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No. 71816-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN W. PALM,
a workers' compensation claimant,
Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
an agency of the State of Washington,
Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Occupational Disease Background:

This is an Industrial Insurance Appeal regarding acceptance of an occupational disease claim involving Appellant's left knee, shoulders, and low back. Appellant, Mr. Palm, worked as an industrial electrician for over 30 years. The distinctive conditions of his employment included carrying steel conduit pipes weighing up to 100 pounds up to 20 times per day, carrying lesser amounts on his shoulders throughout the day, cutting and assembling steel pieces for conduit racks which required carrying steel weighing up to 100 pounds by himself, and with help for pieces weighing more than that. His work required manipulation of these heavy pieces often reaching overhead or bending in ditches. He spent about 15% of his time kneeling on concrete, asphalt, or gravel. He was required to carry and install, again often in awkward positions, bent pipe, fittings (which for larger pipes could be 40 pounds each), and the tools used to manipulate the various parts. He would work on electrical panels that weighed at the low end, 70 or 80 pounds, to a couple tons on the high end. The larger panels would be positioned using bars as levers which required at times, whole body strength to wrestle into position. The wire that he worked with could range in size from normal household wire, up to wire that was

2.5 – 3 inches in diameter. The tool he used to pull wire of such thickness weighed 50 – 60 pounds. In using this tool, he would have to carry, anchor, and feed wire through it, all of which required a full range of body motions (bending, lifting, and pulling).

Dr. Gritzka testified on behalf of Mr. Palm. Dr. Gritzka performed an exhaustive examination, was aware of the nature of Mr. Palm's job duties, and offered the opinion that Mr. Palm suffered several occupational disease based conditions in his left knee, shoulders, and low back as a result of those work duties.

Dr. Karges testified on behalf of the Department of Labor and Industries. Dr. Karges stated that Mr. Palm's conditions were related to age and obesity and were not occupationally related. Dr. Karges was not aware of any of the unusual duties Mr. Palm performed as a part of his employment, thinking that Mr. Palm was more of a residential electrician, and that he had performed that work for only about 15 or 16 years.

Dr. Bergman testified on behalf of the Department of Labor and Industries, and indicated that Mr. Palm did not suffer an occupational disease in his knee or shoulder, but was silent with respect to Mr. Palm's low back. Like Dr. Karges, Dr. Bergman was not aware of Mr. Palm's unique job duties.

It is Appellant's position that in the context of an occupational disease, where the medical analysis is focused on whether distinctive conditions of employment caused a medical problem, when a doctor lacks knowledge about the distinctive conditions of employment, that doctor's opinion is not competent and must be ignored. In the present situation, that would require vacating the jury's verdict and entering judgment in favor of Mr. Palm.

Instruction No. 15 Background

Mr. Palm requested, but was denied, language to the effect that a worker is to be taken as he is, with all of his pre-existing infirmities and disabilities. There was testimony in the record regarding Mr. Palm's weight as a cause of his medical conditions as well as evidence of a congenital defect in a vertebrate in his low back. The instruction was denied.

It is Appellant's position that in the context of such evidence, it was error to refuse the instruction because it allowed the jury to apply erroneous standards to the evidence and ignore evidence in support of Mr. Palm's case. Omission of the instruction was thus prejudicial to Mr. Palm, and a new trial for Mr. Palm is required to correct that error.

Jury Modification Background

During voir dire, it became apparent that Potential Juror No. 20 was acquainted with Mr. Palm. No motion to exclude this juror for cause was made. During the process of exercising preemptory challenges, the Department became confused and, apparently intending to exercise a challenge against Juror No. 20, did not in fact do so. The jury was sworn in and impaneled with Juror No. 20 included in its makeup.

After the jury was sworn in an impaneled, Department requested a sidebar and informed the court that it had mistakenly failed to use a preemptory challenge on Juror No. 20. The court then asked questions of the juror in the presence of the other jurors, clearly designed to determine if she would be biased. After the questioning, another sidebar ensued. Ultimately, the trial court did not dismiss her for cause, but instead reopened the jury selection process, excused Juror 20 when the Department exercised its preemptory, and then reswore and reimpaneled the newly constituted jury.

It is Appellant's position that this departure violated RCW 4.44.290 which outlines the only reason a sitting juror may be replaced: inability to complete her duty. Furthermore, Juror 20 was not dismissed for cause,

III. STATEMENT OF THE CASE

A. Appellant's Occupational Disease.

1. The Distinctive Conditions of Employment.

Mr. Palm's distinctive conditions of employment are outlined in detail in a work history declaration. CP 7, Work History Declaration of John Palm ("Work History Declaration")[1]. He began working as an electrician in December of 1971 and began doing industrial electrical work in September of 1974. *Id.* He worked as an industrial electrician until May of 2009 (with the exception of an approximately nine month period as a general foreman as well as about two years of time during this time period due to unemployment). *Id.* This amounts to more than three decades of work as an industrial electrician.

