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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT III

Case No. 2023AP1764

MARIO VICTORIA VASQUEZ,
Petitioner-Appellant,

v.

STATE OF WISCONSIN CLAIMS BOARD,
Respondent-Respondent.

APPEAL FROM A DECISION AND ORDER ENTERED IN
THE CIRCUIT COURT FOR BROWN COUNTY, THE
HONORABLE TIMOTHY A. HINKFUSS, PRESIDING

BRIEF OF RESPONDENT-RESPONDENT
WISCONSIN CLAIMS BOARD

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INTRODUCTION

This is a judicial review of a decision of the Wisconsin Claims Board under Wis. Stat. § 775.05. That statute allows the Board to grant compensation to individuals who were convicted of crimes but show by clear and convincing evidence that they were innocent of the crime for which they were convicted. Here, the Claims Board concluded that Mario Vasquez failed to meet that standard, and the circuit court agreed.

Vasquez was convicted in 1999 of first-degree sexual assault of a child, based on sexually assaulting a four-year-old girl. In 2015, he filed a motion for new trial, arguing that his original attorney provided ineffective assistance of counsel. The District Attorney agreed that a new trial was warranted and, given the long passage of time and the fact Vasquez had served most of his sentence, decided not to retry him.

Vasquez then sought \$1,214,600 in compensation from the Claims Board on the theory that he was innocent of the crime for which he was convicted. He relied on the materials he presented as part of his new trial motion: a proffered expert report about the reliability of child witnesses and sexual-assault allegations; a translation of an interview with the victim that he said had some changes from the original; a police report about the victim's uncle and an adult woman who said he had sexually assaulted her; and his assertion that in a 2015 interview with the District Attorney, the victim asserted that two family members also sexually assaulted her while she was a child. Vasquez did not assert that the victim recanted her testimony that Vasquez sexually assaulted her, and the District Attorney confirmed that she continued to assert that he had.

The Claims Board concluded that this evidence did not demonstrate Vasquez's innocence by clear and convincing evidence, and the circuit court agreed.

In this Court, Vasquez does not argue that the Claims Board erred in concluding he met that standard. Instead, he presents three legal questions, the one of which is new: (1) whether the Claims Board violated due process by “precluding” him from presenting evidence; (2) that the Claims Board applied a “beyond a reasonable doubt” standard of proof; and (3) that the Claims Board failed to issue a decision consistent with the substantial evidence test. Even if not forfeited, these issues do not merit reversal here.

ISSUES PRESENTED

1. Did the Board violate Vasquez’s due process rights by “precluding” him from presenting evidence of his innocence?

This question was not presented to the circuit court.

This Court should deem the question forfeited or answer no.

2. Did the Board apply a “beyond a reasonable doubt” standard to Vasquez’s claim?

The circuit court implicitly answered no by affirming the Claims Board.

This Court should answer no.

3. Did the Board violate the substantial evidence standard under *Gehin v. Group Insurance Board*, 2005 WI 16, 278 Wis. 2d 111, 629 N.W.2d 572?

The circuit court implicitly answered no by affirming the Claims Board.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs will fully present the issues. Publication is not warranted; none of the criteria in Wis. Stat. § (Rule) 809.23(1) applies.

SUPPLEMENTAL STATEMENT OF THE CASE

The Claims Board is a statutory body whose duties¹ include reviewing petitions for compensation by individuals who have been incarcerated for a crime but who assert that they were innocent of that crime. Wis. Stat. §§ 15.105(2); 775.05. This case reviews the Claims Board's determination that Vasquez was not entitled to compensation because he failed to show, by clear and convincing evidence, that he was innocent of sexual assault of a child.

