IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

RONNIE GENE McELWANEY,	)	
	)	No. 64323-1-I
Appellant,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
	)	
THE DEPARTMENT OF LABOR AND INDUSTRIES and KING COUNTY,	)	
	)	
Respondents.	)	FILED: September 20, 2010

spearman, j. — This is an appeal from a decision of the superior court affirming the denial of Appellant's workers' compensation appeal by the Board of Industrial Insurance Appeals under RCW Title 51, the Industrial Insurance Act. We affirm.

FACTS

Appellant pro se Ronnie McElwaney was on duty as a King County Metro Transit operator on March 9, 2005 when he slipped on an empty plastic bottle left on the stairs while getting off the bus. He attempted to break his fall with his left arm and landed on his left side. Two days later, on March 11, McElwaney filed industrial insurance claim number SA-35109 with the Department of Labor and

Industries (Department).[1] He received treatment for his left foot and lower back, returning to work two months after the injury. Shortly after returning to work, he began to experience pain in his left arm that seemed to worsen when he was on duty. His job entailed certain daily exertions, such as lifting a lever to position the steering wheel and assisting wheelchair passengers onto the bus. At the time, he felt that these activities were exacerbating the pain in his arm. Claim SA-35109 was closed pursuant to a Department order dated December 30, 2005.

In March 2006, McElwaney experienced increased pain in his left wrist and arm to the point that he could not grip the steering wheel while driving. He stopped driving on March 23. At some point, he also began experiencing dizziness and a sleep disorder. On April 7, 2006, McElwaney filed industrial insurance claim number SB-55208 with the Department alleging that he had sustained an occupational disease or injury on March 24, 2006 in the course of his employment with King County (County).[2]

McElwaney was initially seen by Dr. Daniel Nelson on August 3, 2006, at which time he related upper extremity pain due to reinjuring his neck on the job. Dr. Nelson's impression was of Complex Regional Pain Syndrome (CRPS), and

---

[1] McElwaney's other major injury on the job took place in 1996, when the bus he was driving was hit by a truck. McElwaney sustained injuries to his neck, which was treated through surgery and other methods. As of August 11, 2008, McElwaney continued to experience pain in his back and was on medication.

[2] According to McElwaney, he did not know at the time that the cause of his pain was from when he used his left arm to brace his fall in March 2005 and should have been a continuance of claim number SA-35109.

on August 22, he began treating McElwaney's pain with a series of left stellate ganglion block injections. These injections alleviated McElwaney's pain and were progressively more effective, and McElwaney was eventually able to resume his duties full-time. On September 12, 2006, Dr. Nelson diagnosed McElwaney with CRPS/reflex sympathetic dystrophy or variant thereof.

McElwaney's claim number SB-55208 was denied by order dated August 14, 2006, on the basis that his upper extremity condition resulted from neither an industrial injury nor an occupational disease within the meaning of RCW 51.08.140. He filed a protest and request for reconsideration. The August 14 order was affirmed by Department order dated October 30, 2006. McElwaney then appealed to the Board of Industrial Insurance Appeals (Board) on November 20, 2006. On November 28, the Board agreed to hear the appeal under Docket No. 06 27309. On December 22, McElwaney filed an application to reopen claim number SA-35109 for aggravation of that injury. The application was denied by order dated March 28, 2007. On April 18, McElwaney filed a protest and request for reconsideration. The request was denied by order dated May 3, 2007, affirming the March 28, 2007 order. On May 23, 2007, McElwaney filed another protest and request for reconsideration, which the Department forwarded to the Board as a direct appeal on June 1, 2007. The Board agreed to hear the appeal under Docket No. 07 16034.

The Board scheduled both dockets for mediation. McElwaney participated in several of the mediation conferences between June and November 2007. At the time, attorney John Scannell represented him, but on or around October 31, 2007 he discharged Scannell. Scannell formally withdrew as counsel on November 13. The mediation was ultimately unsuccessful, and the Board forwarded the appeals for a hearing. The Industrial Appeals Judge (IAJ) initially attempted to schedule a preliminary conference for both dockets on November 17, 2007, but continued both matters to allow McElwaney to retain Paul Bryan as counsel. The IAJ held a preliminary scheduling conference on January 25, 2008, when Bryan appeared on McElwaney's behalf. Bryan confirmed the issues that required resolution before the Board: whether McElwaney had sustained an occupational disease during his employment with the County, and whether his March 9, 2005 industrial injury was aggravated between December 30, 2005 and May 3, 2007. Bryan indicated that expert medical testimony would be presented by deposition and lay witness testimony would be presented at the hearing. The two dockets were consolidated for hearing.

