71816-9

71816-9

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.

APPELLANT'S REPLY TO BRIEF OF RESPONDENT

Odin Maxwell
WSBA No. 27271
Maxwell & Webb, PLLC
Attorney for Appellant

119 N. Commercial, Suite 860
Bellingham, WA 98225
Phone: 360-738-8584
Fax: 360-733-3242

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes & WPIs

I. ARGUMENT

Medical Opinions

A. The Opinion Of A Doctor Who Is Uninformed About The Factual Basis Underlying The Very Question At Issue, Is Purely Speculative.

"The law demands that verdicts rest upon testimony and not upon conjecture and speculation." *Rambeau v. Department of Labor and Indus.*, 24 Wn.23 44, 50, 163 P.2d 133, 136 (1945). This principle is often included in workers' compensation jury instruction packets with an instruction substantially similar to that given in this case. Respondent's Supp. CP 19, Instruction 13[1]; *Safeway, Inc. v. Martin*, 76 Wn. App. 329, 334, 885 P.2d 842, 845 (1994); *Young v. Group Health Co-op of Puget Sound*, 85 Wn.2d 332, 340, 534 P.2d 1349, 1354 (1975); *Jackson v. Department of Labor and Indus.*, 54 Wn.2d 643, 648-49, 343 P.2d 1033, 1036-37 (1959).

The instruction is designed to prevent speculative testimony from

---

1 Text of Instruction 13:

Medical testimony is necessary to establish the proximate cause relationship between the occupational disease and the need for medical treatment or the extent of disability proximately caused by an occupational disease.

Medical testimony as to the possibility of a causal relationship is not sufficient to establish such a relationship. Testimony as to possibility means testimony which is confined to words of speculation, surmise and conjecture. It is not sufficient to establish that the occupational disease might cause, could cause, can cause, or probably could cause such condition.

being mistaken for testimony sufficient to establish a preponderance, because a preponderance is by definition, better than a 50/50 guess. 6A Washington Prac., Wash. Pattern Jury Instr. Civ. WPI 155.03 (6th ed.). While this principle is most often presented in the context of certain fatal phrases ("could", "can", "probably could", "might", etc.), the principle itself is not based on a formulaic incantation that must be found in the testimony for a medical witness' opinion to be considered conjecture or speculation. Rather, the principle rests upon whether the testimony is, by its nature, speculative. While certain phrases are simple indicators of this characteristic, they are not the only way in which testimony may be speculative.

For instance, in *Safeway, Inc. v. Martin*, the court allowed an instruction similar to Instruction 13 despite the fact that no witness used the fatal phrases because proximate cause was the issue and it was appropriate to ensure that evidence rose "above speculation, conjecture, or mere possibility." *Safeway, Inc. v. Martin*, 76 Wn. App. 329, 334, 885 P.2d 842, 845 (1994), citing *Young v. Group Health Co-op. of Puget Sound,* 85 Wn.2d 332, 340, 534 P.2d 1349, 1354 (1975). Clearly then, in a case where such words were not to be found, the absence of those words is

not the end point of a discussion about speculative evidence.

Perhaps the clearest enunciation of this principle occurs in *Chalmers v. Department of Labor and Indus.*:

> The treating physician, Dr. Snyder, based his opinion on the apparently erroneous information that the fumes causing decedent's accident on March 28, 1960, were from Epoxylite or Epoxylite catalyst, and on erroneous data concerning the chemical composition of Epoxylite. It was assumed, without substantial evidentiary support, that the compound causing the contact dermatitis on March 28, 1961, and thereafter, was the same compound involved in the accident of March 28, 1960.
>
> ... [A medical opinion based on an invalid hypothetical is also invalid.] ...
>
> Similarly, the doctor's opinion, founded on erroneous factual data which is lacking in evidentiary support, and, in fact, is contradicted by substantial evidence, cannot be said to be of sufficient probative value to establish a causal relationship between the injury sustained by decedent and his subsequent death. The fact that the doctor was the treating physician is insufficient to overcome the defect.

Chalmers v. Department of Labor and Indus., 72. Wn.2d 595, 600-01, 434 P.2d 720, 723 (1967).

Here, like *Chalmers*, the attending physician (Dr. Bergman) gave an opinion that was *not* rooted in the actual facts of the case, but rather on his erroneous assumptions regarding what Appellant's work entailed. In the same vein, Dr. Karges' opinion as a one time examiner, was also founded on facts completely unrelated to Appellant's work history. Notably,

Chalmers was cited by Respondent as a legal basis for Instruction 13 and its derision of speculative evidence. Respondent's Supp. CP 11, page 11; *Id.* CP 19, Instruction 13.