I. Underlying criminal case: Vasquez is convicted of sexually assaulting Sara, who was four years old at the time.

The claimant here, Vasquez, was convicted by a jury in 1999 of child sexual assault. At that trial, the victim, Sara,² testified that Vasquez assaulted her during a period when she stayed at a babysitter's house where Vasquez was also staying. (R. 7:28.) Sara, who was four years old at the time of the assaults, told her mother about the assault after she told her mother she was experiencing genital pain and her mother discovered lesions in Sara's genital area. (R. 7:27.) She reported that Vasquez had penetrated her vagina and rubbed his penis against her. (R. 6:58.)

A sexual assault exam concluded that Sara had been assaulted, based on factors including the fact that she had contracted herpes. (R. 7:27; 9:11.)

Vasquez was charged with first-degree sexual assault of a child. *State v. Mario Vasquez*, No. 1998CF115 (Wis. Cir. Ct. Brown Cnty.). The case proceeded to trial, and Sara testified. A physician who had examined Vasquez testified

¹ The Claims Board also reviews claims in equity against state agencies who are alleged to have caused more than \$10 in damage. Wis. Stat. § 16.007.

² The Claims Board uses a pseudonym to refer to the victim.

that lesions on his penis were consistent with a history of herpes. (R. 9:11.) A jury convicted Vasquez of the charges, and he was sentenced to prison.³ (R. 6:58 (described in Parole Commission review).)

II. In 2015, the District Attorney agrees Vasquez is entitled to a new trial based on ineffective assistance of counsel, but based on the victim's continued assertions that Vasquez assaulted her, the District Attorney continues to assert that Vasquez assaulted her.

In 2015, Vasquez filed a post-conviction motion for a new trial, asserting ineffective assistance of counsel and newly discovered evidence. Vasquez did not include a copy of the motion as part of his petition to the Claims Board. But based on the District Attorney's description of the motion, it appears that Vasquez presented the materials he eventually shared with the Claims Board: a proffered expert report about the reliability of Sara's child testimony at the time of trial (R. 8:50–64); a new translation of an interview with Sara from Spanish (R. 8:87–96; 9:1–9) (describing the prior translation as “usually” adequate); and a police report about Sara's uncle including an accusation of sexual assault by a different, adult victim.

Based on Vasquez's assertions to the Claims Board, that motion also included “new evidence,” which was Vasquez's attorney's description of an interview between Sara and the District Attorney's office in 2015. He provided the Claims Board with no transcription of the interview or

³ Vasquez described to the Claims Board his lack of success in obtaining early release on his assertions of innocence. The mandatory-release review notes, however, reflect that the Parole Commission also described his prior convictions, 21 conduct reports in prison, including six major-conduct reports, and the need to be returned to maximum custody on two different occasions. (R. 8:66.)

affidavit from Sara. But according to Vasquez's description of the interview in his brief, Sara indicated to the District Attorney that her uncle and father had also sexually assaulted her at some point, and that those men had had herpes. (R. 6:12.) As Vasquez indicates, Sara had already indicated at various times in her childhood that her uncle or father had also sexually assaulted her.

Vasquez did *not* claim that Sara ever recanted her testimony that Vasquez had assaulted her. According to the District Attorney, Sara continued to assert in 2015 that Vasquez had sexually assaulted her, as she had originally testified at trial. (R. 6:104.)

The District Attorney concluded that the evidence was sufficient that Vasquez should receive a new trial. The court vacated the judgment of conviction and granted Vasquez's motion for new trial. (R. 8:48.) Sixteen years had passed, and the District Attorney decided not to retry Vasquez. (R. 6:103.) The State indicated that it would be difficult to retry the case so long after the events, and Vasquez had effectively served his sentence. (R. 6:104; 6:58 (maximum discharge date was June 19, 2018).)

III. Vasquez files a claim for \$1,214,600 in compensation with the Board, which the Board denies.

On March 11, 2022, Vasquez filed a claim with the Claims Board seeking a total of \$1,214,600 in compensation, based on the premise that he was innocent of the crimes for which he had been convicted. (R. 8:11–12.) The District Attorney opposed the request, asserting that his office had not concluded that Vasquez was innocent and in fact still had the opposite view, and that the victim had consistently maintained, through multiple contacts with the police department and District Attorney's office, that Vasquez was one of multiple men who had sexually assaulted her. (R. 6:104; 9:23.) Vasquez did not provide any admissible

evidence of the victim's naming of additional assailants with his claim to the Claims Board.