The hearing before the IAJ began on August 11, 2008. McElwaney and his wife testified,[3] and McElwaney presented the testimony of Dr. Daniel Nelson by perpetuation deposition. After McElwaney rested, the County moved to

dismiss the appeals. The IAJ issued a proposed decision and order, dismissing both appeals for failure to establish a prima facie case. McElwaney's attorney Paul Bryan withdrew, and McElwaney filed a pro se petition for review. On November 28, 2008, the Board issued an order denying McElwaney's petition. This became the final order of the Board.

McElwaney filed a notice of appeal with the King County Superior Court, and then filed a petition for review. The County filed a trial brief on June 19, 2009. It also filed a motion in limine to exclude a trial brief and trial notebook that McElwaney had filed, on the basis that these documents included references and materials that were not offered to the Board or included in the Certified Appeal Board Record (CABR) filed by the Board. The court granted the motion.[4] Following a bench trial, the court ruled in favor of the County and

---

[3] McElwaney testified that he filed to reopen his first claim—which involved treatment of his left foot—after he was diagnosed with CRPS, because until then he did not know that the pain in his left arm might also be connected to the March 2005 fall. He testified that the pain he felt in his left arm after the fall was completely different from the pain he experienced from the 1996 neck injury. He stated that the duties of his employment that he felt worsened his left arm condition were the repetition of steering the wheel, loosening the lever, and assisting wheelchair passengers.

[4] The order stated:

> [I]t is
> ORDERED the evidence to be considered in this matter is limited to the evidence offered to the Board of Industrial Insurance Appeals during the Board's hearing process, and included in the Board's Certified Appeal Board Record ("CABR").
>
> It is further ORDERED the record is limited to the transcripts, depositions, and exhibits offered during the Board's hearings on this matter.
>
> It is further ORDERED the testimony to be considered in this matter is limited to that of Ronnie G. McElwaney, Kathy McElwaney, and Daniel Nelson, M.D., contained in the Board's CABR.
>
> It is further ORDERED evidence submitted and discussed in the Claimant's trial brief and trial notebook, except those portions already offered to the Board of Industrial Insurance Appeals during the Board's hearing process and included in the Board's Certified Appeal Board Record ("CABR"), is excluded.

dismissed both appeals for failure to state a prima facie case, entering findings of fact[5] and conclusions of law[6] on September 15, 2009. McElwaney filed a motion for reconsideration, which was denied. McElwaney appeals.

DISCUSSION

McElwaney appeals the trial court's "Order on Defendant King County's Motion in Limine" and its "Findings of Fact and Conclusions of Law" dismissing his appeals dated November 20, 2006 and June 1, 2007. We affirm.

Motion in Limine

McElwaney contends that the trial court erred when it granted the County's motion in limine to exclude from consideration any evidence offered by McElwaney that was neither offered to the Board as evidence nor included in the CABR. We disagree.

The admissibility of evidence is within the sound discretion of the trial

---

> It is further ORDERED that no references to evidence other than that contained in the Board's CABR will be included in any Findings of Fact and Conclusions of Law.
> It is further ORDERED the Board's factual findings are verities on appeal.

[5] Two of the findings of fact were that McElwaney (1) "failed to present medical testimony demonstrating that as of March 2006, he suffered from an upper extremity condition which arose naturally and proximately from the distinctive conditions of his employment with King County" and (2) "failed to present medical testimony demonstrating that between December 30, 2005 and May 3, 2007, his condition, proximately caused by his industrial injury of March 9, 2005, objectively worsened." McElwaney does not appeal the findings of fact.

