IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARGARITO BRAMBILA LOPEZ, Respondent, v. WASTE CONNECTIONS, INC., Appellant.	No. 41649-2-II UNPUBLISHED OPINION

Van Deren, J. — Following an appeal to the superior court from a Board of Industrial Insurance Appeals (Board) decision denying Margarito Brambila Lopez's workers compensation claim, a jury entered a verdict finding that the Board incorrectly determined that Lopez did not injure his back in the course of his employment with the self-insured employer, Waste Connections, Inc. Waste Connections appeals, arguing that the trial court erred in entering an order reversing the Board's decision because substantial evidence did not support the jury's verdict finding that Lopez suffered a work-related injury. We affirm the trial court's orders based on the jury verdict that was supported by substantial evidence and award Lopez his attorney fees on appeal.

FACTS[1]

Lopez worked at Waste Connections for over ten years. On May 17, 2007, Lopez felt a sharp pain in his lower back as he pulled a 45-pound pallet from a conveyor belt. Before this incident, Lopez did not have any workplace injuries at Waste Connections and had never taken any sick leave. Lopez continued working that day until his lunch break, when he told his supervisor, Gilberto Maldonado, that his back was hurting. Maldonado told Lopez he could go home before the end of his shift.

The following day, Lopez called Waste Connections manager Siles Ceballos and told Ceballos that he needed to see a doctor and could not come in to work. On May 19, 2007, Lopez sought treatment at the Lakewood Multicare Clinic and was diagnosed with lumbosacral strain and sciatica. Lopez returned to the Lakewood Multicare Clinic on May 25, 2007, and complained that his back pain was getting worse. Dr. Jocelyn DeVita examined Lopez and determined that he was suffering from lumbosacral degenerative disk disease. Lopez informed DeVita that he had a similar problem in Mexico 10 years earlier. DeVita's report did not express any opinion about whether Lopez's injuries were work related because Lopez did not state to her that his injury occurred at work. DeVita stated that she would have more likely than not concluded that Lopez suffered a work-related injury had Lopez told her that he hurt his back while pulling on a pallet at work.

Lopez used his seven weeks of accrued vacation time to remain home from work. During that time, Lopez, or his daughter, remained in contact with Ceballos and provided Ceballos with

[1] Because Waste Connections contends that substantial evidence does not support the jury's verdict, we recite the facts in a light most favorable to Lopez. *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 534, 627 P.2d 104 (1981).

doctors' notes supporting his leave. Lopez returned to work on July 9, 2007, performing light-duty tasks. He continued to work until July 17, 2007, when he informed his supervisor he could no longer work due to his back injury.

With Ceballos' assistance, Lopez completed two incident reports that indicated his injury had occurred at work. Lopez was disciplined for failing to report his injury within 24 hours as instructed in the employee handbook. On his incident report, Lopez explained his failure to report the workplace injury sooner, stating, "I did not think to [report the injury] because I thought some Tylenol would take care of the pain I was having." Administrative Record (AR) Ex. 9.

Dr. Mario Alinea examined Lopez on July 20, 2007. Alinea diagnosed Lopez with a lumbar sprain and determined that Lopez's injury was consistent with pulling a pallet in the manner Lopez described. Alinea's report indicated his opinion that Lopez's "diagnosed condition [was] caused by [his workplace] injury . . . on a more probable than not basis." AR Ex. 8.

Waste Connections contracts with ESIS[2] Insurance to oversee its workers compensation claims. On July 26, 2007, ESIS received Lopez's workers compensation claim, and sent Ceballos a letter titled, "Notice of Late Report of Workers Compensation Injury." AR Ex. 12 The letter stated, "Please note that delays such as this in filing of claims not only may violate state guidelines but they can also negatively impact our ability to investigate and appropriately respond to your losses."[3] AR Ex. 12

On approximately September 23, 2007, ESIS senior claims representative Sherie Kristiansen requested Dr. Michael Barnard of Inland Medical Evaluations to evaluate Lopez.

[2] "ESIS" appears to be an acronym but the full name is not in the record before us.

[3] Washington law provides that an injured worker has one year from the date of injury to file an industrial insurance claim. RCW 51.28.050.

Barnard initially issued a report finding that Lopez's back injury was likely caused by his workplace injury. Barnard also issued a second report that found Lopez's injuries were not work related. Barnard explained that the first report was a draft that had been mistakenly sent out. Barnard stated that he wrote his second report after fully reviewing Lopez's medical records, which he did not have the opportunity to review before creating the draft report.

Orthopedic surgeon Dr. Dean Ricketts examined Lopez on May16, 2008. Ricketts diagnosed Lopez with degenerative disk disease, early degenerative joint disease, and hypertension. Ricketts concluded that Lopez's diagnosis was not work-related based in part on Lopez's failure to report the injury to his employer. Ricketts stated that if Lopez had "reported [his injury] to work on that day, I would say, on a more-probable-than-not basis, [the injury] was work related." AR Dep. of Ricketts at 42.

On October 8, 2007, Kristiansen requested a background check on Lopez, including any criminal history, business licenses, or contractor licenses. The background check did not show any criminal history, business or contractor licenses, or earnings outside of Waste Connections. On October 17, 2007, Ceballos faxed Christianson a letter claiming that he had hired Lopez to complete some yard work for him in the fall of 2006 or some time before that. Ceballos stated that Lopez worked on his property for about half an hour and did not bill Ceballos for the work. But Ceballos stated that after Lopez told him that he did not have the money to purchase medication in July 2007, he paid Lopez $1,000 for the yard work Lopez completed in 2006.