The Board considered Vasquez's petition. On December 16, 2022, the Board issued its decision rejecting Vasquez's claim for compensation. It held that Vasquez's theories and evidence might demonstrate that he received ineffective assistance of counsel, but he did not present affirmative evidence of innocence. It held that Vasquez had failed to carry his burden to show by clear and convincing evidence that he was innocent. (R. 9:23–24.)

IV. On judicial review, the circuit court affirms the Claims Board.

Vasquez appealed the Claims Board's ruling by filing a petition for judicial review with the circuit court. (R. 2.) After briefing, the circuit court affirmed the Claims Board decision. (R. 18.) The court reasoned that "[t]rial counsel's failures and the new evidence are all significant factors for purposes of a motion for a new trial, but these things are not clear and convincing evidence that Vasquez is innocent of sexually abusing [Sara]." (R. 18:9.) The court pointed out that there was no evidence that Sara had ever recanted the allegation, that Vasquez had access to Sara, and that the medical testimony was consistent with his having had herpes. (R. 18:9.) The court concluded: "the record does not demonstrate Vasquez proved by clear and convincing evidence that he is innocent of the charge." (R. 18:9.)

STANDARD OF REVIEW

In considering the decision of an administrative agency, this Court reviews the agency's ruling, not the circuit court's. *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 24, 342 Wis. 2d 444, 820 N.W.2d 404. This Court has noted that it values the circuit court's decision on the matter for guidance. *Painter v. Dentistry Examining Bd.*, 2003 WI App 123, ¶ 8, 265 Wis. 2d 248, 665 N.W.2d 397.

The burden of proof lies with the petitioner. “The burden of proof in a proceeding to review an agency action is on the party seeking to overturn the action,” not on the agency to justify its action. *Racine Educ. Ass’n v. Comm’r of Ins.*, 158 Wis. 2d 175, 182, 462 N.W.2d 239 (Ct. App. 1990); *see also City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984).

This case involves judicial review under Wis. Stat. § 227.52. The administrative procedures of chapter 227, including the contested case procedures in Wis. Stat. § 227.42, do not apply to the Claims Board. Wis. Stat. § 227.03(5) (Claims Board proceedings outside of chapter 227 except as provided in Wis. Stat. § 775.05); Wis. Stat. § 775.05(5) (only judicial review procedures of chapter 227 apply). Outside the contested case hearing context, in matters where facts are determined without a hearing, the question on review is not whether the agency can produce ‘substantial evidence’ to support its decision, but rather whether the facts compel a particular result as a matter of law. *See* Wis. Stat. § 227.57(7); *Koll v. Dep’t of Just.*, 2009 WI App 74, ¶ 6, 317 Wis. 2d 753, 769 N.W.2d 69.

ARGUMENT

The Claims Board correctly concluded that Vasquez failed to show by clear and convincing evidence that he was innocent of child sexual assault. The District Attorney’s conclusion that Vasquez should receive a new trial was not because the State had concluded he was innocent. To demonstrate a right to compensation under section 775.05, Vasquez had to show more than that he was entitled to a new trial; he needed to bring forward evidence that demonstrated, by clear and convincing evidence, that he was actually innocent of the crime for which he was convicted.

The Claims Board properly concluded that Vasquez did not present such a case. Even his assertion that the victim named additional men as having assaulted her during her childhood was not supported by any evidence, but purely his say-so in a brief. More importantly, he provided no evidence that the victim recanted her original testimony about Vasquez's assault, and the District Attorney confirmed that she has continued to assert that Vasquez did sexually assault her. (R. 6:104.) The circuit court agreed, concluding that "the record does not demonstrate Vasquez proved by clear and convincing evidence that he is innocent of the charge." (R. 18:9.)

