis for a reasonable jury to have found for Appellant Mortenson?

2. Whether it was error for the superior court to find as a matter of law that Appellant 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 had to pay for the injury Lydig caused?
3. Whether the superior court erred when it affirmed the May 8, 2013 Board of Industrial Insurance Appeals Decision and Order and consequently awarded attorney fees?
4. Whether the superior court erred when it denied Appellant's Motion for Reconsideration?

IV. STATEMENT OF THE CASE

Mr. Fowler, the Claimant, sustained an industrial injury to his right knee on 2/19/08 while working for Lydig Construction (Claim SC-70449). B.R. Fowler 10; B.R. 63.¹ Specifically, on 2/19/08, Mr. Fowler was carrying a 3/4 inch x 4 x 10 sheet of plywood down a slope that was "really muddy." B.R. Fowler 12. The piece of plywood weighed between 60 and 90 pounds. B.R. Fowler 26. The footing was very unsteady and uneven. B.R. Fowler 27. Mr. Fowler slipped, tripped, twisted and fell. B.R. Fowler 12. Mr. Fowler reported that something definitely happened to his knee when he fell. B.R. Fowler 28. Mr. Fowler filed a claim with Lydig Construction on May 2, 2007 (SC-70449). B.R. 63.

¹ B.R. refers to the Certified Appeal Board Record. If the information comes from a transcript of a specific witness' testimony, the citation format is as follows: B.R. (name of witness)(page number).

Subsequent to the 2/19/08 injury, Mr. Fowler was seen and treated by Dr. Eichler and Dr. Cummings. B.R. Fowler 13; 28-31. Mr. Fowler was assigned to light duty at Lydig Construction. B.R. Fowler 13. He understood that there was a problem with the meniscus and that surgery was an option. B.R. Fowler 33. Mr. Fowler obtained a knee brace after the Lydig injury. B.R. Fowler 38; *See* B.R. Exhibit 1. He did make use of the brace from time to time. B.R. Fowler 38. The SC-70449 claim was closed on 4/30/08. B.R. 63. Mr. Fowler had low grade tenderness in his right knee prior to 8/3/11. B.R. Dinenberg 34.

Subsequently, while working for Mortenson Construction (on 8/3/11), Mr. Fowler knelt down to install a small plaque that acknowledged donors to the hospital. B.R. 84-85. The plaque was to be installed 18 inches from the floor. B.R. Fowler 85. When he knelt down he felt the pain in the right knee (Claim SF-15927 was filed for this incident). B.R. Fowler 85; B.R. 49.

On 1/13/12 the Department determined that the right knee injury claim with Mortenson (Claim SF-15927) should be allowed. B.R. 49. Mortenson appealed the 1/13/12 decision to the Board. B.R. 49. The Board granted Mortenson's appeal on 3/6/12 and assigned the matter docket number 12 12476.

On 5/16/12 Mr. Fowler filed an application to reopen his SC-70449 Lydig claim for his right knee. B.R. 63. On 6/1/12 the Department denied Mr. Fowler's application to reopen the SC-70449 claim. Mr. Fowler appealed the Department's 6/1/12 decision to the Board. The Board granted Mr. Fowler's appeal on 7/10/12 and assigned docket number 12 17778 to the matter.

On 8/1/12, the parties did not object to consolidation of docket numbers 12 12476 (Claim SF-15927) and 12 17778 (SC-70449). B.R. 65. On 10/31/12, the parties did not object to consolidation of docket numbers 12 12476 (Claim SF-15927) and 12 17778 (SC-70449). B.R. at 71.

On 12/20/12, Industrial Appeals Judge (IAJ) Blood issued an Interlocutory Order indicating that the two dockets would be decided in one order. B.R. 82. No party objected. *See* B.R. One record was created for both docket numbers. *See* B.R.

During the presentation of Mortenson's case at the Board, Dr. Dinenberg, a board certified orthopedic surgeon testified that he did not believe that the August 3, 2011 incident caused a new medical condition. B.R. Dinenberg 5-6; 20. Additionally, Dr. Lance Brigham, a board-certified orthopedic surgeon, adopted the statement that the need for treatment was due to an aggravation of the pre-existing tear. B.R.

Brigham 6-7; 9. Finally, Dr. Brigham testified that there was no new injury; the MRI doesn't show a new injury. B.R. Brigham 25.

After receiving all of the evidence, the Board issued one Proposed Decision & Order (PD&O) for both dockets numbers. B.R. 19-35. Mortenson filed a Petition for Review of the PD&O. B.R. 3-14. On 5/8/13, the Board denied Mortenson's Petition for Review. B.R. 1.

On 5/30/13, Mortenson appealed the Board's 5/8/13 decision to Chelan County Superior Court. C.P. 1.

On 10/27/14 the matter came on regularly for trial. C.P. 188. Two issues were before the superior court and they were as follows: 1) On 8/3/11, did Mr. Fowler sustain an industrial injury to his right knee in the course of employment with Mortenson within the meaning of RCW 51.32.160, and 2) Between 4/30/08 and 6/1/12, did Mr. Fowler suffer an objective worsening of his right knee condition, proximately caused by his 2/19/08 industrial injury at Lydig Construction, within the meaning of RCW 51.32.160. C.P. 222.

On 11/2/14, after the presentation of Mortenson's case to the jury but before the presentation of Mr. Fowler's case and before the jury could render a decision, Mr. Fowler, through counsel, moved for judgment as a matter of law. C.P. 185; 189. The Court granted the motion based on the premise that there was no evidence to support a finding that Mr. Fowler

did not sustain an industrial injury with Mortenson on August 3, 2011. C.P. 217. After the Court granted Mr. Fowler's motion for judgment as a matter of law, Lydig moved for dismissal on the second issue. C.P. 186. The Court granted Lydig's motion based on the premise that Mortenson did not have standing. C.P. 185-186. The court then entered an order affirming the Board's final decision. C.P. 187-192.

On 1/15/15 Mortenson filed a Motion for Reconsideration with Supporting Affidavit. C.P. 193-201. On 1/26/15 Lydig filed its Response to the Motion for Reconsideration. C.P. 202-209. On 5/14/15 the court issued an Order that denied Mortenson's Motion for Reconsideration. C.P. 219-220. Mortenson then filed an appeal to this Court.

Mortenson has paid benefits for Mr. Fowler's right knee. C.P. 199.

V. ARGUMENT

A. **The Court Erred When It Granted Mr. Fowler's Motion For Judgment As A Matter Of Law Because There Was A Legally Sufficient Evidentiary Basis For A Reasonable Jury To Have Found For Mortenson.**

At the end of the presentation of the Plaintiff's case, Mr. Fowler, through counsel, essentially made a motion for judgment as a matter of law. C.P. 185; 189. Mr. Fowler based his motion on the incorrect belief that there was no evidence for a jury to find that Mr. Fowler did not

sustain an injury at Mortenson. The Court agreed and incorrectly granted Mr. Fowler's motion.

The authority for a motion for judgment as a matter of law is found in Civil Rule 50. Civil Rule 50 states, in pertinent part,

(a) Judgment as a Matter of Law.

(1) Nature and Effect of Motion. If, during a trial by jury, a party has been fully heard with respect to an issue and there is **no legally sufficient evidentiary** basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue (emphasis added).

Further, the Court in *Ramey v. Knorr*, 130 Wn. App. 672, 675-676, 124 P.3d 314 (2005) stated,

. . . a directed verdict may be granted only if there is **no legally sufficient evidentiary basis** for a reasonable jury to find or have found for that party with respect to that issue. A motion for a directed verdict **admits the truth of the evidence of the non-moving party and all inferences that reasonably can be drawn therefrom. The evidence must be considered in the light most favorable to the nonmoving party.** A trial court may grant a directed verdict **only** when it can be held that as a matter of law, there is **no evidence, nor reasonable inferences from the evidence,** to sustain the verdict (emphasis added).

Here, there is a legally sufficient evidentiary basis for a reasonable jury to find or have found for Mortenson via the testimony of

Dr. Brigham. Specifically, Dr. Brigham, a 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. This testimony alone proves that there was a legally sufficient evidentiary basis for a reasonable jury to find or have found in favor of Mortenson. Therefore, it was legally incorrect and unconstitutional for the superior court to deprive Mortenson of a jury trial by granting Mr. Fowler’s Motion for Judgment as a Matter of Law. *See State ex rel. Mullen v. Doherty*, 16 Wash. 382, 385, 47 P. 958 (1897).

Moreover, even if Dr. Brigham’s testimony (regarding no new injury at Mortenson) was ostensibly not persuasive within the context of his entire deposition, his testimony, nonetheless, must be considered in the light most favorable to Mortenson within the context of a motion for judgment as a matter of law. *See Ramey v. Knorr*, 130 Wn. App. 672, 675-676, 124 P.3d 314 (2005). Because there was a legally **sufficient** evidentiary basis for a reasonable jury to find for Mortenson from the testimony of Dr. Brigham alone, it was contrary to law, or an error in law, to grant Mr. Fowler’s motion and take away Mortenson’s constitutional right to have a jury decide this case.

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.

After the trial court incorrectly found against Mortenson on the injury issue, the Court erroneously granted Lydig's motion to dismiss on the basis that Mortenson was not an aggrieved party. C.P. 185-186.

First, one of the fundamental bases for why the Court granted Lydig's motion to dismiss was because once the Court found as a matter of law an injury occurred at Mortenson, the Court opined that Mortenson no longer was an aggrieved party and therefore did not have standing to continue. However, based upon the prior arguments that there was in fact an evidentiary basis for a jury to find that no injury occurred at Mortenson, the Court's argument on this point must fail.

Second, even assuming *arguendo* that the Court was correct when it found that there was no evidentiary basis for a jury to find that an injury did not occur at Mortenson, the Court still would have been incorrect in dismissing Mortenson's action against Lydig because 1) an event can be both a new injury AND an aggravation of an old

injury² (thereby allowing both claims to be open) and 2) the parties specifically waived the arguments of standing (or are estopped from challenging standing) when they agreed to consolidate the cases and develop one unified/indivisible record for both cases. Therefore Lydig is precluded from now arguing that Mortenson does not have standing. The Court itself cited the doctrine of waiver and doctrine of invited error regarding this issue.

Finally, assuming arguendo that Mr. Fowler did sustain a new injury, Mortenson would still have standing to litigate whether or not Mr. Fowler sustained an aggravation under the Lydig claim because Mortenson is an aggrieved party because of that claim. “An aggrieved party is one whose propriety, pecuniary, or personal rights are substantially affected.” *Cooper v. Tacoma*, 47 Wn. App. 315 , 316-17 , 734 P.2d 541 (1987). Here, Mortenson has been paying for Mr. Fowler’s injury, an injury that Lydig caused and should have been paying, at least in part, under its claim. Therefore, Mortenson is an aggrieved party and has standing to pursue the second issue that was presented to the trial court.

² See Board Significant decision *In re Howard Jones*, BIIA Dec., 13 20776 (2014); Significant decisions of the Board are not binding but a court may consider the decisions as persuasive authority when interpreting the laws it is charged with enforcing. *Stone v. Dep’t of Labor & Indus.*, 172 Wn. App. 256, 260 , 289 P.3d 720 (2012).

C. The Superior Court Erred When It Affirmed The May 8, 2013 Board Of Industrial Insurance Appeals Decision And Order And Consequently Awarded Attorney Fees.

The superior court erred when it affirmed the 5/8/13 Board Order because the evidence in the record proved that the symptoms that Mr. Fowler experienced while working for Mortenson were not a new injury (as the 5/8/13 Board Order determines) but rather an aggravation of his pre-existing injury with Lydig Construction. Additionally, it was legally incorrect, when there was an issue of fact and a waiver to consolidation, for the superior court to grant both the Claimant's Motion for a Judgment as a Matter of Law and Lydig's Motion to Dismiss (which consequently led to the decision to affirm the Board's May 8, 2013 order).

D. The Superior Court Abused Its Discretion When It Denied Appellant's Motion For Reconsideration.

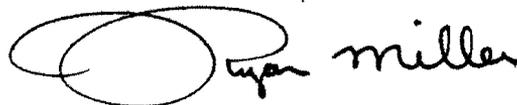
A trial court's decision to grant or deny a Motion for Reconsideration is reviewed pursuant to an abuse of discretion standard. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Id.* Here, the trial court abused its discretion in denying Mortenson's Motion for Reconsideration because it was manifestly unreasonably and untenable for the Court to find (in granting the motion for a judgment as a matter of law) that there was no

issue of fact for a jury to decide when there clearly was an issue of fact (i.e. Dr. Brigham's testimony that no new right knee injury occurred while the Claimant worked for Mortenson). Moreover, it was manifestly unreasonably and untenable for the trial court to find that Mortenson did not have standing in the Lydig claim when the two cases were inextricably consolidated/litigated and Mortenson will ultimately have to pay for the expense the injury that Lydig caused.

VI. CONCLUSION

For the reasons mentioned above, the Appellant respectfully requests that this Court find that the trial court committed error that warrants this case be remanded to the trial court with direction to present the case to a jury.

RESPECTFULLY SUBMITTED this 3 day of August, 2015.

A handwritten signature in black ink that reads "Ryan S. Miller". The signature is written in a cursive style with a large, looping initial "R".

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

NO. 33350-7-III

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I, Angeline Bounds, under penalty of perjury pursuant to the laws of the State of Washington, declares that on August 3, 2015, she caused to be served M.A. Mortenson Company's Brief of Appellant and Certificate of Service in the below described manner:

Via Certified Mail, Return Receipt Requested, Postage Prepaid:

Renee Townsley
Clerk/Administrator
Court of Appeals, Division III
500 N Cedar St.
Spokane, WA 99201-1905
Certified Mail # 7002 2410 0001 8052 2914

Randy Fair
Calbom & Schwab
P.O. Box 1429
Moses Lake, WA 98837
Certified Mail # 7002 2410 0001 8052 2921

///

 ORIGINAL

Kathryn Kunkler
Keehn Kunkler PLLC
810 3rd Ave, Ste 730
Seattle, WA 98104
Certified Mail # 7002 2410 0001 8052 4000

Attorney General's Office
Labor & Industries Division
P.O. Box 40121
Olympia, WA 98504-0121
Certified Mail # 7002 2780 0003 2524 8551

DATED this 3rd day of August, 2015.



ANGELINE BOUNDS
Paralegal
Thomas Hall & Associates
P.O. Box 33990
Seattle, WA 98133
Ph: (206) 622-1107
Fax: (206) 546-9613
abounds@thall.com