Mr. Palm's duties as an industrial electrician were evidently quite different from those of a residential electrician. For example, he would use wire that could be 2.5 – 3 inches in diameter, steel conduit pipe sections up to four inches in diameter and weighing 100 pounds. *Id.* He would carry these on his shoulders up to twenty times per day. *Id.*

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1 This document is found roughly half-way through the Certified Appeal Board Record in a section entitled "Exhibit(s)" which follows the section entitled "Transcript(s)" and precedes the section entitled "Deposition(s)" – it is the only document in the Exhibits section.

Mr. Palm dealt with panel boxes that could weigh as little as 70 or 80 pounds, or as much as a couple tons. CP 7, Work History Declaration. Larger panels had to be positioned using levers and the positioning was a full body workout. *Id.* In building the panels, he was responsible for moving and manipulating steel pieces weighing up to 100 pounds by himself, and if more than 100 pounds, he would have assistance. *Id.*

Mr. Plam's job required a significant amount of overhead work, or work bent over while in ditches. *Id.* Aside from the pipe or wire, the components he used in these tasks were very heavy with some pipe couplings weighing 40 pounds on their own. *Id.* The pipe wrench itself for the larger pipes had a handle three feet long, and using that overhead was very tiring for him. *Id.* Working bent in the ditches was hard on his back, and he spent about 15% of his time kneeling on concrete, asphalt, or gravel. *Id.*

The machine he used to pull larger wire weighed 50 or 60 pounds on its own, required anchoring, and required that he bend, lift, and pull while fighting with wire. *Id.* Manipulating the heavy thick wire was not an easy task. *Id.*

2. The Causal Connection Between Mr. Palm's Medical Conditions and Distinctive Conditions of Employment.

Dr. Gritzka, a Harvard College and Harvard Medical School trained orthopedic surgeon testified on behalf of Mr. Palm. CP 7, Gritzka 5:1-8; 6:13-19[2]. Mr. Palm explained to Dr. Gritzka that he was suffering from "stabbing and aching pain in both shoulders, mid line low back pain, and stabbing and aching pain in his left knee. CP 7, Gritzka 13:8-12. Dr. Gritzka read Mr. Palm's work history declaration and discussed Mr. Palm's job duties with him in a detailed fashion. CP 7, Gritzka 21:10-14; 44:10 – 45:3.

Dr. Gritzka diagnosed the following conditions: left shoulder tendinitis, advanced left acromioclavicular joint arthritis, and left shoulder adhesive capsulitis. CP 7, Gritzka 40:4-7. On the right shoulder, mild degenerative tendinitis, rotator cuff tendinitis, and glenoid chondromalacia degenerative joint disease of the right acromioclavicular joint. CP 7, Gritzka 40:7-18. He diagnosed the left knee as having had arthroscopic debridement and four previous injections of Orthovisc, with multiple loose bodies. CP 7, Gritzka 41:1-5. With respect to the low back, Dr. Gritzka

2 Transcripts of the medical witnesses are contained in the Certified Appeal Board Record and can be found in the section labeled "Deposition(s)" and are cited here by reference to the witness' name. Page and line number citations are provided by the following formula: page number before the colon, line number after the colon.

diagnosed chronic lumbar degenerative spondylosis, mild, and chronic right L-5 pars interarticularis defect. CP 7, Gritzka 41:6-11.

With respect to the shoulders, Dr. Gritzka testified that Mr. Palm's work duties were a proximate cause of the acromioclavicular joint conditions (CP 7, Gritzka 45:19 – 46:22), that the the low back condition was related to Mr. Palm's working conditions (CP 7, Gritzka 46:25 – 47:11), and that Mr. Palm's left knee condition was related to his work (CP 7, Gritzka 47:12 – 48:2). Finally, Dr. Gritzka testified that his opinions were provided on a medically more probable than not basis. CP 7, Gritzka 50:7-9.

Beyond merely connecting Mr. Palm's specific work tasks to his medical conditions, Dr. Gritzka explained mechanically how these tasks led to the conditions. For example, with respect to the shoulders:

> … he claimed that he had to carry heavy loads on his shoulder, such as pipes, and this load-carrying has an effect on the acromioclavicular joints. It does stretch them and stresses them.
>
> So, his work activities as he described them presented stresses to his shoulder joint, they were of the type that in a straightforward mechanical device would cause wear and tear on the structure.

