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NO. ~~44508-5-II~~

COURT OF APPEALS,
DIVISION II

OF THE STATE OF WASHINGTON

PATRICK J. MCMANUS, *APPELLANT,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES, *RESPONDENT.*

BRIEF OF APPELLANT

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A. The Board of Industrial Insurance Appeals, being an appeal board designated by RCW 51.52.050 to hear appeals from orders of the Department of Labor and Industries, should the trier of fact be advised as to how case came to them for their consideration?

B. Is the fact that the Board of Industrial Insurance Appeals adopted an order of the Department of Labor and Industries a fact that should be stated to the trier of fact?

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B. Are there any recognized exceptions to the hearsay rule that would allow the non testifying doctor's opinion to be admissible?

Assignment of Error No. 3

The trail court erred in refusing to correct a scriveners error in Finding of Fact No. 5 of the Board of Industrial Insurance Appeals restated in Instruction No. 4, paragraph 4, that Mr. McManus sustained an aggravation of his pre existing cervical degenerative disc changes, when in fact it was lumbar, or low back, degenerative disc changes that was aggravated, and had nothing to do with the cervix or neck.

Issues pertaining to the third Assignment of Error

A. Did the trial court have jurisdiction as an appellate court, reviewing a prior decision of the Board of Industrial Insurance Appeals, to correct a scriveners error in the Board's findings?

B. Should the trial court have corrected the scriveners error of the Board referencing cervical rather than lumbar degenerative disc disease, which was aggravated by Mr. McManus' employment with Clark County?

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The trail court erred in refusing to give Mr. McManus proposed Instruction No. 10 that special consideration should be given to testimony of an attending physician, namely Dr. Paul Won, who was the only attending physician to testify.

Issues pertaining to the fourth Assignment of Error

A. Should Mr. McManus' proposed Instruction No. 10 on attending physicians have been given to the jury?

B. Is the failure to give the instruction on attending physician prejudicial error?

Statement of the Case

Patrick McManus started working for Clark County, Washington, on June 12, 1989, as an entry level maintenance worker, and progressed to specialist operating backhoes and flatbed type trucks. After three years, he transferred to the bridge crew doing bridge maintenance, from painting to replacing bridge decks, to replacing beams. After seven years on the bridge crew, Mr. McManus in 1998 accepted a position as a street sweeper operator. He first operated an Elgin Whirlwind for five years and then operated an Elgin GeoVac for six years. The third and last street sweeper that he operated for Clark County was called an Elgin Regenerative Air. (Certified Appeal Board Record, P. McManus, October 18, 2012 - Direct, page 73, line 22; page 74, lines 8, 11, 15, 18 and 20; page 75, line 21; page 76, line 4; page 81, line 21; page 82, line 1; page 83, lines 11 and 14; and page 84, line 25)

The first and second street sweepers that Mr. McManus operated were more ergonomically friendly than the last one. They were European drive, where the controls were on the right hand side, and it was easier to

reach switches and gauges. They had a moveable console that set between the two seats and made it easy to access controls, as compared to the Elgin Regenerative Air sweeper. (CABR, P. McManus - Direct, page 78, lines 9 and 22; and page 81, line 1)

All three street sweepers were rough riding pieces of equipment. They all were front over cab designs, so the driver was cramped. They were quite bumpy when working the holes and dips along the curbs, which seemed to be the roughest part of the road. As the machines got older, the shocks would wear out, making the ride bumpier. (CABR, P. McManus - Direct, page 80, line 3; and page 81, line 14)

The third machine, the Elgin Regenerative Air, did not have European drive, and the controls for the heater, radio, mirrors and windows were all on the left side, except for the passenger window. There was a lot of bending around, twisting, and reaching behind to set switches. The control box was behind the driver's seat, which limited the ability of Mr. McManus to move the seat forward or backward, and there was no room to extend his legs out. Mr. McManus had to ride with his right foot, used for the throttle and brake, at an angle instead of being able to sit with his right leg straight down on top of them. To be able to operate the throttle, Mr. McManus had to pivot his right leg to the side, and his left leg

could not extend in front of him like the first two sweepers allowed him to do. (CABR, P. McManus - Direct, page 80, line 3; page 81, line 14; page 86, line 24; and page 87, line 23)

Exhibits 1 through 9 are photographs of the street sweeper, the Regenerative Air machine, that Mr. McManus started operating in 2009. Photograph Nos. 1 and 2 show the left and right sides of the sweeper with the seats over the front tires. Photograph No. 3 shows the seat pushed back as far as it will go, and what little leg room is available. Photograph No. 4 shows the inside left side of the sweeper with the seat and floorboard. Photographs 5 and 6 show the seat and console placement, which cannot be moved as in the first two sweepers. Photographs 7 and 8 is a better view of the console and the position of the steering wheels, right and left. Photograph No. 9 shows the right floorboard with the seat pushed back to take the photograph. Copies of Exhibits 1 through 9 are attached as Appendix A. (CABR, Exhibits section between Transcripts and Depositions, P. McManus - Direct, page 95, lines 15 and 18; page 96, lines 7, 13, 17 and 25; and page 97, lines 4, 14 and 22)

With the front wheels under the seat, whenever Mr. McManus hit a bump, the force radiated in a straight line up through his back. Hitting a bump occurred quite frequently with potholes and low spots along the

curb line, where Mr. McManus spent 90% of his time sweeping. The Elgin Regenerative Air had a cheaper seat than the first two street sweepers. The air could not be adjusted, and the air would hold Mr. McManus up when he hit a bump, instead of floating like the adjustable air ride seats in the first two sweepers. The seat would hold him in place, and was like sitting on a block of concrete. (CABR, P. McManus - Direct, page 87, line 12)

Mr. McManus spoke to the crew chief, Kent MacDonald, several times about the seats in the Elgin Regenerative Air sweeper, and there was an attempt to repair the seat in May 2010. After the seat was repaired, the lumbar support was still not working properly, and the padding was overdone and like sitting on cement. (CABR, P. McManus - Direct, page 85, lines 10 and 12; page 88, line 25; page 89, lines 1, 12 and 14; and page 90, line 17)

The first part of 2010, Mr. McManus started to develop a problem related to the operation of the Elgin Regenerative Air sweeper. Mr. McManus has had injuries and treatment to his low back over the years. Then in 2010, the pain in his low back worsened to the point where it was radiating across the lower back, down his left leg, affecting his sleep and activities of daily living. Mr. McManus would have electric

shocks going down his left leg and across the top of his foot. Weakness in his lower left leg caused him to stumble, and he almost fell twice. Between January and April 2011, his low back became progressively worse to the point where he could not operate a street sweeper without being overwhelmed with pain, and he last worked in April 2011. (CABR, P. McManus - Direct, page 91, lines 22 and 25; page 92, lines 7, 9, 16 and 25; page 93, lines 12 and 19; and page 94, lines 16 and 19)

