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MAR 23 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 336212

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JOEL GONZALEZ-PRUNEDA, *Respondent*

v.

VALLEY FRUIT COMPANY, LLC, *Appellant*

APPEAL FROM THE SUPERIOR COURT FOR COUNTY OF YAKIMA
HONORABLE BLAINE G. GIBSON

REPLY BRIEF OF APPELLANT

WALLACE, KLOR & MANN, P.C.
WILLIAM A. MASTERS
JEFFERY H. CAPENER
Attorneys for Valley Fruit Company, LLC

By William A. Masters, WSBA#13958
Attorney at Law
5800 Meadows Road, Suite 220
Lake Oswego, Oregon 97035
(503) 224-8949
bmasters@wallaceklormann.com

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A. Assignment of Error

Mr. Gonzalez asserts that Valley Fruit Co. “neglected to assign error to any of the trial court’s findings of fact... .” [Response Brief at pages 1 & 6]. But Valley Fruit Co. did identify the finding of fact it challenges.

As it stated in its Brief:

II. ASSIGNMENTS OF ERROR

The trial court erred in reversing the decision of the Board of Industrial Insurance Appeals.

III. ISSUES PRESENTED FOR REVIEW

The trial court erred in finding that Mr. Gonzalez’s left shoulder injury occurred during the course of his employment with Valley Fruit Co., LLC because that finding is not supported by sufficient or substantial evidence, viewing the record in the light most favorable to Mr. Gonzalez.

When Valley Fruit Co. stated in its Brief at roman numeral III that “the trial court erred in finding that Mr. Gonzalez’s left shoulder injury occurred during the course of his employment with Valley Fruit Co., LLC. ...”, it was clearly referring to Finding of Fact No. 2.4 in the Findings of Fact and Conclusions of Law filed by Judge Gibson. In Valley Fruit Co.’s Brief, that Finding of Fact was quoted verbatim. That Finding of Fact reads as follows:

“Mr. Gonzalez’s left shoulder injury occurred during the course of his employment with Valley Fruit Co., LLC.”

Valley Fruit Co.'s reading of RAP 10.3(4) is that II and III, quoted above, should be read together as delineating the assignment of error. RAP 10.3(g). RAP 10.3(g) provides in part as follows:

The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.”

RAP 10.3(4) provides:

(4) *Assignment of Error.* A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

If Valley Fruit Co. had deleted the roman numeral “III”, then presumably Mr. Gonzalez would not have been confused about what Finding of Fact was at issue. In any case, Valley Fruit Co. has made clear, in its Brief reading II and III together, the nature of its challenge to the trial court's findings of fact.

If Mr. Gonzalez is asserting that Valley Fruit Co. should have included the numeric reference “2.4” used in the trial Court's Findings of Fact to the Finding of Fact Valley Fruit Co. quoted in III of its Brief, Valley Fruit Co. responds that such a requirement would be highly technical. RAP 10.3(g). This Court should waive such a technical violation particularly when it is clear from III in Valley Fruit Co.'s Brief

which Finding of Fact it is challenging. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-10, 592 P.2d 631 (1979); *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d 530 (2006); *Professionals 100 v. Prestige Realty, Inc.*, 80 Wn. App. 833, 841, 911 P.2d 1358 (1996); *Forbes v. American Building Maintenance Co. West*, 148 Wn. App. 273, 291, 198 P.3d 1042 (2009)(Div III).

In this case, the trial court issued a memorandum opinion. A memorandum opinion may be considered as supplementation of formal findings of fact and conclusions of law. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 523 n.3, 22 P.3d 795 (2001). In such cases, this court reviews the trial court's letter opinion, findings and conclusions, and judgment as a whole. *See, e.g., Me[~~x~~161]trovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 702, 176 P.3d 536 (2008), *aff'd on other grounds by Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010); *see also Tae T. Choi v. Sung*, 154 Wn. App. 303, 317, 225 P.3d 425 (2010).

B. Sufficiency of the Evidence

1. Credibility Issues. Valley Fruit Co. acknowledges that this Court does not weigh or balance the competing testimony and inferences. *E.g., Zavala v. Twin City Foods*, 185 Wn. App. 838, 859, 343 P.3d 761 (2015); *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40

P.3d 1221 (2002); *Weatherspoon v. Dep't of Labor & Indus.*, 55 Wn. App. 439, 440-441, 777 P.2d 1084 (1989).

