IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RANDAL L. PHIBBS,	)	**No. 28153-1-III**
	)	
Appellant,	)	
	)	
v.	)	
	)	
DE VRIES MOVING PACKING	)	
STORAGE,	)	**Division Three**
	)	
Defendant,	)	
	)	
DEPARTMENT OF LABOR &	)	
INDUSTRIES OF THE STATE OF	)	
WASHINGTON,	)	
	)	
Respondent.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Randal L. Phibbs appeals a jury verdict that found his industrial injury did not become aggravated between the terminal dates of September 24, 2004 and March 22, 2006. For reasons discussed below, we affirm.

FACTS

Mr. Phibbs was injured in an industrial motor vehicle accident in October 1999. The Department of Labor & Industries (L&I) accepted his claim, provided treatment, and closed his claim in September 2004.

In early 2005, Mr. Phibbs was diagnosed with superior oblique myokymia (SOM). In December 2005, Mr. Phibbs filed to reopen his claim, seeking coverage for an aggravation of his injury due to a condition of "disequilibrium" associated with SOM. Mr. Phibbs' application was denied in March 2006. He promptly appealed to the Board of Industrial Insurance Appeals (Board). A Board judge considered deposition testimony from three doctors; Mr. Phibbs testified in person at a hearing in November 2006. None of the doctors testified regarding an aggravation of Mr. Phibbs' injuries during the period between the appropriate terminal dates of September 24, 2004 and March 22, 2006. Based upon the evidence in the record, the judge concluded that Mr. Phibbs' injury did not become aggravated between the terminal dates.

Mr. Phibbs then appealed that decision to the full Board, which affirmed in June 2007. Mr. Phibbs timely appealed to superior court. At trial, Mr. Phibbs' counsel did not object to any of the jury instructions. A unanimous jury found the Board to have correctly determined that Mr. Phibbs' injury did not aggravate between the terminal

dates. The court subsequently entered an order upholding the Board's decision. This appeal followed.

ANALYSIS

Jury Instructions

For the first time on appeal, Mr. Phibbs challenges jury instructions 11, 12, and 14. However, jury instructions may not be challenged for the first time on appeal. *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 244-245, 728 P.2d 585 (1986). It is well-established that "[t]he trial court must have been sufficiently apprised of any alleged error to have been afforded an opportunity to correct the matter if that was necessary." *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978); CR 51(f). Because he did not object to the jury instructions at trial, Mr. Phibbs failed to preserve the matter for appeal.

Board's Finding re: "Disequilibrium"

Mr. Phibbs' next argument is somewhat unclear. We believe the challenge is to the Board's finding that he does not have the condition of disequilibrium. We do not review the Board's determination regarding that condition.

"RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act." *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn.

App. 853, 857, 86 P.3d 826, *review denied*, 152 Wn.2d 1031 (2004). Superior courts review decisions of the Board *de novo*, examining only the evidence in the record before the Board. RCW 51.52.115. The Board's findings and conclusions are generally considered *prima facie* correct and the burden of proof is on the attacking party. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 127-128, 913 P.2d 402, *review denied*, 130 Wn.2d 1009 (1996). We review superior court rulings to see if "substantial evidence" supports the court's findings of fact, whether the court's conclusions of law flow from the findings of fact, and consider pure issues of law *de novo*. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

Thus, Mr. Phibbs may not directly challenge the Board's findings on appeal to this court. RCW 51.52.115. However he may, and does, challenge the sufficiency of the evidence supporting the jury's finding of no aggravation. *See Ruse*, 138 Wn.2d at 5; *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001).

Sufficiency of the Evidence

Though Mr. Phibbs frames his next argument in terms of challenging the Board's determination that his injury did not aggravate between the terminal dates, we take it to challenge the jury verdict upholding the Board's finding.

Jury verdicts are reviewed under a sufficiency of the evidence standard. *Winbun*,

143 Wn.2d at 213. "'The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question.'" *Id.* (quoting *Canron, Inc. v. Fed. Ins. Co.*, 82 Wn. App. 480, 486, 918 P.2d 937 (1996), *review denied*, 131 Wn.2d 1002 (1997)). "'A challenge to the sufficiency of the evidence, . . . admits the truth of the opposing party's evidence and all inferences that reasonably can be drawn therefrom and requires that the evidence be interpreted most strongly against the moving party and in the light most favorable to the party against whom the motion is made.'" *Holland v. Columbia Irr. Dist.*, 75 Wn.2d 302, 304, 450 P.2d 488 (1969) (quoting *Billingsley v. Rovig-Temple Co.*, 16 Wn.2d 202, 133 P.2d 265 (1943)). Further, in an aggravation case such as this, "[m]edical testimony is required to show that there actually was a worsening or aggravation between the terminal dates." *Lewis v. ITT Continental Baking Co.*, 93 Wn.2d 1, 3, 603 P.2d 1262 (1979).

Mr. Phibbs' argument relies primarily upon inferences that could be drawn from the record in support of his position. That approach fails for two reasons. First, such an argument asks us to reweigh the evidence. This we will not do, even if we would have resolved a factual inquiry differently. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). Second, that

approach wrongly reverses the standard of review. This court looks to see whether the evidence supports the jury's verdict, not whether the evidence is subject to another interpretation.

Mr. Phibbs failed to present objective medical testimony that his condition had become aggravated between the terminal dates. The jury was therefore entitled to uphold the Board's finding on the strength of the opposing medical testimony in the record.

Supplemental Assignments of Error Raised in Reply Brief

Mr. Phibbs raises additional issues for the first time in his reply brief. These we will not consider. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(c).

The verdict is affirmed.

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

____
Korsmo, J.

WE CONCUR:

____

Kulik, C.J.

____
Sweeney, J.