Starting in 2010, his wife, Karon McManus, noticed that when her husband would come home from work, he would have a hitch in his back. He would touch the wall like he was trying to catch himself from tripping. If he went upstairs, he would grab the hand rail like his whole left side wanted to give out. Walking, he would drop down like he was falling to the left, and have to catch himself. (CABR, K. McManus - Direct, page 122, lines 1, 9 and 14)

Dr. Paul Won, who is Board Certified in family medicine and preventative medicine, joined Kaiser Permanente in 1999 as an occupational physician, treating on the job injuries and occupational diseases. Occupational medicine is under the umbrella of Preventative Medicine. Dr. Won first treated Patrick McManus on January 13, 2005, for a low back injury at work when he was moving a rubber speed bump.

Mr. McManus twisted and felt a pull in his back, continued working, and had an increase in low back pain. On examination, Dr. Won found muscle spasm and limited range of motion, prescribed Ibuprofen and a muscle relaxer, placed Mr. McManus on modified work, which he performed for one day. Mr. McManus then went back to his regular job as a street sweeper and his low back condition improved. (CABR, Dr. Won - Direct, page 5, line 15; page 7, lines 15, 20, 23 and 25; page 9, line 19; page 10, line 12; page 11, lines 6, 8 and 10; page 13, lines 2, 4 and 23; page 14, line 10; page 15, line 5; and Cross, page 36, line 13)

Dr. Won next saw Mr. McManus on April 11, 2011. Mr. McManus had gotten a new street sweeper two years before with a very poor seat cushion. His back was being jarred when the road was bumpy, or he hit a pothole, and his back pain was getting progressively worse. His pain was going down his left thigh, and he was taking Tramadol and Dilaudid for pain. He had an epidural injection without much improvement, and he had last worked on April 6, 2011. (CABR, Dr. Won - Direct, page 18, line 12; page 19, lines 1 and 16; page 20, lines 7, 17, 21 and 25; and page 21, lines 3, 5 and 8)

Dr. Won examined Mr. McManus on April 11, 2011. Mr. McManus had difficulty standing from a seated position, and walked

slowly and stiffly. Mr. McManus had limited range of motion of the low back, and could not bend backwards. Dr. Won reviewed a Magnetic Resonance Imaging taken on June 25, 2010, which was compared to an MRI taken on February 4, 2006, and showed a new central disc protrusion at L2-3, resulting in moderate to severe stenosis, or narrowing, with crowding of the nerve root. Dr. Won diagnosed displacement of the lumbar intervertebral disc at L2-3. Dr. Won continued to treat Mr. McManus through December 15, 2011. (CABR, Dr. Won - Direct, page 22, lines 13, 15 and 24; page 23, lines 3, 5, 11 and 20; and page 30, line 1)

Dr. Won testified that driving the street sweeper, with the jarring and bouncing, had been a major contributor to his lumbar condition. Mr. McManus worked full time, and a major portion of his activity was driving a street sweeper. He had no major outside activities, and is a pretty sedentary guy just doing street sweeping work. Mr. McManus is a big man and drives a street sweeper on bumpy roads. Physical force equals mass times acceleration, and there was a great force focused on his low back. The L2-3 disc protrusion is symptomatic, and distinctive conditions of his employment driving a street sweeper was a cause of the development of the disc herniation at L2-3. (CABR, Dr. Won – Direct,

page 31, lines 10, 15 and 22; page 32, lines 6, 11, 16 and 18; Cross, page 38, line 2; and Re-Direct, page 43, line 5)

Dr. Thomas Dietrich, a Board Certified neurosurgeon, conducted a one time medical evaluation of Mr. McManus on July 14, 2011, at the request of the self insured employer, Clark County, pursuant to RCW 51.32.110(1). Dr. Dietrich retired from the practice of treating patients in 1994, and does about 300 medical evaluations a year in Oregon and Washington, but mostly Oregon, for which he is paid $300.00 per examination and has averaged $150,000 to $200,000 a year over the last 10 years. Though Dr. Dietrich testified that Mr. McManus' low back condition did not arise naturally and proximately from the distinctive conditions of his employment, Dr. Dietrich also testified that contributing to the development of his degenerative disc disease is a situation where you have repetitive bouncing up and down over a period of years, and that likely played a role in the rate of degenerative change in Mr. McManus' low back condition. (CABR, Dr. Dietrich - Direct, page 7, line 25; page 8, lines 9 and 23; page 9, line 24; page 26, line 11; and Cross, page 32, lines 12 and 19)

Dr. James Harris is a Board Certified orthopedic surgeon, who testified by telephone from his office at Naval Hospital in Bremerton,

Washington. Dr. Harris is an active duty medical officer in the Navy, who performs medical evaluations four to seven evenings a month, and averages five to six examinations per evening, to supplement his income from the Navy. On one of those evenings, June 27, 2012, Dr. Harris conducted a records review at the request of the employer's attorney. Dr. Harris never examined Mr. McManus. Dr. Harris had the report of the MRI performed on June 25, 2010, and compared to the MRI performed February 4, 2006, there was a new central disc protrusion at the L2-3 level that resulted in moderate to severe stenosis, or narrowing of the spinal canal. At the time of his review, Dr. Harris stated in his report that it was possible that the L2-3 disc protrusion was caused by his employment activities, but then when he testified, stated that he does not believe that the L2-3 disc protrusion is symptomatic in any event. (CABR, Dr. Harris - Direct, page 4, line 21; page 5, line 3; page 7, line 12; page 10, line 2; page 11, lines 12 and 14; page 12, line 3; page 13, line 1; page 21, line 21; page 22, lines 2 and 7; page 26, line 4; Cross, page 37, line 1; and Re-Direct, page 44, line 22)

On December 13, 2011, the Department of Labor and Industries affirmed the order dated August 30, 2011, allowing the claim as an occupational disease with a manifestation date of June 25, 2010. On

February 7, 2012, Clark County appealed the Department order allowing the claim to the Board of Industrial Insurance Appeals, and its appeal proceeded to an evidentiary hearing before an Industrial Appeals Judge. On February 21, 2013, and Industrial Appeals Judge issued a 15 page Proposed Decision and Order upholding the decision of the Department of Labor and Industries. On March 22, 2013, Clark County petitioned to the three member Board for review of the Proposed Decision. On April 5, 2013, the Board denied Clark County's petition and adopted the Proposed Decision. (CABR, pages 1, 36-51, 57-71 and 73-76)

Clark County then appealed to Superior Court for Clark County, and the case proceeded to a two day jury trial on November 18 and 19, 2013. After having the testimony read to them by the attorneys from the Certified Appeal Board Record, being provided the exhibits admitted before the Board, and receiving the Court's instructions, the jury reversed the Board and the Department in deciding that Mr. McManus did not have an occupational disease. On November 19, 2013, the trial court entered the Order and Judgment on the jury verdict. (CP, pages 1, 98 and 99)

ARGUMENT

Assignment of Error No. 1

The trial court erred in its introductory oral instruction in refusing to state that the Board of Industrial Insurance Appeals in its decision was affirming an order of the Department of Labor and Industries.