CP 7, Gritzka 46:8-15.

Dr. Gritzka testified that load carrying and handling of the pipes were activities of a type stressful to Mr. Palm' low back. CP 7, Gritzka

47:1-11. Finally, Dr. Gritzka spoke about how the kneeling requirements of Mr. Palm's work affected his knee: "that impairs the nutrition of the articular cartilage and over time can affect the health of the cartilage. So I think his work activities probably were injurious to his left knee as well." CP 7, Gritzka 47:24 – 48:2.

3. Respondent's Medical Experts Were Not Aware of Mr. Palm's Distinctive Conditions of Employment.

Dr. Karges was not aware of the three page typed declaration describing Mr. Palm's work as an industrial electrician (CP 7, Karges 38:11-18). Instead, he believed Mr. Palm's work was similar to that of a residential electrician (CP 7, Karges 38:1-7) and erroneously believed that Mr. Palm had worked at such employment for 15 or 16 years (CP 7, Karges 38:19-23). Dr. Karges was not aware of the dimensions or weight of steel pipe Mr. Palm worked with, the diameter of wire he worked with, how often Mr. Palm would have to lift 100 pounds per day, how often he worked in trenches, or what types of body positions were required when pulling heavy wire or setting up two ton panels (CP 7, Karges 38:24 – 40:13). Dr. Karges report contained merely a handful of general sentences regarding Mr. Palm's work history (CP 7, Karges 36:24 – 38:1) and critically, he admits that he did not really look at the case from the

perspective of Mr. Palm's work duties:

> Q: In terms of a description of how – what he did at work, is it fair to say that those are the only paragraphs that, in the history section, that describe what his particular work was?
>
> A: Well yeah I suppose so, although I think ....
> [comments about remodeling houses and that electricians perform various tasks omitted] ... but, basically, I suppose. I haven't really gone through this from that standpoint.

CP 7, Karges 37:22 – 38:7.

Dr. Bergman addressed only Mr. Palm's shoulders and left knee, he did not address Mr. Palm's low back condition at all (CP 7, Bergman 18:8-22). Secondly, by Dr. Bergman's own admission, he did not know what Mr. Palm actually did for work:

> Q: At the time of your examination of Mr. Palm in 2009, you didn't, you really didn't have a lot of detail regarding what he did at his job, is that fair?
>
> A: That would be a fair assessment.
> I mean, I was aware that he was an electrician, and you know, granted, there can be a variety of different activities within that job description, but I did not go into the specifics of his work, that's correct. ... Or at least I didn't record it.
>
> Q: ... And since that time have you discussed his work activities with the state at all?
>
> A: No ... I think this is the first discussion with you all since I've last seen him in July of 09.

CP 7, Bergman 29:17 – 30:8.

In summary, neither Dr. Karges nor Dr. Bergman had an understanding of Mr. Palm's work duties when they testified that his work duties were not a cause of any his medical problems.

B. Jury Instruction No. 15 Was Designed to Address Evidence of Pre-existing Conditions existent in the Record.

During the argument related to jury instructions for this case, Mr. Palm offered Instruction No. 15, modified to include only the last paragraph. CP 12, Inst. 15; RP 161:3-16. The proposed language was:

> A worker is taken as he is, with all his pre-existing frailties and bodily infirmities. The provisions of the workmen's compensation act are not limited in their benefits to such persons only as approximate physical perfection, for few, if any, workers are completely free from latent infirmities originating either in disease or in some congenital abnormality.

This instruction would have informed the jury how to view Mr. Palm's claim in light of the fact that the record contained references to his physical imperfections. For example, there was testimony regarding Mr. Palm's weight (CP 7, Trans.[3] 24:11-16; Gritzka 57:17-25; Karges 15:24 – 17:18) with Dr. Karges particularly emphasizing its importance (CP 7, Karges 16:1 – 17:18). There was also reference made to a congenital pars defect at the L5 vertebrate. CP 7, Gritzka 54:18 – 55:6. One of the

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3 This refers to the transcript of the hearing that was held before the Industrial Appeals Judge. It is found in the Certified Appeal Board Record in the section entitled "Transcript(s)."

Department's arguments in this matter was rooted in age[4] and obesity as the cause of Mr. Palm's medical problems.

C. The Modification of The Sworn and impaneled Jury.

1. Juror No. 20 Was Acquainted with Appellant, Not Excused for Cause, But Was Nevertheless Replaced After The Jury Was Sworn and impaneled.

Potential Juror No. 20 was an acquaintance of Mr. Palm. RP 33:23-24. Juror No. 20 was questioned by the court (RP 32:25 – 35:13; 128:11 – 129:6) and by the Department (RP 96:3 – 98:11) regarding her acquaintanceship with Mr. Palm. At no time during voir dire, was a motion made Department to exclude Juror No. 20 for cause, nor did the court decide to exclude her for cause on its own motion. RP 132:5-13, 136:13-17.