In the present case, both Drs. Bergman and Karges admitted that they did not consider the issues here in the context of Appellant's work history. CP 7, Karges 37:22 – 38:7; Bergman 24:25 – 25:9, 29:17 – 30:8. Besides ignoring the prime question, both fundamentally misunderstood the magnitude of Mr. Palm's work (CP 7, Karges 38:1 – 40:13; 29:17-25) and Dr. Karges, the duration of that work by half (CP 7, Karges 38:19-23). Given this total lack of awareness regarding Appellant's work, the doctors' opinions regarding whether the work was a cause of Appellant's medical problems are necessarily speculative in nature. *Chalmers v. Department of Labor and Indus.*, 72. Wn.2d 595, 600-01, 434 P.2d 720, 723 (1967). This is true even though they used the phrase "more probable than not probable" because to elevate testimony based on the mere recitation of a magic incantation, is to make the law against the value of speculative testimony little more than a farce.

Appellant's request that the verdict be overturned is based on a simple equation: in order to render a competent opinion on whether Appellant's

distinctive conditions of employment caused one or more medical problems, an examining doctor must know what that work entailed. Without such knowledge, the opinion is a guess, and despite any protestations that it is made on a more probable than not basis, it is still pure speculation. In the same way that the phrase "probably could have" overtly demonstrates a speculative opinion, an occupational disease opinion is *structurally* speculative if it is based on a fictional work history. See *Chalmers v. Department of Labor and Indus.*, 72. Wn.2d 595, 600-01, 434 P.2d 720, 723 (1967).

Ultimately, Appellant presented a prima facie case of occupational disease and Respondent presented evidence of an inherently speculative nature as rebuttal. Because neither of Respondent's witnesses knew what Appellant did for work, their opinions that his work had no bearing on his medical conditions are completely hollow. They may well be great doctors, even the best two doctors on the planet, but if the facts on which they base their opinions are a fiction, their opinions are at best, guesses. As such, even when applying the greatest possible deference to the trial court decision, the most appropriate solution here is to reverse and order that Appellant's claim be accepted as an occupational disease because the

trial court decision can only be based on speculative medical evidence.

Jury Instruction

B. Appellant Was Effectively Denied The Ability To Address Respondent's Arguments By Failure To Give Modified Instruction 15 Because Respondent's Defense Was Comprised Substantially Of The Matters Directly Addressed By That Instruction.

The only piece of law Appellant had at its disposal to argue that age or pre-existing conditions (like obesity) were not a bar to recovery, were a few short sentences in Instruction 11. Respondent's Supp. CP 19, Instruction 11. There was nothing else which backed up the well established, long affirmed, precedent that a worker "is to be taken as he is, with all his preexisting frailties and bodily infirmities." *Wendt v. Department of Labor and Indus.*, 18 Wn. App. 674, 682-83, 571 P.2d 229, 235 (1977). Furthermore, it does not matter in the industrial insurance context whether the work would, or would not have, affected a different person differently. *Id.*

Appellant tried to make the most of things in closing (RP 180:20 – 182:23):

> If the worker [*sic*] compensation system didn't protect people who were imperfect in some way, it wouldn't protect anyone, and that's why when we talk about a cause and not the cause, it's very important because a cause is okay under the Industrial Insurance

> Act. If it wasn't, the act would cover nobody.
>
> It won't cover people who were born with something that didn't prevent them from working but made them weaker. It wouldn't cover people that got hurt playing sports in high school. It wouldn't cover almost anybody over 30 because we all end up degenerating. It would be a limited system and that's why the tiny little word that's only one letter is so important in the proximate cause instruction.

RP 183:8-23.

In the end though, the jurors simply did not believe that this correct statement was the law (and Instruction 1 told them expressly the they could ignore any remark that did not fit with the instructions). Respondent's Supp. CP 19, Instruction 1. What they said after trial was that they did not want to set a "precedent" that people get to have a claim just for getting old. CP 24. This is a concrete demonstration that attempting to pack so much meaning and long standing legal precedent into so short a phrase as is found in the proximate cause instruction (Respondent's Supp. CP 19, Instruction 11), is unworkable. Given that the requested modified instruction accurately described the law, and more importantly, directly addressed a key element of Respondent's argument, specifically, that age and obesity were the cause of Appellant's medical issues, it was an abuse of discretion to refuse to give the instruction

because it tasked Appellant with not only convincing the jury the facts were in his favor, but that the law itself was supportive.