Issues pertaining to the first Assignment of Error

A. The Board of Industrial Insurance Appeals, being an appeal board designated by RCW 51.52.050 to hear appeals from orders of the Department of Labor and Industries, should the trier of fact be advised as to how case came to them for their consideration?

B. Is the fact that the Board of Industrial Insurance Appeals adopted an order of the Department of Labor and Industries a fact that should be stated to the trier of fact?

In consideration of an introductory oral instruction about the case, the Superior Court Judge considered a statement to present to the jury. (Reports of Proceedings - First Supplemental Transcript, page 3, line 10).

Mr. McManus requested a statement to the jury that the Board of Industrial Insurance Appeals had affirmed a Decision of the Department of Labor and Industries. (RP 1-S, page 5, line 1) Argument to the Court then continued by respective counsel as to whether the fact that the Board had affirmed a decision of the Department should be presented to the jury in the introductory oral instruction.

Pursuant to RCW 51.52.115, the court by instruction shall advise the jury of the exact findings of the Board on each material issue before the Court. Instruction No. 3, given by the court, states in paragraph 2, that the Department is the state agency that administers the Industrial Insurance Act, and it is the Department's duty to issue orders relating to the claims under the Act. Then paragraph 4 states that the Board of Industrial Insurance Appeals is a separate state agency whose function is to review the Department's determination when there is an appeal of that decision. RCW 51.04.020 invests the Department of Labor and Industries with the responsibility for administering the Industrial Insurance Act. The Department is an integral part of the appeal process in worker compensation claims, and first has to make a decision before an appeal can even be taken to the Board. RCW 51.52.050.

Clark County argues that referencing the fact that the Board affirmed the Department, allows Mr. McManus to argue that Clark County is being given three bites of the apple instead of just two. The fact that the Department decided to allow the claim as an occupational disease, and the Board affirmed that allowance somehow prejudices Clark County. To give the jury Instruction No. 3, without referring what the Board did as to the Department order, leaves the jury hollow as an explanation of the appeal process to reach Superior Court. The party defending the Board decision, here Mr. McManus, is entitled to have the jury know what the Board was doing in its decision by affirming an order of the Department of Labor and Industries. To affirm or reverse an order of the Department is the role of the Board. RCW 51.52.060.

Assignment of Error No. 2

The trial court erred in reversing an evidentiary ruling of the Board of Industrial Insurance Appeals in allowing the expert opinion of a doctor, who was not called to testify, through another doctor's testimony.

Issues pertaining to the Second Assignment of Error

A. Was the opinion of the doctor who did not testify hearsay?

B. Are there any recognized exceptions to the hearsay rule that would allow the non testifying doctor's opinion to be admissible?

At page 30, line 14, of the Report of Proceedings, the trial court reversed the decisions of the Board of Industrial Insurance Appeals in striking the deposition testimony of Mr. McManus' treating physician, Paul Won, MD, from page 38, line 15, through page 40, line 3. Before the Board, Mr. McManus had objected to injecting the opinion of Charles Wrobel, MD, another doctor that treated Mr. McManus and was not called to testify in the case, on the basis of hearsay, and was granted a continuing objection to that line of questioning at page 38, line 19, through page 39, line 4. (CABR, pages 1 and 57, Dr. Won - Cross, page 38, line 15 through page 40, line 3)

Dr. Paul Won on direct examination had testified that an MRI taken on June 25, 2010, when compared to an MRI taken on February 4, 2006, showed a new central disc protrusion at L2-3, resulting in moderate to severe stenosis, caused by the distinctive conditions of Mr. McManus' employment driving a street sweeper over bumpy roads. (CABR,

Dr. Won - Direct, page 23, lines 5 and 11; page 31, lines 10 and 15; page 32, line 6; and Re-Direct, page 43, line 5) The opinion of Dr. Charles Wrobel, introduced through Dr. Won on cross examination, which went to the heart of the case, was that it was unknowable as to whether or not the protrusion at L2-3 was related to Mr. McManus' employment. (CABR, Dr. Won - Cross, page 38, line 22)

Pursuant to ER 801(c), hearsay is a statement, other than one made by the declarant while testifying at hearing, offered to prove the truth of the matter asserted. Dr. Wrobel is the declarant, was not being called to testify at hearing, and his statement was offered to prove the truth of the matter asserted. Pursuant to ER 802, hearsay is not admissible except as provided by the rules.

ER 703 does provide that facts or data on which an expert bases an opinion made known to the expert before or during the hearing, if of a type reasonably relied upon by those experts in forming opinions, need not be admissible in evidence. If the opinion of Dr. Wrobel were considered to be facts or data, the testimony would be admissible into evidence, but it is not, and the Board should not have been overruled in excluding the testimony.

The reason that opinions of experts are not admissible is that unless they testify, they are not available for cross examination to test their opinion. The earlier question of Dr. Won at page 38, line 2, related to whether the L2-3 disc protrusion was symptomatic, and not the causation of the L2-3 disc protrusion. One would only infer form Dr. Won's answer at page 38, line 5, that Dr. Wrobel thought the L2-3 disc was symptomatic, and not as to the issue of causation. Clark County is attempting to bootstrap Dr. Won's answer into an issue of causation, which goes to the heart of the case. Mr. McManus would never be able to question Dr. Wrobel's opinion on causation because he was never called to testify in the case, and his opinion is blatant hearsay.

The trial court at page 26, line 4, thought the opinion of Dr. Wrobel was comparable to a learned treatise, which is an exception to the hearsay rule. ER 803(18) provides that statements contained in published treatises, periodicals, or pamphlets established as reliable authority may be read into the record. Dr. Wrobel's opinion was not contained in a learned treatise established as a reliable authority.

