IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CATHY THARALDSON, Respondent, v. PROVIDENCE HEALTH SERVICES OF WASHINGTON, Appellant.	)	No. 67366-1-I DIVISION ONE UNPUBLISHED FILED: November 21, 2011

Cox, J. – Our review of factual determinations of a superior court's decision reviewing a determination by the Board of Industrial Insurance Appeals is limited to whether substantial evidence supports a jury's verdict.[1] Here, there is substantial evidence to support the jury's verdict that Cathy Tharaldson's treatment had not reached the level of maximum medical improvement. Accordingly, proper and necessary medical care is still needed. We affirm.

In 2006, Tharaldson was injured in the course of her employment as a certified nursing assistant when she attempted to move a patient who weighed over 400 pounds. She sustained an injury to the right side of her neck, shoulder, and back. At the time of her injury, Tharaldson was employed by Providence Health Services of Washington, a self-insurer under the Industrial Insurance Act.

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[1] Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180, 210 P.3d 355, review denied, 167 Wn.2d 1015 (2009).

Tharaldson filed an application with the Department of Labor and Industry (DLI) for provision of medical care as a result of her industrial injury. DLI approved the claim and Tharaldson began a course of treatment for her injuries that included physical therapy, massage therapy, and chiropractic care. Her primary care physician referred her to Dr. Robert Lang, a neurosurgeon, for her injuries. Dr. Lang diagnosed Tharaldson with a "pinched nerve in the neck from a cervical disc herniation on the right side between the 6th and 7th cervical vertebra[e]." Tharaldson received one cortisone injection in her back from Dr. Lang, which alleviated pain in that area. Dr. Lang also recommended, but never administered, three more steroid injections to ameliorate Tharaldson's symptoms and end the nerve inflammation in her neck.

In October 2008, DLI issued an order that closed Tharaldson's claim and ended payment as of January 2007. This closure occurred prior to the administration of the recommended steroid injections. Tharaldson filed a timely appeal of the closure of her claim.

The Board of Industrial Insurance Appeals (BIIA) considered her appeal. An industrial appeals judge (IAJ) heard testimony from Tharaldson and her husband, and read deposition testimony of Dr. Lang, Dr. Edward DeVita, and Dr. Patrick Bays. Dr. DeVita and Dr. Bays were independent medical examiners hired by Providence through Sedgwick Claims Management Services. The IAJ concluded that Tharaldson's condition had reached "maximum medical improvement" and issued a proposed decision affirming DLI's closure order.

Tharaldson petitioned the BIIA for review of the IAJ's decision. The BIIA adopted the IAJ's proposed decision as the Decision and Order of the Board.

Tharaldson timely appealed the BIIA's decision to the Thurston County Superior Court. As a self-insurer, Providence Health Services appeared as the respondent in that appeal. The jury found unanimously that the BIIA was incorrect in deciding that Tharaldson's condition had reached maximum medical improvement. Thereafter, the superior court entered a judgment and order that also awarded Tharaldson's attorney fees and costs totaling $11,255.15.

Providence Health Services appeals.

SUFFICIENCY OF THE EVIDENCE

Providence Health Services argues that the evidence presented by Tharaldson regarding her need for continued medical care was not substantial and thus did not support the jury's verdict. We disagree.

The Industrial Insurance Act requires the DLI or self-insured employers to reimburse qualified claimants "[u]pon the occurrence of any injury to a worker entitled to compensation . . . ."[2] Compensation is required for all "***proper and necessary*** medical and surgical services . . . ."[3] There is no definition of "proper and necessary" in chapter 51 RCW itself. But, the Washington Administrative Code (WAC), which provides rules for medical coverage under the Industrial Insurance Act, states that proper and necessary health care services are those:

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[2] RCW 51.36.010(2)(a).

[3] Id. (emphasis added).

> of a type to cure the effects of a work-related injury or illness [curative], or . . . rehabilitative. Curative treatment produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition. Rehabilitative treatment allows an injured or ill worker to regain functional activity in the presence of an interfering accepted condition. Curative and rehabilitative care produce long-term changes.[4]

The WAC goes on to explain that:

> [t]he department or self-insurer stops payment for health care services once a worker reaches a state of maximum medical improvement. Maximum medical improvement occurs when no fundamental or marked change in an accepted condition can be expected, with or without treatment. Maximum medical improvement may be present though there may be fluctuations in levels of pain and function. A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with passage of time. Once a worker's condition has reached maximum medical improvement, treatment that results only in temporary or transient changes is not proper and necessary. 'Maximum medical improvement' is equivalent to 'fixed and stable.'[5]

Our review of a trial court's decision in a worker's compensation case is governed by RCW 51.52.140.[6] This statute provides that an "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." We do not sit in the same position as the superior court and review only "'whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings.'"[7] As we

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[4] WAC 296-20-01002.

[5] Id.

[6] Du Pont v. Dep't of Labor & Indus., 46 Wn. App. 471, 476, 730 P.2d 1345 (1986).

[7] Rogers, 151 Wn. App. at 180 (quoting Watson v. Dep't of Labor &

stated in Rogers v. Department of Labor and Industries,[8] "[m]ore extensive appellate review of facts found in the superior court abridges the jury trial right provided by RCW 51.52.115. . . . We are not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury."[9]

Here, Tharaldson presented substantial evidence that her condition had not reached the level of maximum medical improvement and that the steroid injections recommended by Dr. Lang were proper and necessary medical treatment. As of the DLI's closure of Tharaldson's case, Lang "had recommended a right epidural steroid injection at C6-7 level . . . [b]ecause that's the level of the disc protrusion."[10] He testified that the recommended steroidal injections could "get rid of the inflammation permanently . . . ."[11] Thus, he felt that a marked change in her condition could still be accomplished through medical treatment, and that this treatment would either cure Tharaldson of her symptoms or allow her fuller functionality. This constitutes substantial evidence to support the jury verdict.

Indus., 133 Wn. App. 903, 909, 138 P.3d 177 (2006)).

[8] 151 Wn. App. 174, 210 P.3d 355 (2009).

[9] Id. at 180-81(citing Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002)).

[10] Certified Appeal Board Record (Feb. 22, 2010) at 12-13.

[11] Id. at 23.

Providence Health Services argues that Tharaldson did not present sufficient evidence because, Dr.s DeVita and Bay disagreed with Dr. Lang's diagnosis. Mere disagreement with the jury's resolution of credibility determinations does not diminish the fact that the other witnesses provided substantial evidence to support the claim.[12] Moreover, determinations as to credibility of witnesses are not subject to appellate review.[13] Finally, it is not our role to reweigh or rebalance the evidence.[14] Because Tharaldson presented substantial evidence that she had not reached maximum medical improvement, Providence's argument fails.

ATTORNEY FEES

Tharaldson requests attorney fees and costs on appeal under RCW 51.52.130. We grant them, subject to her compliance with the provisions of RAP 18.1.

RCW 51.52.130 provides, in pertinent part:

> If, on appeal to the superior or appellate court from the decision and order of the board, . . . 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."

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[12] Faust v. Albertson, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009).

[13] Valdez-Zontek v. Eastmont Sch. Dist., 154 Wn. App. 147, 158, 225 P.3d 339 (2010) (citing Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994)).

[14] Rogers, 151 Wn. App. at 180-81.

Because Tharaldson prevails on appeal, she is entitled to an award of attorney fees on appeal.

We affirm the judgment and order.

Cox, J.

WE CONCUR:

Leach, A.C.J.

Appelwick, J.