Modification of the Jury

C. While A Judge May Alter The Makeup Of A Jury Due To Unforeseen Circumstances, The Issues Behind Juror No. 20's Replacement Were Not Only Actually Foreseen, They Were Extensively Addressed During Voir Dire By Both Department's Counsel And The Judge.

Respondent cites *State v. Williamson*, 100 Wn. App. 248, 996 P.2d 1097 (2000), for the proposition that altering the makeup of the jury after it was impanelled is acceptable under current law. Brief of Respondent, 31-38. *Williamson* is distinguishable for a couple reasons.

First, in *Williamson,* it was not until after the jury was seated and witnesses were called, that it became known that the *Williamson* juror was acquainted with one of the witnesses. *State v. Williamson*, 100 Wn. App. 248, 252, 996 P.2d 1097, 1100 (2000). In contrast, Juror No. 20 was subjected to questioning by both Department's counsel *and* the trial judge hearing this case specifically on whether she could be fair because of her acquaintance with Mr. Palm. A key basis for *Williamson* was the fact that the acquaintanceship had *not* arisen during voir dire, and because the exact opposite is true here, *Williamson* simply does not apply. *Williamson* at 254

("neither the court rule nor the statute prohibits a peremptory challenge to an impaneled and sworn juror *based on unforeseen circumstances*." *emphasis added*).

Secondly, *Williamson* interpreted a prior version of RCW 4.44.210 which while similar to the current version, is different from the current version and the statutory matrix in which it resided, has also changed. Attachment 1. For that matter, the 2003 changes to RCW 4.44.290 (Attachment 2) lend additional credence to this distinction because when *Williamson* was decided, RCW 4.44.290 lacked any flexibility.

Prior to 2003, RCW 4.44.290 outlined the procedure for replacing a juror due to illness, but was limited to that single circumstance[2]. This obviously failed to take into account any number of situations. For example, if a juror became unable to participate due to a localized geological event (e.g., being cut off from town by a massive mudslide such as occurred in Oso), the previous RCW 4.44.290 would not have

---

2 4.44.290. Procedure when juror becomes ill

If after the formation of the jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards formed.

Prior RCW 4.44.290, Attachment 2.

addressed that situation, nor would it be appropriate to take into consideration a severe weather event which could make jurors living in remote areas put their lives at serious peril to attend a trial. Sudden death *not* due to illness would likewise not fit in the plain language of the pre-2003 version. So it is instructive that when the legislature made this statute more broadly applicable, it used the phrase "unable to perform" to denote the circumstances that would bring this provision into play. It did not broaden RCW 4.44.290 to cover mistakes or misunderstandings even though it could have, adhering instead to the most serious reasons possible for removing a juror. RCW Chapter 4.44 now provides a flexibility that did not exist at the time *Williamson* was decided and so, in addition to the factual distinction, there is a legal distinction as well.

Secondly, under the plain terms of RCW 4.44.210, Respondent waived using a pre-emptory up through Juror 20 but unlike *Williamson,* no unforeseen circumstance evolved which might warrant adjustment of the statutory procedure. As such, the appropriate question to ask was whether Juror 20 was *unable* to perform jury duty under RCW 4.44.290. That question was not asked and instead, Respondent was granted the right to step outside the statutory framework and have the jury reconstituted.

D. Chapter RCW 4.44 Describes The Process For Selecting A Jury With The Various Statutes Ordered In A Specific And Inherently Meaningful Sequence.

Although neither RCW 4.44.210 nor 4.44.290 seems particularly ambiguous, it is worth examining these provisions closely.

> We construe statutes to ascertain and carry out the legislature's intent. To construe a statute, we examine the whole statute "and consider the entire sequence of all statutes relating to the same subject matter." More broadly, we consider all statutes relating to the same subject matter, pursuant to the principle of reading statutes *in pari materia*.

State v. Monfort, 179 Wn.2d 122, 130, 312 P.3d 637, 641 (2013), *citations omitted.*

RCW Chapter 4.44 contains a sequence of statutes that when followed in order, describes the entire set of procedures related to selecting and seating a jury, what should happen with the jury during trial, how the verdict is delivered, and how the jury is discharged. Reading the statutory provisions in sequence and in the context of each other, makes it clear that the ordering of the statutes is important, intentional, and most to the point, meaningful. The provisions governing challenges during voir dire, come prior to the provisions dealing with the oath administered to those selected to be on the jury. RCW 4.44.210 & 260. What to do in the

event that after the jury is sworn in (but before a verdict is reached), a juror becomes *unable* to perform her duty, comes *after* the oath statute. RCW 4.44.260 & 290. Procedures for dealing with a jury that cannot agree on a verdict, naturally come before those regarding the handling of a verdict. RCW 4.44.330, 360, 370. Polling of the jury following verdict is governed by RCW 4.44.390. In short, RCW Chapter 4.44 flows in logical sequence from provision to provision.