The continued questioning by Clark County at page 39, line 5, as to a discovery deposition of Dr. Wrobel having been taken by him and what he said, without proof of the matter asserted, was highly prejudicial

to Mr. McManus. Apparently, Clark County did not call Dr. Wrobel to testify because he did not want his opinion tested by cross examination. If Dr. Wrobel's opinions are left standing as an uncalled witness used to defeat Mr. McManus' claim, Mr. McManus is being denied due process of law. All of Dr. Won's testimony as to Dr. Wrobel's deposition should not have been read to the jury from page 38, line 15, through page 40, line 3, in the Certified Appeal Board Record.

Under ER 803(a), the learned treatise exception does not depend on whether the declarant, Dr. Wrobel, is available as a witness or not. However, pursuant to ER 804(b)(1), testimony given as a witness in a deposition may be admissible if a party against whom the testimony is now offered had an opportunity to cross examine the witness. Mr. McManus' attorney was present for Dr. Wrobel's discovery deposition, and had an opportunity to cross examine Dr. Wrobel. Dr. Wrobel had been identified as a witness for Mr. McManus in the Interlocutory Order Establishing Litigation Schedule, and the attorney was surprised by Dr. Wrobel's testimony and did not question Dr. Wrobel. (CABR, page 98) In any event, the use of hearsay exceptions under ER 804 are dependent upon the unavailability of the witness being able to

testify, and it was never established by Clark County that Dr. Wrobel was unavailable to testify under any of six criteria stated in ER 804(a).

Assignment of Error No. 3

The trail court erred in refusing to correct a scriveners error in Finding of Fact No. 5 of the Board of Industrial Insurance Appeals, restated in Instruction No. 4, paragraph 4, that Mr. McManus sustained an aggravation of his pre existing cervical degenerative disc changes, when in fact it was lumbar, or low back, degenerative disc changes that was aggravated, and had nothing to do with the cervix or neck.

Issues pertaining to the third Assignment of Error

A. Did the trial court have jurisdiction as an appellate court, reviewing a prior decision of the Board of Industrial Insurance Appeals, to correct a scriveners error in the Board's findings?

B. Should the trial court have corrected the scriveners error of the Board referencing cervical rather than lumbar degenerative disc disease, which was aggravated by Mr. McManus' employment with Clark County?

Commencing at page 4, line 10, of the Second Supplemental Transcript of trial proceedings (RP 2-S) discussion with court and counsel took place regarding Instruction No. 4, the Board's Findings.[1] There is an error in paragraph 4 at the Board's Findings. Paragraph 2 of the Findings correctly references that Mr. McManus developed a low back condition from operating a new street sweeper purchased by Clark County, which affected his lumbar spine and there was a new central disc protrusion at the L2-3 level. Then going to paragraph 4 at the Findings, the reference is to Mr. McManus having a cervical or neck condition, rather than a lumbar or low back condition. There was no testimony in the Certified Appeal Board Record that Mr. McManus had a cervical condition, and all of the testimony is related to a lumbar condition.

Clark County initially raised the error as to paragraph 4 in their Petition for Review from the Proposed Decision and Order of the Industrial Appeals Judge dated February 21, 2013, in a footnote on page

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[1] The Board's Findings appear at page 70 of the Certified Appeal Board Record, and the numbered Findings where the error appears is No. 5, which became No. 4 in the Court Instruction. Finding No. 1 established the Board's jurisdiction to hear the employer's appeal from the order of the Department of Labor and Industries and was not given to the jury. Pages 75 and 76 of the Certified Appeal Board Record are the Department order affirming the order allowing the claim as an occupational disease, and Clark County's notice of appeal.

13. (CABR, page 48). The Board then on April 5, 2013, issued an Order Denying Petition for Review without addressing the apparent error in Finding No. 5, which became Finding No. 4 in Instruction No. 4. (CABR, Page 1)

Mr. McManus proposed Instruction No. 3 which changed cervical to lumbar in paragraph 4. The trial court refused to give proposed Instruction No. 3, and instead gave Employer's Instruction No. 14, with the error included. Mr. McManus' Proposed Instruction No. 3 is included in the appendix here as No. B. The prejudice here lies in the fact the sole issue in the case as reflected by the Special Verdict Form is, "was the Board of Industrial Appeals correct..." The jury was then able to decide that the Board was not correct, in that there was an error in the Findings of the Board. (Clerk's Papers, page 98)

Mr. McManus in support of his Proposed Instruction No. 3 argued that the error was merely a scriveners error and should be corrected by the trial court. (RP 2-S, page 7, line 3) The trial court maintained that the only way to correct scriveners error was to take the case back to the Board to correct the mistake. (RP 2-S, page 7, line 20) Clark County argued that the mistake was not a scriveners error and moved for a directed verdict. (RP 2-S, page 7, line 24)

Clark County then agreed that the trial court could substitute lumbar for cervical in Instruction No. 4, paragraph 4. (RP 2-S, page 10, line 3) The trial court then refused to modify Finding No. 4 in Instruction No. 4, and refused to give Mr. McManus' Proposed Instruction No. 3. (RP 2-S, page 14, line 10) The court then went one step further and precluded Mr. McManus from arguing that Finding No. 4 was a scriveners error. (RP 2-S, page 21, line 11) And, if the employer opened the door by arguing that the Board clearly got it wrong when they stated that there were cervical disc changes, Mr. McManus could only argue the "possibility" of a scriveners error. (RP 2-S, page 25, line 21)

Of particular significance here is that the following instruction given by the trial court, Instruction No. 5, states "the findings and decision of the Board of Industrial Insurance Appeals are presumed correct..." (CP, page 8) Mr. McManus then emphasized that is why it was incumbent on the court to make the change in Instruction No. 4. (RP 2-S, page 27, line 14)

Pursuant to RCW 51.52.120, where the trial court submits a case to the jury, the court shall by instruction advise the jury of the exact rulings of the Board on each material issue. The word "findings" should be considered to mean findings of ultimate fact; e.g. a finding or the identity

of the claimant and his employer, the claimant's status as an employee or defendant under the act, the nature of the injury or occupational disease, the nature and extent of the disability, the casual relationship between the injury or the disease and the disability, and other ultimate facts upon the existence or nonexistence of which the outcome of the litigation depends. *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547, 551 P.2d 269 (1969)

In *Stratton v. Dep't of Labor & Indus.*, 7 Wn. App. 652, 654, 501 P.2d 1072 (1972), the court held that it is reversible error to include in a jury instruction on the Board's findings comments on the claimant's behavior that are not supported by the evidence. In *Wendt v. Dep't of Labor and Indus.*, 18 Wn. App. 674, 685, 571 P.2d 299 (1977), the trial court rephrased the Board's finding of fact. Division II held that there was no prejudicial error because the trail judge's rewording of the finding of fact did not change the ultimate fact finding of the Board.