During the selection process, the Department realized it had intended to use a preemptory challenge against Juror No. 20, but had not done so due to mistake. RP 132:23 – 124:1. A sidebar ensued (RP 128:7-10) after which the court questioned Juror No. 20 on her ability to be impartial. RP 128:10 – 129:6. Following this questioning, another sidebar

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4 Age is an interesting defense in that it may actually be little more than a proxy for the accumulation of decades of assaults caused by work activities. As Dr. Gritzka stated: "Well, it's an intuitive perception that the longer you live, the more so-called micro traumas you sustain just in your normal being on the planet and walking around. That's intuitively at least considered to contribute to osteoarthritis. So not only in his case is his work a risk factor, but his age is probably a risk factor, too, in terms of the etiology of his generalized osteoarthritis." CP 7, Gritzka 57:6-12.

was held and following that, the Department was allowed to use a preemptory challenge to exclude her, jury selection proceeded, and the newly constituted jury sworn in. RP 129:21-22; 130:16-22.

Outside the presence of the jury, the court summarized the sidebar proceedings (RP. 131:1 – 136:19) and during that summary, the court indicated that it felt Juror No. 20 would have survived a challenge for cause. RP 136:13-17. Mr. Palm lodged a formal objection to the modification of the jury panel. RP 135:18-21.

IV. ARGUMENT

A. The Trial Court Should Have Granted Mr. Palm's Motion for Judgment as a Matter of Law.

1. The Court of Appeals Reviews a Motion for Judgment as a Matter of Law Applying the Same Standards as the Trial Court, and May Grant Such Motion if There Is No Evidence that Would Convince a Fair-minded Person of the Contrary.

The Washington State Supreme Court has provided a concise summary of the standard the Courts of Appeals apply when evaluating a motion for judgment as a matter of law:

> "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to

> sustain a verdict for the nonmoving party." "Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest." "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." When reviewing a motion for judgment notwithstanding the verdict (judgment as a matter of law), this Court applies the same standard as the trial court.

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) *Citations Omitted.*

2. The Industrial Insurance Act Is to Be Liberally Construed in Favor of Injured Workers

It is a well known precept of the Industrial Insurance Act ("Act") that it "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.04.010. This principal is often repeated in the case law involving the Act:

> ... the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

Dennis v. Department of Labor and Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

3. An Occupational Disease Is a Medical Condition Caused By Distinctive Conditions of a Worker's Employment.

With respect to the actual evaluation of an occupational disease, the seminal test is outlined in the *Dennis* case:

> We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, *the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employmen*t. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of employment, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.

Dennis v. Department of Labor and Indus. 109 Wn.2d 467, 481, 745 P.2d 1295 (1987)[5] *emphasis added.*

Dennis has been fleshed out over time, particularly with respect to the concepts of distinctive conditions of employment ("DCE"). For

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5 In the middle of the italicized section, note that again, the principle that a worker may have pre-existing conditions and still suffer an occupationally related medical condition and that this principle is worked deep into the occupational disease test.

example, an exposure that is coincidental in the workplace, meaning the disease causing agent is wholly untethered to the worker's job duties, would not be considered an occupational disease under the Industrial Insurance Act. *Witherspoon v. Department of Labor and Indus.*, 72 Wn. App. 847, 851, 866 P.2d 78 (1994). In *Witherspoon*, a slaughterhouse worker contracted spinal meningitis after a co-worker coughed in his face. *Id.* at 849. Because exposure to meningitis is not a distinctive condition of employment in slaughterhouse work, Witherspoon's contraction of the disease at work was merely coincidental and thus the disease was naturally not related to his duties. *Id.* at 851.

In contrast, a nurse who contracted hepatitis while working in a hospital, an environment which necessarily brings health workers into contact with numerous pathogens, was deemed to have contracted an occupational disease. *Sacred Heart Medical Center v. Department of Labor & Indus.*, 92. Wn.2d 631, 637, 600 P.2d 1015 (1979). Had the worker in *Witherspoon* been a hospital nurse, that worker would likely have been covered under the Act because of that nexus between the work and the worker's medical condition. Which is as it should be, because the medical condition must be a "natural incident" of a worker's job duties, per *Dennis*. *Dennis v. Department of Labor and Indus.* 109 Wn.2d 467,

481, 745 P.2d 1295 (1987).

4. Mr. Palm Presented Competent Evidence That Distinctive Conditions of His Employment Caused Medical Conditions Affecting His Left Knee, Shoulders, and Low Back.