On appeal, Vasquez raises two new legal arguments and tries again on a third: (1) that the Claims Board violated his due process rights; (2) that the Claims Board applied a "beyond a reasonable doubt" standard; and (3) that it violated the substantial evidence test. The first argument was forfeited; both that argument and the second argument are also undeveloped. And the "substantial evidence" test as Vasquez conceives it does not apply here, particularly where Vasquez himself relied entirely on hearsay.

This Court should affirm.

I. The Claims Board correctly concluded that Vasquez failed to show by clear and convincing evidence that he was innocent of child sexual assault.

Unlike in the circuit court, Vasquez does not identify an issue on appeal as whether the Claims Board acted according to Wis. Stat. § 227.57 in determining that he failed to prove his entitlement to compensation by clear and convincing evidence. Because his brief includes many arguments that would be responsive to that issue, however, the Claims Board addresses them here.

A. The Claims Board provides compensation to individuals who prove, by clear and convincing evidence, that they are innocent.

The Claims Board is authorized to provide compensation to innocent people who have been convicted of a crime. A person may file a petition with the Claims Board and is entitled to submit evidence with the petition. If the Claims Board finds that the petitioner was innocent and did not contribute to bring about the conviction and imprisonment, the Claims Board shall provide compensation in specific statutory amounts. Wis. Stat. § 775.05(4).

The standard to obtain compensation is demanding. To be entitled to compensation, the petitioner must show that the evidence “is clear and convincing that the petitioner was innocent of the crime for which he or she suffered imprisonment.” Wis. Stat. § 775.05(3). In cases where the Claims Board has made a finding of innocence, the petitioner provided direct evidence that he was not the perpetrator of the crime.

For example, in the *Holloway* case, a man convicted of two home-invasion sexual assaults provided DNA and blood-type evidence, as well as alibi witnesses, demonstrating that he could not have been the assailant of either victim. (R. 7:30–31.) A similar result occurred in the *Hadaway* case, where DNA evidence excluded the claimant and supported that a different individual committed the crime. (R. 7:32–33.)

In contrast, where a court has concluded only that a new trial was warranted due to ineffective assistance of counsel or other trial error, the Claims Board has not treated that decision as equivalent to a finding that the claimant showed he was innocent by clear and convincing evidence. For example, in *Clements*, the Claims Board found that the claimant had not met his burden where the court of appeals concluded that a jury-instruction error warranted a new trial.

(R. 7:34–35.) Similarly, in *Adams*, the court of appeals granted the claimant a new trial on his sexual-assault charges based on ineffective assistance of counsel. The Claims Board denied compensation to Adams, concluding that that determination did not amount to proof that Adams was innocent by clear and convincing evidence. (R. 7:67–68.)

B. The record supports that Vasquez failed to show by clear and convincing evidence that he was innocent of child sexual assault.

Here, the Claims Board correctly concluded that Vasquez failed to satisfy that demanding standard. Under Wis. Stat. § 227.57(7), the facts did not compel a determination that Vasquez proved his innocence by clear and convincing evidence.

In deciding that a new trial was warranted, the District Attorney did not conclude that Vasquez was innocent; to the contrary, the prosecutor continued to believe Vasquez was guilty, and only that there were new issues warranting a new trial. Vasquez asserts that the victim told the District Attorney in 2015 that her uncle and father had also assaulted her during her childhood. But he does not even assert that the victim recanted her testimony that Vasquez *also* assaulted her, and the District Attorney confirmed that she continues to assert that Vasquez did sexually assault her.

Vasquez's basic problem has been that he confuses a right to a new trial with actual innocence. He described to the Claims Board a 2015 interview of Sara by the District Attorney, where Sara asserted that two other men also assaulted her, and he provided the Claims Board with a proposed expert report criticizing the forensic interview of the victim in 1998 and an alternate translation of Sara's trial testimony. But while this "evidence" supported Vasquez's motion for new trial on ineffective assistance of counsel grounds, it does not show that he is innocent. And the Claims

Board precedent he looks to is distinguishable; it only illustrates what Vasquez's claim lacks.