In this context, it is clear that RCW 4.44.210 is designed to handle the selection of the jury up to the point it is impanelled. The statute regarding the swearing in of the jury, RCW 4.44.260, naturally comes after the section dealing with how that jury is selected. The remedy for altering a jury when a juror is no longer capable of service after that oath is given and before a verdict is reached, is dealt with in RCW 4.44.290 (this from both the plain language of RCW 4.44.290, as well as its position in the sequential flow of RCW Chapter 4.44).

In following this sequence embedded within the statutory framework, it is clear that the pertinent statute here is RCW 4.44.290, not RCW 4.44.210 as suggested by Respondent (Brief of Respondent, page 31) because voir dire had been completed, the oath administered, and no

unforeseen circumstance had arisen. That statute is abundantly clear and plain "*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." RCW 4.44.290, *emphasis added.*

The trial judge did not dismiss Juror No. 20 for cause, and Department's counsel did not request she be dismissed for cause. No evidence was presented that she was incapable of performing her role as a juror. The only basis for excusing Juror No. 20, was the use of a pre-emptory challenge and the only way this can be considered to comport with the statutory scheme, is if the plain language of RCW 4.44.210 & 290 is ignored, and the statutory matrix in which these laws reside is likewise ignored.

Turning to an earlier point in that statutory matrix, RCW 4.44.210 also supports Appellant's argument because Respondent's waiver of its pre-emptory challenge meant it necessarily accepted the jury as constructed up through Juror 20:

> ... During this alternating process, if one of the parties declines to exercise a peremptory challenge, then that party may no longer peremptorily challenge any of the jurors in the group for which challenges are then being considered and may only peremptorily challenge any jurors later added to that group. ...

RCW 4.44.210.

Respondent claims it became confused about the process. What is confusing is how confusion was possible. It is not logical to think that the nine people in the box were the 12 people that would make up the jury – that is like thinking 12 minus 3 equals 12. Secondly, it makes no sense to think that the people in the box were the final set when moments before, Appellant had used a pre-emptory on a person in the gallery. RP 126:9-16.

But, assuming for the moment Respondent did misunderstand the process rather than simply make a mistake, how is it that its misunderstanding is of such great importance, that it exceeds the plain language of RCW 4.44.210 (waiving a pre-emptory accepts all jurors to the point of waiver)? Why is a misunderstanding made by the state, sufficient to completely unravel the plain language of RCW 4.44.290, which makes *inability* the standard for removal? Why is a misunderstanding by the state, sufficient to overcome the meaning inherent in the ordered sequence of the statutes in the chapter?

Such a misunderstanding or mistake should not be the basis for ignoring the law as it is written because otherwise, the law becomes a tool

for favoritism. Granting the privilege to the state to amend statutory language on the fly to its advantage, is of great harm to the rule of law, and of incredible specific prejudice to Appellant here.

E. The Jury Selection Process Was Materially Breached, Thus Prejudice Is Presumed, But Even If Prejudice Is Not Presumed, Actual Prejudice Occurred Due To The Protracted Post-Oath Selection Process.

Because the plain language of the pertinent provisions of RCW Chapter 4.44 were breached, as well as the interpretive meaning that can be gleaned from viewing the sequence of statutes as a whole, prejudice is to be presumed. *Brady v. Fiberboard Corp.,* 71 Wn. App. 280, 284, 857 P.2d 1094, 1097 (1993).

Beyond that presumption however, real prejudice occurred here. In reading the record, it is clear that the judge and the lawyers spent a substantial amount of time whispering away at sidebar, on two occasions, in front of the jury pool. This was interspersed with a rehashing by the judge of the questions gone over during voir dire. CP 128:9 – 129:6. When finally Juror No. 20 was stricken from the panel, it established a tone of negativity against Appellant.

Secondly, in discussion following the exceptionally short deliberation

time (45 minutes over lunch), the jurors had clearly been preoccupied with this issue and more importantly, had decided amongst themselves that it was a good idea despite being instructed to not pay attention to rulings. Respondent's Supp. CP 19, Instruction 1; CP 24. Given the complex medical testimony involved here, the fact that this issue made it into the jurors' consciousness could have no effect but to reduce even the minimal amount of analysis they conducted in a case where examining complicated facts was of the utmost importance.