2. Sufficiency of Evidence. But the Court does assess whether the findings are supported by sufficient or substantial evidence, viewing the record in the light most favorable to the prevailing party in Superior Court. RCW 51.52.140; RCW 4.44.060; *e.g.*, *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). "Substantial evidence" is such evidence that would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. Alternatively, "'substantial evidence' is the quantum of evidence sufficient to persuade a rational *fair-minded* person that the premise is true." *E.g.*, *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2006); *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657, 219 P.3d 711 (2009); *Zavala v. Twin City Foods*, 185 Wn. App. 838, 859, 343 P.3d 761 (2015). Valley Fruit Co. takes this requirement as insuring that the findings of fact are not reached arbitrarily (the antithesis of a fair trial) or through some illicit motive, such as bias, sympathy or personal preference for an individual party or class of parties, *etc.*¹ See WPI 1.01.²

¹ Although admittedly a finding of fact could be decided unfairly through bias, sympathy and/or personal preference and still be found on appeal to be based on

Valley Fruit Co. contends that the evidence for Finding of Fact 2.4 is not “substantial evidence”—that is, it is not evidence that would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed--viewing the record in the light most favorable to the prevailing party in Superior Court.

Parsed, this test of sufficiency has a framework constituted of (1) evidence (2) that forms a purported foundation or premise from which (3) the fact is purportedly inferred and (4) that fact is the necessary foundation or premise from which the judgment is purportedly inferred.

Credibility assessments should be findings of fact based on evidence. Such credibility assessments should not be arbitrary. *See Meeker v. Howard*, 7 Wn. App. 169, 171, 499 P.2d 53 (1972); *Cochran v. Cochran*, 2 Wn. App. 514, 517, 468 P.2d 729 (1970). That is, they should be based on evidence which would convince an *unprejudiced*, thinking mind of the *truth* of the fact to which the evidence is directed.

“substantial evidence” (a test external to the motives of the trier-of-fact) if such evidence existed and if the trier-of-fact’s illicit motive behind the finding of fact was not revealed.

² As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

Witness Directly Contradicts Himself. For example, assume that establishing the truth of proposition X is needed to support key finding of fact number 1 supporting the judgment. Assume that witness Smith is the only witness to testify about proposition X. Assume witness Smith testified that proposition X was true. But also assume that witness Smith then admitted he lied about proposition X being true. Assume the court determined that witness Smith was credible. (This determination creates a dilemma—that is, was witness Smith credible in saying that proposition X was true or credible in saying that he lied and proposition X was untrue?) Assume the court finds that finding of fact number 1 is true, which implies the court believes proposition X is true, which in turn implies that the court believed witness Smith was credible when he testified that proposition X was true and not credible when he testified that he lied about proposition X being true.

Given that, assume there is no way for the court to discriminate whether witness Smith is telling the truth or lying about proposition X. Does “substantial evidence” support the truth of proposition X? The answer would be no.³ The court’s credibility assessment is arbitrary.⁴ On

³ The intuitive reasonableness of this analysis would be even more evident if witness Smith, after testifying that proposition X was true, testified *repeatedly*, with no evidence of coercion or mental disability, that proposition X was untrue and that he lied when he testified that it was true and that the trier-of-fact should in no circumstance believe him when he said that proposition X was true, and yet

that record, no rational person would have reached that credibility assessment. *See Meeker v. Howard*, 7 Wn. App. 169, 171, 499 P.2d 53 (1972); *Cochran v. Cochran*, 2 Wn. App. 514, 517, 468 P.2d 729 (1970). The proponent of proposition X has failed in its burden of proof.

Medical Records Directly Contradict Witness. Consider another example. Assume the preceding scenario with this difference: Witness Smith, instead of testifying that he lied under oath about proposition X, is contradicted by his statements in medical records, the contents of which are in evidence and unimpeachable. The medical records establish that witness Smith said that proposition X is untrue. Does “substantial evidence” support the truth of proposition X? The answer again would be no. The court’s assessment that proposition X is true is arbitrary. Again, the proponent of proposition X has failed in its burden of proof.

Finding of Fact 2.4. In this case at hand, the focal finding of fact is Finding of Fact No. 2.4—*viz.* that Mr. Gonzalez’s left shoulder injury occurred during the course of his employment with Valley Fruit Co., LLC.

after all that, the trier-of-fact said it believed him when he said that proposition X was true.

⁴ The evidence from which the trial court assesses credibility is limited to the CABR. So only the evidence in the CABR must support those credibility findings. There is no room for deciding credibility on the basis of intangibles as would be the case when witnesses testify live before a trier of fact.