C. Vasquez does not argue that the Claims Board failed to make a correct determination based on the facts before it, and the arguments made throughout his brief would not support such a claim.

Vasquez does not present the issue to this Court of whether he can justify reversal under Wis. Stat. § 227.57 based on the Claims Board's consideration of the materials presented in support of the claim. But for purposes of completeness, the Claims Board responds to the assertions made throughout his brief.

1. In light of the victim's assertion that she was assaulted by multiple men, including Vasquez, the possibility of additional perpetrators does not show Vasquez's innocence.

Vasquez asserted in his brief to the circuit court and now to this Court that in a 2015 interview between Sara and the District Attorney's office, Sara indicated she was also sexually assaulted during her childhood by her uncle and father. (App. Br. 24–25; R. 15:5.) The record contains no evidence of this interview other than Vasquez's attorney's description and includes no affidavit. Assuming the information is true, however, it does not prove Vasquez's innocence.

Vasquez's unspoken premise is that if those two men sexually abused her (in his brief to this Court, Vasquez focuses on her uncle), Vasquez could not have. Indeed, he describes the uncle as "a more likely suspect." (App. Br. 27.) But the underlying assumption—that there can be only one perpetrator—is incorrect.

This was not a home-invasion sexual assault of an adult, where the victim describes a single incident of assault and a single assailant. Instead, it is a child victim describing events of sexual assault during her childhood, and affirmatively indicating that there were multiple assailants. The potential guilt of other men does not exonerate Vasquez. Vasquez recognizes that Sara has continued to assert to the District Attorney that Vasquez assaulted her during the very interview he relies on.

Vasquez's side-by-side chart in his brief (App. Br. 27) suffers from this same flaw. Its underlying premise is that Sara could only have been assaulted by one of the men, but that is not what she alleged. Further, the comparative facts do nothing to show Vasquez's innocence. Vasquez had access to Sara—she was being cared for by a woman in the home where Vasquez resided. And Vasquez does not deny that lesions on his penis were consistent with a history of herpes.

2. The expert report and alternate translation of Sara's trial testimony provided to the Claims Board did not prove Vasquez's innocence.

Vasquez also presented the Claims Board with an expert report about problems with forensic interview techniques in 1998, when Sara was interviewed. Vasquez argues that "it is entirely possible that [Sara] experienced sexual contact with her father and uncle and misreported her recollection." He also announces, with no explanation of how, that the translation "confirm[s] the many ways [Sara] was subjected to external influence and inappropriate interview techniques." (App. Br. 30.)

These possibilities do not show that Vasquez was innocent, and nothing in the expert report said that. For purposes of Vasquez's motion for new trial, these materials were relevant as part of an argument that Vasquez's trial counsel should have considered these avenues of inquiry and

was ineffective for failing to do so. It is unknown what effect they would have had on the jury.

The proffered expert report (R. 6:44–55) appears to have assumed that if others assaulted Sara, Vasquez could not have, and so materials suggesting that her uncle or father sexually assaulted her must by definition exclude Vasquez. And even so, it did not conclude that what Sara said was untrue:

In summary, there is no way to definitively know whether [Sara’s] statements are true statements or untrue statements which resulted from inappropriate interviewing, interviewer bias, source monitoring error, or other influences. However, what is clear and supported by extensive research is that there are a number of factors present in the records of interviews of [Sara] that raise significant questions about the accuracy and reliability of the information provided by this child.

(R. 6:54.) Again, this report was prepared as part of Vasquez’s effort to obtain a new trial, not a claim for compensation based on innocence. And Vasquez’s assertion that forensic interview techniques have improved since 1998 (App. Br. 28–29) would not show that all child-assault convictions during that period were invalid.

As to the alternative translation, Vasquez argues these documents “give a clear explanation of why Mr. Vasquez was falsely accused,” (App. Br. 30), but neither he nor the translation pinpoints mistranslated aspects of Sara’s testimony that would show it is untrue (R. 6:79).

Regardless of whether these materials and arguments would have mattered in the criminal case, where the State had to prove Vasquez’s guilt beyond a reasonable doubt, they are not affirmative evidence of innocence in the matter before the Claims Board, where Vasquez had the burden to show that he is actually innocent by clear and convincing evidence.

3. Vasquez's case is unlike the Claims Board precedent where the Claims Board found an applicant actually innocent despite the victim's continued accusations.

Vasquez recognizes that the victim continues to assert to the District Attorney that she was assaulted by him. (App. Br. 31.) He points out that in two past cases, *Holloway* and *Sanders*, the Claims Board determined that a petitioner showed he was innocent by clear and convincing evidence despite the victim's continued assertion that the person had committed the crime. (App. Br. 31.) The evidence presented by Vasquez is not like the evidence in those two cases.

In *Holloway*, the Claims Board found that a petitioner had proved his innocence even though the victim continued to believe Holloway was the assailant. Holloway was convicted of stranger sexual assault of an adult, where there could be only one perpetrator. That meant that if Holloway had affirmative evidence that someone else committed the crime, he could prove he was innocent. And that was the case: Holloway presented DNA and blood-type evidence, as well as alibi witnesses, that affirmatively demonstrated he could not have been the assailant. (R. 7:30–31.)

Sanders featured the same situation: a case where there was only a single assailant. That assailant turned out to be a different individual with the same name as Sanders; the individual was located and confessed to the crime. (R. 7:69–70.) That individual's guilt meant that Sanders proved his innocence, because they could not both have committed the crime.

Vasquez's case is not a one-time stranger assault where only one person can have committed that single crime. Instead, it involves allegations that the victim was repeatedly assaulted as a child by multiple men in her life. Implicating

other men does not mean that Vasquez has shown he is innocent.

Vasquez's case is like *Clements* (R. 7:34–35) and *Adams* (R. 7:67–68), where a defendant was granted a new trial due to ineffective assistance of counsel or other trial errors. The Claims Board denied compensation in both cases, concluding that that determination did not amount to proof that they were innocent by clear and convincing evidence.

II. Vasquez's due process argument is unsupported and not raised to the circuit court.

Vasquez newly argues that his rights of due process were violated by the Claims Board's consideration of his claim on the theory that the Claims Board was biased and precluded him from presenting evidence. (App. Br. 18–20.)

That claim is forfeited because it was not raised below. The “fundamental forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal.” *Townsend v. Massey*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155. This forfeited issue should not be considered for the first time on appeal.

In addition, even if not forfeited, he offers no support for this theory—the most the Claims Board can discern is that he was not encouraged to present additional evidence to the Claims Board. (App. Br. 35.) But he does not reveal what evidence he would have brought forward had the Claims Board encouraged him to. And he offers no support for his suggestion that he was “preclude[d]” from presenting evidence. (App. Br. 19, 20.) He was free to present evidence to support his clear-and-convincing burden. *See* Wis. Stat. § 775.05(3) (referring to “hearing evidence on the petition”). The Claims Board liaison's reassurance that the hearing would be informal did not preclude Vasquez from presenting whatever materials he felt would meet his burden of proof.

Vasquez makes much of the fact that the Claims Board wrote to the District Attorney, sending him a copy of Vasquez's claim and asking for any feedback. (App. Br. 19–20.) But the statute requires the Claims Board to send claims to the district attorney and sentencing court. Wis. Stat. § 775.05(2). Vasquez does not assert that the Claims Board had any ex parte contact with either body, and he does not explain how this contact affected any right of due process.