Mr. Palm identified numerous distinctive conditions of employment. CP 7, Work History Declaration. These conditions of employment, while common with some aspects of the construction trades as was argued by Department (RP 208:5-12), were not conditions common to *all* employments nor were they conditions common to every day life in general.

For example, Mr. Palm's work as an industrial electrician required that he carry 100 pound pipes on his shoulder up to twenty times per day. *Id.* If this was a condition of everyday life, almost every person would carry such weights on their shoulders every day when not working. If this condition was a common to *all* employments in general, *all* workers in any job, judges and lawyers included, would hoist a 100 pound object onto their shoulders twenty times per day. Common human experience is sufficient to see that this particular task was not common to all life and employment, but was rather a specific duty of his job, and as such, it is a distinctive condition of employment. The same can be said of the other

tasks Mr. Palm performed, such as levering electrical panels of great weight into position, working bent over in ditches, or kneeling on concrete, asphalt, or gravel 15% of the work day.

After identifying a number of distinctive conditions of employment, it was then incumbent upon Mr. Palm to connect those tasks to medical conditions, which he clearly did. Dr. Gritzka testified that these specific duties, in specific ways damaged Mr. Palm's left knee, shoulders, and low back. CP 7, Gritzka 45:4 – 48:2, 50:7-9. He testified that this was so on a more probable than not basis, although he recognized that the these job duties were not the only cause of Mr. Palm's conditions. CP 7, Gritzka 49:3-22. Still, the distinctive conditions need only be "a" cause. *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 340, 777 P.2d 568 (1989) ("the 'multiple proximate cause' theory is but another way of stating the fundamental principle that, for disability assessment purposes, a workman is to be taken as he is, with all his preexisting frailties and bodily infirmities."). Dr. Gritzka testified that Mr. Palm needs a wide array of treatments some of which are palliative, some of which are curative, and some of which are rehabilitative. CP 7, Gritzka 62:16 – 64:6.

Given this evidence, Mr. Palm established a *prima facie* case of

occupational disease. The burden then shifted to the Department to prove that Mr. Palm's conditions were unrelated to the distinctive conditions of his employment.

5. The Department Presented Two Witnesses, Neither Of Whom Had An Understanding of Mr. Palm's Work Duties and One Who Misunderstood the meaning of Occupational Disease In the Industrial Insurance Context.

Before discussing the Department's evidence, consider the wide array of job conditions that can form an occupational disease claim: they may result from repetitive work such as the use of tin snips daily for years. *Dennis v. Department of Labor and Indus.* 109 Wn.2d 467, 469, 745 P.2d 1295 (1987). "Assembly line" type repetitive work however, is *not the only* mechanism by which an occupational disease may manifest itself. Work that exposes a worker to chemicals used in the employer's manufacturing process is not repetitive in the assembly-line sense, yet may form a basis for an occupational disease if medical evidence links the exposure to a medical condition. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 324 & 327, 189 P.3d 178 (2008). Work that exposes a worker to dust that aggravates a pre-existing silicosis is an occupational disease. *Snyder v. Department of Labor & Indus.*, 40 Wn. App. 566, 568 & 575, 699 P.2d 256 (1985). Work that requires standing for long periods of time

on concrete is another basis for an occupational disease (plantar fascitis). *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 735 & 738-9, 981 P.2d 878 (1999). And as mentioned previously, work in a hospital with its exposure to pathogens, has been determined to be the basis for hepatitis as an occupational disease. *Sacred Heart Medical Center v. Department of Labor & Indus.*, 92. Wn.2d 631, 637, 600 P.2d 1015 (1979). In sum, while doing an assembly-line type job is *one* of the ways an occupational disease may develop, such work is not a *requirement* for an occupational disease.

Turning to the Department's evidence, it presented Dr. Karges who testified about his understanding of what an occupational disease is, specifically that occupational diseases *require* an assembly-line type task:

> A. Well, you know, just from the medical standpoint, when I think about occupational disease, that implies a type of work that usually has one or two motions that are extremely repetitive. ... And a journeyman electrician simply doesn't do that.

CP 7, Karges 14:10-17.

> The best occupational disease that I see in Washington are the poor women over east of the mountains who do nothing but clip off a piece of chicken wing at the rate of two to three a minute all day. Now that's a real repetitive motion.
>
> The very nature of being an electrician, you're doing different things; you're working on the floor, you're working on a ladder, you're working bending over, **and it just doesn't qualify for this.**

CP 7, Karges 26:1-9. *emphasis added.*

This false understanding that Dr. Karges has of what constitutes an occupational disease is important because it demonstrates exactly what Dr. Karges meant when he testified that Mr. Palm did not have an occupational disease (CP 7, Karges 10:23 – 11:22). Furthermore, consider the following testimony by Dr. Karges in the context of *Dennis'* holding that "[t]he focus is … not upon whether the disease itself is common to that particular employment".

> A. And the same thing I feel concerning the knee. You know, all sorts of people work on ladders and concrete floors most of their lives in different - - and we don't have droves of electricians or construction people going out and ending up with bad shoulders and bad knees from that.

CP 7, Karges 15:5-10. Dr. Karges is focusing on precisely what *Dennis* clearly states, is not the focus. *Dennis v. Department of Labor and Indus.* 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). Dr. Karges would have excluded from occupational disease, all of those workers the Washington Courts have expressly included simply because they didn't have a job akin to an assembly-line type position, and his testimony must necessarily be viewed in that light.

Finally, but of great importance when considering whether Mr.

Palm's distinctive conditions of employment were a cause of Mr. Palm's medical conditions, Dr. Karges was completely uninformed about Mr. Palm's work: Dr. Karges was not aware of the three page typed declaration describing Mr. Palm's work (CP 7, Karges 38:11-18). Instead, he believed Mr. Palm's work was similar to that of a residential electrician (CP 7, Karges 38:1-7); that Mr. Palm had worked at such employment for 15 or 16 years (CP 7, Karges 38:19-23) (the correct answer was over 30 years (CP 7, Work History Declaration)); Dr. Karges was not aware of the dimensions or weight of steel pipe Mr. Palm worked with, the diameter of wire he worked with (up to 2.5 – three inches thick), how often Mr. Palm would have to lift 100 pounds per day, how often he worked in trenches, or what types of body positions were required when pulling heavy wire or setting up two ton panels (CP 7, Karges 38:24 – 40:13); his report contained merely a handful of general sentences regarding Mr. Palm's work history (CP 7, Karges 36:24 – 38:1); and critically, he admits that he did not really look at the case from the perspective of whether Mr. Palm's distinctive conditions of employment had caused medical problems. CP 7, Karges 37:22 – 38:7.

It is unsurprising that Dr. Karges would not have evaluated Mr. Palm from a perspective of his distinctive conditions of employment,

because Dr. Karges had already categorized Mr. Palm as having the type of work that does not qualify for occupational disease. Ultimately, not only was Dr. Karges understanding of "occupational disease" completely at odds with Industrial Insurance law, and thus not actually an answer to the ultimate question in the case, Dr. Karges, by his own admission, had an extremely limited (and sometimes incorrect) understanding of Mr. Palms' conditions of employment and his work history. Given this confluence of a flawed understanding of the law combined with an incorrect understanding of the work, no fair minded person, even if giving Dr. Karges' testimony every benefit of the doubt, could find that Dr. Karges' was in any position to provide substantial evidence on whether Mr. Palm's conditions of employment were a cause of Mr. Palm's occupational diseases.

Dr. Bergman addressed only Mr. Palm's shoulders and left knee, he did not address Mr. Palm's low back condition at all (CP 7, Bergman 18:8-22), and his testimony is thus incapable of overcoming the *prima facie* case with respect to the low back. Secondly, by Dr. Bergman's own admission, he did not know what Mr. Palm did for work. CP 7, Bergman 29:17 – 30:8. Because Dr. Bergman did not know what Mr. Palm's

conditions of employment were, it is absolutely impossible for him to provide a qualified opinion that those conditions had no effect on his body – he is providing a mere guess. Again, no fair-minded person could place any real value on the testimony of a doctor tasked with determining whether a set of distinctive conditions of employment bear any relation to a medical condition, when the doctor has no knowledge of what those distinctive conditions are.

Given that Dr. Karges used a definition of "occupational disease" not just unrelated to the Industrial Insurance Act, but contrary to it, and worse, had no understanding of Mr. Palm's work, a fair-minded person viewing that testimony in a light most favorable to the Department, could not be persuaded by his opinion. Dr. Bergman's testimony was even worse because it did not even address the low back condition, and it too was based on a complete lack of knowledge of Mr. Palm's job duties. As a result, a fair-minded person would conclude that Dr. Bergman was not in a position to offer any valuable opinion on whether the job duties he was completely unaware of, were or were not related to Mr. Palm's medical conditions. Such guess work by Department's medical witnesses, cannot be substantial evidence and considering that all the medical evidence provided by the Department shared this lack of foundation in the facts of

Mr. Palm's work duties, no fair-minded person could have decided that Mr. Palm did not suffer occupational diseases after hearing Dr. Gritzka's testimony.