Lopez filed for worker's compensation benefits on July 24, 2007. The Washington State Department of Labor and Industries (L&I) denied Lopez's claim on June 18, 2008. Lopez appealed the L&I's order to the Board on July 10, 2008. Following testimony and publication of

perpetuation depositions, an industrial insurance appeals judge issued a proposed decision and order on May 8, 2009, that affirmed the L&I's denial of workers compensation benefits to Lopez. Lopez filed a petition for review of the proposed decision and order with the Board, which petition the Board denied.

Lopez appealed the Board's decision to superior court. Following a jury trial limited to reviewing the certified Board record, the jury entered a verdict finding the Board was incorrect in determining that Lopez did not injure his back in the course of his employment with Waste Connections. The trial court entered an order directing L&I to accept Lopez's benefits claim. The trial court order also awarded Lopez $19,250.00 in attorney fees and $1,748.60 in costs. Waste Connections appeals.

ANALYSIS

I. Substantial Evidence Supports the Jury's Verdict

Waste Connections contends that the trial court erred in entering an order reversing the Board's decision because substantial evidence did not support the jury's verdict finding Lopez suffered a work-related injury. We disagree and affirm the jury's verdict and the trial court's orders.

Under RCW 51.52.115, "the findings and decision of the [B]oard [are] prima facie correct," and a party challenging the Board's findings and decision must support its challenge by a preponderance of the evidence. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Under RCW 51.52.115, the superior court conducts a de novo review of the Board's decision, relying exclusively on the certified Board record. *Gallo v. Dep't of Labor & Indus.*, 119 Wn. App. 49, 53, 81 P.3d 869 (2003), *aff'd*, 155 Wn.2d 470, 120 P.3d 564 (2005). On review at

the superior court, the finder of fact may substitute its own findings and decision only if it finds "'from a fair preponderance of credible evidence', that the Board's findings and decision are incorrect." *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992) (quoting *Weatherspoon v. Dep't of Labor & Indus.*, 55 Wn. App. 439, 440, 777 P.2d 1084 (1989)).

We review the trial court's decision on an industrial insurance appeal for "substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court," here Lopez. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002) (footnote omitted). Substantial evidence is a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In reviewing the trial court's decision, we do not "reweigh or rebalance the competing testimony and inferences, or . . . apply anew the burden of persuasion, for doing that would abridge the right to trial by jury." *Harrison*, 110 Wn. App. at 485. Credibility determinations are for the trier of fact and are not subject to our review. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

Dr. Alinea testified that Lopez's injury was consistent with Lopez's description of how he had sustained the injury by pulling on a 45-pound pallet at work. Dr. DeVita testified that she initially did not have any opinion regarding whether Lopez's injury was work related because Lopez did not tell her that he injured himself at work. DeVita indicated that had Lopez told her that he hurt his back while pulling on a pallet at work, she would have more likely than not attributed his back injury to a work-related injury. Although Dr. Ricketts testified that he did not believe Lopez suffered a work-related injury because Lopez failed to immediately inform his

employer of the injury, Ricketts stated that had Lopez "reported [his injury] to work on that day, I would say, on a more-probable-than-not basis, [the injury] was work related." AR Dep. of Ricketts at 42. Finally, although Dr. Barnard's final report concluded that Lopez's injury was not work related, his initial report concluded the opposite.

In short, all of the testifying medical professionals that examined Lopez indicated that they would have concluded Lopez's injuries were work related on a more-probable-than-not basis had Lopez immediately reported his injury to his employer or had they believed Lopez's reasons for not reporting his injuries sooner. Accordingly, Lopez's claim turned on whether the jury found his testimony regarding the cause of his injury and the reasons for the delayed reporting of the injury to his employer credible. And we do not review credibility determinations, nor do we reweigh or rebalance competing testimony and inferences.[4] Accordingly, we affirm the trial court's order reversing the Board's denial of Lopez's workers compensation benefits.[5]

Waste Connections also argues that the trial court erred in awarding Lopez attorney fees and costs. But Waste Connections' argument is based solely on its contention that substantial evidence did not support the jury verdict. Because substantial evidence supported the jury verdict, we affirm the trial court's award of attorney fees and costs to Lopez.

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[4] Waste Connections appears to concede that Dr. Alinea's testimony coupled with Maldonado's testimony provided some evidence supporting the jury's verdict, but argues that "there remains a plethora of substantial evidence that Mr. Lopez'[s] condition is not the result of an industrial injury." Br. of Appellant at 16. Waste Connections thus appears to misunderstand our standard of review from a superior court's decision reversing a Board order, and essentially argues that we should re-weigh the evidence presented to the jury.

[5] Because substantial evidence supports the trial court order following the jury verdict, we need not address Waste Connections' claim that the trial court erred by denying its motion to dismiss Lopez's claim for failure to make a prima facie case under CR 41(b)(3). Additionally, Waste Connections does not assign error to the trial court's denial of its CR 41(b)(3) motion to dismiss Lopez's claim.

II. Attorney Fees on Appeal

Lopez requests appellate attorney fees under RAP 18.1 and RCW 51.52.130. RCW 51.52.130 provides in relevant part:

> [I]n cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. . . . In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

Because the self-insured employer, Waste Connections, appealed the trial court's decision below and that decision is sustained, we award Lopez appellate attorney fees under RCW 51.52.130. *See McIndoe v. Dep't of Labor & Indus.*, 100 Wn. App. 64, 72, 995 P.2d 616 (2000), *aff'd*, 144 Wn.2d 252, 26 P.3d 903 (2001).

We affirm the trial court's orders and award Lopez his attorney fees and allowable costs on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Armstrong, J.

Worswick, A.C.J.