Here, there was an obvious error in the wording of an ultimate fact found by the Board. Paragraph 2 of Instruction No. 4 states:

> As early as 1976, prior to his employment with Clark County, Mr. McManus was seen and treated for intermittent, chronic *low back* pain and degenerative disc changes. An MRI dated February 24, 2006, showed moderately severe degenerative changes in the entire *lumbar spine.* An MRI dated

> June 25, 2010, showed moderately severe degenerative changes in the entire *lumbar spine*, and also a new central disc protrusion at the *L2-3 level. (Emphasis added.)*

These are ultimate findings of fact by the Board. Paragraph 4 of Instruction 4 states:

> Mr. McManus sustained an aggravation of his pre-existing *cervical* degenerative disc changes arising naturally and proximately out of the distinctive conditions of his employment with Clark County. (Emphasis added.)

Paragraph 4 is an ultimate finding as well, but misstates entirely the area of the spine affected by the occupational disease. The importance of Finding No. 4 is that it is the key finding on which the case turns; whether or not Mr. McManus has an occupational disease. The trial court should have changed "cervical" to "lumbar" in paragraph 4 to avoid confusion and consternation by the jury, and the failure to do so is prejudicial error. *Wendt v. Dept. of Labor and Indus.*, 18 Wn. App. 674, 685, 571 P.2d 299 (1977)

Assignment of Error No. 4

The trail court erred in refusing to give Mr. McManus' proposed Instruction No. 10 that special consideration should be given to testimony

of an attending physician, namely Dr. Paul Won, who was the only attending physician to testify.

Issues pertaining to the fourth Assignment of Error

A. Should Mr. McManus' proposed Instruction No. 10 on attending physicians be given to the jury?

B. Is the failure to give the instruction on attending physicians prejudicial error?

At page 43, line 14, of the Second Supplemental Transcript, the trial court refused to give Mr. McManus' proposed Instruction No. 10, WPI 155.13.01 Testimony of Attending Physician. (CP, page 44) Proposed Instruction No. 10 is attached as Appendix C. The note on use in Washington Practice, 6th Edition, page 167, states that this instruction should be considered in conjunction with WPI 1.02 Introductory Instruction, as modified by WPI 155.01, as well as the provisions of WPI 2.10 Expert Testimony. WPI 2.10 was given as court's Instruction No. 7. (CP, page 81)

In *Hamilton v. Dep't of Labor & Indus*, 111 Wn.2d. 569, 571, P.2d 618 (1988), the court held that a similar instruction did not constitute a comment on the evidence, citing a long line of cases. The court there stated that it has consistently held that an instruction which does no more than accurately state the law pertaining to an issue, does not constitute an impermissible comment on the evidence by the trial court. The instruction states a long standing rule of law in worker compensation cases that special consideration should be given to the opinion of a worker's attending physician. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964), *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 129, 186 P2d 76 (1947)

As stated in *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d, at page 572, the instruction does not require the jury to give more weight or credibility to the attending physician's testimony, but to give it careful thought. The language of the instruction is an accurate statement of both the letter and the spirit of the law regarding the Industrial Insurance Act, Title 51. The Act is a unique piece of legislation, is remedial in nature, and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 446, 378 P2d.684 (1963) The case law allowing special consideration of the

attending physician's testimony supports the purpose of the Act which is to promote benefits and to protect workers. *Newby v. Gerry*, 38 Wn. App. 812, 814, 690 P.2d 603 (1984)

In *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998), the court upheld the trial court's refusal to give WPI 155.13.01 as being within the range of discretion. The reasoning of the court was that a more general instruction was given that enabled Ms. Harker-Lott to argue that special consideration should be given to her treating physician.[2] The instruction given in *Harker-Lott* was similar to the general instruction given by the trial court here in Instruction No. 1, paragraph 3, but how does that permit Mr. McManus to argue that special consideration should be given to his treating physician?

Paul Won, MD, was Mr. McManus' treating physician and the only doctor that testified for him. *Harker-Lott* is distinguishable from the case here in that two doctors who testified there believed that she was disabled by the industrial injury rather than an intervening motor vehicle accident. A third doctor, presumably called by the Boeing Co., believed that she did not have a physical injury. A fourth doctor who testified, also presumably

[2] The general instruction stated, "take into account the opportunity and ability of the witness to observe, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of the evidence, and any other factors that bear on the believability and weight." *Boeing Co. v. Harker-Lott*, 93 Wn. App., at page 187.

on behalf of the Boeing Co., and who could be considered a treating physician, found no objective evidence of a physical injury.[3] Because the testimonies of the attending physicians were in conflict for Ms. Harker-Lott, and for the Boeing Co., the court held that it was not error to refuse to give the Attending Physician Instruction, WPI 155.13.01.

The thrust of Clark County's closing argument was that their doctors, Dr. Dietrich and Dr. Harris, had superior credentials compared to Dr. Won, and that Dr. Won was not even Board Certified in his specialty of occupational medicine. (RP, page 38, line 18, through page 51, line 9). The trial court did give as Instruction No. 7, WPI 2.10 Expert Testimony, the general instruction on evaluating expert witness testimony. This instruction is given in every case in which an expert witness testifies, whether or not this witness is a doctor or engineer. That instruction discusses how to evaluate an expert witness, and does not focus on a doctor's testimony in a worker compensation case. Mr. McManus' proposed Instruction No. 10 should have been given to the jury in addition to Instruction No. 7, and it was prejudicial error not to give it. *Hamilton v.*

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[3] Ms. Harker-Lott treated with George Gilman, MD, who was considering surgery. She sought a second opinion from Dr. Robert Aigner, who referred her to Dr. James Blue. Dr. Blue did not agree with Dr. Gilman's recommendation for surgery, and found no objective evidence of a physical problem. *Boeing Co. v. Dep't of Labor & Indus.*, 93 Wn. App., at page 183.

Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988), *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998)

Attorney Fees

RCW 51.52.130 provides that on appeal to the appellate court from the decision and order of the board, and the worker's right to relief is sustained, a reasonable fee for services of the worker's attorney shall be fixed by he court. RCW 51.52.130 goes onto the state that in case of self insured employers, the attorney fee fixed by the court, for services before the court only, shall be payable directly by the self-insured employer. In this case Clark County is a self-insured employer. If the decision of the Board of Industrial Insurance Appeals is sustained by this appeal to the Court of Appeals, a reasonable attorney fee should be fixed for Mr. McManus' attorney for services before this court payable by Clark County.

In 1993 the Legislature to strengthen the purpose of providing representation for injured workers allowed attorney fee awards at the appellate court as well as the superior court when the worker successfully defends against the appeal of a decision of the Board of Industrial Insurance Appeals. *Boeing Co. v. Lee*, 102 Wn. App. 552, 557, 8 P.3d 557 (2000), *Brandt v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 667, 983 P.2d 1111

(1999) Though reversed in Superior Court, if the Board's decision is sustained on appeal by reversal of the Order and Judgment of Superior Court,

Mr. McManus should recover reasonable attorney fees before the appellate court.

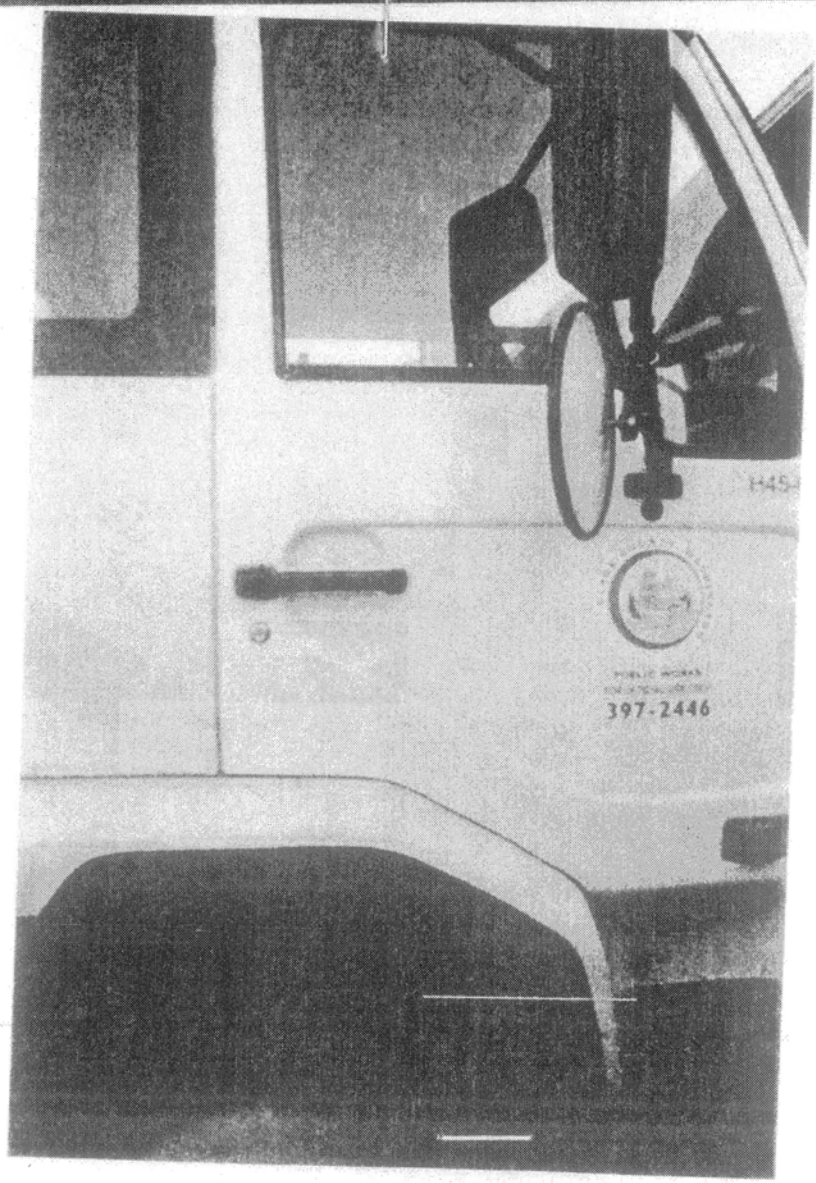
Conclusion

The Order and Judgment of Superior Court dated November 19, 2013, should be reversed and remanded to Superior Court for Clark County for a new trial on any one of the four assignments of error, or the multiplicity of errors, committed by the trial court.

Dated March 24, 2014.

Steven L. Busick, WSBA No. 1643
Attorney for Patrick McManus,
Appellant/Defendant

Board of Industrial Insurance Appeals
In re: PATRICK MCMANUS
Docket No. 12 11103
Exhibit No. 1
☒ ADM. 10-18-12 Date ☐ REJ.



EXS. 1, 2

Board of Industrial Insurance Appeals
In re: PATRICK MCMANUS
Docket No. 12 11103
Exhibit No. 2
☒ ADM. 10-18-12 Date ☐ REJ.

Board of Industrial Insurance Appeals
In re PATRICK MCMANUS
Docket No. 12 11103
Exhibit No. 3
X ADM 10-18-12 Date □ REJ.

EXS.

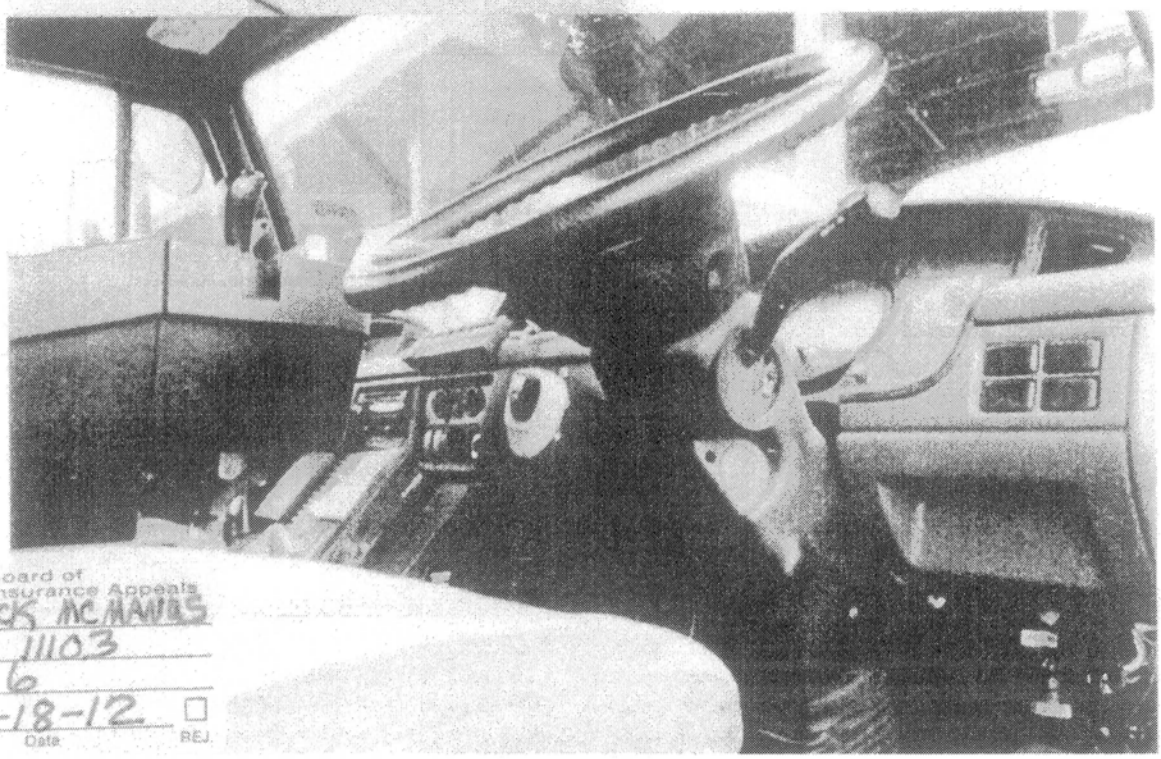
3, 4

Board of Industrial Insurance Appeals
In re PATRICK MCMANUS
Docket No. 12 11103
Exhibit No. 4
X ADM. 10-18-12 Date □ REJ.

Board of
Industrial Insurance Appeals
In re PATRICK MCMANUS
Docket No 12 11103
Exhibit No 5
X ADM 10-18-12 Date ☐ REJ.

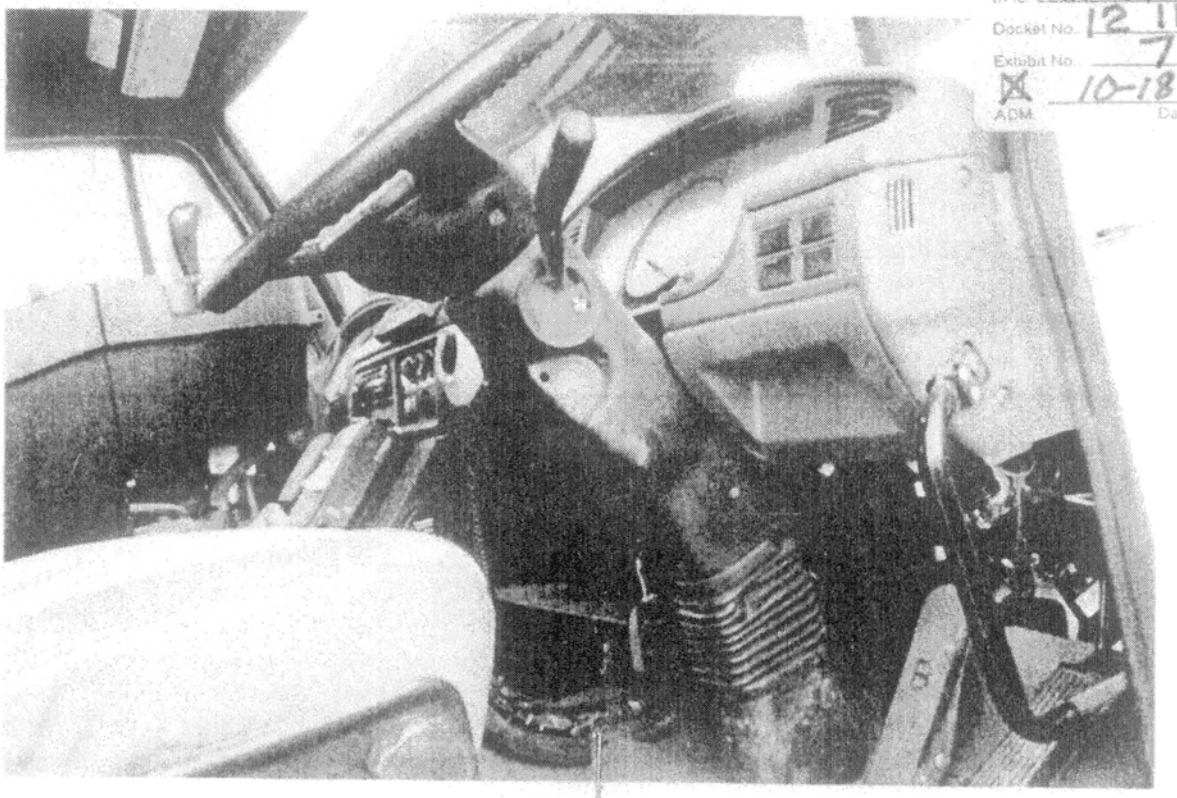
EXS.

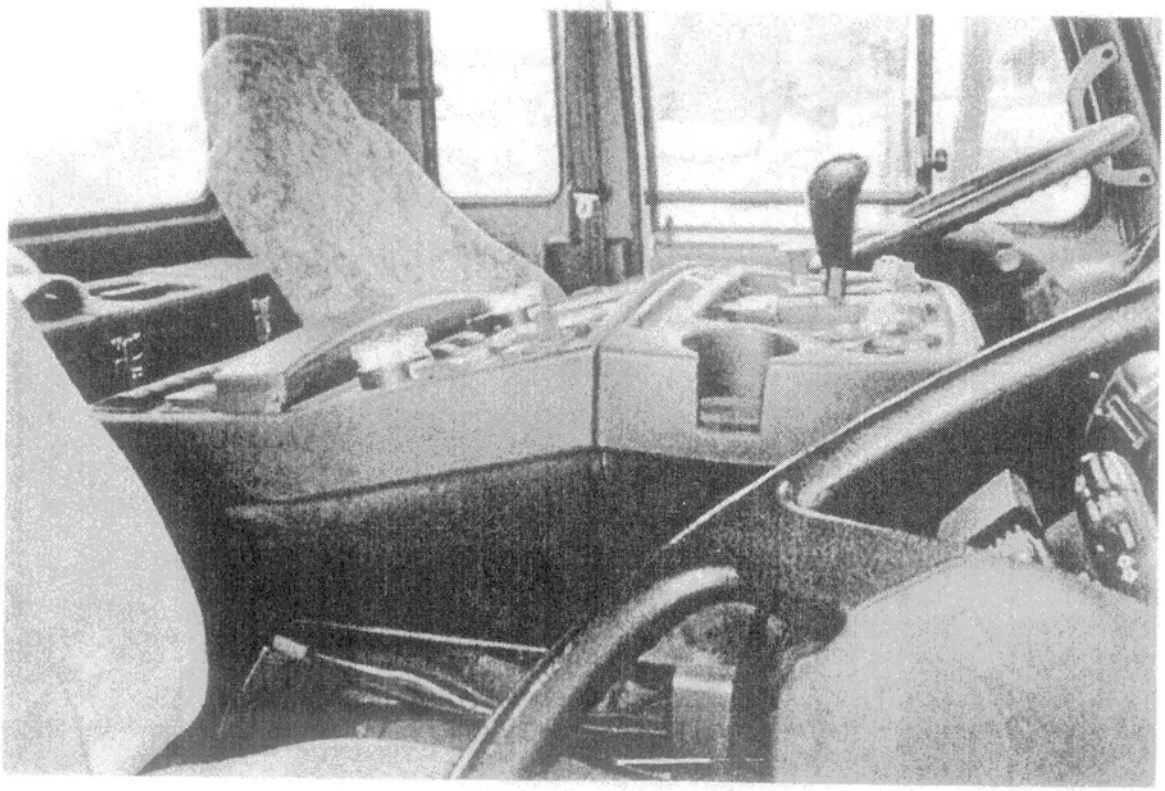
5, 6



Board of
Industrial Insurance Appeals
In re PATRICK MCMANUS
Docket No. 12 11103
Exhibit No. 6
X ADM. 10-18-12 Date ☐ REJ.

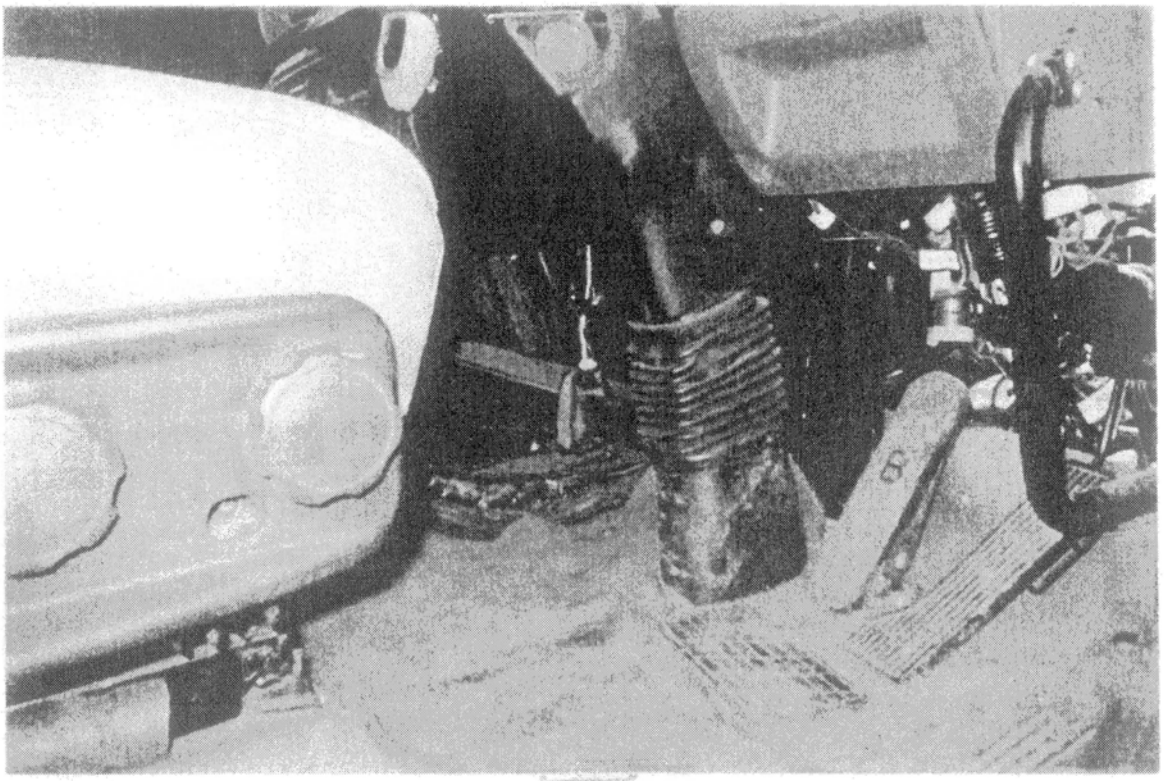
Board of
Industrial Insurance Appeals
In re: PATRICK MCMANUS
Docket No. 12 11103
Exhibit No. 7
☒ ADM. 10-18-12 Date ☐ REJ.





EXS. 7, 8

Board of
Industrial Insurance Appeals
In re: PATRICK MCMANUS
Docket No. 12 11103
Exhibit No. 8
☒ ADM. 10-18-12 Date ☐ REJ.



EX. 9

Board of
Industrial Insurance Appeals
In re: PATRICK MC MANUS
Docket No.: 12 11103
Exhibit No.: 9
☒ ADM. 10-18-12 Date ☐ REJ.

INSTRUCTION NO. 3

This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:

1. Patrick J. McManus worked as a street sweeper operator for Clark County from 1998 or 1999 to April of 2011. As a street sweeper operator, Mr. McManus worked 40 hours per week, and sometimes worked overtime. While operating the street sweeper, Mr. McManus repetitively hit holes and dips along the curb line, which can be the roughest part of the road. Bumpy conditions jarred his back, causing pain. In 2008 or 2009, Clark County purchased a new street sweeper. Mr. McManus experienced more bumping and jarring while operating the new street sweeper. In April of 2011, Mr. McManus ceased working as a street sweeper operator due to pain in his low back.

2. As early as 1976, prior to his employment with Clark County, Mr. McManus was seen and treated for intermittent, chronic low back pain and degenerative disc changes. An MRI dated February 24, 2006 showed moderately severe degenerative changes in the entire lumbar spine. An MRI dated June 25, 2010, showed moderately severe degenerative changes in the entire lumbar spine, and also a new central disc protrusion at the L2-3 level.

3. Repetitive jarring and bumping constitute distinctive conditions of employment.

4. Mr. McManus sustained an aggravation of his pre-existing lumbar degenerative disc changes arising naturally and proximately out of the distinctive conditions of his employment with Clark County.

By informing you of these findings, the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings.

WPI 155.02 Defendant

INSTRUCTION NO. 10

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

WPI 155.13.01

Defendant

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

CLARK COUNTY, Respondent, v. PATRICK MCMANUS, Appellant.	Court of Appeals Case No. 45695-8-II Clark County Case No. 13-2-01560-2 PROOF OF SERVICE

The undersigned states that on Monday, the 24th day of March, 2014, I deposited in the United States Mail, with proper postage prepaid, Brief of Appellant, dated March 24, 2014, addressed as follows:

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Gress & Clark, LLC
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Portland, OR 97223

Anastasia Sandstrom, Assistant Attorney General
Attorney General of Washington
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Seattle, WA 98104-3188

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

March 24, 2014 Vancouver, WA

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