[6] The court's conclusions of law were that McElwaney (1) failed to establish a prima facie case that his upper extremity condition, manifest in March 2006, constitutes an occupational disease within the meaning of RCW 51.28.140, (2) failed to establish a prima facie case that between December 30, 2005 and May 3, 2007, his condition proximately caused by the industrial injury of March 9, 2005, objectively worsened within the meaning of RCW 51.32.160, and (3) that the appeals filed on November 20, 2006 and June 1, 2007 were dismissed for failure to present a prima facie case for relief as required under RCW 51.52.050.

court and will only be reversed upon showing an abuse of discretion. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107, 864 P.2d 937 (1994). An abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Mayer v. STO Indus, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Here, the trial court's ruling was well grounded on RCW 51.52.115, which provides that while the hearing on appeal to the superior court shall be de novo, "the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court . . . ." Because the trial court's order was consistent with this statutory mandate, it was not an abuse of discretion. There was no error. Rector v. Dep't of Labor & Indus., 61 Wn. App. 385, 387 n.3, 810 P.2d 1363 (1991). See also Stelter v. Dep't of Labor & Indus., 147 Wn.2d 702, 707, 57 P.3d 248 (2002) (appellate review of Board decision is based solely on evidence and testimony presented to Board).

Dismissal of Appeals

In industrial insurance appeals, the rulings of the Board are prima facie correct and the party attacking the ruling bears the burden of proof. Gallo v. Dep't of Labor & Indus., 119 Wn. App. 49, 53–54, 81 P.3d 869 (2003), aff'd, 155 Wn.2d 470, 120 P.3d 564 (2005). We review the trial court's decision to determine whether substantial evidence supports its factual findings and

whether its conclusions of law flow from the findings. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. Garrett Freightlines, Inc. v. Dep't of Labor & Indus., 45 Wn. App. 335, 340, 725 P.2d 463 (1986). Where evidence is disputed, the substantial evidence standard is satisfied if there is any reasonable view that substantiates the trial court's findings, even though there may be other reasonable interpretations. Id.

We discuss McElwaney's appeals in turn. His November 20, 2006 appeal was dismissed by the superior court for failure to present a prima facie case before the Board that his upper extremity[7] condition, manifest in March 2005, constituted an occupational disease within the meaning of RCW 51.08.140. McElwaney argues that he met the requirements and that Dr. Nelson was not required to use the words "on a more probable than not basis." The County contends that Dr. Nelson's testimony gave no causation opinion for an occupational disease and that McElwaney "failed to present competent medical testimony to show that his condition was probably, as opposed to possibly, caused by his employment at King County." In other words, Dr. Nelson's testimony could not be construed as a clearly articulated "but for" opinion on causation. The County points out that Dr. Nelson testified that he did not know

[7] To clarify, this refers to Mr. McElwaney's left arm condition.

McElwaney's job duties and testified that his purpose was to treat McElwaney, not necessarily to provide an opinion on the cause of a job-related injury. McElwaney responds that because his injury occurred from a fall, it was irrelevant that Dr. Nelson did not know his complete job description. Instead, it was sufficient that Dr. Nelson knew that he was a bus driver.

Occupational disease is defined as "such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." RCW 51.08.140. The causal connection between a claimant's condition and his employment must be established by competent medical testimony[8] that shows that the condition is probably, not merely possibly, caused by the employment. Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 745 P.2d 1295 (1987). The Washington Supreme Court has addressed what is required for a disease to arise "naturally" out of employment:

> We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life

[8] Causation may be established by lay testimony if the injury is apparent to one without medical testimony (e.g., a layman sees his coworker lose a finger on the job). See Jackson v. Dep't of Labor & Indus., 54 Wn.2d 643, 648, 343 P.2d 1033 (1959).

> or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of employment, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.

Id. at 481. A disease is proximately caused by employment conditions when "there [is] no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the . . . employment." Simpson Logging Co. v. Dep't of Labor & Indus., 32 Wn.2d 472, 479, 202 P.2d 448 (1949).

A review of the record demonstrates that McElwaney failed to present a prima facie case to the Board that his condition constituted an occupational disease within the meaning of RCW 51.08.140. Specifically, he failed to present medical testimony that his condition probably resulted from the conditions of his employment as a Metro transit operator.

Dr. Nelson testified that he first saw McElwaney on August 3, 2006. He testified that he began treating McElwaney with a series of left stellate ganglion blocks on August 22, and that McElwaney's response to that treatment suggested CRPS. Dr. Nelson testified that CRPS is a little-understood syndrome that can be triggered by an innocuous event such as a slight injury to a hand, and that his main criteria for diagnosis were patients' reports of pain out of proportion to the triggering event and how they responded to sympathetic

nerve blocks. Dr. Nelson testified that there could also be changes in skin color, hair-growth patterns, and nail beds. He did not observe these changes in McElwaney, which led him to believe McElwaney had a variant of CRPS, not the classic presentation. He testified that it was common to see CRPS patients with sleep disorders and that McElwaney's case was reflective of that.