The evidence upon which that finding of fact rests is Mr. Gonzalez's testimony. That testimony is that while at work, he developed symptoms (subjective sensations of pain) for the first time in his left shoulder.⁵ [CP--CABR—J. Gonzalez 101/17-21]. Without that testimony, Finding of Fact No. 2.4 is unsupported. Evidence was also introduced that before the purported industrial event, Mr. Gonzalez had that same kind of symptom of pain in his left shoulder to the same degree as the symptom of pain⁶ he testified that he developed for the first time during the alleged industrial event.

There is no way for the court to discriminate whether Mr. Gonzalez is telling the truth or lying about whether he had an industrial event on September 5, 2012. Does “substantial evidence” support the truth of the proposition he had an industrial event on September 5, 2012? The answer would be no. In essence, the court's credibility assessment is arbitrary. Mr. Gonzalez, the proponent of that proposition, has failed in his burden of proof.

⁵ He also testified he had never seen a physician for the pathology in his left shoulder. [CP—CABR-J. Gonzalez 101/22-25].

⁶ Only Mr. Gonzalez knows whether he is in pain and the degree of that pain. That is, other minds cannot experience Mr. Gonzalez's pain. They merely report what he has told them.

That Mr. Gonzalez had an industrial event on September 5, 2012 that proximately caused a left shoulder injury is a necessary fact for a judgment in his favor.

Whether Mr. Gonzalez had (1) an “injury” to his left shoulder on September 5, 2012 (2) proximately caused by an industrial event is a complex medical fact necessarily requiring **medical evidence** from a medical expert. *Stampas v. Dep’t of Labor & Indus.*, 38 Wn.2d 48, 50, 227 P.2d 739 (1951).

Medical evidence from a medical expert that Mr. Gonzalez had (1) an “injury” to his left shoulder on September 5, 2012 (2) proximately caused by an industrial event necessarily requires, as a foundation, evidence in the form of Mr. Gonzalez’s **history** of complaints of symptoms in his left shoulder.⁷

By definition, “symptoms” are subjective complaints, not objective findings. WAC 296-20-220(i); *Hinds v. Johnson*, 55 Wn.2d 325, 327, 347 P.2d 828 (1959). The significance of this distinction is that the medical expert, in formulating a hypothesis about the existence of an injury and the cause of that injury, takes this history as a given, an unexamined predicate to that hypothesis.

⁷ Proof of the hypothesis of medical causation is typically based on the fallacy, *post hoc; ergo, propter hoc*—after this; therefore, because of this.

Dr. Vickers testified that he *assumed* Mr. Gonzalez had an injury at work because Mr. Gonzalez said he did. Otherwise, Dr. Vickers did not know independently whether Mr. Gonzalez had an injury at work. [CP—CABR—Vickers 49/19-25; 50/1-2]. In essence, Dr. Vickers was a mere conduit for Mr. Gonzalez’s testimony about event, cause and effect.⁸

Mr. Gonzalez asserted that he had an injury at work because he did not have left shoulder complaints before September 5, 2012, but did have left shoulder complaints on and after September 5, 2012. [See CP--CABR—J. Gonzalez 101/17-21].

Yet, also in evidence were Mr. Gonzalez’s statements in medical records pre-existing the purported industrial event of September 5, 2012—*viz.*, statements from 2010 up to August 27, 2012 that he had *chronic* left shoulder symptoms of the same kind and to the same degree as the left shoulder symptoms he testified he had for the first time on and after September 5, 2012.⁹ [CP--CABR—Vickers 39/13-15 & 22-25; 40/2-5].

⁸ Obviously, Dr. Vickers knew that Mr. Gonzalez had chronic left shoulder complaints before September 5, 2012. But all he knew was that Mr. Gonzalez had chronic significant left shoulder complaints on August 27, 2012, as he had since 2010, and chronic significant left shoulder complaints on September 18, 2012, as he had since 2010, when he next saw Mr. Gonzalez after the purported industrial event. He merely *assumed* an industrial event on September 5, 2012 because that is what Mr. Gonzalez later told him when seen on September 18, 2012.

⁹ Dr. Vickers said that on August 27, 2012 (his last visit with Mr. Gonzalez before the purported industrial event) Mr. Gonzalez reported significant left

These statements about Mr. Gonzalez's chronic preexisting left shoulder symptoms were unimpeached. Mr. Gonzalez did not testify that these statements were untrue or that he had lied to his physician. He did not testify that the medical records in which these statements appeared were forgeries or mistakenly related to another patient. *Etc.*

Mr. Gonzalez's testimony that he had no history of left shoulder symptoms before the purported industrial event of September 5, 2012 was factually and logically inconsistent with his statements of chronic left shoulder complaints in the medical records from 2010 up to August 27, 2012. That inconsistency was never explained, rationalized or excused.