Finally, it is a mischaracterization to say that Appellant was looking for a specific juror – Appellant was looking for any juror who would bring attention to the complex medical facts and instigate discussion, because it is a discussion of the facts of the case – *not a discussion of what happened during voir dire* – that is of critical importance in a case like this. Jurors are not mere cogs in a machine and it cannot be said that all of the individual jurors would have come to the same conclusion they did, if there had been a person in there pointing out that none of the state's doctors had any idea what Mr. Palm did for work, and thus their opinion that his work was not a cause of his conditions was at best, suspicious and deserved scrutiny. That person could well have existed within the other

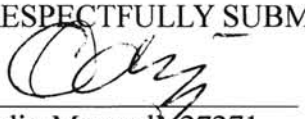
eleven members of the jury if it had not been subjected to the strange and prejudicial procedures of jury selection in this case. To think otherwise, would be to consider jurors as mere machine parts that respond the exact same way every time. In that case, it makes no sense to even have a voir dire process – a lottery would be far more efficient.

In summary, where the greatest prejudice lies, is not in using or excluding Juror No. 20, *but in the process by which she was excluded*, the negative impact that had on the jury, and the consequent prejudice this procedure produced against Appellant. Ultimately, Appellant suffered presumptive and actual prejudice by the jury selection process employed here, and at minimum, a new trial is warranted.

II. CONCLUSION

For these reasons, Appellant reiterates its request for an order overturning the trial court's decision and allowing the occupational disease claim, or in the alternative a new trial for reasons of instructional error and/or prejudicial error in the jury selection process. Should the occupational disease claim be allowed, Appellant requests an award of attorney fees and costs.

RESPECTFULLY SUBMITED December 5, 2014



Odin Maxwell, 27271
Attorney for Appellant
Maxwell & Webb, PLLC
119 N. Commercial Suite 860
Bellingham, WA 98226
360-738-8584

West's RCWA **4.44.210**

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 4. CIVIL PROCEDURE
CHAPTER 4.44. TRIAL

4. 44. 210. Peremptory challenges, how taken

The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:
The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation, shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn, shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only.

CREDIT(S)

1988 Main Volume

[Code 1881 § 215; 1877 p 45 § 219; 1869 p 53 § 219; RRS § 333.]

HISTORICAL AND STATUTORY NOTES

1988 Main Volume

Source:
Laws 1869, p. 53, § 219.
Laws 1877, p. 45, § 219.
RRS § 333.

Attachment 1
(prior RCW 4.44.210)

West's RCWA **4.44.290**

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 4. CIVIL PROCEDURE
CHAPTER 4.44. TRIAL

4. 44. 290. Procedure when juror becomes ill

If after the formation of the jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards formed.

CREDIT(S)

1988 Main Volume

[Code 1881 § 227; 1877 p 48 § 231; 1869 p 56 § 231; RRS § 347.]

HISTORICAL AND STATUTORY NOTES

1988 Main Volume

Source:
Laws 1869, p. 56, § 231.
Laws 1877, p. 48, § 231.
RRS § 347.

Attachment 2
(prior RCW 4.44.290)

No. 71816-9-I

COURT OF APPEALS FOR DIVISION I
OF THE STATE OF WASHINGTON

JOHN W. PALM Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF MAILING

I hereby certify under penalty of perjury of the laws of the state of Washington, that on December 5, 2014, I mailed the original and copy of the identified document(s) to the parties listed below as indicated below:

DOCUMENT TITLE:
APPELLANT'S REPLY TO BRIEF OF RESPONDENT

ORIGINAL:

USPS Priority Mail Express
Richard D. Johnson, Court Admin/Clerk
WA State Court of Appeals, Div I
One Union Square
600 University Street
Seattle, WA 98101-1176

///

///

///

///

///

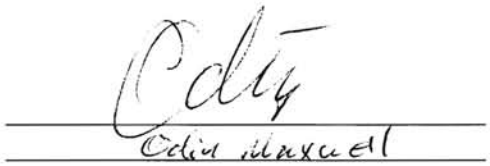
Maxwell & Webb, PLLC
119 N. Commercial, Suite 860
Bellingham, WA 98225
(360) 738-8584
fax: 733-3242

COPIES:

USPS Priority Mail Express
Paul M. Weideman
Attorney General of Washington
800 Fifth Ave Suite 2000
Seattle, WA 98104-3188

Dated on December 5, 2014, at Bellingham WA:

MAXWELL & WEBB, PLLC



Colin Maxwell

Maxwell & Webb, PLLC
119 N. Commercial, Suite 860
Bellingham, WA 98225
(360) 738-8584
fax: 733-3242