Dr. Nelson testified that he believed McElwaney was a transit bus driver but that he did not have a specific knowledge of McElwaney's job duties. When asked whether he had an opinion as to whether or not McElwaney's job of driving the transit bus had any relation to McElwaney's CRPS, he testified:

> As I recall, this was a job-related injury. I do not recall the exact details, except that there was a situation in which he was performing his job, and there was a job-related accident of some sort, or job-related injury. And the patient attributed the—his situation, meaning his chronic extremity pain, as being related to that—to that industrial job injury.

He acknowledged that his understanding of McElwaney's injury was based on McElwaney's own report. He stated that his purpose in treating McElwaney was to treat McElwaney's pain, not to do any forensics on the job-related injury or to establish causality.

While Dr. Nelson's testimony tended to demonstrate that McElwaney's condition was CRPS, it did not offer an opinion that, on a more probable than not basis, McElwaney's CRPS resulted from his March 2005 industrial injury. Dr. Nelson testified that McElwaney attributed his CRPS to the job-related injury.

This testimony did not constitute Dr. Nelson's own conclusion that, more probably than not, McElwaney's CRPS originated from the March 2005 injury.

We next address McElwaney's June 1, 2007 appeal, which was dismissed for failure to present before the Board a prima facie case that, between December 30, 2005 and May 3, 2007, his condition proximately caused by the March 9, 2005 industrial injury objectively worsened within the meaning of RCW 51.32.160. The County argues that McElwaney failed to meet his burden of proof because Dr. Nelson did not opine, on a more probable than not basis, that McElwaney's March 2005 injury objectively worsened between December 30, 2005 and May 3, 2007. McElwaney contends that he did prove that his condition worsened, through "treatment, diagnosis, [and] medical testimony." He points to Dr. Nelson's deposition testimony that the onset of McElwaney's pain was closely associated with the 2005 job-related injury.

The Industrial Insurance Act authorizes the reopening of a workers' compensation claim if aggravation of a disability occurs after a claim is closed. Loushin v. ITT Rayonier, 84 Wn. App. 113, 117, 924 P.2d 953 (1996). A claimant in an aggravation claim must establish the following elements:

> (1) The causal relationship between the injury and the subsequent disability must be established by medical testimony.
> (2) The claimant must prove by medical testimony, some of it based upon objective symptoms, that an aggravation of the injury resulted in increased disability.
> (3) A claimant's medical testimony must show that the increased aggravation occurred between the terminal dates of the aggravation

> period.
> (4) A claimant must prove by medical testimony, some of it based upon objective symptoms which existed on or prior to the closing date . . . , that his disability on the date of the closing order was greater than the supervisor found it to be.

Id. at 117–18 (citing Phillips v. Dep't of Labor & Indus., 49 Wn.2d 195, 197, 298 P.2d 1117 (1956)). To prove causation in an aggravation claim, the medical testimony must establish that, more probably than not, the worsening of the condition is causally related to the industrial injury. Loushin, 84 Wn. App. at 122.

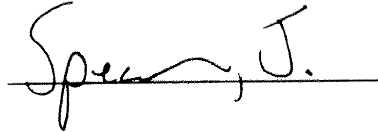
McElwaney failed to establish a prima facie case of aggravation before the Board. He did not provide medical testimony that between December 30, 2005 and May 3, 2007, his condition proximately caused by the March 9, 2005 industrial injury objectively worsened within the meaning of RCW 51.32.160, as was required to reopen claim number SA-35109. As with his other appeal, the medical testimony presented by McElwaney did not establish that, more probably than not, any worsening in his condition was causally related to the March 2005 injury. Again, while Dr. Nelson's testimony indicated that McElwaney had CRPS, his testimony did not present his own clear opinion on causation.

Attorney Fees on Appeal

McElwaney, who is pro se, requests attorney and deposition fees for

doctors and reports, citing RCW 51.52.130, RCW 51.52.150, and RAP 18.1(b). The County requests statutory attorney fees pursuant to RAP 18.1. Neither party's request is warranted, and we decline to award attorney fees on appeal.

Affirmed.



WE CONCUR: