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NO. 74664-2-I

COURT OF APPEALS,
DIVISION I

IN THE STATE OF WASHINGTON

ALLA KOVAL,
APPELLANT/PLAINTIFF

v.

AUBURN REGIONAL MEDICAL
CENTER, INC,
RESPONDENT/DEFENDANT.

PETITION FOR REVIEW TO THE SUPREME COURT

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ISSUE FOR REVIEW

In this industrial insurance case, does a jury instruction misstate the law of multiple proximate cause when it instructs the jury Ms. Koval is not entitled to further benefits if her pre-existing condition is a proximate cause of her current condition?

The Court should grant review because the last optional sentence of WPI 30.18.01 was improperly given in Instruction No. 10 to the jury, which states "There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence." This instruction wrongfully instructs the jury that so long as Ms. Koval's pre-existing knee condition was a proximate cause of her current disability then she is not entitled to further workers compensation benefits. Through a long line of decisions, our courts have affirmed that an injured worker is entitled to benefits so long as the industrial injury is "a" proximate cause of their current medical condition or disability and any pre-existing condition is immaterial to the analysis. See *Miller v. Dep't of Labor & Indus.*, 200 Wn. 674, 94 P.2d 764 (1939); *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 571 P.2d 229 (1977); *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d

467, 745 P.2d 1295 (1987); *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390 (2012); RAP 13.4(b)(1) & (2)

The Court should grant review because the optional sentence of Instruction No. 10 incorrectly shifts the jury's focus off of the consequences of Ms. Koval's industrial injury by instructing the jury the ongoing effects of her pre-existing condition are material. Our courts have correctly required the jury to focus on the effects of an industrial injury on a worker's medical condition and disability (*Shirley*, 171 Wn. App. at 886) regardless of whether it was symptomatic at the time of injury (*Dennis*, 109 Wash.2d at 476). This is because injured workers are to be taken as we find them (*Wendt*, 18 Wn. App. at 682-3). Thus, Instruction No. 10 wrongly requires the jury to decide whether Ms. Koval has a naturally progressing pre-existing condition; and if so, to then find she is not entitled to further workers compensation benefits in violation of our rules governing multiple proximate cause.

STATEMENT OF THE CASE

Ms. Koval, a full-time phlebotomist, twice fell in the course of employment: January 1, 2010, and September 21, 2011. Both falls caused injury to her bilateral knees, with her right knee being worse than her left knee. The January 1, 2010, claim was closed on May 27, 2010.

The evidence presented demonstrated Ms. Koval had, prior to the first

injury, sought treatment for her knees. (Depositions of Drs. Singer and Moore). However, the last time, prior to these injuries, Ms. Koval saw a physician for her knees was a half-dozen times between May 2008 and April 2009 without any specific treatment being rendered for her knees since she was in a weight counseling program. (Dep. Dr. Moore pp. 7-25). At the time of the second injury, she was working as a phlebotomist without any work restrictions. (Dep. Dr. McCollum p. 46).

After her second fall at work on September 21, 2011, Ms. Koval obtained specific treatment for her knees. While there was a recommendation for surgery, the Respondents challenged whether the need for that surgery was due to the pre-existing arthritic condition. The Department closed the September 21, 2011 claim and Appellant appealed to the Board of Industrial Insurance Appeals.

Regarding the January 1, 2010, claim, Appellant also filed a re-opening application alleging an objective worsening of her knees, but the Department denied the reopening application on July 11, 2013, and Appellant further appealed that order as well.

The primary dispute in this appeal is what effect these injuries had on Ms. Koval's knees. Dr. Makovski testified her knees were aggravated by the injuries. (Deposition Dr. Makovski p. 24). Dr. Nayan testified these falls

aggravated her pre-existing arthritis. (Deposition Dr. Nayan p. 53). Dr. Cheung testified the injury caused an exacerbation of her prior knee problems. (Deposition Dr. Cheung pp. 22-24).

On direct examination, Dr. Dinneberg, who performed a one-time medical examination, testified these injuries did not aggravate the pre-existing arthritis. (Deposition Dr. Dinneberg pp. 27-28, 30-31). On cross-examination, Dr. Dinneberg deferred to Dr. McCollum's opinions on aggravation, because he examined the patient closer in time to the injuries. (Dep. Dr. Dinneberg pp. 67-68). On re-direct, Dr. Dinneberg testified Ms. Koval does not have traumatic arthritis, yet also acknowledged he did not examine her close in time to either injury. (Dep. Dr. Dinneberg pp. 94-95).