B. In the Alternative, a New Trial Should Be Granted.

1. Errors in Jury Instructions Are Reviewed *De Novo* and It Is Reversible Error If the Omission of an Instruction Prejudices a Party.

The standard of review regarding jury instructions is as follows:

> An appellate court reviews de novo alleged errors in a trial court's instructions to the jury. "Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law." A court's omission of a proposed statement of the governing law will be reversible error where it prejudices a party.

Miller v. Kenny, 180 Wn. App. 772, ___, 325 P.3d 278, 290-91 (2014)[6].

2. Instruction No. 15 Correctly Stated the Law, Was Pertinent to the Facts, and its Exclusion Prevented Full Argument of Mr. Palm's Case, Thus Prejudicing Him.

Mr. Palm offered Instruction No. 15 in his proposed instructions because there was testimony in the case regarding his life long weight status and a congenital pars defect in his low back at the L5 vertebral segment. During the prehearing discussion regarding instructions, Mr. Palm's counsel offered to trim the instruction to the third paragraph. RP

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6 Internal page citation information was not available in Westlaw, so the Pacific Reporter page reference is cited instead.

161:3 – 162:13. That third paragraph summarized the oft repeated segment of *Miller* which reads:

> A worker is taken as he is, with all his pre-existing frailties and bodily infirmities. The provisions of the workmen's compensation act are not limited in their benefits to such persons only as approximate physical perfection, for few, if any, workers are completely free from latent infirmities originating either in disease or in some congenital abnormality.

Miller v. Department of Labor & Indus., 200 Wash. 674, 682, 94 P.2d 764 (1939). While *Miller* is an injury case, it was cited in one of the most influential occupational disease cases in the Industrial Insurance lexicon, *Denis v. Department of Labor & Indus.* 109 Wn.2d 469, 471-72, 745 P.2d 1295 (1987). In *Denis*, the Supreme Court expressly drew on the logic embodied by *Miller* in the context of occupational diseases and in fact, expressly imported the *Miller* injury framework into occupational disease cases:

> In summary, the purpose of the Industrial Insurance Act, the rule of liberal construction of provisions of the Act in favor of workers, **analogous case law involving industrial injuries acting on preexisting nonwork-related disease**, the history of occupational disease coverage in Washington, and our broad definition of occupational disease all support our holding that compensation may be due where disability results from work-related aggravation of a preexisting nonwork-related disease.

Dennis at 474, *emphasis added.*

The requested modified Instruction 15 was a key piece of the law in this case, because the Department's defense relied in part on Mr. Palm's pre-existing weight condition:

> Dr. Karges, Mr. Palm's longstanding condition were the result of age, general living, exogenous obesity and deconditioning. There were no activities that he identified that Mr. Palm engaged in while working as an electrician that naturally and proximately cased [*sic*] his diagnosed conditions. There it is right there.

RP 209:21 – 210:2. Without an instruction specifically directed at the pre-existing conditions, Mr. Palm was deprived of the legal substance to fully argue his case. While it is true one could argue that the "a cause" phrase of the proximate cause instruction (CP 12, Instruction 9) would allow an argument to be made, a different instruction specifically advises the jury that the lawyers comments are neither evidence nor the law (CP 12, Instruction 1), thus turning what should rightly be expressed in terms of the law as embodied by the instructions, into mere opinion of counsel open to be ignored.

Without the addition of Instruction 15, either in the original form or as offered modified at hearing, Mr. Palm was severely prejudiced in his ability to present his case because his physical history could be used against in him in ways contrary to letter and spirit of the Industrial

Insurance Act.

3. It Was Error to Revise the Makeup of the Jury for the Convenience of the State After the Jury Was Sworn and impaneled Because the Jury so Created, Was No Longer a Random Jury.

After jury selection had been completed, the jury sworn in and impaneled, the Department requested the opportunity to modify the jury by excusing Juror No. 20[7] with a preemptory challenge due to mistake. RP 127:23 – 128:8, 132:23 – 133:6.

Litigants, even civil litigants, have an inviolate right under the Washington State Constitution to a jury trial. Wash. Const., art. I, § 21. Moreover, it is required that the jury selected be a random jury: "A randomly selected jury is a right provided by statute and is based on the Legislature's policy of providing an impartial jury." RCW 2.36.065; *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991) (trial court procedure excluding any person from the jury pool who was acquainted with a defendant was deemed not-random and required retrial). The random selection of a jury is critical to a fair trial, and meddling with that randomness is why in *Tingdale*, a new trial was ordered: "the practice allows the judge, and even the clerk, to assemble a jury panel of their own

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7 Juror No. 20 was acquainted with Mr. Palm, but was not excused for cause. RP 128:9 – 129:6.

choosing. This practice violates the statutorily required element of chance and calls into doubt the impartiality of the jury selected." *Id.* at 601.