When the trial court found that Mr. Gonzalez was credible, it was finding that what Mr. Gonzalez said is true. What Mr. Gonzalez said is (1) that he had no left shoulder symptoms before September 5, 2012, and (2), by reference to his statements in his medical records, that he had chronic left shoulder complaints of the same kind and to the same degree from 2010 up to August 27, 2012. These are mutually inconsistent statements. Both cannot be true.

shoulder pain, and Dr. Vickers noted that that chronic left shoulder pain was not improving with treatment. [CP--CABR—Vickers 39/13-15 & 22-25; 40/2-5]. When Dr. Vickers next saw Mr. Gonzalez on September 18, 2012, Mr. Gonzalez continued to report significant left shoulder pain. [CP--CABR—Vickers 13/4-6].

So which of these two statements is the trial court finding to be true? By inference, the trial court is apparently finding statement (1) to be true. This is so by implication because it found that Mr. Gonzalez had an industrial injury to his left shoulder on September 5, 2012, a finding necessarily predicated on statement (1).¹⁰ But how can (1) be true when it is contradicted by the unimpeached evidence of statement (2), which the trial court, in finding Mr. Gonzalez credible, must also have determined to be true? The trial court's finding is logically inconsistent.¹¹ It is arbitrary. That is, this complex of evidence— Mr. Gonzalez's statement (1) and Mr. Gonzalez's statement (2) taken together--is evidence that would not convince an *unprejudiced*, thinking mind of the *truth* of the fact—*viz.*, that “Mr. Gonzalez's left shoulder injury occurred during the course of his employment with Valley Fruit Co., LLC”—to which the complex of evidence--statement (1) and statement (2)--is directed. *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657, 219 P.3d 711 (2009).

¹⁰ If the trial court did not believe Mr. Gonzalez when he stated that he had not had any left shoulder complaints before September 5, 2012, then the trial court would have had to find that Mr. Gonzalez was not credible. There was no evidence to enable it to demarcate that statement as false and Mr. Gonzalez's statement that he sustained an injury on September 5, 2012 as true.

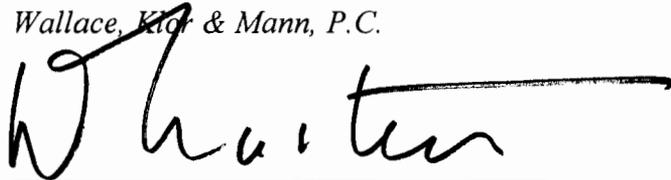
¹¹ This situation is different from that where one witness, based on personal experience, testifies that statement (1) is true and another witness, based on personal experience, testifies that statement (2), the negation of statement (1), is true. That complex of evidence is factually, not necessarily logically inconsistent, and the trial court can then weigh or balance the competing testimonies to determine which of the two statements it believes is true.

II. CONCLUSION

For the preceding reasons, Valley Fruit Co. respectfully requests that this Court reverse the Superior Court's judgment which had reversed the decision of the Board of Industrial Insurance which had reversed the order of the Department of Labor and Industries.

Respectfully submitted this 21st day of March 2016.

Wallace, Klor & Mann, P.C.

A handwritten signature in black ink, appearing to read "W. Masters", with a long horizontal flourish extending to the right.

William A. Masters, WSBA No. 13958
Jeffery H. Capener, WSBA No. 28492
Attorneys for Appellant
5800 Meadows Road, Ste. 220
Lake Oswego, OR 97035
(503) 224-8949
bmasters@wallaceklormann.com

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Spokane, WA 99201

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15 Smart, Connell, Childers & Verhulp, P.S.
16 P.O. Box 228
Yakima, WA 98907

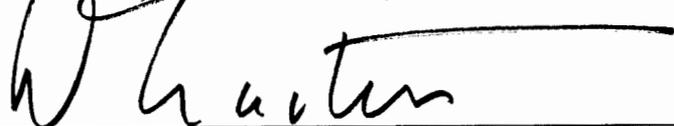
James A. Yockey, AAG
Office of the Attorney General
1433 Lakeside Ct., Suite 102
Yakima, WA 98902-7301

17 Brian Bruner (*via email*)
18 Legacy Fruit
P.O. Box 8
Wapata, WA 98951

Ava Daniels (*via email*)
Penser North America, Inc.
700 Sleater Kinney Road SE, Suite B-170
Lacey, WA 98503

19
20 DATED: March 21, 2016.

21 WALLACE, KLOR & MANN, P.C.

22 

23 _____
24 William A. Masters, WSBA No. 13958
25 Jeffery H. Capener, WSBA No. 28492
26 Attorneys for Appellant