Then there was the testimony from Dr. McCollum, who also performed a one-time medical examination. Dr. McCollum diagnosed pre-existing symptomatic knee arthritis, which was aggravated by Ms. Koval's industrial injury. (Deposition Dr. McCollum p. 22). He qualified his opinion that she was also experiencing the natural progression of her pre-existing arthritis and the effects of her pre-existing obesity. (Dep. Dr. McCollum p. 22). Dr. McCollum also testified that her pre-existing weight played a significant role in the development of arthritis in the knee. (Dep. Dr. McCollum pp. 55-56).

Dr. Singer testified he only saw Ms. Koval once in 2002, and again in 2005. (Deposition Dr. Singer p. 18). Dr. Singer believed Ms. Koval's pre-existing weight played a role in the progression of Ms. Koval's knee arthritis. (Dep. Dr. Singer p. 19). He last saw Ms. Koval in 2005, and he did not see or treat her at all after either of her industrial injuries. (Dep. Dr. Singer pp. 25-27). Even though he last saw Ms. Koval in 2005, Dr. Singer reviewed medical records up through 2012. He testified her first fall had not objectively worsened after claim closure and her second fall did not require further treatment. (Dep. Dr. Singer pp. 25-27).

Finally, Dr. Moore testified about his examinations of Ms. Koval's knees in 2008 and 2009. He did not review any additional records after 2009. Dr. Moore did not provide any opinions about causation of Ms. Koval's arthritis in her knees.

STANDARD OF REVIEW

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). Even if the instructions are misleading, however, the verdict will not be reversed unless prejudice is shown. *Keller*, 146 Wn.2d at 249. An error is prejudicial if it presumably affects the outcome

of trial. *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 23, 914 P.2d 67 (1996).

It is well established that it is within the trial court's discretion whether to give a particular jury instruction. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). This Court has also summarized this standard as:

> An exercise of judicial discretion is a composite of, among other things, conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. A decision involving discretion will not be disturbed on review except on a clear showing of its abuse, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State Ex Rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Alternatively, the trial court abuses its discretion when it makes a decision contrary to the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). "Jury instructions are reviewed *de novo*, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party." *Cox v. Spangler*, 141 Wash.2d 431, 442, 5 P.3d 1265 (2000).

ARGUMENT

The Court should grant review because the decision of the Court of Appeals is contrary to this Court's prior precedent in *Dennis* and the Court of Appeals' published decisions in *Wendt* and *Shirley*. RAP 13.4(b)(1) &

(2). In general, these cases stand for the proposition that in workers compensation appeals the focus of the jury must be on whether or not the industrial injury is a proximate cause of the worker's current disability. Instructions that ask the jury to focus on pre-existing or unrelated medical conditions create prejudicial error.

This Court's decision in *Dennis* affirms prior formulations of proximate cause in industrial insurance cases in our State:

> It is a fundamental principle which most, if not all, courts accept, that, if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness

Dennis, 109 Wn.2d at 471, 745 P.2d 1295 (1987), *quoting Miller*, 200 Wash. at 682-83. This holding makes clear that if the "previous physical condition of the workman is immaterial" and if recovery is obtainable "independent of any preexisting . . . weakness," then the jury in this matter should not have been instructed that Ms. Koval is entitled to "no recovery" so long as her current knee condition is due (regardless of degree) to a natural progression of her pre-existing condition. Yet, this optional sentence of WPI 30.18.01 makes any natural progression of Ms. Koval's pre-existing conditions a complete bar to any recovery whatsoever under our Industrial Insurance Act, contrary to *Dennis*, *Miller*, *Shirley*, and *Wendt*.

The Court of Appeals wrongly held this sentence was a correct statement of the law, "The last sentence of Instruction 10 told the jury that Koval was not entitled to recover damages incurred from the natural progression of her preexisting condition." Slip Opinion at 6. While this might be a correct statement of the law in a personal injury lawsuit, where damages are apportioned, it is not a correct statement of the law in a workers compensation claim. There is no apportionment of time loss or medical treatment under the Industrial Insurance Act. Where there is no apportionment, the optional sentence of WPI 30.18.01 is not a correct statement of the law.

The lower court's formulation itself, "recover damages," highlights this important distinction between tort and workers compensation. Ms. Koval is not recovering damages in this appeal; she is seeking to prove her entitlement to further statutory benefits. This optional sentence instructs the jury to decide whether the evidence supports a "finding that some of the resulting injury would have resulted from the natural progression of the condition, even without the occurrence." *Torno v. Hayek*, 133 Wn. App. 244, 252, 135 P.3d 536 (2006).

If the jury so finds, then it is told Ms. Koval can have no recovery for those damages. In a workers compensation appeal, no recovery means

Ms. Koval is not entitled to any benefits. Without apportionment, this optional sentence transforms "immaterial" evidence of Ms. Koval's pre-existing conditions into material evidence that acts as a complete bar to further statutory benefits.

Besides making Ms. Koval's immaterial pre-existing conditions material, the instruction also flips the proximate cause requirements. Again, there can be no recovery for Ms. Koval "for any injuries or disabilities" that have naturally progressed even if the industrial injuries had not occurred. Instruction No. 10 (emphasis added). This simply means if Ms. Koval's pre-existing conditions have naturally progressed and are a proximate cause of her current condition, she is not entitled to any benefits. This is an incorrect statement of the law of multiple proximate cause in the context of a workers' compensation claim.

This harm caused by the optional sentence of WPI 30.18.01 used in Instruction No. 10 is highlighted by the facts and holdings of *Shea v. Dep't of Labor & Indus.*, 12 Wn. App. 410, 529 P.2d 1131 (1974). In *Shea*, the injured worker had a metal beam fall upon him, injuring his right shoulder and neck. There was testimony sufficient to find he was a permanently totally disabled worker due to the residuals of that injury. *Id.* at 411-12.

As the Court of Appeals identified, the case was complicated by the

fact that prior to this injury, the worker was suffering from high blood pressure and degenerative vascular disease, both of which were completely unrelated to the industrial injury. *Id.* at 412. Those conditions progressed naturally and concurrently with the sequelae of the industrial injury to the point where the vascular conditions independently prevented him from working. *Id.* at 412-13.

The court rightly cited to the *Miller* case and *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 499 P.2d 255 (1972) for the now oft-repeated proposition that the injured worker's previous physical condition is immaterial and a full recovery is available independent of any pre-existing weakness. *Id.* at 414. The Court concluded that where there is evidence the industrial injury is a proximate cause of the worker's disability, the worker is entitled to benefits regardless of other causes. *Id.* at 415-6. While *Shea* addresses permanent total disability, there is no reason why its analysis of proximate cause is not also applicable to Ms. Koval's appeal.

As a thought experiment, the Court should imagine the outcome of *Shea* if the final sentence of Instruction No. 10 is, in fact, a proper statement of the law in workers compensation claims. Again the instruction states in relevant part, "There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-

existing condition even without this occurrence." The Court should apply this "law" to the facts of Mr. Shea's case.

Mr. Shea's vascular condition pre-existed the industrial injury. That condition naturally progressed, even without his industrial injury. The vascular condition proximately caused Mr. Shea to be permanently totally disabled. This sentence tells the jury to give Mr. Shea "no recovery" for "any" disabilities that would have occurred from the natural progression of his vascular condition. This sentence instructs the jury to deny Mr. Shea benefits for being permanently totally disabled, even if it also finds his industrial injury is also a proximate cause of his disability.

The Court should grant review and hold the final sentence of WPI 30.18.01 should not be given in workers' compensation appeals because it misstates the law. An injured worker should not be denied statutory benefits merely because their pre-existing condition has progressed concurrently with their industrial injury. They can be denied benefits if the trier of fact finds the industrial injury is not a proximate cause of the current disability. There should not be a bar to any recovery merely because a jury finds the injured worker's disability was also proximately caused by the natural progression of a pre-existing condition. When read as a whole, Instruction No. 10 prejudicially misstates the law of multiple proximate cause as

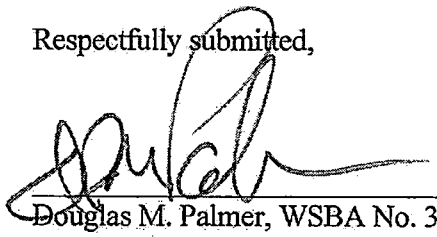
applied to the Industrial Insurance Act.

CONCLUSION

The Court should grant review because the decision below conflicts with this Court's and the Court of Appeals' own long-standing precedent. A worker's pre-existing condition is immaterial to her entitlement to benefits. The focus of the jury must be on whether the industrial injury is a proximate cause of her current disability. As given, Instruction No. 10 wrongly and prejudicially instructs the jury to switch its focus to Ms. Koval's immaterial pre-existing conditions. Contrary to established court precedent, it instructs the jury to deny Ms. Koval any industrial insurance benefits even if her industrial injury is also a proximate cause of her disability. Review should be granted.

Dated: November 28, 2017.

Respectfully submitted,



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APPENDIX A

Instruction No. 10

If you find that:

1. before this occurrence Alla Koval had a bodily condition that was not causing pain or disability; and
2. the condition made Alla Koval more susceptible to injury than a person in normal health,

then you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition. There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALLA KOVAL, Appellant, v. AUBURN REGIONAL MEDICAL CENTER, INC., a Washington self-insured employer, and THE DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	)	No. 74664-2-I DIVISION ONE UNPUBLISHED OPINION FILED: November 6, 2017

TRICKEY, A.C.J. — Alla Koval appeals the jury's verdict in favor of Auburn Regional Medical Center (Auburn Medical). The jury denied her request for a permanent partial disability award and her application to reopen her claim. Koval contends that the trial court erroneously instructed the jury to deny her recovery if any part of her claimed injury could be attributed to the natural progression of her preexisting condition. Koval also argues that the trial court abused its discretion when it excluded testimony that she had not received a vocational assessment prior to her claim being closed. Because the trial court's jury instruction correctly instructed the jury about Koval's damages attributable to the natural progression of her preexisting condition and Koval was not prejudiced by the trial court's exclusion of the challenged testimony, we affirm.

FACTS

Koval worked at Auburn Medical as a phlebotomist. Prior to 2010, Koval had traumatic arthritis likely caused by a knee injury she sustained in 2002. She also had several risk factors for degenerative joint disease, including long-term weight issues.

In January 2010, Koval injured her right knee when she slipped and fell at work. She filed a claim for her injury with the Washington State Department of Labor and Industries (L&I). L&I allowed the claim.[1] In May 2010, L&I closed Koval's 2010 claim. In July 2013, L&I denied Koval's application to reopen her 2010 claim.

Koval slipped and fell again in September 2011, injuring both of her knees. She filed another claim with L&I. L&I allowed the claim. In April 2012, L&I closed Koval's 2011 claim with no permanent partial disability award. L&I affirmed the order in December 2012.

From March 23, 2012 to December 7, 2012, Koval was able to return to work at Auburn Medical as a phlebotomist without any physical limitations caused by her knee injuries.

Koval appealed L&I's denial of her application to reopen her 2010 claim and L&I's closure of her 2011 claim without a permanent partial disability award to the Board of Industrial Insurance Appeals (the Board). The Board consolidated the appeals.

Koval called Lori Allen, a vocational rehabilitation counselor, to testify before the Board. Allen testified about her understanding of RCW 51.32.095 and its application to vocational assessments performed prior to L&I closing a claim (preclosure vocational assessments).

Koval asked Allen if she thought Koval would have benefitted from further vocational services on December 2012. Auburn Medical objected to the question as irrelevant and vague, and the Board sustained the objection. Allen answered in colloquy[2]

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[1] Neither party provides a citation for the date of Koval's filing of her claims or the claims themselves. Neither party challenges that Koval filed claims or that L&I allowed them to proceed.

[2] "When evidence has been excluded, the proponent of the evidence should make an offer of proof, thus creating a record for subsequent motions and a possible appeal." 14A WASHINGTON

that her review of the records did not show that Auburn Medical had conducted a vocational assessment of Koval. Still in colloquy, Allen indicated that Koval was in need of vocational services as of December 2012.[3]

Also over Auburn Medical's sustained objection, Allen answered in colloquy that she did not find any "employer ability [sic] assessment reports" in Koval's claim files for her injuries.[4]

The Board affirmed both L&I orders.

Koval appealed the Board's decision to the King County Superior Court. The trial court sustained Auburn Medical's objection to Allen's statements that Koval would have benefitted from a vocational assessment, that one had not been done, and that Koval needed further vocational services. The trial court overruled Auburn Medical's objection to Allen's statement that Koval's claim files did not contain vocational assessments, and admitted the testimony.

Koval requested a jury instruction on proximate causation and preexisting conditions based on WPI 30.18.01. Over Koval's objection, the trial court included an optional bracketed paragraph of WPI 30.18.01 that was not in Koval's proposed jury

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PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 34.18, at 448 (2d ed. 2009) (WPI) (citing ER 103, Wilson v. Olivetti North America, Inc., 85 Wn. App. 804, 934 P.2d 1231 (1997)). A "colloquy" is a discussion between the court and counsel, a party, or a witness that is not admitted as evidence but is recorded as part of the record. WPI 34.18, at 449; see also Sturgeon v. Celotex Corp., 52 Wn. App. 609, 618, 762 P.2d 1156 (1988) (party failed to preserve alleged error for appeal by failing to make adequate offer of proof as to what expert's testimony would have been if he had been allowed to testify).

[3] Counsel initially asked Allen if, in her opinion, Koval required vocational services. In rephrasing the question, the judge asked Allen if, in her opinion, Koval was entitled to vocational services. Allen responded, "Yes is my answer." Administrative Record (AR) (Dec. 19, 2013) at 71.

[4] AR (Dec. 19, 2013) at 71. The parties' briefs use the terms "employability assessment" and "vocational assessment" interchangeably. See Appellant's Opening Br. at 18; Resp't Br. (Auburn Medical) at 17; Resp't Br. (L&I) at 8. We refer to these as "vocational assessments." It appears that Allen's testimony was referring to an "employability assessment."

instructions.

Koval did not request a jury instruction on whether L&I had performed a vocational assessment or whether L&I prematurely closed her claim. The trial court's final jury instructions did not address whether L&I performed a vocational assessment.

Following a jury verdict in favor of Auburn Medical, the trial court affirmed the Board's decisions. Koval appeals.

ANALYSIS

Jury Instruction 10

Koval argues that the trial court erred because its instruction on proximate causation and preexisting conditions (Instruction 10) misstates Washington's law of proximate cause. Specifically, Koval contends that the court's jury instruction precluded her from recovery by telling the jury that it had to find that her preexisting condition played no role in her disability for her to recover. We disagree.

The "multiple proximate cause" theory states that "for disability assessment purposes, a workman is to be taken as he is, with all his preexisting frailties and bodily infirmities." Wendt v. Dep't of Labor & Indus., 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977). "A fundamental principle of workers' compensation is that if the accident or injury is a proximate cause of the disability or death for which compensation is sought, the previous physical condition of the worker is immaterial." Dep't of Labor & Indus. v. Shirley, 171 Wn. App. 870, 886, 288 P.3d 390 (2012).

"'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact

of the applicable law.'" Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)).

"On appeal, jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party." Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000), 22 P.3d 791 (2001) (citing State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977)).

Based on WPI 30.18.01, the trial court's Instruction 10 read:

> If you find that:
>
> 1. before this occurrence Alla Koval had a bodily condition that was not causing pain or disability; and
>
> 2. the condition made Alla Koval more susceptible to injury than a person in normal health,
>
> then you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition. There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.[5]

The last sentence of WPI 30.18.01 "should be included solely where the evidence supports a finding that some of the resulting injury would have resulted from the natural progression of the condition, even without the occurrence." Torno v. Hayek, 133 Wn. App. 244, 252, 135 P.3d 536 (2006) (citing Leavitt v. De Young, 43 Wn.2d 701, 708-09, 263 P.2d 592 (1953) ("jury instructions must be supported by substantial evidence"); WPI 30.18)).

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[5] Clerk's Papers at 75 (Instruction 10) (emphasis added).

Here, Instruction 10 correctly states the law of proximate causation. The first part of Instruction 10 told the jury that Koval was entitled to damages that were proximately caused by her knee injuries, even if her preexisting condition made her more susceptible to injury or caused her injuries to be greater than if she had been in normal health. The last sentence of Instruction 10 told the jury that Koval was not entitled to recover damages incurred from the natural progression of her preexisting condition. This is consistent with Washington's multiple proximate cause theory, as the jury was instructed to award Koval only those damages proximately caused by her complained of injuries, not those incurred due to the natural progression of her preexisting condition.

Moreover, substantial evidence in the record supported the inclusion of the last sentence of WPI 30.18.01 in Instruction 10. Koval had a history of knee injuries, weight issues, and arthritis that could have been the sole cause of her claimed damages. Koval had likely reached her maximum medical improvement for her 2010 and 2011 knee injuries, 6 to 12 weeks after they occurred. The continued deconditioning of her knees was likely due to the natural progression of her arthritis and her weight issues. Thus, the trial court's decision to include the bracketed language was supported by evidence in the record that some or all of Koval's injuries could be attributed to her preexisting condition.

Koval argues that Instruction 10 erroneously told the jury that her knee condition was caused by either her 2010 and 2011 injuries or the natural progression of her preexisting condition. This misinterprets the language of Instruction 10. The first section of Instruction 10 tells the jury that Koval was entitled to damages proximately caused by her knee injuries. Contrary to Koval's interpretation, the last sentence of Instruction 10 does not preclude the jury from awarding any damages if it finds that any part of her

damages are attributable to the natural progression of her preexisting condition. Rather, it correctly informs the jury that Koval is not entitled to recover damages that would have been incurred because of the natural progression of her preexisting condition even if her knee injuries had not occurred.

Koval also contends that Instruction 10 improperly required the jury to speculate about whether the natural progression of Koval's preexisting condition would have required future treatment.

"A verdict cannot be founded on mere theory or speculation." Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). The causal relationship between a claimed injury, aggravation of the injury, and disability must be established by medical testimony. Phillips v. Dep't of Labor & Indus., 49 Wn.2d 195, 197, 298 P.2d 1117 (1956).

Instruction 10 did not require the jury to speculate about how the natural progression of Koval's preexisting condition would affect her knee. As discussed above, the jury heard substantial medical testimony about Koval's prior knee injuries, preexisting condition, and knee injuries in 2010 and 2011. Also, the jury heard that the deconditioning of Koval's knees was likely due to the natural progression of her arthritis and her weight issues. The jury could rely on the medical testimony and did not need to speculate about whether Koval's damages were attributable to her preexisting condition, rather than her 2010 and 2011 knee injuries.

Koval argues that the last sentence of WPI 30.18.01 should only be included in personal injury cases to allow the defense to argue for a lower damages award. See Torno, 133 Wn. App. at 252. Torno was a personal injury case arising from a car accident. 133 Wn. App. 244, 246, 135 P.3d 536 (2006). The plaintiff appealed the trial court's

instruction to the jury on preexisting medical conditions, including that the plaintiff could not recover "'for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.'" Torno, 133 Wn. App. at 249. The Court of Appeals held that the trial court did not err in giving the instruction because an inference from the defense's medical evidence was that the plaintiff's injuries were due at least in part to the natural progression of her preexisting condition. Torno, 133 Wn. App. at 253.

Korval's reliance on Torno is misplaced. Torno examined the amount of evidence required to support giving the instruction. Torno did not address whether the instruction was appropriate only in cases where the jury's role would include determining whether to reduce the plaintiff's award. Moreover, here, as in Torno, substantial medical testimony about the natural progression of Koval's preexisting condition supports the challenged instruction. Thus, Torno supports the trial court's decision to give the full version of WPI 30.18.01 in this case.

At oral argument, Koval cited Shea v. Department of Labor & Industries to argue that she was still entitled to recover damages caused by her industrial injuries even if her preexisting condition alone would have caused her ultimate disability. 12 Wn. App. 410, 529 P.2d 1131 (1974). In Shea, a worker suffered an industrial injury in 1964 that ultimately resulted in his total and permanent disability by August 1971. 12 Wn. App. at 411-12. The worker also suffered from a degenerative vascular disease unrelated to his 1964 industrial injury, which "effectively removed [him] from the labor market as early as November 1965." Shea, 12 Wn. App. at 413. The trial court concluded that the evidence

was insufficient as a matter of law to establish a prima facie case and dismissed the worker's claim. Shea, 12 Wn. App. at 411.

The Court of Appeals remanded the case, stating that there was "no reason why the workman should be denied the opportunity to present [evidence of the effect of his 1964 injury] to a fact-finding body, which may or may not accept his version of the evidence." Shea, 12 Wn. App. at 414-15. The Court of Appeals also held that a worker is entitled to total disability benefits under the workmen's compensation act if his industrial injury is a significantly contributing cause of his inability to work, regardless of other circumstances or conditions that may have also contributed to his inability to work. Shea, 12 Wn. App. at 415.

Shea is distinguishable from the present case. Here, unlike Shea, Koval had an opportunity to present evidence to the jury in support of her argument that she was entitled to damages proximately caused by her industrial injuries. The jury considered evidence of her knee injuries and preexisting condition. The jury determined that Koval was not entitled to further medical treatment and was not temporarily totally disabled, and that the Board correctly determined that her 2010 injury did not objectively worsen between May 2010 and July 2013. Moreover, Koval was not totally and permanently disabled. She returned to work as a phlebotomist, even after L&I determined that she did not need vocational services. Therefore, Shea is both procedurally and factually dissimilar to the present case, and is not persuasive.

In sum, Instruction 10 correctly stated the law of proximate cause and preexisting conditions. It properly directed the jury to determine what damages, if any, were proximately caused by Koval's 2010 and 2011 knee injuries. It also told the jury that

Koval was not entitled to recover damages caused by the natural progression of her preexisting condition. The instruction was supported by substantial evidence in the record. The trial court did not err in giving Instruction 10 to the jury.

Exclusion of Testimony

Koval argues that the trial court abused its discretion when it excluded testimony that she was not provided vocational services and that L&I did not conduct a vocational assessment prior to closing her claim. Koval contends that this testimony was essential to her theory of recovery that L&I did not perform a preclosure vocational assessment and thus prematurely closed her claim. Because there was sufficient evidence in the record for Koval to have argued her theory of recovery to the jury, we conclude that she cannot show that she was prejudiced by its exclusion.

Relevant evidence is admissible unless its admissibility is otherwise limited. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Here, Koval asked Allen whether, in her opinion, Koval was in need of further vocational services as of December 2012. Allen's response in colloquy was that, in her opinion, Koval required further vocational services but her employer had not performed a vocational assessment.[6] The trial court excluded this testimony on relevance grounds. But the trial court admitted two other pertinent parts of Allen's testimony. First, it admitted

[6] Allen also stated that a vocational assessment had not been performed and the statute's return-to-work priorities had not been addressed. Koval needed to address these priorities if Koval was permanently restricted from performing phlebotomy work, and that Koval likely needed additional vocational services. The court told Allen to limit her response to the scope of Koval's question, after which Allen indicated that her answer was "[y]es." AR (Dec. 19, 2013) at 71. The trial court struck all of this testimony on relevance grounds.

Allen's testimony that she understood that workers had to be given a vocational assessment to determine whether the worker needs vocational services under RCW 51.32.095. Second, it admitted Allen's testimony that Koval's claims file did not contain a vocational assessment.

Even assuming that the trial court erroneously excluded Allen's testimony about whether Koval required vocational services and had not been given a vocational assessment as irrelevant, Koval cannot show that she was prejudiced by that error.

Evidentiary errors merit reversal only where the error is prejudicial. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial when it materially affects the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

Here, the trial court admitted evidence showing that L&I had not performed a preclosure vocational assessment. Specifically, it admitted Allen's testimony about her understanding of RCW 51.32.095 and that Koval's claim files did not contain preclosure vocational assessments. This evidence was sufficient to allow Koval to argue to the jury that L&I prematurely closed her claim because it had not conducted a vocational assessment. Thus, the exclusion of the testimony did not prejudice Koval because it did not preclude Koval from arguing this theory of the recovery to the jury, and did not materially affect the outcome of the trial.

Attorney Fees

Koval requests her reasonable attorney fees on appeal if this court reverses or modifies the decision of the superior court. RCW 51.52.130; Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 674-75, 989 P.2d 1111 (1999). Koval has not prevailed on any

of her claims on appeal, and we decline to award her reasonable attorney fees under RCW 51.52.130.

Affirmed.

Trickey, ACJ

WE CONCUR:

Dwyer, J.

Becker, J.

IN THE COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

ALLA KOVAL,	)	COA No. 74664-2-1
	)	
Appellant,	)	
	)	PROOF OF SERVICE
v.	)	
	)	
AUBURN REGIONAL MEDICAL CENTER, INC.,	)	
	)	
Respondent.	)	

The undersigned states that on December 6, 2017, I served, as indicated below, Petition for Review to the Supreme Court of Washington, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: December 6, 2017.

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