There are only a limited set of circumstances in which it is acceptable to modify the composition of a jury. RCW 4.44.290 provides in very plain language[8]:

> If after the formation of the jury, and before verdict, a juror becomes unable to perform his or her duty, the court may discharge the juror.

To modify the jury for any reason outside of statutory parameters necessarily mars the randomness of that jury, because when a person is pulled not for reasons of inability, that person is pulled for some other reason personal to the trial court and as a result, the jury is no longer purely random, but one selected by some criterion not contemplated by the statute or the Constitution.

Lastly, with respect to whether a showing of prejudice is required, consider *Brady*:

> When statutory jury selection procedures are materially violated, the claimant need not show actual prejudice; rather, prejudice is presumed.

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8 "If the statute's meaning is plain on its face, then we give effect to that meaning as an expression of legislative intent." "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Where the legislature's intent is clear through the plain meaning, a court may not interpret into a statute words it does not contain. *Five Corners Family Farmers v. State*, 173. Wn.2d 296, 311, 268 P.3d 892 (2011), *citations omitted.*

Brady v. Fiberboard Corp., 71. Wn. App. 280, 284, 857 P.2d 1094 (1993).

The Washington State Constitution protects the right to trial by jury with the strongest possible terms: such a right is inviolable. Wash. Const., art. I. § 21. RCW 4.44.290 uses the phrase "unable to perform his or her duty" in describing the *only* circumstance in which a juror may be replaced after formation of a jury. No provision anywhere in the chapter is made for replacement of a juror because a party makes mistakes in applying strikes, nor is there is any evidence in the record that the juror the Department wished to strike became incapable of performing her duty, nor was she demonstrated to be biased. As such, her replacement after impaneling the jury was in violation of the statute, and created a non-random jury, one whose membership was intentionally manipulated, and as such it is presumed prejudicial and requires a new trial.

Had this been a criminal case, the trial court would not have made the decision to create a non-random jury once the jury was impaneled[9]. But the right to a random jury in civil cases is no less important than that same right in criminal cases, and the prohibition against double litigation applies in civil cases as well through the doctrine of *collateral estoppel*.

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9 "Generally, jeopardy attaches in a jury trial when the jury is impaneled, and in a bench trial when the first witness is sworn." *State v. George*, 160 Wn.2d 727, 742, 158 P.3d 1169 (2007).

The courts have chosen in the criminal context, that impanelling a jury, required to be a random jury, is a critical moment. The same should be true in the civil context because the right to a jury trial in both criminal and civil contexts springs from the same constitutional guarantee. There is obviously a difference in the scope of the potential harm a civil trial may inflict compared to a criminal trial, and this difference suggests a different remedy than one would see in a criminal case, namely that a civil case should be retried under fair and random conditions.

What happened in this case however, was that instead of a complete restart of the process with a new jury pool, a half-measure was invoked after the jury witnessed lengthy whispered argument on two occasions, questioning of a seated juror by the judge, the Department emerging clearly a victor as demonstrated by the dismissal of Juror No. 20, and a manipulated jury composition that tainted the randomness of the procedure. If a party's simple mistake in the jury selection process should be considered sufficient cause to question the suitability of a jury, the correct remedy following such a question should be a restart of the voir dire process with a new set of potential jurors. There is no other way to comply with RCW 2.36.065 (requiring randomness) although by dismissing a panel of able jurors, it would violate RCW 4.44.290. Still, it

would be a better process than proceeding with a tainted jury, and even better, would be simply allowing the element of chance its due.

D. RCW 51.52.130 Provides for the Award of Attorney Fees and Costs to Successful Claimants in the Industrial Insurance Context.

Pursuant to RCW 51.52.130, should Appellant prevail in this matter by having the court order dated March 14, 2014, overturned and a judgment entered which reverses the Board of Industrial Insurance Appeals' ("Board") decision denying his occupational disease claim, he would be entitled to an award of attorney fees and costs for the work performed above the Board level, and hereby makes such request. If a new trial is ordered instead, Appellant's right to fees and costs would be contingent on the new trial resulting in an order reversing the Board's decision and as such, an award of fees and costs at this time would be premature.

V. CONCLUSION

For the reasons stated above, Appellant requests this court reverse the trial court order dated March 14, 2014, and direct that judgment be entered in favor of Appellant, or in the alternative a new trial granted.

If judgment is entered in favor of Appellant, Appellant seeks an award of attorney fees and costs pursuant to RCW 51.52.130. If a new

trial is granted, an award of fees and costs would be contingent on the outcome of that trial.

DATED September 4, 2014

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