III. Vasquez's standard of review argument is unsupported.

Vasquez announces that the Claims Board required Vasquez to prove his innocence beyond a reasonable doubt. (App. Br. 21–23.) He offers nothing in the Claims Board's decision or proceedings that would support his assertion. The Claims Board's decision cites the proper standard of proof—"clear and convincing evidence" (R. 9:23)—and Vasquez offers nothing in the record indicating the Claims Board failed to follow that standard.

IV. Vasquez's hearsay argument ignores the type of proceeding and the lack of any admissible evidence supporting his new-evidence claim.

Vasquez asserts that, even though he has the burden of proof and offered no evidence (even hearsay evidence) of Sara's 2015 statements about her assailants, the Claims Board improperly relied on "hearsay" in concluding that she had not recanted her trial testimony. This argument ignores the type of proceeding and, more importantly, the fact that it was Vasquez's burden to present evidence and prove his innocence by clear and convincing evidence.

As a starting point, the premise of Vasquez's argument is that *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, 278 Wis. 2d 111, 629 N.W.2d 572, applies to proceedings before the Claims Board. (App. Br. 34, 35.) It does not. That case applied to a proceeding for insurance benefits before the

Group Insurance Board, where the contested-case process applied and the agency was required to make findings of fact and conclusions of law. Wis. Stat. § 227.47; Wis. Admin. Code ETF § 11.12(1)(a). *Gehin*’s “substantial evidence” review standard flows from Wis. Stat. § 227.57(6), which applies to judicial review of decisions stemming from contested case hearings: “[i]f the agency’s action depends on any fact found by the agency in a contested case proceeding . . . the court [should] . . . set aside agency action or remand the case to the agency if it finds that the agency’s action depends on any finding of fact that is not supported by substantial evidence in the record.”

That was not the type of matter here. Claims Board proceedings are specifically exempted from the hearing procedures of chapter 227. Wis. Stat. § 227.03(5) (chapter 227 provisions do not apply except as provided in Wis. Stat. § 775.05); Wis. Stat. § 775.05(5) (only the judicial-review provisions of chapter 227 apply). That means that Wis. Stat. § 227.47, which requires an agency to make findings of fact in a contested case hearing, does not apply to these proceedings. Wis. Stat. § 227.47(1). Unsurprisingly, no court has ever treated the Claims Board process as subject to *Gehin*.

But even if *Gehin* applied to this type of proceeding, the Claims Board would not have run afoul of it. In *Gehin*, the claimant presented live testimony by her physician in support of her claim, and the respondent offered only a medical report. 278 Wis. 2d 111, ¶ 3. Under those circumstances, where live testimony controverted a hearsay medical report, the supreme court held that the board could not make its findings of fact based on hearsay. *Id.* ¶ 4.

Gehin thus stands for the proposition that an administrative agency cannot make findings of fact on uncorroborated written hearsay alone when that hearsay is otherwise controverted by in-person testimony.

Vasquez's case is not like *Gehin*. Vasquez offered no live testimony—or even an affidavit from Sara—to support his claims that Sara identified other assailants.⁴ His attorney's account of the interview between Sara and the District Attorney included multiple levels of hearsay. Vasquez cannot complain that the District Attorney himself provided details from that interview that he does not like. That is particularly true since Vasquez raised no objection to the Claims Board about the types of material he believed the Claims Board could rely on.

CONCLUSION

The Claims Board's decision should be affirmed.

Dated this 12th day of April 2024.

Respectfully submitted,

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⁴ Vasquez does not assert that the proffered expert report or translation are not hearsay. Perhaps his theory is that they might be subject to hearsay exceptions, but *Gehin* treated such materials as hearsay, regardless of any exception in court, for purposes of findings of fact and its substantial-evidence rule. *Gehin v. Wis. Grp. Ins. Bd.*, 2005 WI 16, ¶¶ 89–90, 278 Wis. 2d 111, 629 N.W.2d 572.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5144 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 12th day of April 2024.

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